The Supreme Court of South Carolina

RE: Administrative Suspensions for Failure to Pay License Fees Required by Rule 410 of the South Carolina Appellate Court Rules (SCACR)

O R D E R

The South Carolina Bar has furnished the attached list of lawyers (including those holding a limited certificate to practice law) who have failed to pay their license fees for 2016. Pursuant to Rule 419(d)(1), SCACR, these lawyers are hereby suspended from the practice of law. They shall surrender their certificate of admission to practice law to the Clerk of this Court by March 24, 2016.

Any petition for reinstatement must be made in the manner specified by Rule 419(e), SCACR. Additionally, if they have not verified their information in the Attorney Information System, they shall do so prior to seeking reinstatement.

These lawyers are warned that any continuation of the practice of law in this State after being suspended by this order is the unauthorized practice of law, and will subject them to disciplinary action under Rule 413, SCACR, and could result in a finding of criminal or civil contempt by this Court. Further, any lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.

s/ Costa M. Pleicones C.J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

Columbia, South Carolina
February 26, 2016

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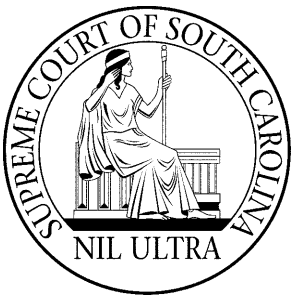

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 9
March 2, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2016-UP-107-State v. Beneco Antwon Ganson

2016-UP-108-State v. David W. Chiles, Jr.

2016-UP-109-Brook Waddle v. SCDHHS

2016-UP-110-Kevin Daniels v. SCDC

2016-UP-111-State v. Richard A. Woodbury

2016-UP-112-State v. Annetta Grant

2016-UP-113-Kathleen Ransom v. Christopher O. Brisbon
(Filed February 25, 2016)

2016-UP-114-State v. David Judson Penn

2016-UP-115-Mary Wall Black v. Bi-Lo, LLC

2016-UP-116-State v. Tre'Vaughn Ziontae Jackson

2016-UP-117-Rawcliffe Resorts v. Matt Becker

2016-UP-118-State v. Lywone S. Capers

2016-UP-119-State v. Bilal Sincere Haynesworth

2016-UP-120-State v. O'Neal Bernard Byrdic, Jr.

2016-UP-121-State v. Leroy Clifton Gibbs, III

2016-UP-122-Tonia D. Williams v. Geico Casualty Co.

2016-UP-123-State v. Deron Jardell Myers

2016-UP-124-State v. Prince Deven Snipes

2016-UP-125-Jerome Myers v. Walter Kaufman

2016-UP-126-U. S. Bank, N.A. v. Kim Byrd

2016-UP-127-James B. Neff v. Lear's Welding and Fabrication Inc.

PETITIONS FOR REHEARING

5359-Bobby Joe Reeves v. State	Pending
5374-David Repko v. Cty. of Georgetown	Pending
5375-Mark Kelley v. David Wren	Pending
5376-Paula Russell v. Wal-Mart Stores	Pending
5378-Stephen Smalls v. State	Pending
5379-Francis Ackerman v. SCDC	Pending
2015-UP-328-Billy Lisenby v. SCDC (7)	Pending
2015-UP-505-Charles Carter v. SCDC (3)	Pending
2015-UP-523-State v. Gary Lane Prewitt	Pending
2015-UP-572-KNS Foundation v. City of Myrtle Beach	Pending
2016-UP-010-State v. James C. Dill, Jr.	Denied 02/25/16
2016-UP-012-Whelthy McKune v. State	Pending
2016-UP-015-Onrae Williams v. State	Pending
2016-UP-022-State v. Michael Anderson Manigan	Pending
2016-UP-023-Frankie Lee Bryant v. State	Pending
2016-UP-028-Arthur Washington v. Resort Services	Pending
2016-UP-034-State v. Tyrel R. Collins	Pending
2016-UP-037-Joseph Gelotte v. Davis Roofing	Pending
2016-UP-039-State v. Fritz A. Timmons	Pending
2016-UP-040-State v. Jonathan Xavier Miller	Pending
2016-UP-047-State v. Zinah D. Jennings	Pending

2016-UP-052-Randall Green v. Wayne Bauerle Pending

2016-UP-054-In the matter of the Jt. Application of Duke Energy Pending

2016-UP-056-Gwendolyn Sellers v. Cleveland Sellers, Jr. Pending

2016-UP-061-Charleston Harbor v. Paul Davis Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5209-State v. Tyrone Whatley Pending

5247-State v. Henry Haygood Pending

5250-Precision Walls v. Liberty Mutual Fire Ins. Pending

5253-Sierra Club v. Chem-Nuclear Pending

5254-State v. Leslie Parvin Pending

5295-Edward Freiburger v. State Pending

5301-State v. Andrew T. Looper Pending

5308-Henton Clemmons v. Lowe's Home Centers Pending

5312-R. C. Frederick Hanold, III v. Watson's Orchard POA Pending

5313-State v. Raheem D. King Pending

5314-State v. Walter M. Bash Pending

5317-Michael Gonzales v. State Pending

5322-State v. Daniel D. Griffin Pending

5324-State v. Charles A. Cain Pending

5326-Denise Wright v. PRG Pending

5328-Matthew McAlhaney v. Richard McElveen Pending

5329-State v. Stephen Douglas Berry	Pending
5331-State v. Thomas Stewart	Pending
5332-State v. Kareem Harry	Pending
5333-Yancey Roof v. Kenneth A. Steele	Pending
5335-Norman J. Hayes v. State	Pending
5336-Phillip Flexon v. PHC-Jasper, Inc.	Pending
5337-Ruben Ramirez v. State	Pending
5338-Bobby Lee Tucker v. John Doe	Pending
5341-State v. Alphonso Thompson	Pending
5342-John Goodwin v. Landquest	Pending
5344-Stoneledge v. IMK Development (Southern Concrete)	Pending
5345-Jacklyn Donevant v. Town of Surfside Beach	Pending
5346-State v. Lamont A. Samuel	Pending
5347-George Glassmeyer v. City of Columbia	Pending
5348-Gretchen A. Rogers v. Kenneth E. Lee	Pending
5351-State v. Sarah D. Cardwell	Pending
5352-Ken Lucero v. State	Pending
5355-State v. Lamar Sequan Brown	Pending
5365-Thomas Lyons v. Fidelity National	Pending
5369-Boisha Wofford v. City of Spartanburg	Pending
5370-Ricky Rhame v. Charleston County School	Pending

5371-Betty Fisher v. Bessie Huckabee	Pending
2015-UP-010-Latonya Footman v. Johnson Food Services	Pending
2015-UP-031-Blue Ridge Electric v. Kathleen Gresham	Pending
2015-UP-069-Amie Gitter v. Morris Gitter	Pending
2015-UP-091-U.S. Bank v. Kelley Burr	Pending
2015-UP-167-Cynthia Griffis v. Cherry Hill Estates	Pending
2015-UP-174-Tommy S. Adams v. State	Pending
2015-UP-176-Charles Ray Dean v. State	Pending
2015-UP-201-James W. Trexler v. The Associated Press	Pending
2015-UP-208-Bank of New York Mellon v. Rachel R. Lindsay	Pending
2015-UP-209-Elizabeth Hope Rainey v. Charlotte-Mecklenburg	Pending
2015-UP-215-Ex Parte Tara Dawn Shurling (In re: State v.Harley)	Pending
2015-UP-248-South Carolina Electric & Gas v. Anson	Pending
2015-UP-259-Danny Abrams v. City of Newberry	Pending
2015-UP-262-State v. Erick Arroyo	Pending
2015-UP-266-State v. Gary Eugene Lott	Pending
2015-UP-269-Grand Bees Development v. SCDHEC	Pending
2015-UP-273-State v. Bryan M. Holder	Pending
2015-UP-280-State v. Calvin Pompey	Pending
2015-UP-300-Peter T. Phillips v. Omega Flex, Inc.	Pending
2015-UP-303-Charleston County Assessor v. LMP Properties	Pending

2015-UP-304-Robert K. Marshall, Jr. v. City of Rock Hill	Pending
2015-UP-307-Allcare Medical v. Ahava Hospice	Pending
2015-UP-311-State v. Marty Baggett	Pending
2015-UP-320-American Community Bank v. Michael R Brown	Pending
2015-UP-327-State v. Shawn Justin Burris	Pending
2015-UP-330-Bigford Enterprises v. D. C. Development	Pending
2015-UP-331-Johnny Eades v. Palmetto Cardiovascular	Pending
2015-UP-333-Jennifer Bowzard v. Sheriff Wayne Dewitt	Pending
2015-UP-339-LeAndra Lewis v. L. B. Dynasty, Inc.	Pending
2015-UP-344-Robert Duncan McCall v. State	Pending
2015-UP-350-Ebony Bethea v. Derrick Jones	Pending
2015-UP-351-Elite Construction v. Doris Tummillo	Pending
2015-UP-353-Wilmington Savings Fund v. Furmanchik	Pending
2015-UP-357-Linda Rodarte v. USC	Pending
2015-UP-359-In the matter of the estate of Alice Shaw Baker (Fisher v. Huckabee)	Pending
2015-UP-361-JP Morgan Chase Bank v. Leah Sample	Pending
2015-UP-362-State v. Martin D. Floyd	Pending
2015-UP-364-Andrew Ballard v. Tim Roberson	Pending
2015-UP-365-State v. Ahmad Jamal Wilkins	Pending
2015-UP-367-Angela Patton v. Dr. Gregory A. Miller	Pending

2015-UP-372-State v. Sheldon L. Kelly	Pending
2015-UP-376-Ron Orlosky v. Law Office of Jay Mullinax	Pending
2015-UP-377-Long Grove at Seaside v. Long Grove Property Owners (James, Harwick & Partners)	Pending
2015-UP-378-State v. James Allen Johnson	Pending
2015-UP-381-State v. Stepheno J. Alston	Pending
2015-UP-382-State v. Nathaniel B. Beeks	Pending
2015-UP-384-Robert C. Schivera v. C. Russell Keep, III	Pending
2015-UP-388-Joann Wright v. William Enos	Pending
2015-UP-391-Cambridge Lakes v. Johnson Koola	Pending
2015-UP-395-Brandon Hodge v. Sumter County	Pending
2015-UP-402-Fritz Timmons v. Browns AS RV and Campers	Pending
2015-UP-403-Angela Parsons v. Jane Smith	Pending
2015-UP-414-Christopher A. Wellborn v. City of Rock Hill	Pending
2015-UP-417-State v. Raheem Jamar Bonham	Pending
2015-UP-423-North Pleasant, LLC v. SC Coastal Conservation	Pending
2015-UP-427-William McFarland v. Sofia Mazell	Pending
2015-UP-428-Harold Threlkeld v. Lyman Warehouse, LLC	Pending
2015-UP-429-State v. Leonard E. Jenkins	Pending
2015-UP-432-Barbara Gaines v. Joyce Ann Campbell	Pending
2015-UP-439-Branch Banking and Trust Co. v. Sarah L. Gray	Pending
2015-UP-446-State v. Tiphani Marie Parkhurst	Pending

2015-UP-455-State v. Michael L. Cardwell	Pending
2015-UP-465-Dushun Staten v. State	Pending
2015-UP-466-State v. Harold Cartwright, III	Pending
2015-UP-474-Edward Whitner v. State	Pending
2015-UP-476-State v. Jon Roseboro	Pending
2015-UP-477-State v. William D. Bolt	Pending
2015-UP-478-State v. Michael Camp	Pending
2015-UP-485-State v. Alfonzo Alexander	Pending
2015-UP-491-Jacquelin S. Bennett v. T. Heyward Carter, Jr.	Pending
2015-UP-501-State v. Don-Survi Chisolm	Pending
2015-UP-513-State v. Wayne A. Scott, Jr.	Pending
2015-UP-518-SCDSS v. Bruce Walters	Pending
2015-UP-524-State v. Gary R. Thompson	Pending
2015-UP-536-Vondell Sanders v. State	Pending
2015-UP-540-State v. Michael McCraw	Pending
2015-UP-542-Frazier T. Williams, #227393, v. State	Dismissed 02/22/16
2015-UP-547-Evalena Catoe v. The City of Columbia	Pending
2015-UP-548-Thaddess Starks v. State	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Fayrell Furr and Karole Jensen, Petitioners,

v.

Horry County Zoning Board of Appeals, Respondent.

Appellate Case No. 2015-000271

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 27608
Heard December 2, 2015 – Filed March 2, 2016

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Gene McCain Connell, Jr., of Kelaher Connell & Connor, P.C., of Surfside Beach, for Petitioners.

Leah Montgomery Cromer and Emma Ruth Brittain, both of Thomas & Brittain, P.A., of Myrtle Beach, for Respondent.

PER CURIAM: We granted certiorari to review the court of appeals' opinion in *Furr v. Horry Ctny. Zoning Bd. of Appeals*, 411 S.C. 178, 767 S.E.2d 221 (Ct. App. 2014). We now dismiss the writ of certiorari as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

PLEICONES, C.J., BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice Jean H. Toal, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Donald Marquice Anderson, Petitioner.

Appellate Case No. 2014-001968

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
The Honorable G. Edward Welmaker, Circuit Court Judge

Opinion No. 27609
Heard October 7, 2015 – Filed March 2, 2016

REVERSED

Carmen V. Ganjehsani, of Richardson, Plowden & Robinson, PA, and Appellate Defender Laura Ruth Baer, both of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Assistant Attorney General Mary W. Leddon, and Assistant Attorney General Susannah Rawl Cole, all of Columbia, and W. Walter Wilkins, III, of Greenville, all for Respondent.

JUSTICE HEARN: Donald Marquice Anderson was walking in the vicinity of a drug raid when police officers located in the periphery of the search ordered him to the ground. Upon searching him, officers found crack cocaine, and Anderson was thereafter indicted for possession with intent to distribute crack cocaine. He moved to suppress the drugs, arguing the detention and subsequent pat-down were unlawful under the Fourth Amendment. The trial court denied his motion to suppress and, following a bench trial, found Anderson guilty as charged. The court of appeals affirmed in an unpublished opinion, finding the police had both reasonable suspicion to detain him and reasonable belief he was armed and dangerous to justify the pat-down. *State v. Anderson*, Op. No. 2014-UP-282 (S.C. Ct. App. filed July 9, 2014). We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Detective Keith Cothran of the Greenville Police Department obtained a no-knock search warrant for a house on Dobbs Street (the Dobbs house). The warrant was founded on surveillance and observations by officers of drug activity in the home and in the surrounding area, including a successful purchase of crack cocaine by a confidential informant. During surveillance, officers learned that runners used a footpath to ferry drugs from the Dobbs house to interested buyers on Sullivan Street. Nevertheless, the search warrant included only the Dobbs house and its curtilage; the warrant did not include the footpath.

As a part of the effort in executing the search warrant, Detective Cothran instructed officers in the vice and narcotics unit of the Greenville SWAT team, including Detectives Kevin Hyatt and Gary Rhinehart, to secure and detain any person found on the footpath because the police department knew the footpath was being used to transport drugs.[1] The two detectives were located near the Dobbs house portion of the footpath and others were stationed at the end of the footpath by Sullivan Street.

During the execution of the search warrant, Detective Hyatt observed Anderson and a woman halfway down the footpath walking toward Sullivan Street away from Dobbs Street. Detective Hyatt and Detective Rhinehart were stationed

[1] Because of safety concerns, Greenville Police SWAT used a distraction device at the time they executed the warrant.

behind Anderson and began walking towards him. When Anderson saw the officers at the Sullivan end of the footpath, he turned around and observed the other two detectives. Anderson and the woman then "veered to the right in a quick manner" off the footpath.

Detective Hyatt drew his weapon and ran towards Anderson advising him to stop and get on the ground. Anderson immediately complied and was handcuffed. When Anderson stood up again, Detective Hyatt completed a pat-down of Anderson's outer clothing for safety reasons. In Anderson's front right pocket, Detective Hyatt felt a plastic bag and hard objects, which later tested positive for crack cocaine.

Anderson moved to suppress the crack cocaine found in his pocket on two grounds. First, he alleged the drugs were not found as part of a *Terry*[2] stop, but pursuant to a warrant executed for Dobbs Street and its curtilage. Therefore, Anderson was outside the bounds of the warrant. Second, even if it was a *Terry* stop, it was improper because there was no reasonable suspicion to stop him and there was no reasonable suspicion that he was armed. Detectives Cothran, Hyatt, Rhinehart, Brown, and Gault testified at the hearing. The trial court denied the motion, relying on *State v. Taylor*, 401 S.C. 104, 113, 736 S.E.2d 663, 667 (2013), finding this was a *Terry* stop and articulable reasons were elicited from testimony to show there was reasonable suspicion to stop and complete a pat-down pursuant to *Minnesota v. Dickerson*, 508 U.S 366 (1993).[3] During the trial, Anderson renewed his objection to the introduction of the crack cocaine. The State adduced no evidence connecting Anderson or the drugs found on him to the house on Dobbs Street.

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[2] *Terry v. Ohio*, 392 U.S. 1 (1968).

[3] There is conflicting evidence regarding whether the detectives believed the footpath was included in the warrant. Detective Hyatt testified Detective Cothran advised him the footpath leading to Sullivan Street was part of the search warrant and told him to detain any subjects he encountered there. However, Detective Cothran testified the warrant did not include the footpath. We express concern with the inference that the officers detained Anderson under the mistaken belief it was within their authority pursuant to the warrant, and only afterwards attempted to claim it was a valid *Terry* stop; nevertheless, Anderson did not argue this issue on appeal and therefore it is not properly before us.

Anderson testified in his own defense. He stated he was at his aunt's house hanging out on top of her car when he heard a "big boom," and believing it was a shooting, he thought he needed to get away. As he was reacting from the "big boom," he saw the police and believed he was safe. He further testified he continued to move once he saw the police because there was a kerosene tank in his aunt's backyard and he worried if shots hit it, the tank might explode. He testified "I did not step foot in the [footpath], but I kind of moved towards the front, the front yard, so I can, you know what I'm saying, be clear of that gas jar."

The trial court ultimately found Anderson guilty as charged, and sentenced him to imprisonment for five years, suspended upon the service of ninety days with probation for forty months. Anderson appealed and the court of appeals affirmed in an unpublished opinion. *State v. Anderson*, Op. No. 2014-UP-282 (S.C. Ct. App. filed July 9, 2014). We granted certiorari.

ISSUE PRESENTED

Is there evidence in the record to support the trial court's finding that Detective Hyatt had reasonable suspicion to make an investigatory stop?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). In reviewing a challenge under the Fourth Amendment, the Court must affirm if there is any evidence to support the ruling. *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011). Accordingly, this Court reviews the trial court for clear error and will affirm if there is any evidence to support the ruling. *State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000).

LAW/ANALYSIS

Anderson argues the trial court erred in failing to suppress the evidence obtained because the officer did not have reasonable suspicion that Anderson was involved in criminal activity to justify an investigative stop. We agree.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Evidence obtained in violation of the Fourth Amendment must

be excluded from trial. *Mapp v. Ohio*, 367 U.S. 643, 648 (1961). The Fourth Amendment applies to all seizures of a person, including only a brief detention. *United States v. Brignoni–Ponce*, 422 U.S. 873, 878 (1975). Pursuant to *Terry*, a police officer with a reasonable suspicion based on articulable facts that a person is involved in criminal activity may stop, briefly detain, and question that person for investigative purposes, without treading upon his Fourth Amendment rights. *State v. Khingratsaiphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002). Reasonable suspicion requires a particularized and objective basis that would lead a person to suspect another of criminal activity. *United States v. Cortez*, 449 U.S. 411, 418 (1981). In determining whether reasonable suspicion exists, the totality of the circumstances must be considered. *Khingratsaiphon*, 352 S.C. at 69, 572 S.E.2d at 459. "While such a detention does not require probable cause, it does require something more than an 'inchoate and unparticularized suspicion or 'hunch.'" *United States v. Sprinkle*, 106 F.3d 613, 617 (4th Cir. 1997) (quoting *Terry*, 392 U.S. at 27). Therefore, in reviewing reasonable suspicion determinations, a court must look to the totality of the circumstances "to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

We find the trial court's finding of reasonable suspicion is not borne out by the record. The State offers us no more than Anderson's proximity to criminal activity and his allegedly evasive behavior. Although never dispositive, we acknowledge that being in a high crime area can be a consideration in our analysis of the totality of the circumstances. *See Sprinkle*, 106 F.3d at 617 ("Although being seen in a high crime district carries no weight standing alone, an area's disposition toward criminal activity is an articulable fact.") (internal citations omitted); *but see United States v. Perrin*, 45 F.3d 869, 873 (4th Cir. 1995) ("Were we to treat the dangerousness of the neighborhood as an independent corroborating factor, we would be, in effect, holding a suspect accountable for factors wholly outside of his control."). We likewise appreciate that evasive conduct can become a factor in adjudging reasonable suspicion. *See Taylor*, 401 S.C. at 112, 736 S.E.2d at 667 (holding evasive conduct may be considered in the totality of the circumstances analysis for reasonable suspicion because an attempted evasion may inform an officer's appraisal of an encounter).

Examining these facts within the context of Anderson's seizure, we cannot agree the evidence supports the conclusion that the officers had a particularized and objective basis to suspect illegal activity that would justify the detention. It is

undisputed Anderson was in a high crime area and near the home where a search warrant was being executed. This fact carries little weight here. The police were in the area for the express purpose of executing a search warrant on a discrete property—which did not include the footpath where the officers encountered Anderson. Officers did not see Anderson flee the property involved and did not recognize him as a suspect related to those crimes. Certainly being in a high crime area does not provide police officers carte blanche to stop any person they meet on the street. We acknowledge we are dealing with the totality of the circumstances. Nevertheless, even considering the situs with the fact that Anderson stepped off the footpath after seeing the police, we find the circumstances here fail to support the finding of reasonable suspicion.

We remain ever mindful of the difficult and often dangerous situations officers encounter daily and acknowledge that we give great deference to their experience and expertise. Here, however, the facts amount to no more than baseless conjecture that a person in a high crime area must be engaged in illicit activity. A person's proximity to criminal activity, without more, cannot establish reasonable suspicion to detain that individual. Taken to its logical conclusion, the erosion of an individual's Fourth Amendment right would necessarily accompany his or her misfortune of living in an area plagued by crime. We decline to accept such a result.

CONCLUSION

Based on the foregoing, we reverse the court of appeals and hold the trial court erred in failing to suppress the evidence found as a result of Anderson's unconstitutional seizure.[4]

PLEICONES, C.J., BEATTY, KITTREDGE, JJ., and Acting Justice Jean H. Toal, concur.

[4] Anderson also challenges the trial court's finding that Detective Hyatt had a reasonable belief that Anderson was armed and dangerous to justify a pat-down. Because we hold that the initial seizure was unconstitutional, we need not address the subsequent search.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clifford Thompson, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2014-001984

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 27610
Heard October 21, 2015 – Filed March 2, 2016

AFFIRMED IN PART, REVERSED IN PART

Lindsey S.Vann, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, and Assistant Attorney General Marcie E. Greene, all of Columbia, for Respondent.

ACTING JUSTICE TOAL: Clifford Thompson appeals the court of appeals' decision in *Thompson v. State*, 409 S.C. 386, 762 S.E.2d 51 (Ct. App. 2014), affirming the circuit court's refusal to grant Thompson's request for declaratory judgments finding that: (1) his kidnapping offenses did not involve a sexual element; and (2) Thompson would not need to register as a sex offender upon his release from prison in 2020. We reverse in part, and affirm in part.

FACTS/PROCEDURAL BACKGROUND

From 1998 to 2000, an armed perpetrator committed six robberies of hotels in Lexington, Richland, Berkeley, and Charleston counties. During each of these robberies, the perpetrator entered the hotel, held the clerk at gunpoint, restrained the clerk with either duct tape or rope, and stole money out of the hotel safe and till. After an investigation, the police arrested Thompson for these robberies, and a grand jury indicted Thompson on multiple counts of armed robbery and kidnapping.[1]

In 2001, Thompson pled guilty to six counts of armed robbery and four counts of kidnapping. At the time of the plea, the circuit court failed to make a finding that the four kidnapping offenses were not sexual in nature. *See* S.C. Code Ann. § 23-3-430(C)(15) (2007 & Supp. 2014) (stating that anyone convicted of kidnapping is considered a sex offender "except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense").

In 2009, after discovering that the South Carolina Department of Corrections (SCDC) classified him as a sex offender due to his kidnapping convictions, Thompson filed a petition for a declaratory judgment, requesting the court find that the kidnapping offenses were not sexual in nature, and did not require him to register as a sex offender pursuant to section 23-3-430(C)(15). The State moved the court to dismiss Thompson's action under Rules 12(b)(1) and (6), SCRCP, arguing that Thompson's petition was not yet ripe because sex offender registration requirements are determined solely by the law in effect at the time of an inmate's release from prison, and Thompson would not be released until 2020.

[1] The kidnapping charges against Thompson stemmed solely from Thompson's alleged restraint of the clerks.

The circuit court granted the State's motion, finding that the action was not ripe. The court further found that Thompson was required to pursue administrative review within the SCDC in order to change his internal classification there. *See Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). The circuit court did not address Thompson's request that the court make a finding on the record that his kidnapping convictions were not sexual in nature.

In a split decision, the court of appeals affirmed. *Thompson*, 409 S.C. 386, 762 S.E.2d 51. Chief Judge Few, writing for the majority, found that "the circuit court properly determined no justiciable controversy existed and dismissed the action because the question of whether Thompson should be required to register as a sex offender is not ripe for adjudication." *Id.* at 388, 762 S.E.2d at 52.

In dissent, Judge Thomas found that Thompson's claim presented a justiciable controversy because of the SCDC's current classification of Thompson as a sex offender, noting that the classification "could have immediate and harmful ramifications." *Id.* at 390–91, 762 S.E.2d at 53 (Thomas, J., dissenting). For example, Judge Thomas noted that because of his classification, Thompson was ineligible for substance abuse services and the ninety-day pre-release program. *Id.* at 391 n.7, 762 S.E.2d at 53 n.7 (Thomas, J., dissenting). Further, Judge Thomas found that the SCDC's classification of Thompson was a "direct result of the circuit court's finding or failure to make any finding, that the [kidnapping] offense was a criminal sexual offense," and that therefore "any attempt by Thompson to challenge his status as a sex offender through the inmate grievance process would be futile in that the [SCDC] is bound by the effect of the circuit court's decision regarding whether his kidnapping was sexual in nature." *Id.* at 391–92, 762 S.E.2d at 54 (Thomas, J., dissenting) (footnote omitted).

We granted Thompson's petition for a writ of certiorari to review the court of appeals' decision.

ISSUES

I. Whether the circuit court may properly issue a declaratory judgment that Thompson's kidnapping offenses did not involve a sexual element?

II. Whether the circuit court may properly issue a declaratory judgment that Thompson need not register as a sex offender upon his release from prison in 2020?

III. Whether the circuit court may properly address the SCDC's classification of Thompson as a sex offender?

ANALYSIS

Pursuant to South Carolina's Uniform Declaratory Judgments Act (the Declaratory Judgment Act),[2] "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20. "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the [] statute . . . and obtain a declaration of rights, status or other legal relations thereunder." *Id.* § 15-53-30.[3]

"To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Sunset Cay, L.L.C. v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004). "'A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.'" *Id.* (quoting *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970)); *see also Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Planning Corp.*,

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[2] S.C. Code Ann. §§ 15-53-10 to -140 (2005 & Supp. 2014).

[3] Section 23-3-430 is found in the portion of the South Carolina Code encompassing South Carolina's sex offender registry. As we have repeatedly stated, the sex offender registry is a civil requirement separate and apart from the criminal punishments associated with sexual offenses in this state. *State v. Nation*, 408 S.C. 474, 481, 759 S.E.2d 428, 432 (2014) (citing *In re Justin B.*, 405 S.C. 391, 394, 404–08, 747 S.E.2d 774, 775, 781–83 (2013)). As such, a declaratory judgment, and not post-conviction relief (PCR), is the appropriate vehicle in which to address this matter. *Cf. Williams v. Ozmint*, 380 S.C. 473, 671 S.E.2d 600 (2008) (stating that PCR is intended to address constitutional violations related to the criminal conviction (citing S.C. Code Ann. § 17-27-20(a) (2007))).

358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) (quoting *Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)). The Court should liberally construe the Declaratory Judgment Act so as "to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationships." *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995).

I. Character of Kidnapping Offenses

Thompson contends that in his action for a declaratory judgment, he requested two declarations: (1) that his kidnapping offenses did not involve a sexual element (the first declaration); and (2) that therefore he would not have to register as a sex offender in the future (the second declaration). Thompson asserts that the circuit court and court of appeals ignored the first declaration in their respective order and opinion, and only addressed the second. We agree.

During the hearing regarding the State's motion to dismiss, the circuit court stated that a criminal defendant must request the court make a finding on the record regarding the character of a kidnapping offense at the time of a guilty plea or jury verdict. The circuit court further stated that should the defendant fail to secure a finding at that time, he forever waives his right to assert that the kidnapping was not sexual in nature.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). Fundamentally, due process requires notice, a meaningful opportunity to be heard, and judicial review. *Id.*

We find that Thompson has been denied a meaningful opportunity to be heard on whether his kidnapping offenses were sexual in nature. Section 23-3-430 is a civil statute, and we cannot imagine the General Assembly intended to allow a criminal defendant affected by section 23-3-430 the opportunity to be heard only during his criminal proceedings. While it is permissible—and even encouraged—for the sentencing court to determine the character of any kidnapping offenses at

that time, the defendant is entitled to a meaningful opportunity to be heard on the matter at some point, because the civil consequences follow immediately after conviction, and not merely upon his release from prison.[4]

We therefore reverse the court of appeals' affirmance of the trial court's order with respect to the first declaration. On remand, Thompson and the State are entitled to a hearing to determine whether Thompson's kidnapping offenses were sexual in nature. At that hearing, the court should allow the victims' to testify if they so desire, and should consider the victims' opinions.

II. Future Sex Offender Registration

In *Hazel v. State*, we held that a person convicted of kidnapping could not challenge whether he was required to register as a sex offender until the date of his release from prison, because that issue is entirely dependent on the sex offender registry statute in existence at that time. 377 S.C. 60, 64, 659 S.E.2d 137, 139 (2008) (detailing the history of the sex offender registry as it related to kidnapping offenses). Here, Thompson will not be released from prison until 2020. Because there is no way to determine whether the General Assembly will amend section 23-3-430(C)(15) prior to 2020, a declaration that Thompson is not required to register as a sex offender in the future would be purely advisory. Thus, the second declaration does not present a justiciable controversy, and we affirm the court of appeals' decision with regards to the second declaration.

III. SCDC Classification

Because Thompson has not yet exhausted the SCDC's internal grievance procedures, we decline to address this issue. *Al-Shabazz*, 338 S.C. at 375, 527 S.E.2d at 753 (finding that with respect to an inmate's sentence, sentence-related

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[4] For example, as Judge Thomas noted in her dissent, Thompson is ineligible to receive substance abuse services while incarcerated, or to enroll in the ninety-day pre-release program (a program designed to help soon-to-be-released inmates reintegrate back into society). *Thompson*, 409 S.C. at 391 n.7, 762 S.E.2d at 53 n.7 (Thomas, J., dissenting); *see also Division of Behavioral Health and Substance Abuse Services*, S.C. Dep't of Corrs., http://www.doc.sc.gov/programs/substance.jsp (last visited Dec. 15, 2015).

credits, or custody status, "[i]nitiating a grievance is a method an inmate uses to challenge such decisions within the prison system"). Once Thomson receives his requested hearing regarding the nature of his kidnapping offenses, and once he attempts to have the SCDC modify his classification through the grievance system, he may obtain judicial review of this issue. *See id.*

CONCLUSION

For the foregoing reasons, we reverse the court of appeals' decision affirming the circuit court's refusal to address whether Thompson's kidnapping offenses did not involve a sexual element, and remand for a hearing on this issue. However, because the issue of whether Thompson will be required to register as a sex offender upon his release from prison is not yet ripe, and because the SCDC's classification of Thompson as a sex offender in prison is subject to internal grievance procedures, we affirm the court of appeals' decision with respect to those two issues, and allow Thompson to file a grievance with the SCDC to become reclassified in the SCDC's system.

AFFIRMED IN PART, REVERSED IN PART.

BEATTY, KITTREDGE, and HEARN, JJ., concur. PLEICONES, C.J., concurring in result only.

The Supreme Court of South Carolina

In the Matter of Richard G. D'Agostino, Respondent.

Appellate Case Nos. 2016-000407 & -000418

ORDER

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

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

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

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

Finally, this Order, when served on any office of the United States Postal Service,

shall serve as notice that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

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

s/ Costa M. Pleicones C.J.

Columbia, South Carolina

February 29, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mae Ruth Davis Thompson, Individually and as the appointed Personal Representative of the Estate of Eula Mae Davis, deceased, Respondent,

v.

Pruitt Corporation d/b/a UHS-Pruitt Corporation; UHS-Pruitt Holdings, Inc.; UHS of South Carolina-East, LLC; United Health Services of South Carolina, Inc.; United Clinical Services, Inc.; United Rehab, Inc.; Rock Hill Healthcare Properties, Inc.; Uni-Health Post Acute Care-Rock Hill, LLC d/b/a UniHealth Post Acute Care-Rock Hill, Appellants.

Appellate Case No. 2014-001624

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

Opinion No. 5384
Heard February 2, 2016 – Filed March 2, 2016

AFFIRMED

Monteith Powell Todd, Robert E. Horner, John Michael Montgomery, and Alexander Erwin Davis, all of Sowell Gray Stepp & Laffitte, LLC, of Columbia, for Appellants.

John Gressette Felder, Jr., of Columbia, and Jordan Christopher Calloway, of Rock Hill, both of McGowan, Hood & Felder, LLC, for Respondent.

GEATHERS, J.: In this wrongful death and survival action, Appellants, Pruitt Corporation d/b/a UHS-Pruitt Corporation, UHS-Pruitt Holdings, Inc., UHS of South Carolina-East, LLC, United Health Services of South Carolina, Inc., United Clinical Services, Inc., United Rehab, Inc., Rock Hill Healthcare Properties, Inc., and Uni-Health Post Acute Care-Rock Hill, LLC d/b/a UniHealth Post Acute Care-Rock Hill, challenge the circuit court's order denying their motion to compel arbitration. We affirm.

FACTS/PROCEDURAL HISTORY

On January 11, 2011, Respondent, Mae Ruth Davis Thompson (Daughter), and her brother, Andrew Phillip Davis (Son), had their mother, Eula Mae Davis (Mother), transferred from Piedmont Medical Center to a nearby nursing home facility owned or operated by Appellant UniHealth Post Acute Care-Rock Hill (UniHealth). A UniHealth employee presented an Admission Agreement, an Arbitration Agreement (AA), and several other documents to Son for his signature on behalf of Mother, who suffered from dementia. Mother was not present at this time as she was in the process of being transported to UniHealth.

Within five hours of being admitted to UniHealth, Mother died as a result of falling out of a bed with a malfunctioning side rail. Subsequently, Daughter filed a wrongful death and survival action against Appellants. Appellants later filed a motion to dismiss Daughter's action and to compel arbitration of Daughter's claims or, in the alternative, to compel arbitration and stay Daughter's action.

The circuit court denied the motion to compel on the ground that Son did not have authority to execute the AA on Mother's behalf under either common law agency principles or the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (2002 & Supp. 2012)). Appellants filed a motion for reconsideration; however, the circuit court denied the motion. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in concluding Mother's estate could not be bound by the AA under the Adult Health Care Consent Act?

2. Did the circuit court err in concluding Mother's estate could not be bound by the AA under common law agency principles?

3. Did the circuit court err in concluding Mother's estate could not be bound by the AA under a third-party beneficiary theory?

4. Did the circuit court err in concluding Mother's estate could not be equitably estopped from refusing to comply with the AA?

STANDARD OF REVIEW

"Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012).

LAW/ANALYSIS

I. Merger

Appellants contend the circuit court erred in concluding Mother's estate could not be bound by the AA under the Adult Health Care Consent Act (the Act). Appellants argue the AA "merged" with the Admission Agreement, which Son was authorized to execute under the Act, making both agreements one and the same. We disagree.

Initially, we note this issue is not preserved for our review. Appellants did not raise this issue below; rather, Daughter raised the issue during both motions hearings, citing our supreme court's recent opinion in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 453 (2014), and its interpretation of the Act. Appellants addressed the merger concept in the second motions hearing only to respond to Daughter's argument that she could be not be equitably estopped

because under the analysis provided by *Coleman*, the AA and the Admission Agreement had not been merged. Appellants attempted to distinguish *Coleman* as follows: "[I]t doesn't discuss equitable estoppel other than to basically discuss merger and say if your argument is premised on merger, we found no merger; therefore, this argument must fail. My argument is not premised upon a merger . . . ."

Based on the foregoing, Appellants are precluded from arguing the doctrine of merger in this appeal. *See Richland Cty. v. Carolina Chloride, Inc.*, 382 S.C. 634, 656, 677 S.E.2d 892, 903 (Ct. App. 2009) (holding the appellant was barred on appeal from asserting its argument concerning governmental estoppel because it expressly waived this argument during trial), *aff'd in part, rev'd in part on other grounds*, 394 S.C. 154, 714 S.E.2d 869 (2011). Even if Appellants' merger argument had been properly preserved, we would affirm on the merits.

The Act confers authority on a health care surrogate to consent on the patient's behalf "to the provision or withholding of medical care" and to make financial decisions obligating the patient to pay for the medical care provided. *Coleman*, 407 S.C. at 351-52, 755 S.E.2d at 453.

> Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority:
>
> (1) a guardian appointed by the [Probate Court], if the decision is within the scope of the guardianship;
>
> (2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant to [section 62-5-501 of the South Carolina Code (2009 & Supp. 2015)], if the decision is within the scope of his authority;
>
> (3) a person given priority to make health care decisions for the patient by another statutory provision;
>
> (4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:

> (a) entry of a pendente lite order in a divorce or separate maintenance action;
>
> (b) formal signing of a written property or marital settlement agreement;
>
> (c) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;
>
> (5) a parent or adult child of the patient;
>
> (6) an adult sibling, grandparent, or adult grandchild of the patient;
>
> (7) any other relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient;
>
> (8) a person given authority to make health care decisions for the patient by another statutory provision.

S.C. Code Ann. § 44-66-30(A) (2002).

In *Coleman*, our supreme court held an arbitration agreement signed by the surrogate in that case was separate from the agreement to admit the patient to a health care facility and "concerned neither health care nor payment, but instead provided an optional method for dispute resolution between [the facility] and [the patient or her surrogate] should issues arise in the future." 407 S.C. at 353-54, 755 S.E.2d at 454. The court further held, "Under the Act, [the surrogate] did not have the capacity to bind [the patient] to this voluntary arbitration agreement." *Id.* at 354, 755 S.E.2d at 454.

Here, in its order denying Appellants' motion to compel arbitration, the circuit court stated,

> The manifest purpose of the Act is to enable contracting parties in a healthcare situation to enter into a binding agreement when express authority has not been conferred upon an agent for that purpose. It further eliminates the need to deal with questions of apparent agency or authority in order to make such a contract binding.
>
> However, *the Act does not confer such authority with respect to an Arbitration Agreement[] such as the one in issue in this case*. *See Coleman v. Mariner Health Care, Inc.*, Supreme Court, Opinion No. 27362, filed March 12, 2014. As the Arbitration Agreement does not deal with healthcare decisions, the provisions of the Act do not apply to establish the necessary principal-agent relationship. *Id.*

(emphasis added). We agree with the circuit court's analysis.

Like the arbitration agreement in *Coleman*, the AA signed by Son in the present case was separate from the Admission Agreement. Therefore, any authority Son had to sign the AA on Mother's behalf could not come from the Act. *See id.* at 353-54, 755 S.E.2d at 454 (holding that under the Act, the patient's surrogate did not have authority to bind the patient to a voluntary arbitration agreement that was separate from the agreement to admit the patient to a health care facility and "concerned neither health care nor payment").

Appellants argue the terms of the Admission Agreement indicate it either incorporated, or merged with, the AA and thus, Son's authority to execute the Admission Agreement covered the terms of the AA as well. We disagree.

After holding the Act did not authorize the surrogate to sign an arbitration agreement on the patient's behalf, the court in *Coleman* addressed the health care facility's alternative argument that the surrogate was equitably estopped to deny the arbitration agreement's enforceability because that agreement merged with the admission agreement:

> The general rule is that, *in the absence of anything indicating a contrary intention*, where instruments are

> executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

407 S.C. at 346, 355, 755 S.E.2d at 455 (emphasis added) (quoting *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). The court then explained the evidence of the parties' intent to keep the two agreements separate by highlighting the admission agreement's recognition of the arbitration agreement as a separate document, i.e., "This Agreement, including all Exhibits hereto, and the Arbitration Agreement . . . supersede all other agreements . . . and contain all of the promises and agreements between the parties." *Id.* The court also highlighted the arbitration agreement's provision allowing it to be disclaimed within thirty days and noted the admission agreement did not include such a provision, "evidencing an intention that each contract remain separate." *Id.* Finally, the court stressed that even if the language of the admission agreement created "an ambiguity as to merger, the law is clear that any ambiguity in such a clause is *construed against the drafter*, in this case, [the facility]." *Id.* at 355-56, 755 S.E.2d at 455 (emphasis added).

Here, as in *Coleman*, the AA contained language that provided it could be disclaimed within thirty days, yet the Admission Agreement did not include such a provision. Appellants argue the Admission Agreement could have been "disclaimed" at any time by Mother leaving the facility and thus, the right to disclaim the AA does not show the parties intended for the AA to be separate from the Admission Agreement. This is not a valid comparison. Because there are no provisions in the Admission Agreement allowing Mother to disclaim it, leaving the facility would be the only way she could "disclaim" the agreement, whereas the AA allows the patient to disclaim the AA unconditionally. Therefore, Mother's right to disclaim the AA without having to terminate her residency at the facility indicates the parties' intent to keep the AA separate from the Admission Agreement. This is consistent with the AA's statement that its execution was not a condition precedent for being admitted to the nursing home: "The signing of this Agreement is not a precondition to admission, expedited admission, or the furnishing of services to the Patient/Resident by the Healthcare Center[.]" This demonstrates the parties' intent that the two agreements retain their separate identities.

Appellants also argue the Admission Agreement incorporates by reference all exhibits to the agreement and the AA is one of the exhibits. However, the Admission Agreement is ambiguous on this point because (1) it does not define the term "exhibit" or cross-reference any specific exhibits and (2) the AA does not include any labels or other language indicating it serves as an exhibit or addendum to the Admission Agreement.[1] Therefore, the Admission Agreement's provision incorporating all "exhibits" must be construed against Appellants. *See Coleman*, 407 S.C. at 355-56, 755 S.E.2d at 455 (holding any ambiguity in the patient's admission agreement as to its merger with the arbitration agreement was to be construed against the health care facility); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 94, 594 S.E.2d 485, 493 (Ct. App. 2004) ("A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear."). As to Appellants' contention they relied on Son's written representation he was authorized to sign the AA, we see no true reliance. Appellants represented the AA to be a voluntary agreement that was not a condition to Mother's admission to the facility and was unconditionally revocable within thirty days of execution.

Based on the foregoing, we affirm the circuit court's conclusion that the particular AA in the present case did not require the type of decision for which the Act confers authority on a surrogate, i.e., health care or payment for health care.

II. Common Law Agency

Appellants maintain the circuit court erred in concluding no common law agency relationship existed between Son and Mother when Son executed the AA. Appellants argue Son had apparent authority to execute the AA on Mother's behalf. We disagree.

To establish apparent authority, the proponent must show (1) "the purported principal consciously or impliedly represented another to be his agent;" (2) the proponent relied on the representation; and (3) "there was a change of position to the [proponent's] detriment." *Froneberger v. Smith*, 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013) (quoting *Graves v. Serbin Farms, Inc.*, 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991)).

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[1] In fact, the front page of the AA is labeled "Arbitration Agreement," indicating the parties' intent for it to stand by itself as an independent contract.

> Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the *principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.

Id. (emphasis added) (quoting *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 244-45, 473 S.E.2d 865, 868 (Ct. App. 1996)). "Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Id.* (quoting *Frasier*, 323 S.C. at 245, 473 S.E.2d at 868). "Moreover, an agency may not be established solely by the declarations and conduct of an alleged agent." *Id.*

Here, Appellants assert Mother "allowed, passively or otherwise, [Son] to not only sign her into [UniHealth], but also to handle multiple other financial affairs for her." While the evidence indicates Son handled Mother's finances in the years leading up to her admission to UniHealth, the evidence also indicates Mother had dementia prior to being admitted to UniHealth. Therefore, her incapacity prevented her from "consciously or impliedly" representing another to be her agent. *See id*. at 47, 748 S.E.2d at 630 (holding that to establish apparent authority, the proponent must show, among other things, "the purported principal consciously or impliedly represented another to be his agent"); *id.* ("Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief."); *see also Cook v. GGNSC Ripley, LLC*, 786 F. Supp. 2d 1166, 1171 (N.D. Miss. 2011) (holding a patient's daughter could not bind the patient through apparent authority because the patient was incapacitated and unable to acquiesce in her daughter's actions).

Further, the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial. *See Dickerson v. Longoria*, 995 A.2d 721, 736-37 (Md. 2010) ("[T]he decision to enter into an arbitration agreement primarily concerns the signatory's decision to waive his or her right of access to the courts and right to a trial by jury."); *id.* at 739 ("The decision to sign a free-standing arbitration

agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement."); *id.* at 736 (concluding the medical and financial decisions of the patient's companion on the patient's behalf suggested the patient may have conferred on his companion "the authority to make health care and financial decisions on his behalf, but no more than that"); *id.* at 735 (holding the patient's companion was the patient's "agent for purposes of health care and financial decisions, but that the scope of this consensual relationship did not include the authority to bind [the patient] to the arbitration agreement in this case"); *id.* at 735 (holding an agent's statement will bind the principal only if the statement is within the scope of the agency and, therefore, an agent may not enlarge the actual authority by his own acts without the principal's assent or acquiescence); *see also Cook*, 786 F. Supp. 2d at 1171 ("An arbitration agreement is not considered to be a health-care decision when admission is not contingent upon its execution."); *cf. Coleman*, 407 S.C. at 354, 755 S.E.2d at 454 ("The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between [the health care facility] and [the patient] or [surrogate] should issues arise in the future. Under the Act, [the surrogate] did not have the capacity to bind [the patient] to this voluntary arbitration agreement."); *id.* ("We therefore affirm the circuit court's holding that the Act did not confer authority on [the surrogate] to execute a document which involved neither health care nor financial terms for payment of such care.").

Based on the foregoing, the evidence does not show that Son had either actual or apparent authority to execute the AA on Mother's behalf. Therefore, the circuit court properly concluded Son did not have the authority to bind Mother to the AA. *See Pearson*, 400 S.C. at 286, 733 S.E.2d at 599 ("Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings.").

III. Third-Party Beneficiary

Appellants contend the circuit court erred in concluding that Mother's estate was not bound by the AA under a third-party beneficiary theory. Appellants maintain Mother was a third-party beneficiary of the AA as executed by Son in either his representative or individual capacity and Mother's third-party beneficiary status made the AA binding on her estate. We disagree.

"A third-party beneficiary is a party that the contracting parties intend to directly benefit." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). However, there can be no third-party beneficiary unless a valid contract exists. *See Dickerson*, 995 A.2d at 742 ("Before one can enforce a contract, however, whether as a party to the contract or as a third-party beneficiary, there must be a contract to enforce."). Here, Son was not authorized to execute the AA on Mother's behalf. Therefore, she could not be the third-party beneficiary of the alleged AA between herself and Appellants.

As to the AA between Appellants and Son in his individual capacity, "a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement." *Id.* Here, Daughter is not attempting to enforce the AA on behalf of Mother's estate. Rather, she has asserted tort claims against Appellants arising out of the patient-provider relationship created by the separate Admission Agreement. Further, Mother's diminished mental capacity prevented her from assenting to the AA's terms. Therefore, her estate cannot be bound by the AA. *See Drury v. Assisted Living Concepts, Inc.*, 262 P.3d 1162, 1166 n.5 (Or. Ct. App. 2011) ("[U]nless the third-party beneficiary in some way assents to a contract containing an arbitration clause, the contracting parties have waived the beneficiary's right to a jury trial without her consent.").

Appellants also assert that even if Mother was not a third-party beneficiary of the AA, it is still binding on Mother's estate because "the claims of the other beneficiaries of the Estate are inextricably intertwined with [Son's] claims and the members of the group share a close relationship." Appellants cite *Long v. Silver*, 248 F.3d 309, 320 (4th Cir. 2001), in support of this argument. In *Long*, the Fourth Circuit held that the facts and claims against a close corporation and its shareholders were "so closely intertwined that [the plaintiff's] claims against the non-signatory shareholders of the [c]orporation [were] properly referable to arbitration even though the shareholders [were] not formal parties" to the agreement containing the arbitration clause. *Id.*

Daughter correctly points out that the basis for the Fourth Circuit's holding in *Long* was the "ordinary state-law principles of agency or contract." *Id.* ("A non-signatory may invoke an arbitration clause under ordinary state-law principles of agency or contract."). Further, agency is inherent in the nature of a relationship between a corporation and its shareholders. *See id.* ("In this context, we see little

difference between a parent and its subsidiary and a corporation and its shareholders, where, as here, the shareholders are all officers and members of the Board of Directors and, *as the only shareholders*, control all of the activities of the corporation." (emphasis added)). In contrast, the evidence in the present case does not show Son met the legal requirements for an agency relationship with Mother. *See supra*. Therefore, Appellants' "inextricably intertwined" argument has no relevance to the present case.

IV. Equitable Estoppel

Finally, Appellants assert the circuit court should have concluded that Mother's estate was equitably estopped from refusing to comply with the AA. Appellants argue Mother benefited from the AA because she was admitted to UniHealth, received medical care, and became capable of enforcing the AA. We disagree.

Initially, we note the recent conflict between the United States Supreme Court and our state courts concerning the application of state law in determining whether a non-signatory is bound by an arbitration agreement. *Compare Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630, 632 (2009) (holding that a nonparty to an agreement is entitled to invoke the Federal Arbitration Act (FAA) "if the relevant state contract law allows him to enforce the agreement"), *and id.* at 631 ("Because 'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,' the Sixth Circuit's holding that nonparties to a contract are categorically barred from [FAA] relief was error." (citation omitted)), *with Pearson*, 400 S.C. at 289-90, 733 S.E.2d at 601 (decided in 2012 and holding "[b]ecause the determination of whether a non[-]signatory is bound by a contract presents no state law question of contract formation or validity, the court looks to the federal substantive law of arbitrability to resolve the question").

Nonetheless, the doctrine of equitable estoppel does not apply to Mother's estate under either South Carolina law or federal substantive law concerning arbitrability. We first examine the doctrine as it has been developed under federal substantive law:

> 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.

Pearson, 400 S.C. at 290, 733 S.E.2d at 601 (emphasis omitted) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)). In other words, "[w]hen 'a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a "direct benefit" from a contract containing an arbitration clause.'" *Id.* at 295, 733 S.E.2d at 604 (quoting *Jackson v. Iris.com*, 524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007)).

Notably, in those opinions addressing equitable estoppel in the arbitration context, the nonsignatory's contractual benefit is not typically an alleged benefit of arbitration such as "avoiding the expense and delay of extended court proceedings" or being "capable of enforcing the [AA]," as touted by Appellants in the present case—rather, the contractual benefit typically arises from another provision of the same contract that includes the arbitration provision. *See Pearson*, 400 S.C. at 296-97, 733 S.E.2d at 605 (ability to work at the defendant's hospital facility and receive payment for work); *see also Int'l Paper Co.*, 206 F.3d at 418 (warranty provisions); *Jackson*, 524 F. Supp. 2d at 750 (entitlement to retain a $150,000 payment pursuant to the contract's liquidated damages provision); *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (lower insurance rates on a yacht and the ability to sail under the French flag); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993) (continuing use of a name).

Here, the AA is not incorporated into the Admission Agreement; therefore, Appellants' assertion that Mother received benefits under the Admission Agreement, i.e., being admitted to the facility and receiving medical care, is of no moment. The two agreements are independent of one another, as reflected in the language of the AA indicating its execution is not a condition for being admitted to the nursing home. Further, any possible benefit emanating from the AA alone is offset by the AA's requirement that Mother waive her right to access to the courts and her right to a jury trial. Therefore, equitable estoppel under federal substantive law has no application to the present case.

Under South Carolina law, the elements of equitable estoppel as to the party to be estopped are

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is *calculated* to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) *intention*, or at least expectation, that such conduct shall be acted upon by the other party; and (3) *knowledge*, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Boyd v. Bellsouth Tel. Tel. Co., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006) (emphases added).

Here, Mother had dementia prior to being admitted to UniHealth. Therefore, her incapacity prevented her from forming the intent or having the requisite knowledge to mislead Appellants or to assent to the AA's terms. In their brief, Appellants side-step this inconvenient fact by substituting both Daughter, in her individual capacity, and Son for Mother in the estoppel analysis:

> [Son] represented in the contract itself that he was authorized to sign it. . . . [Daughter] was present while the agreements were signed and made no effort to repudiate [Son's] representations that he was authorized to sign the agreements on [Mother's] behalf. . . . Now, however, [Daughter] seeks to repudiate these agreements on the basis that [Son] was not authorized to sign them on [Mother's] behalf. [Daughter] should be estopped from taking this contrary position. Additionally, . . . the very last sentence of the [AA] notes that in signing the [AA], the Patient/Resident Representative binds both the

> Patient/Resident and the Patient/Resident Representative. [Son], [Daughter], and the Estate should be estopped from denying that [Son] had the authority to sign the [AA], or that they are bound by it . . . .

This argument necessarily implies that Daughter, in her individual capacity, or Son may serve as the legal equivalent of Mother's estate. However, at least one jurisdiction has rejected this type of premise. In *Dickerson*, the Maryland Court of Appeals addressed an argument identical to Appellants' estoppel argument in the present case:

> Respondent is attempting to use equitable estoppel against [the patient's] [e]state based on actions that [patient's companion] took *in her individual capacity*. The fact that [the patient's companion] is *now the personal representative for [the patient's] [e]state* is of no moment; we will not hold this circumstance against [the patient's] [e]state. Simply put, [the patient's] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] [e]state, or by [the patient's companion] in *her capacity as Personal Representative* of [the patient's] [e]state, that has affected Respondent's position. This, too, is a necessary element of an equitable estoppel defense.

995 A.2d at 743 (emphases added). The court also noted the absence of evidence that the owner of the nursing home facility had changed its position for the worse based on the assertion of the patient's companion that she was acting on the patient's behalf when she signed the arbitration agreement. *See id.* Like the facility owner in *Dickerson*, Appellants have failed to show how they have changed their position for the worse based on Son's representation that he was acting on Mother's behalf when he signed the AA. As we stated previously, the AA was separate from the Admission Agreement, and Appellants represented the AA to be a voluntary agreement that was not a condition to Mother's admission to the facility and was unconditionally revocable within thirty days of execution.

The *Dickerson* court also addressed the facility owner's argument that the doctrine of unclean hands should apply to the patient's estate because the patient's companion was an heir to the estate:

> Respondent notes that [the patient's companion] is 'the heir of [the patient's] [e]state,' suggesting that we should apply the doctrine of unclean hands because [the patient's companion] may benefit if the [e]state's claims against Respondent are successful. We decline to do so. First, as we have explained, we will not hold against the Estate acts that [the patient's companion] may have performed *in her individual capacity*. Second, the [e]state may well have other beneficiaries or creditors. We will not hold [the patient's companion's] *individual acts* against these other entities for the same reasons.

Id. at 744 n.23 (emphases added). Likewise, Appellants in the present case may not hold Mother's estate responsible for any possible misrepresentations Son or Daughter may have made in their individual capacities. Therefore, the circuit court properly rejected Appellants' equitable estoppel theory.

CONCLUSION

Accordingly, the circuit court's denial of Appellants' motion to compel arbitration is

AFFIRMED.

HUFF, A.C.J, and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bank of New York Mellon Trust Company, National Association f/k/a The Bank of New York Trust Company, N.A. as successor to JP Morgan Chase Bank N.A. s/b/m Bank One National Association as Trustee for RAMP 2002RS5, Plaintiff,

v.

Chartrease Grier, Palmetto Health Alliance, and Palmetto Richland Memorial, Defendants.

Chartrease Grier, Appellant,

v.

Nationwide Property & Casualty Insurance Company and Tonya D. Parks, Respondents.

Appellate Case No. 2013-002403

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5385
Heard November 4, 2015 – Filed March 2, 2016

AFFIRMED

M. Allison Moon and Sarah E. Brown, of Moon Law Firm, and Scott J. Bradley, of The Joel Bieber Firm, of

Greenville; and Michael G. Wimer, pro hac vice, all for Appellant.

Michael J. Anzelmo, Alana Odom Williams, and Jay T. Thompson, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Respondents.

WILLIAMS, J.: Chartrease Grier appeals the circuit court's grant of summary judgment in favor of Nationwide Property & Casualty Insurance Company (Nationwide), arguing the court erred in (1) finding section 38-75-740 of the South Carolina Code (2015) was inapplicable to homeowners insurance policies, (2) ruling her breach of contract claim failed as a matter of law, (3) concluding Nationwide's refusal to pay was not in bad faith, and (4) denying Grier's motion to amend her third-party complaint. We affirm.

FACTS/PROCEDURAL HISTORY

In 2006, Grier purchased a homeowner's insurance policy from Nationwide through her insurance agent, Tanya Parks. The policy covered her home and its contents in Columbia, South Carolina. The Bank of New York Mellon Trust Company (the Bank) held a mortgage on Grier's property, and GMAC Mortgage, LLC (GMAC) serviced the mortgage on behalf of the Bank. Pursuant to the mortgage, Grier was required to pay the homeowners insurance premium as a part of her monthly mortgage payment into an escrow account managed by GMAC.

In March or April of each year, GMAC issued a check to Nationwide for the amount of the insurance premium it withdrew from the escrow account, and Nationwide renewed the policy. Nationwide renewed Grier's homeowner's policy annually from 2007 to 2010. In January 2011, however, Nationwide decided not to renew Grier's policy—which was set to expire on March 24, 2011—because she failed to remedy various hazards and risks on her property. Nationwide claims it mailed proper notice of nonrenewal to Grier on January 14, 2011, at her home address listed on the policy.

On March 11, 2011—before the policy expired—a GMAC representative contacted Nationwide about paying the premium for Grier's policy for the upcoming renewal period. Grier contends Nationwide welcomed the payment in

this conversation and stated it would renew the policy if it received the premium. Thereafter, GMAC mailed a check to Nationwide on March 15, 2011, for the same amount it submitted the prior year for the renewal. Nevertheless, because no active policy was listed for Grier in its records, Nationwide returned the premium to Grier by a check dated April 1, 2011.

On April 6, 2011, a fire destroyed Grier's home, leaving it uninhabitable. Grier filed a claim for insurance coverage, but Nationwide denied her claim, explaining that Grier had no policy in place. Grier soon defaulted on her mortgage, and on September 13, 2011, the Bank filed a foreclosure action against her.[1] Grier answered and filed a third-party complaint against Nationwide and Parks,[2] asserting causes of action for breach of contract, bad faith failure to pay her insurance claim, and indemnity and contribution.

While the parties participated in discovery, Grier filed a motion on June 8, 2012—with leave of court pursuant to Rule 15(a), SCRCP—to amend her complaint and add a cause of action for negligent misrepresentation against Nationwide. Grier asserted Nationwide breached its duty of care by falsely "representing to GMAC that [Grier's] policy would be renewed upon payment of the policy premium."

On November 5, 2012, Grier filed a motion for summary judgment, arguing Nationwide violated section 38-75-740 of the South Carolina Code by failing to deliver written notice to Parks, the insurance agent of record, that Grier's policy was not being renewed. According to Grier, Nationwide could not deny coverage because its attempt to nonrenew the policy was invalid. Nationwide filed its own motion for summary judgment the following day, arguing it properly denied coverage because no policy was in place.

After conducting a hearing on the cross-motions for summary judgment on November 28, 2012, the circuit court granted summary judgment in favor of Nationwide. In its order, the court held Grier's breach of contract claim against Nationwide failed as a matter of law. Contrary to Grier's assertion, the court determined section 38-75-740 did not apply to the nonrenewal of homeowners

[1] The circuit court approved a joint stipulation of dismissal of the foreclosure action between the Bank and Grier on November 27, 2012.

[2] Grier did not appeal the circuit court's rulings as to Parks.

insurance policies. The court instead found that Nationwide complied with section 38-75-1160 of the South Carolina Code (2015), under which notice for the nonrenewal of a homeowner's insurance policy must be delivered or mailed to the named insured. Because Nationwide produced sufficient proof of mailing the notice of nonrenewal to Grier, the court concluded the policy was not in effect at the time of Grier's loss and, therefore, Grier could not sue for breach of a nonexistent contract. As to whether Nationwide reached an agreement with GMAC that the policy would be renewed if Nationwide received the required premium, the court found Grier provided no evidence of communication between GMAC and Nationwide to demonstrate such an agreement existed.[3]

The circuit court next granted summary judgment to Nationwide on Grier's bad faith failure to pay claim. Given that no policy was in effect, the court held Grier's cause of action failed as a matter of law because Nationwide had a reasonable, objective basis for denying her claim for coverage.

Lastly, the circuit court denied Grier's motion to amend her third-party complaint to add a cause of action for negligent misrepresentation against Nationwide. The court concluded Grier did not allege Nationwide made a misrepresentation to her, but rather to a third party—GMAC. Because GMAC was not acting on Grier's behalf, the court reasoned the cause of action was futile and failed as a matter of law. The court further held Nationwide would be prejudiced if it granted leave to amend because Nationwide lacked the opportunity to defend against this new claim. In reaching this decision, the court noted the case had already been placed on the jury trial roster and Nationwide had already taken Grier's deposition.

Thereafter, Grier filed a motion to alter or amend judgment, and the circuit court denied her motion on September 23, 2013. This appeal followed.

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Rule

[3] Although we note that Grier did alert the circuit court to the existence of a recorded phone conversation between representatives of GMAC and Nationwide at the motions hearing, this evidence does not affect our disposition of the case.

56(c), SCRCP, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law."

LAW/ANALYSIS

I. Notice Requirement for the Nonrenewal of Homeowners Insurance

Grier first argues the circuit court erred in holding section 38-75-1160, rather than section 38-75-740, governs the notice requirements for the nonrenewal of a homeowner's insurance policy. We disagree.

"Determining the proper interpretation of a statute is a question of law, and [the appellate court] reviews questions of law de novo." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "The primary purpose in construing a statute is to ascertain legislative intent." *Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005). "A specific statutory provision prevails over a more general one." *Wooten ex rel. Wooten v. S.C. Dep't of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999); *see also Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) ("Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.").

Located in article 9 of chapter 75 of the South Carolina Insurance Code (the Insurance Code), section 38-75-740 addresses the cancellation, nonrenewal, and renewal of property and casualty insurance. The statute, in pertinent part, provides that "[a] policy written for a term of one year or less may be nonrenewed by the insurer at its expiration date by giving or mailing written notice of nonrenewal to the insured and the agent of record." S.C. Code Ann. § 38-75-740(b). According to the Insurance Code, section 38-75-740 "applies to all property insurance and casualty insurance, . . . except for . . . any other type of property or casualty insurance as to which there are specific statutory provisions of law governing cancellation, nonrenewal, or renewal of policies." S.C. Code Ann. § 38-75-710 (2015). Thus, in the absence of a more specific provision, section 38-75-740

generally governs the manner in which an insurer must nonrenew a policy for property or casualty insurance.

In 2004, the General Assembly enacted the Property and Casualty Insurance Personal Lines Modernization Act (the Act). *See* Act No. 290, 2004 S.C. Acts 2889–2909. As part of the Act, the General Assembly added article 13, titled "Property Insurance Cancellation and Nonrenewal," to chapter 75 of the Insurance Code. *See* Act No. 290, 2004 S.C. Acts 2896–2907. Article 13 specifically "applies only to property insurance on risks located in this State." S.C. Code Ann. § 38-75-1130(A) (2015). Located in article 13, subsection 38-75-1160(A)(1) provides that "a cancellation or refusal to renew by an insurer of a policy of insurance covered in [article 13] is not effective unless the insurer delivers or mails to the named insured at the address shown in the policy a written notice of the cancellation or refusal to renew."

Because the scope of article 13 is limited to governing the nonrenewal of policies for "property insurance on risks located in this State," we hold subsection 38-75-1160(A)(1) constitutes one of the "specific statutory provisions" contemplated by subsection 38-75-740(b) in article 9. Therefore, when an insurer attempts to nonrenew a policy that provides "property insurance on a risk located in this State," the insurer must follow the procedures outlined in subsection 38-75-1160(A)(1), not those provided in subsection 38-75-740(b). See *Wooten*, 333 S.C. at 468, 511 S.E.2d at 357 (stating a specific statutory provision prevails over a more general one); *Capco*, 368 S.C. at 142, 628 S.E.2d at 41 (providing when one statute addresses an issue in general terms and another deals with the same issue in a more specific and definite manner, the more specific statute will prevail).

Turning to the facts of the instant case, given that the homeowner's policy provided "property insurance on a risk located in this State," Grier's home, Nationwide was required to follow the nonrenewal procedures outlined in subsection 38-75-1160(A)(1). Specifically, to successfully nonrenew Grier's homeowner's policy, Nationwide had to deliver or mail notice of nonrenewal to Grier. Because Nationwide gave proper notice, as evidenced by its proof of mailing to Grier's address listed on the policy, we find Nationwide complied with the appropriate statute and, therefore, effectively nonrenewed Grier's homeowner's policy.

Accordingly, we find the circuit court properly determined subsection 38-75-1160(A) was the controlling provision in this case and Nationwide fully complied with the requirements of the statute in nonrenewing Grier's policy.

II. Breach of Contract

Grier next contends the circuit court erred in holding her breach of contract claim against Nationwide failed as a matter of law. According to Grier, GMAC—the Bank's mortgage servicer—renewed the insurance policy on her behalf as her agent when it contacted Nationwide regarding the payment of the annual premium. We disagree.[4]

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006)). "Generally, [a]gency is a question of fact." *Id.* (alteration in original) (quoting *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984)). A court ordinarily should not resolve an agency question on summary judgment if "*any* facts giv[e] rise to an inference of an agency relationship." *Fernander v. Thigpen*, 278 S.C. 140, 142, 293 S.E.2d 424, 425 (1982) (quoting *Reid v. Kelly & Play Air, Inc.*, 274 S.C. 171, 174, 262 S.E.2d 24, 26 (1980)). If any facts tend to prove an agency relationship, then the question becomes one for the jury and granting summary judgment is inappropriate. *Froneberger*, 406 S.C. at 50, 748 S.E.2d at 631 (quoting *Gathers*, 282 S.C. at 226, 317 S.E.2d at 752).

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[4] Likewise, we reject Grier's alternative argument that she was a third-party beneficiary to a contract of renewal between GMAC and Nationwide. *See Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) ("A third-party beneficiary is a party that the contracting parties intend to directly benefit."). GMAC and Nationwide were not contracting parties. The contract of insurance was between Nationwide as the insurer and Grier as the insured policyholder. Even assuming, *arguendo*, GMAC and Nationwide were contracting parties, GMAC did not intend to directly benefit Grier. GMAC's sole reason for contacting Nationwide was to ensure that an active insurance policy covered the Bank's collateral.

In the instant case, although GMAC, the Bank's mortgage servicer,[5] submitted the annual insurance premiums for Grier's policy to Nationwide, GMAC was not subject to Grier's control. Under the mortgage, GMAC—acting on behalf of the Bank—required that Grier purchase homeowners insurance on the dwelling to protect the Bank's collateral for the mortgage loan. Further, GMAC required that the insurance policy contain a standard mortgage clause listing it as the mortgagee. Grier's choice of insurance was also subject to GMAC's approval. Additionally, if Grier failed to maintain property insurance, then the mortgage authorized GMAC to force-place a policy on Grier's home at her expense. Therefore, we find no evidence in the record suggests Grier exercised any control over GMAC's use of the escrow funds. *See Froneberger*, 406 S.C. at 49, 748 S.E.2d at 631 (noting an agent must act on behalf of, and be subject to the control of, the principal); *see also, e.g.*, *Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333, 1340–42 (11th Cir. 2000) (finding no agency relationship between a mortgage lender and a borrower concerning the administration of an escrow account). To the contrary, our review of the record reveals GMAC controlled the use of the escrow funds.

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[5] "Mortgage servicing is '[t]he administration of a mortgage loan, including the collection of payments, release of liens, and payment of property insurance and taxes.'" *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 221, 746 S.E.2d 478, 481 (Ct. App. 2013) (alteration in original) (quoting *Mortgage Servicing*, BLACK'S LAW DICTIONARY (9th ed. 2009)).

> [A] servicer is defined as the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan). Servicing is defined as receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts . . . and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

Id. (first alteration in original) (quoting *Bryant v. Wells Fargo Bank, Nat'l Ass'n*, 861 F. Supp. 2d 646, 658 (E.D.N.C. 2012)).

Accordingly, because GMAC was not Grier's agent, we find the circuit court properly ruled that Grier's breach of contract claim failed as a matter of law.

III. Remaining Issues

In light of our findings that Nationwide provided proper notice of nonrenewal and Grier's breach of contract claim failed as a matter of law, we decline to address the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

CONCLUSION

Accordingly, the circuit court's grant of summary judgment in favor of Nationwide is

AFFIRMED.

HUFF, A.C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elizabeth L. Snow (f/k/a Elizabeth S. Bell), Mark S. Campitella, Chrissie E. Campitella, Henry D. Gehlken, Sr., Vivian S. Gehlken, Kenneth W. Kelly and Anita B. Kelly, Stephen F. Linder, Sr., Jackie Bower Linder, and Kathryn A. McDaniel, Appellants,

v.

Judson P. Smith, Christy Brabham Bell, Charles S. Coleman, Jr., J. Thomas Coleman, Jacob C. Coleman, Valiska C. Freeman, George Arthur Stoudenmire, George Arthur Stoudenmire as trustee for the benefit of William E. Stoudenmire, Linda B. Stoudenmire, Stacey S. Dershaw f/k/a Stacy Mitchell Stoudenmire and Laura Brittany Stoudenmire, and Trust "B" Created By U/W Everett L. Stoudenmire and Valiska F. Coleman, Respondents.

Appellate Case No. 2013-002727

Appeal From Lexington County
James O. Spence, Master-in-Equity

Opinion No. 5386
Heard September 16, 2015 – Filed March 2, 2016

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Thomas Bailey Smith, of Smith Law Firm, PA, of Mount Pleasant, for Appellants.

Harry Clayton Walker, Jr. and Thomas E. Andrews, III, both of Walker & Reibold, LLC, of Columbia, for Respondents.

KONDUROS, J.: In this easement action, a group of homeowners contend the master-in-equity erred in finding (1) their easement was limited to ingress and egress and (2) the restrictive covenants do not apply to the Lake Access Lot. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

Charles S. Coleman, Sr. and E.L. Stoudenmire (Developers) developed Hilton Place subdivision in 1983. The Restrictions were filed on October 12, 1983. The Restrictions stated, "No lot or property conveyed hereunder shall be used for any other than private residential purposes of one family, except by and with written consent and approval of Grantors." Additionally, they stated, "No building, barn, outbuilding, fence, garage or structure of any kind or alterations or additions thereto shall be erected, placed or made on any lot hereby conveyed; no residence containing less than 1,200 square feet of living space shall be erected on any lot . . . ." The Restrictions also provided any lot or property conveyed could only be used for "private residential purposes of one family, except by and with written consent and approval of the Grantors." The Restrictions banned any "noxious or offensive activity" on the lots and anything that "becomes an annoyance or nuisance to the neighborhood." They likewise barred any "condition or situation" on any of the lots that was "a nuisance or otherwise detract[ed] from the desirability of the neighborhood as a residential section." Further, the Restrictions provided "[t]hese covenants, conditions and restrictions are for the benefit of the Grantors who may change or modify the terms contained herein at any time." The Restrictions also stated they were "imposed upon all those lots shown on a plat . . . dated September 19, 1983" (1983 Plat). The 1983 Plat shows several numbered lots and a lot with no number described as "Lake Access" (Lake Access Lot). The Developers never formed a homeowners' association although a group of homeowners attempted to form one at one point.

When Elizabeth Snow (f/k/a Elizabeth S. Bell) bought her lot in 1990, the deed stated, "Also conveyed her[e]with is an easement for the use and enjoyment by the lot owner and the lot owner[']s immediate family to the Lake Access Lot shown on the recorded subdivision lot, said easement to be appurtenant to the land her[e]in conveyed." Additionally, her purchase contract stated, "Lake Access Lot is available for purchaser's use at time of closing." Henry D. Gehlken, Sr. and Vivian Gehlken's deed stated the conveyance included "a non-exclusive access to the water of Lake Murray through the lake access as shown on [the 1983 P]lat[,] which shall run with the land." Other homeowners' deeds make no mention of lake or water access but do indicate they are subject to all easements of record.

A Confirmatory Amendment to the Restrictions was filed on February 5, 1999. It indicated the Restrictions only applied to the numbered lots. It also stated, "Nothing contained herein shall be construed to impose any covenants, conditions or restrictions on any other property shown on the aforesaid plat." The Amendment further provided, "In the event this amendment conflicts with any other provisions of the Restrictions . . . this amendment shall supersede and govern."

In July 2010, the heirs[1] of the Developers deeded the Lake Access Lot to Judson P. Smith and Christy Brabham Bell (n/k/a Jennifer Christy Brabham) for $25,000. Smith and Bell built a dock, gazebo, fire pit, deck, and storage building containing a toilet[2] on the Lot. They also widened and lengthened the boat ramp.

Several homeowners[3] brought suit against Smith and Bell as well as the Heirs (collectively, Respondents) for declaratory judgments and breach of covenants.

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[1] Those heirs were Charles S. Coleman, Jr., J. Thomas Coleman, Jacob C. Coleman, Valiska (Sissy) C. Freeman, George Arthur Stoudenmire, George Arthur Stoudenmire as trustee for the benefit of William E. Stoudenmire, Linda B. Stoudenmire, Stacey S. Dershaw f/k/a Stacy Mitchell Stoudenmire, and Laura Brittany Stoudenmire (collectively, Heirs).

[2] Appellants refer to this as an "outhouse."

[3] These owners are Snow, Mark S. Campitella, Chrissie E. Campitella, the Gehlkens, Kenneth W. Kelly, Anita B. Kelly, Stephen F. Linder, Sr., Jackie Bower Linder, and Kathryn A. McDaniel (collectively, Appellants).

They also sought as to the Heirs to set aside the conveyance of the Lake Access Lot due to fraud, negligence, and breach of fiduciary duty.

At trial, Snow testified she interpreted her sales contract and deed as allowing her to use the entire Lake Access Lot at any time. Snow believed the outhouse on the Lake Access Lot negatively affected her property value because "it is an outhouse. It's a bathroom outside." She thought the outhouse diminished the value of her property by $25,000. She acknowledged the Lake Access Lot now being maintained instead of overgrown as it previously had been helped her property value. However, she stated her home value had decreased $19,000 since she refinanced her home in 2006.

Another owner, Stephen Linder, testified the outhouse decreased his property value by $10,000 to $25,000. He believed it was "a detriment to the neighborhood" "[b]ecause it's an outhouse where people go to the bathroom outside." Linder further indicated he could hear noise when Smith and Bell occasionally had parties on the Lot.

Kathryn Ann McDaniel, also a homeowner, testified once when she believed Smith and Bell were having a party, she had noticed an odor coming from the Lake Access Lot that smelled like an outhouse. She believed her property value had decreased by at least $20,000. She stated she had arrived at that figure "I guess probably just from what I think I would pay for something with an outhouse next door."

Homeowner Vivian Gehlken testified her property value had decreased $50,000 but she attributed that to the economy. However, she thought the outhouse had a negative effect on her property and the neighborhood. She provided she had not used the Lake Access Lot since Smith and Bell bought the Lot because it made her feel "uncomfortable."

Kenneth Kelly also testified as a property owner in the subdivision. He believed the outhouse and his believed loss of lake access had a negative effect on his property value in the amount of $20,000 to $25,000. Chrissie Campitella, another homeowner as well as a real estate broker, testified her property value had decreased by $25,000 because the outhouse was an eyesore. She also indicated she had seen the boat access ramp blocked about two to three times a month.

Bell testified she and Smith lived together in a house in the subdivision and had bought the Lake Access Lot together. She stated that when they bought the Lot, it was very overgrown and had a great deal of construction debris and trash on it. She provided they used a lot of heavy equipment to remove the debris. Bell considered the outhouse to be a bathroom because it was on a permitted septic tank. She indicated the South Carolina Department of Health and Environmental Control (DHEC) had issued the permit. She testified the Lot had electricity and currently had one television. She and Smith moved an additional, bigger television to the Lot for parties during football games.

Smith testified that although vehicles would be parked in the driveway of the Lake Access Lot from time to time, they did not block the access to the lake because one could easily go around them. He acknowledged the driveway had been blocked at times during the construction but it was now completed. He also provided he does leave his truck in the driveway while he is putting his boat in the water but moves it as soon as his boat is unloaded. He also indicated he parks his golf cart in the driveway while unloading supplies but moves it as soon as it is unloaded. He stated that when he and Bell bought the Lot, "it was a dump. You couldn't get to the water." Smith indicated the grass on the upper part of the Lot was cut but the lower part towards the water was not. He provided he had to bush hog the property to even get to the water. He also testified that after he had cleared all the debris off the Lot, they had to haul in large amounts of dirt. He indicated they brought in a gazebo and built a new deck, fire pit, and dock. He stated they had concrete poured to widen and lengthen the boat ramp because due to the water level, they could not launch a boat from it when they purchased the Lot. He testified it took three months to haul all of the debris away and all of the changes took two and half years to complete.

Smith also testified that after he and Bell bought the Lot, they discovered several sewer leaks on the Lot. Smith stated he fixed the leaking lines despite his belief it was actually the responsibility of the homeowner whose lines they were. He acknowledged the smell was "awful" while the lines were being fixed. He stated that since he had repaired the lines, he had not noticed any odors. He indicated his septic tank did not cause any odors and although he had not smelled anything, others could have broken lines on their property as he previously had on his.

Smith also provided he and Bell's house was reappraised recently and the value had increased $15,000.

Freeman testified she was Developer Charles Coleman's daughter and had lived in the subdivision since 1988. She recalled a homeowners' association being formed by some of the residents of the subdivision but it disbanded once they realized they would have to pay property taxes on the Lake Access Lot. She testified the development of the Lake Access Lot had increased her property value because it looked better now than when it was overgrown.

The master found on behalf of the Respondents. It determined the Restrictions did not apply to the Lake Access Lot because they were meant to maintain certain standards for residences only. Additionally, it found the Amendment merely confirmed the original purpose and plain meaning of the parcel shown on the 1983 Plat. The master also determined Appellants had a right to use the driveway to the boat ramp as a pathway to and from the lake and nothing more. The master also found no fiduciary duty existed or was breached and no fraud was perpetrated.[4] Further, the master determined Appellants had not proved a diminution in value. This appeal followed.

I. Limited to Ingress and Egress

Appellants contend the master erred in finding the easement over the Lake Access Lot is limited only to ingress and egress over the driveway/ramp. They assert the 1983 Plat does not indicate the easement is limited to a specific area on the Plat. They maintain the record contains no evidence the parties intended the easement to be limited to the driveway/ramp. We agree as to Snow and disagree as to the remaining Appellants.

An easement is a right to use the land of another for a specific purpose. *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009). This right of way over land may arise by grant,[5] from necessity, by prescription, or by implication by prior

[4] Appellants do not challenge this ruling on appeal.

[5] "A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of

use. *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 416-17, 633 S.E.2d 136, 139 (2006); *Steele v. Williams*, 204 S.C 124, 132, 28 S.E.2d 644, 647-48 (1944). "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001).

"[T]he determination of the scope of the easement is a question in equity." *Hardy v. Aiken*, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006); *see also Eldridge v. City of Greenwood*, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998) ("[T]he interpretation of a deed is an equitable matter."). On appeal in an action in equity tried by the master, "the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." *Campbell v. Carr*, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004). Thus, this court may reverse a factual finding by the master in such cases when the appellant satisfies us the finding is against the greater weight of the evidence. *Id.* This broad scope of review does not require this court to disregard the findings of the master. *U.S. Bank Tr. Nat'l Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). Nor are we required to ignore the fact the master, who saw and heard the witnesses, was in a better position to evaluate their credibility. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000). Furthermore, the appellant is not relieved of the burden of convincing this court the master committed error in its findings. *Pinckney v. Warren*, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001).

"[T]he determination of whether language in a deed is ambiguous is a question of law." *Proctor v. Steedley*, 398 S.C. 561, 573 n.8, 730 S.E.2d 357, 363-64 n.8 (Ct. App. 2012). "The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation." *Id.* When a deed is unambiguous, any attempt to determine the grantor's intent when reserving the easement must be limited to the deed itself, and using extrinsic evidence to contradict the plain language of the deed is improper. *See Springob v. Farrar*, 334 S.C. 585, 590, 514 S.E.2d 135, 138 (Ct. App. 1999). "The determination of the grantor's intent when reviewing a clear and unambiguous deed is [also] a question of law for the court." *Proctor*, 398

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the easement by the grantee of the lands." *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965).

S.C. at 573, 730 S.E.2d at 363. "[T]his [c]ourt reviews questions of law de novo. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). "[A] reviewing court is free to decide questions of law with no particular deference to the [master]." *Hunt v. S.C. Forestry Comm'n*, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct. App. 2004).

"[T]his court must construe unambiguous language in the grant of an easement according to the terms the parties have used." *Plott v. Justin Enters.*, 374 S.C. 504, 513-14, 649 S.E.2d 92, 96 (Ct. App. 2007).

> In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law. The intention of the grantor must be found within the four corners of the deed.

Proctor, 398 S.C. at 573, 730 S.E.2d at 363 (emphasis omitted) (quoting *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582-83 (2009)). If this court decides the language in a deed is ambiguous, the determination of the grantor's intent then becomes a question of fact. *See id.* at 573 n.8, 730 S.E.2d at 364 n.8.

"An easement is a right which one person has to use the land of another for a specific purpose, and gives no title to the land on which the servitude is imposed." *Windham*, 381 S.C. at 201, 672 S.E.2d at 582 (quoting *Douglas v. Med. Inv'rs, Inc.*, 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971)). Access is defined in Black's Law Dictionary as "[a] right, opportunity, or ability to enter, approach, [or] pass to and from . . ." *Access*, Black's Law Dictionary (10th ed. 2014). A lot is defined as "[a] tract of land, esp[ecially] one having specific boundaries or being used for a given purpose." *Lot*, Black's Law Dictionary (10th ed. 2014). When language in a plat reflecting an easement is capable of more than one construction, the construction that least restricts the property will be adopted. *Tupper v. Dorchester Cty.*, 326 S.C. 318, 326, 487 S.E.2d 187, 191 (1997). "[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden." *Clemson Univ. v. First Provident Corp.*, 260 S.C. 640, 650,

197 S.E.2d 914, 919 (1973) (quoting 25 Am. Jur. 2d *Easements and Licenses*, § 72, page 478). Although the rights of the easement owner are paramount to those of the landowner as to the easement, the easement owner's rights are not absolute but are limited, so both the owners of the easement and the servient tenement may have reasonable enjoyment. *Id.* The owner of an easement has all rights incident or necessary to its proper enjoyment but nothing more. *Id.*

The master erred in finding Snow was limited to ingress and egress to the lake. Snow's deed is clear; it specifically states she and her family have an easement for the use of the Lake Access Lot. This would require more than just using the Lot to get to the lake. The deed is not capable of any other interpretation. Nothing in the language of her deed limits her use only to access. However, her use of the Lot still must be limited to the least restrictive use and she only has rights incident or necessary to its proper enjoyment but nothing more. Because use is not defined, it must be interpreted as whatever least restricts the property owner. Accordingly, we reverse the master's decision that Snow's easement is limited to ingress and egress of the lake and remand to the master for a determination of Snow's rights in using the Lot.

As to the Appellants other than Snow, the master did not err in finding the Lake Access Lot only provides ingress and egress on the driveway/ramp. The Gelhkens' deed specifically grants them access to the lake and does not mention the use of the Lot. The other owners' deeds make no mention of an easement at all; they only reference the 1983 Plat, which shows the Lake Access.[6] Further, the Restrictions do not mention the Lake Access Lot. The Lot is described on the 1983 Plat solely as "Lake Access." Neither the Plat nor the Restrictions make reference to the Lot being a common area. To obtain access to the lake, Appellants only need to use the driveway/ramp. None of their deeds give them access to the use of the entire Lot as Snow's specifically does. Smith and Bell's buildings do not interfere with the homeowners access to the lake. Based on the testimony presented, the driveway only appears to occasionally be used by Smith and Bell. No evidence was presented Smith and Bell ever received a request to move a vehicle because it

[6] Respondents did not appeal, nor did they dispute at trial, Appellants are entitled to use the Lot to access the lake via the driveway/ramp. "[A]n unappealed ruling, right or wrong, is the law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012).

was blocking access. A vehicle could temporarily block the ramp even without Bell and Smith's ownership of the Lot because the Access is shared by many homeowners. Smith and Bell have actually made it much easier for Appellants to use the driveway because previously it was overgrown and the ramp was not long enough to use without damaging a boat. In keeping with the principle that an easement holder is only entitled to the use that least restricts the property, Appellants are not entitled to use the Lot other than to access the lake using the driveway and ramp. Accordingly, the master did not err in limiting the easement to ingress and egress to the lake for Appellants other than Snow.

II. Restrictive Covenants

Appellants maintain the master erred in finding the restrictive covenants do not apply to the Lake Access Lot and therefore the improvements may stay. They argue the Restrictions state they apply to all lots on the 1983 Plat and the Lake Access Lot was one of the lots on the Plat. They contend the 1999 Confirmatory Amendment does not apply to the Lake Access Lot because it only applied to property that was not a part of Hilton Place subdivision and to property not divided into lots at the time of the Restrictions. We disagree.

"Restrictive covenants are construed like contracts and may give rise to actions for breach of contract." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006). "An action to construe a contract is an action at law reviewable under an 'any evidence' standard." *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). On appeal of an action at law tried without a jury, this court's review is limited to correction of errors of law. *Epworth Children's Home v. Beasley*, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). The master's findings are equivalent to a jury's findings in a law action. *King v. PYA/Monarch, Inc.*, 317 S.C. 385, 389, 453 S.E.2d 885, 888 (1995). "[Q]uestions regarding credibility and weight of the evidence are exclusively for the" master. *Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). "We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." *Id.*

"Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution." *Taylor v. Lindsey*, 332 S.C. 1, 4,

498 S.E.2d 862, 863 (1998). "Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Id.* at 4, 498 S.E.2d at 863-64 (quoting *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985)). When "the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning." *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992). "The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009).

"Whether the language of a contract is ambiguous is a question of law for the court. A contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation." *Id.* at 242, 672 S.E.2d at 803 (citation omitted). "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then a question of fact." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001) (citation omitted).

"A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." *Taylor*, 332 S.C. at 5, 498 S.E.2d at 864 (quoting *Hamilton v. CCM, Inc.*, 274 S.C.152, 157, 263 S.E.2d 378, 380 (1980)). "Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenant." *Seabrook Island Prop. Owners Ass'n v. Marshland Tr., Inc.*, 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004).

"[A] developer may generally reserve to himself the right to amend restrictive covenants in his sole discretion, and may do so without the consent of the grantee, so long as he exercises that right in a reasonable manner." *Queen's Grant II Horizontal Prop. Regime*, 368 S.C. at 362, 628 S.E.2d at 913.

> [A] developer may reserve to himself, in his sole discretion, the right to amend restrictive covenants

> running with the land or impose new restrictive covenants running with the land, provided five conditions are met: (1) the right to amend the covenants or impose new covenants must be unambiguously set forth in the original declaration of covenants; (2) the developer, at the time of the amended or new covenants, must possess a sufficient property interest in the development; (3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants; (4) the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and as otherwise may be provided by law; and (5) the amended or new covenants must not be unreasonable, indefinite, or contravene public policy.

Id. at 350, 628 S.E.2d at 907.

An action seeking an injunction to enforce restrictive covenants sounds in equity. *Santoro v. Schulthess*, 384 S.C. 250, 261, 681 S.E.2d 897, 902 (Ct. App. 2009). "[U]pon a finding that a restrictive covenant has been violated, a court may not enforce the restrictive covenant as a matter of law. Rather, the court must consider equitable doctrines asserted by a party when deciding whether to enforce the covenant." *Buffington v. T.O.E. Enters.*, 383 S.C. 388, 394, 680 S.E.2d 289, 292 (2009).

Viewing the Restrictions alone, whether they apply to the Lake Access Lot is unclear. They state they apply to "all lots hereinafter designated" and "all those lots shown on [the 1983 Plat]." On the Plat, it does appear the "Lake Access," as the Plat calls it, is different from the other lots, which are numbered, but otherwise looks like a lot on the Plat. The Restrictions reference things relevant to residences, such as the minimum size of a house and where trash cans must be placed in reference to a house. Accordingly, the Restrictions are ambiguous as to whether the terms provided by them apply to the Lake Access Lot. However, the master did not find them to be ambiguous. Looking outside the Restrictions because we find them ambiguous, the record contains no evidence the Grantors ever intended for the Lake Access Lot to be a residential lot. If a home was built on the Lot in accordance with the provisions in the Restrictions, using the access

could be more difficult for the other homeowners than it is currently. One of the Heirs testified the Lake Access had no restrictions on it. Another of the Heirs testified her father, one of the Grantors, intended for the Lake Access to provide the homeowners with access to the lake. She also testified the Heirs informed Smith and Bell they could build structures on the Lake Access Lot.

As noted by the master, restrictions on the use of property must be created in express terms or by plain and unmistakable implication, and restrictions will be strictly construed with all doubts resolved in favor of free use of the property. Accordingly, because whether the Restrictions apply to the Lake Access is unclear, we construe the Restrictions in favor of allowing Smith and Bell to have the gazebo, building, fire pit, and deck on the Lake Access Lot.

Additionally, the Amendment was valid. The Grantors reserved the right to amend in the Restrictions and stated that right was for their benefit and they could do so at any time. The Amendment met the requirements in *Queen's Grant* to allow the amending of restrictive covenants. 368 S.C. at 350, 628 S.E.2d at 907. The Amendment was reasonable. The Grantors still owned property in the subdivision at the time, including the Lake Access Lot. The Restrictions specifically reserved the right for the Grantors to modify the Restrictions. The Restrictions did not require a specific procedure for the Grantors to follow when amending the Restrictions or require that notice be given to homeowners. The Amendments are clear the Restrictions only applied to numbered lots and the Lake Access Lot was not numbered. Accordingly, the master did not err in finding the Restrictions did not apply to the Lake Access Lot.[7]

[7] Appellants also assert the master erred in finding the Lake Access Lot had been improved. Because they provide no citations or legal authority for this argument, this argument is abandoned. *See State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (finding that when a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue); *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without

CONCLUSION

The master erred in finding Snow's easement was limited to ingress and egress of the lake. Accordingly, we reverse that finding and remand for the master to determine the extent of Snow's use of the Lake Access Lot. However, we affirm the master's finding the Lot is only for Appellants to use the driveway/ramp for ingress and egress. Further, the master did not err in finding the Restrictions did not apply to the Lot. Therefore, the master's order is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FEW, C.J., and LOCKEMY, J., concur.

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supporting authority are deemed abandoned on appeal and therefore not presented for review.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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, Respondents,

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, and Foremost Insurance Company, Defendants,

Of whom Peerless Insurance Company, Montgomery Mutual Insurance Company, and Safeco Insurance Company of America are the Appellants,

And

Of whom Laurie Williams is a Respondent.

Appellate Case No. 2014-000946

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

Opinion No. 5387
Heard December 8, 2015 – Filed March 2, 2016

REVERSED AND REMANDED

C. Mitchell Brown, William C. Wood, Jr., Allen Mattison Bogan, and Miles Edward Coleman, of Columbia; and Robert Curt Calamari, of Myrtle Beach, all of Nelson Mullins Riley & Scarborough, LLP, for Appellants.

Thomas E. Hite, Jr., of Hite and Stone, of Abbeville, for Respondents Richard Wilson, Cynthia Gary, Robert Wayne Gary, Robert W. Spires, Crystal Spires Wiley, Lewis S. Williams, Michael J. Antoniak, Jr., Marsha L. Antoniak, Eugene P. Lawton, Jr., Anita L. Belton, Jeanette Norman, James Robert Shirley, Johnny Calhoun, Sallie Calhoun, Benjamin Franklin Wofford, Jr., Rebecca Hammond Wofford, Prescott Darren Bosler, and Janie Wiltshire; and Jane Hawthorne Merrill, of Hawthorne Merrill Law, LLC, of Greenwood, for Respondent Laurie Wilson Williams.

WILLIAMS, J.: Peerless Insurance Company (Peerless), Montgomery Mutual Insurance Company (Montgomery), and Safeco Insurance Company (Safeco) (collectively "the Insurers") appeal the circuit court's denial of their motions to dismiss the claims and compel arbitration in fourteen related actions. The Insurers argue the court erred in (1) ruling no valid contract containing an arbitration provision existed between the parties, (2) determining the arbitration provision at

issue was too narrow to encompass the causes of action, (3) refusing to compel arbitration of claims brought by nonsignatories, (4) finding the claims against the Insurers were not encompassed by the arbitration provision because their alleged actions constituted illegal and outrageous acts unforeseeable to a reasonable consumer in the context of normal business dealings, and (5) holding the Insurers waived their right to compel arbitration. We reverse and remand.

FACTS/PROCEDURAL HISTORY

This appeal arises from fourteen related lawsuits—filed in Abbeville County, South Carolina, between November 1, 2012, and August 28, 2013—against two local insurance agents, Laura Willis and Jesse Dantice, and their agency, Southern Risk Insurance Services, LLC (Southern Risk). Willis's customers (the Insureds) brought twelve of the suits,[1] alleging causes of action for violation of the South Carolina Unfair Trade Practices Act,[2] common law unfair trade practices, fraud, and conversion. The Insureds also named the Insurers as defendants in the action, arguing they were liable under a respondeat superior theory for failure to supervise or audit Willis and Southern Risk.

The Insureds allege that, while customers of Willis and Dantice, they were "victims of many illegal and improper tactics used by [Willis, Dantice, and the Insurers] to corner the retail insurance market in Abbeville County, South Carolina[,] and destroy all competition." The claims and allegations in all of the suits include, *inter alia*, that Willis forged insurance documents; issued policies on unsigned applications; changed or omitted information on insurance applications, without the Insureds' permission, to reduce quoted premiums; submitted applications using her own personal identifying information, such as driver's

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[1] The Insureds who filed suit—Lewis Williams, Johnny and Sally Calhoun, Robert Spires, Crystal Spires Wiley, Prescott Darren Bolser, Benjamin and Rebecca Wofford, Robert and Cynthia Gary, Janie Wiltshire, Marsha and Michael Antoniak, Eugene Lawton, Anita Belton, and Jeanette Norman—were all residents of Abbeville County. Laurie Williams, who filed a separate but substantially similar brief, is also a respondent in the instant appeal alongside the Insureds.

[2] S.C. Code Ann. §§ 39-5-10 through -560 (1985 & Supp. 2015).

license and Social Security numbers, to reduce quoted premiums; accepted cash payments she converted to her own use; and issued fake policies to customers.

According to the Insureds, Willis's actions resulted in harm to them as well as their credit rating within the insurance industry. The Insureds seek to recover from Dantice, Southern Risk, and the Insurers because these parties—as principals of their agent, Willis—had a duty to investigate, train, and supervise Willis, particularly after she "was fined, publicly reprimanded[,] and placed on probation for dishonesty by the South Carolina Insurance Commission in October 2011."

Richard Wilson and Robert Shirley (collectively "the Agents")—both of whom were local competitors of Willis and Southern Risk—filed the other two suits at issue in this case. The Agents alleged Willis, Dantice, Southern Risk, and the Insurers engaged in illegal business practices that effectively prohibited them from competing in the local insurance market, resulting in a substantial loss of clients and revenue. Further, the Agents argued the Insurers owed a duty to properly investigate, train, and supervise Willis; failed to detect and stop her wrongdoing; and engaged in statutory unfair trade practices, common law unfair trade practices or unfair competition, and tortious interference with existing and prospective contractual relations.

In their answers, the Insurers denied the majority of the Insureds' substantive claims and set forth the following defenses: failure to state a claim, statutory bar by section 39-5-40(c) of the South Carolina Code (Supp. 2015), comparative fault, intervening actions of third parties, scope of agency, set off, failure to properly allege special damages, unconstitutionality of punitive damages, and limitation or bar to punitive damages. The Insurers, however, did not raise arbitration as a defense in their answers to the Insureds.

Likewise, in answering the Agents' complaints, the Insurers denied each of the factual allegations set forth and raised a number of defenses. The Insurers, for example, denied that Willis was their "authorized and acting agent and/or servant" and denied that she acted with their permission. Nevertheless, the Insurers did not assert arbitration as a defense in their answers to the Agents.

On October 31, 2013, the Insurers filed motions to compel arbitration and dismiss the suits, seeking to apply against the Insureds and Agents an arbitration provision from a 2010 agency agreement (the 2010 Agency Agreement) the Insurers entered

into with Southern Risk.[3] The main thrust of the Insurers' argument in these motions was that each of the Insureds and Agents' claims was premised on alleged duties that would not exist but for the Insurers' contractual relationship with Southern Risk and, thus, the court should compel arbitration based upon the arbitration provision found in the 2010 Agency Agreement. According to the Insurers, the Insureds and Agents could not rely on—and seek to recover damages from the Insurers based upon—some provisions, while ignoring the arbitration provision in the agreement.

The circuit court heard arguments on the motions on January 21, 2014, and the Insureds and Agents filed memoranda in opposition to the Insurers' motions that same day. In their memoranda, the Insureds and Agents asserted no valid or enforceable agreement to arbitrate existed because the agreement upon which the Insurers based their motion was not signed by any representative of Southern Risk. The Insureds and Agents further alleged they were not signatories or parties to the 2010 Agency Agreement, and their claims against the Insurers did not fall within the arbitration clause in the agreement. The Insurers subsequently filed reply memoranda in support of their motion on February 11, 2014.[4]

On March 25, 2014, the circuit court issued an order in which it denied the Insurers' motions to compel arbitration and dismiss the suits. The Insurers then filed motions to alter or amend the court's ruling, and the court denied these motions on April 21, 2014. This appeal followed.[5]

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[3] Specifically, Liberty Mutual Insurance Company (Liberty), a parent company of Montgomery and Safeco, entered into the agreement with Southern Risk.

[4] The circuit court granted the Insurers' request to file a reply brief only to address two points raised in the memoranda in opposition. While the Insurers attached an affidavit of one of their employees to the reply memorandum, the court specifically declined to leave the record open for the addition of new evidence. Because the affidavit was not properly admitted into evidence below, we do not consider it as part of the record on appeal.

[5] This court granted the Insurers' motion to consolidate the appeal in all fourteen actions pursuant to Rule 214, SCACR.

ISSUES ON APPEAL

I. Did the circuit court err in ruling no valid contract containing an arbitration provision existed between the parties?

II. Did the circuit court err in determining the arbitration provision was too narrow to encompass the causes of action raised by the Insureds and Agents?

III. Did the circuit court err in refusing to compel arbitration of claims against the Insurers because the Insureds and Agents were nonsignatories?

IV. Did the circuit court err in finding the claims were not encompassed by the arbitration provision because the Insurers' alleged actions constituted illegal and outrageous acts unforeseeable to a reasonable consumer in the context of normal business dealings?

V. Did the circuit court err in holding the Insurers waived their right to compel arbitration?

STANDARD OF REVIEW

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Arbitrability determinations are subject to de novo review." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (emphasis omitted). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). "It is the policy of this state and federal law to favor arbitration[,] and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996)). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015) (alteration in original) (quoting *Dean*, 408 S.C. at 379, 759 S.E.2d at 731).

LAW/ANALYSIS

I. Existence of a Valid Contract with an Arbitration Provision

First, the Insurers contend the circuit court erred in ruling no valid contract containing an arbitration provision existed. We agree.

A. Signature Requirement

The Insurers argue that, contrary to the circuit court's ruling, no requirement exists under the Federal Arbitration Act[6] (FAA) or in contract law that a contract must be signed by all parties to be enforceable. We agree.

"Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that the party has not agreed to submit." *Chassereau v. Glob.-Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005). "Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Id.* (quoting *Zabinski*, 346 S.C. at 596–97, 553 S.E.2d at 118). Unless the parties contract otherwise, the FAA[7] applies to any arbitration agreement involving interstate commerce, regardless of whether the parties contemplated an interstate transaction.[8] *Munoz v.*

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[6] 9 U.S.C. §§ 1–16 (2012).

[7] The FAA, in pertinent part, provides the following:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2012).

[8] The Insureds and Agents do not dispute that the 2010 Agency Agreement involves interstate commerce—presumably because they contest the validity of the agreement in its entirety. Nevertheless, we find the 2010 Agency Agreement did involve interstate commerce. The agreement, along with its addenda, indicated the Insurers are located outside of South Carolina. Further, some or all of the insurance premiums to which the Insureds claimed they were entitled—as well as

Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Nonetheless, "[g]eneral contract principles of state law apply to arbitration clauses governed by the FAA." *Id.* at 539, 542 S.E.2d at 364.

"The necessary elements of a contract are an offer, acceptance, and valuable consideration." *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) (quoting *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997)). "[I]t has long been a paradigm of South Carolina law that when a contract signed by one party only is accepted by the other party, it becomes binding upon both just as if it were signed by both." *Jaffe v. Gibbons*, 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct. App. 1986). "A contract does not always require the signature of both parties; it may be sufficient[] if signed by one and accepted and acted on by the other." *Id.*; *see also Peddler, Inc. v. Rikard*, 266 S.C. 28, 32, 221 S.E.2d 115, 117 (1975) (stating to give validity to a contract, it is not always necessary that it be signed by both parties, but rather it may be sufficient if one party signed the contract and the other party accepted, held, and acted upon it).

In the instant case, the circuit court held the Insurers "failed to meet their burden of proof in establishing a valid, binding contract by which the [Insureds and Agents] should be forced to arbitrate their claims" because the 2010 Agency Agreement was not signed by Southern Risk. We initially note that South Carolina law does not necessarily require both parties to sign a contract for it to be enforceable. *See Jaffe*, 290 S.C. at 473, 351 S.E.2d at 346; *Peddler*, 266 S.C. at 32, 221 S.E.2d at 117. Further, based upon our review of the record, Southern Risk, Dantice, and Willis accepted and acted upon the 2010 Agency Agreement. At all relevant times, Southern Risk, Dantice, and Willis sold insurance policies on behalf of the Insurers—a fact which is undisputed—and the 2010 Agency Agreement, along with the predecessor agreements, provided the sole source of authorization for them to do so.

Therefore, although Southern Risk did not sign the 2010 Agency Agreement, we hold the agreement—as well as the arbitration provision contained therein—was valid and binding upon the parties during the relevant period of Willis's alleged

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any resulting commissions of which the Agents claimed they were deprived—would have been sent from outside of South Carolina. Accordingly, we find the transaction involved interstate commerce and, thus, is covered by the FAA.

wrongdoing.[9] *See Jaffe*, 290 S.C. at 473, 351 S.E.2d at 346; *Peddler*, 266 S.C. at 32, 221 S.E.2d at 117; *see also Poteat v. Rich Prods. Corp.*, 91 F. App'x 832, 834 (4th Cir. 2004) (finding an agreement to arbitrate enforceable under South Carolina law, despite the fact that the employer never signed the agreement containing the arbitration provision).

B. Statute of Frauds

The Insurers further argue the circuit court erred in ruling the 2010 Agency Agreement is invalid because it violates the statute of frauds. We agree.

Under the statute of frauds, "a contract that cannot be performed within one year [must] be in writing and signed by the parties." *Springob v. Univ. of S.C.*, 407 S.C. 490, 495, 757 S.E.2d 384, 387 (2014) (quoting *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005)); *see also* S.C. Code Ann. § 32-3-10 (2007) ("No action shall be brought . . . [t]o charge any person upon any agreement that is not to be performed within the space of one year from the making thereof . . . [u]nless the agreement . . . [is] in writing and signed by the party to be charged therewith . . . .").

To satisfy the statute of frauds, the writing must be "signed by the party against whom enforcement is sought." *Springob*, 407 S.C. at 496, 757 S.E.2d at 387. The statute of frauds only applies to contracts that are impossible to perform within one

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[9] In light of our holding, the question of whether prior agreements governed the parties' relationship is immaterial. Assuming, *arguendo*, we found the 2010 Agency Agreement was not binding upon the parties, we note the 2007 Agency Agreement—which contains an identical arbitration provision and was signed by a Southern Risk representative—would have remained in effect during the period of Willis's alleged wrongdoing. In the end, at all relevant times, the parties' relationship was governed by one of two agency agreements with identical arbitration provisions through which Southern Risk was permitted to sell insurance on behalf of the Insurers. We find the Insureds and Agents' arguments to the contrary unavailing and further reject the argument that the Insurers failed to preserve this argument. Starting with the motion to compel arbitration, the Insurers have repeatedly argued directly, or in the alternative, that their relationship with Southern Risk was governed by multiple agreements.

year. *Roberts*, 327 S.C. at 484, 486 S.E.2d at 774. If performance of a contract is possible within a year, then the statute of frauds is not a bar to enforcement of the contract. *Id.* "The fact that performance within a year is highly improbable or not expected by the parties does not bring a contract within the scope of th[e statute of frauds]." *Id.*

Contrary to the circuit court, we find performance of the 2010 Agency Agreement was possible within a one-year period because the agreement was for an indefinite term and either party could terminate it at will—with or without cause—by giving as little as ninety days' notice. Given that it was possible for the 2010 Agency Agreement to be performed within a year, we hold the statute of frauds does not apply in this case. *See Roberts*, 327 S.C. at 484, 486 S.E.2d at 774 (asserting the statute of frauds is not a bar to enforcement of a contract if performance is possible within a year because the statute of frauds only applies to contracts that are impossible to perform within one year); *see also Ctr. State Farms v. Campbell Soup Co.*, 58 F.3d 1030, 1032 (4th Cir. 1995) (stating "[a] contract terminable at will does not fall under South Carolina's statute of frauds"); *Weber v. Perry*, 201 S.C. 8, 11, 21 S.E.2d 193, 194 (1942) (providing that "contracts of employment for an indefinite term or on a contingency" do not fall within the statute of frauds).

Based on the foregoing, we find the circuit court erred in ruling the arbitration provision was unenforceable because the 2010 Agency Agreement did not satisfy the statute of frauds. In our view, the statute of frauds did not apply to the 2010 Agency Agreement and, thus, the absence of a signature from a Southern Risk representative could not—without more—act as a bar to its enforcement.

II. Scope of the Arbitration Provision

Next, the Insurers contend the circuit court erred in determining the arbitration provision was too narrowly worded to encompass the causes of action raised by the Insureds and Agents. Specifically, the Insurers argue the court erred in concluding the claims had no relation to, and were not in connection with, the performance or interpretation of the 2010 Agency Agreement. We agree.

"The policy of the United States and South Carolina is to favor arbitration of disputes." *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. "The heavy presumption of arbitrability requires that[,] when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Landers*, 402 S.C. at 109, 739 S.E.2d at 213 (quoting *Am. Recovery*, 96 F.3d at 94). "Unless a

court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered." *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603–04 (2010) (per curiam). "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012) (quoting *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118–19).

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Id.* (quoting *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* (quoting *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118).

"[E]ven if the court finds that a claim is outside the scope of the arbitration clause, the clause may still apply." *Partain*, 386 S.C. at 492, 689 S.E.2d at 604. Both the U.S. Court of Appeals for the Fourth Circuit and our supreme court "have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." *Landers*, 402 S.C. at 109, 739 S.E.2d at 214 (citing *J.J. Ryan*, 863 F.2d at 319; *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119). "Thus, a claim falls within the scope of an arbitration clause if it is encompassed by the language of the clause or if a 'significant relationship' exists between the claim and the contract." *Partain*, 386 S.C. at 492, 689 S.E.2d at 604.

The arbitration provision at issue in this case, located in section 12.A of the 2010 Agency Agreement, provided as follows:

> 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 . . . .

(emphasis added).

Applying the principles outlined above, we find the arbitration provision in the 2010 Agency Agreement was sufficiently broad to encompass a wide array of claims and should be construed accordingly. *Cf. J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988) (stating "[t]he difference between the phrases 'in connection with' and 'may arise out of or in relation to' is largely semantic. Any difference is immaterial in view of the Supreme Court's admonition that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" (footnote omitted) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983))). We further find the Insureds and Agents' proposed rule and reliance upon cases from other jurisdictions unpersuasive because the body of law in this state, as well as the Fourth Circuit, makes clear that arbitration provisions like the one at issue in this case should be broadly construed. *See J.J. Ryan*, 863 F.2d at 319; *Landers*, 402 S.C. at 109, 739 S.E.2d at 214; *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119.

In broadly construing the arbitration provision, we must determine whether the claims against the Insurers are encompassed by the language of the arbitration clause or if the claims bear a significant relationship to the 2010 Agency Agreement. *See Partain*, 386 S.C. at 492, 689 S.E.2d at 604. The Insurers argue the claims in the instant case are premised on rights and duties that would not exist but for the 2010 Agency Agreement. The Insurers correctly assert that the claims are inextricably linked to their duties to investigate, train, supervise, and audit—all of which arose out of the agency relationship created by the 2010 Agency Agreement. Our inquiry, however, does not end here. As our supreme court has noted, "[a]pplying what amounts to a 'but-for' causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. Such a result is illogical and unconscionable." *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 150, 644 S.E.2d 705, 708 (2007). Nevertheless, "under the expansive reach of the FAA[,] a tort claim need not raise an issue that requires reference to or the construction of the contract . . . to be encompassed by a broadly-worded arbitration clause." *Landers*, 402 S.C. at 111, 739 S.E.2d at 214.

Turning to the 2010 Agency Agreement, we find all of the duties the Insurers allegedly breached directly arose out of and touched upon the provisions of the agreement. The duties to train and supervise, for example, relate to paragraph 1.C of the agreement, under which Southern Risk was "only authorized to act as agent for [the Insurers] pursuant to written authority and guidelines furnished" by the Insurers. Additionally, paragraph 2.E of the agreement, which concerns Southern Risk's duty to notify the Insurers when any employees have their licenses suspended, implicates the duties to investigate and supervise. Paragraph 2.C—a provision requiring that all Southern Risk employees have the proper licensing and authority to sell insurance—also touches upon the duty to investigate and conduct background checks. Even more specifically, paragraph 2.F directly spells out the duty to assist in conducting background checks of all Southern Risk personnel. Finally, paragraphs 6.A–D outline the billing and accounting practices, as well as collection procedures, the Insurers expected Southern Risk to follow, all of which implicated a duty to audit. Although the Insureds and Agents seek to focus on the fraud, forgery, and misappropriation claims, these allegations related specifically to Willis's conduct. As to the Insurers, on the other hand, the main crux of the Insureds and Agents' claims was that they failed in their duties to investigate, train, supervise, and audit Willis. Willis, in her role as a subproducer, had no authority to sell insurance on behalf of the Insurers in the absence of the 2010 Agency Agreement the Insurers entered into with her employer, Southern Risk.

Accordingly, in light of the breadth of the 2010 Agency Agreement, as well as the particular manner in which the Insureds and Agents pled their underlying factual allegations, we find their tort claims against the Insurers were encompassed by the language of the arbitration clause in the 2010 Agency Agreement.[10] *See Partain*, 386 S.C. at 492, 689 S.E.2d at 604; *Landers*, 402 S.C. at 112, 739 S.E.2d at 215. Therefore, we hold the circuit court erred in finding the arbitration provision was too narrowly worded to reach the type of claims asserted in this case.

III. Compelling Arbitration on Nonsignatories

The Insurers contend the circuit court further erred in refusing to compel arbitration of the claims against them based upon the fact that the Insureds and Agents were nonsignatories to the 2010 Agency Agreement. We agree.

[10] Given our finding that the claims were encompassed by the language of the arbitration clause, we need not reach the significant relationship question.

"While a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, '[i]t does not follow . . . that[,] under the [FAA,] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.'" *Pearson*, 400 S.C. at 288, 733 S.E.2d at 600 (first and third alterations in original) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000)). "Rather, a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause." *Id.* (quoting *Int'l Paper*, 206 F.3d at 416).

"The rule in the Fourth Circuit is that 'a broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained.'" *Id.* (quoting *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001)). "Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Id.* (quoting *Int'l Paper*, 206 F.3d at 416–17).

"Equitable estoppel precludes a party from asserting rights 'he otherwise would have had against another' when his own conduct renders assertion of those rights contrary to equity." *Id.* at 290, 733 S.E.2d at 601 (quoting *Int'l Paper*, 206 F.3d at 417–18). "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." *Int'l Paper*, 206 F.3d at 418. "To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA]." *Id.* (first alteration in original) (quoting *Avila Grp., Inc. v. Norma J. of Calif.*, 426 F. Supp. 537, 542 (S.D.N.Y. 1977)). "A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a "direct benefit" from a contract containing an arbitration clause.'" *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)).

In the instant case, although the Insureds and Agents admittedly did not see the 2010 Agency Agreement prior to bringing this action, this does not control our inquiry because the allegations in their complaints necessarily depend upon the

terms, authority, and duties created and imposed by that agreement.[11] In other words, while the Insureds and Agents do not expressly rely upon other provisions in the 2010 Agency Agreement, they would not be able to reach the Insurers with their claims in the absence of the agreement establishing the agency relationship between the Insurers and Southern Risk, Dantice, and Willis. Because the duties the Insureds and Agents contend the Insurers allegedly breached arise from the 2010 Agency Agreement, the Insureds and Agents receive a "direct benefit" from that agreement. Accordingly, we find the Insureds and Agents are equitably estopped from arguing their status as nonsignatories precludes enforcement of the arbitration provision when their complaints seek to benefit from the enforcement of other provisions in the 2010 Agency Agreement. *See Pearson*, 400 S.C. at 297, 733 S.E.2d at 605; *see also Int'l Paper*, 206 F.3d at 413–14, 418 (concluding the plaintiff–buyer could not "sue to enforce the guarantees and warranties of the distributor–manufacturer contract without complying with its arbitration provision" and, therefore, compelling the nonsignatory plaintiff's claims to arbitration under a theory of equitable estoppel).

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[11] The Insureds and Agents argue they rely upon section 38-51-10(h) of the South Carolina Code as the basis for establishing the Insurers' agency relationship with Willis, Dantice, and Southern Risk. The provision cited, however, does not appear in the current version of the Code. *See* S.C. Code Ann. § 38-51-10 (2015). Indeed, a review of the legislative history reveals the subsection relied upon was removed from the statute in 1987. *See* Act No. 155, 1987 S.C. Acts 741–42. In any event, because the current version of section 38-51-10 defines "administrator" and lists a number of exceptions for that term, we find it inapplicable to the instant case. Additionally, while the Insureds and Agents also rely upon section 38-43-10 of the South Carolina Code (2015), this statute merely lists the requirements for being appointed a producer of insurance on behalf of an insurer. Given that section 38-43-55 of the South Carolina Code (2015) lists the procedures an insurer must follow when it "cancel[s] a producer contract"—thereby divesting the producer of the appointment mentioned in section 38-43-10—we find the General Assembly contemplated that agency relationships such as the one at issue here would be governed by a contract. Thus, even looking to the statutes upon which the Insureds and Agents purportedly rely, we find they still cannot reach the Insurers without the 2010 Agency Agreement. The agreement defined the parameters of the authority for Willis, Dantice, and Southern Risk to sell insurance on behalf of the Insurers and exclusively governed the agency relationship between them.

Therefore, we find the circuit court erred in concluding the doctrine of equitable estoppel was inapplicable to the instant case.

IV. Outrageous Conduct

Additionally, the Insurers contend the circuit court erred in finding the claims were not encompassed by the arbitration provision because the Insurers' alleged actions constituted illegal and outrageous acts unforeseeable to a reasonable consumer in the context of normal business dealings. We agree.

"Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, [an appellate c]ourt will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Aiken*, 373 S.C. at 151, 644 S.E.2d at 709. Nevertheless, our supreme court "did not seek to exclude all intentional torts from the scope of arbitration [in *Aiken*], but only 'those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties.'" *Partain*, 386 S.C. at 493–94, 689 S.E.2d at 605 (quoting *Aiken*, 373 S.C. at 152, 644 S.E.2d at 709). "Where parties have contractually agreed to arbitrate a claim, a party may not escape its commitment simply by presenting his claim as a tort. Only where the claim presented was clearly not within the contemplation of the parties will a court decline to enforce an otherwise proper arbitration agreement." *Id.* at 494–95, 689 S.E.2d at 605.

In this case, the circuit court found the Insureds and Agents "grounded their [c]omplaints on allegations of fraudulent conduct and misrepresentation." As noted in Part II, *supra*, we disagree with this characterization of the Insureds and Agents' claims against the Insurers. In our view, the Insureds and Agents' claims—even under a respondeat superior theory—center on the Insurers' alleged failure to sufficiently investigate, train, supervise, and audit Willis. Given that such tort claims are rather commonplace, and do not involve intentional or otherwise outrageous conduct, we cannot say these claims were "clearly not within the contemplation of the parties" to the 2010 Agency Agreement. *Cf. Partain*, 386 S.C. at 494–95, 689 S.E.2d at 605. To the contrary, we believe the parties to the 2010 Agency Agreement did contemplate that ordinary claims directly related to their agency relationship would be submitted to arbitration pursuant to the agreement governing that relationship. Thus, because their claims against the Insurers did not contain allegations of the type of outrageous conduct contemplated

under the *Aiken* line of cases, we find the arbitration clause in the 2010 Agency Agreement should apply to the Insureds and Agents.

Based on the foregoing, we hold the circuit court erred in finding the claims were not encompassed by the arbitration provision because the Insurers' alleged actions constituted illegal and outrageous acts unforeseeable to a reasonable consumer in the context of normal business dealings.

V. Waiver of Right to Compel Arbitration

Finally, the Insurers contend the circuit court erred in holding they waived their right to compel arbitration in this case. We agree.

Although South Carolina favors arbitration, the right to enforce an arbitration clause may be waived. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). "[T]o establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Gen. Equip. & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001). No set rule exists "as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999) (quoting *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992)).

Our courts consider the following three factors when determining whether a party has waived its right to compel arbitration:

> (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.

Rhodes, 374 S.C. at 126, 647 S.E.2d at 251.

"Thus, a party may waive its right to compel arbitration if a substantial length of time transpires between the commencement of the action and the commencement of the motion to compel arbitration." *Id.* What constitutes a substantial length of

time can vary from one case to the next, depending upon the extent of discovery conducted and whether the party opposing arbitration is prejudiced. *Id.*

"To establish prejudice, the non-moving party must show something more than 'mere inconvenience.'" *Id.* at 127, 647 S.E.2d at 251 (quoting *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003)). "In addition to the above factors, this court has also considered the extent to which the parties have availed themselves of the circuit court's assistance." *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 257, 743 S.E.2d 868, 872 (Ct. App. 2013).

> To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took "advantage of the judicial system by engaging in discovery." This inquiry, however, is just part of a broader, common sense approach our courts take to determine whether a motion to compel arbitration should be granted or denied: (1) if the parties conduct little or no discovery, then the party seeking arbitration has not taken "advantage of the judicial system," prejudice will not likely exist, and the law would favor arbitration; (2) if the parties conduct significant discovery, then the party seeking arbitration has "taken advantage of the judicial system," prejudice will likely exist, and the law would disfavor arbitration. Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts.

Rhodes, 374 S.C. at 127, 647 S.E.2d at 251–52 (internal citation omitted).

We hold the Insurers did not waive their right to compel arbitration under the 2010 Agency Agreement in this case. Turning to the first factor, we find a substantial length of time did not transpire between the Insureds and Agents commencing these lawsuits and the Insurers filing their motions to compel arbitration. Although many of the actions had been pending for anywhere from six to eleven months prior to the Insurers seeking to compel arbitration, this time frame does not appear

to be substantial under our line of waiver cases or the facts of the instant case. *Compare Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (finding a five-and-a-half-year period in which the parties "conducted a significant amount of discovery, resulting in the production of thousands of documents" was sufficient for waiver), *Evans*, 352 S.C. at 548, 575 S.E.2d at 75–76 (finding a nineteen-month period in which the parties exchanged written interrogatories, requests for production, and the party requesting arbitration took two depositions demonstrated waiver), *and Liberty Builders*, 336 S.C. at 666, 521 S.E.2d at 753–54 (finding a two-and-a-half-year period in which the parties sought assistance from the court on approximately forty occasions constituted waiver), *with Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., Inc.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding a thirteen-month period in which discovery was "very limited in nature and the parties had not availed themselves of the court's assistance," and the respondent "had not held any depositions," did not demonstrate waiver), *Rich v. Walsh*, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct. App. 2003) (finding a thirteen-month period in which "[l]imited discovery was conducted" and the party requesting arbitration took one deposition lasting fifteen minutes did not amount to waiver), *and Gen. Equip.*, 344 S.C. at 557, 544 S.E.2d at 645 (finding a period of less than eight months in which the "litigation consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories" did not establish waiver).

Regarding the second factor, we find the limited amount of discovery the parties engaged in further supports the notion that a substantial amount of time had not transpired in this case before the Insurers moved to compel arbitration. Although the *Rhodes* court upheld a finding of waiver when the appellant waited ten months to file its motion to compel arbitration, the parties in that case had conducted virtually all discovery—including written interrogatories, requests for production, and five depositions—and the case was already set on the trial docket at the time the motion was filed. The instant case, on the other hand, had not progressed much beyond the filing of pleadings and motions to dismiss. The Insureds and Agents had served complaints and amended complaints, and the Insurers had answered and filed motions to dismiss. Neither party, however, had taken any depositions in this case. While the parties had certainly "commenced discovery," as the circuit court noted, they had not "engaged in extensive discovery" as is required under the test. Further, when the Insurers filed the motions to compel arbitration, they

alerted the Insureds and Agents in writing that they need not respond to the Insurers' written discovery while the motion was pending.

As to the third and final factor, we disagree with the circuit court's finding that the Insureds and Agents were prejudiced as a result of the Insurers waiting, in some instances, eleven months to file motions to compel arbitration. In our opinion, the Insureds and Agents are unable to show anything beyond "mere inconvenience" to reach the requisite level of prejudice to establish waiver. Moreover, unlike the circuit court, we believe the complexity of this matter goes against a finding of prejudice in the instant case. Instead, we find the complicated nature of this action rendered the eleven-month period even more reasonable under the circumstances.

We do, however, acknowledge it is a closer call on the third factor because the Insurers took some actions that could be deemed taking advantage of the judicial system or availing themselves of the circuit court's assistance. The Insurers, for example, filed two motions for judgment on the claims of civil conspiracy, unfair trade practices, and common law unfair trade practices. Nevertheless, the Insurers withdrew both motions prior to the circuit court holding a hearing and ruling upon them. Additionally, while the Insurers filed an action in federal court seeking a declaratory judgment against Williams, this action was dismissed pursuant to a stipulation of dismissal. Thus, although the Insurers did take some minimal action availing themselves of the court system, we find such action—when viewed in light of the minimal amount of discovery conducted in this case and the amount of time that transpired—does not rise to the level of prejudice necessary to waive the right to compel arbitration against the Insureds or Agents, or Williams in particular, under our line of waiver cases.

Accordingly, we hold the circuit court erred in finding the Insurers waived their right to compel arbitration in this case.

VI. Additional Sustaining Grounds

While this court has discretion regarding whether to address additional sustaining grounds,[12] we take the opportunity to do so here to clarify the law discussed in the Insureds and Agents' arguments.

A. Production of the 2010 Agency Agreement

As an additional sustaining ground, the Insureds and Agents first argue the circuit court could have denied the Insurers' motions on the ground that the agreements containing the arbitration clauses were intentionally withheld during discovery to prevent the Insureds and Agents from challenging them. We disagree.

In support of their argument, the Insureds and Agents broadly assert the following:

> Substantive due process and the [South Carolina] Rules of Civil Procedure require that critical documents to a matter pending in court, which could potentially end the trial and compel arbitration, must be timely provided to the other parties in the case . . . [so] the documents can be appropriately challenged through discovery and appropriate cross-examination of the person or persons having knowledge concerning the documents.

They further note that the attorney's oath in Rule 402, SCACR, requires "fairness, integrity, and civility . . . in all written and oral communications," and Rule 37, SCRCP, prohibits a party from intentionally refusing to respond to specific questions in interrogatories and requests for production. The Insurers, on the other hand, argue "[t]heir objections to the [Insureds and Agents]' discovery requests were legitimate, legally supported, reasonable, and not unusual."

Whether to impose sanctions is a decision left to the sound discretion of the circuit court. *Davis v. Parkview Apartments*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014). "Therefore, an appellate court will not interfere with 'a [circuit] court's

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[12] *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420 n.9, 526 S.E.2d 716, 723 n.9 (2000) (noting "[t]he appellate court may or may not wish to address such grounds when it reverses the lower court's decision").

exercise of its discretionary powers with respect to sanctions imposed in discovery matters' unless the court abuses its discretion." *Id.* (quoting *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997)).

We find the primary case upon which the Insureds and Agents rely, *Hilton Head Beach & Tennis Resort v. Sea Cabin Corp.*, 305 S.C. 517, 409 S.E.2d 434 (Ct. App. 1991), is distinguishable from the case at hand. Unlike the defendant in *Sea Cabin*, who responded to discovery but withheld one item, the Insurers raised legitimate objections to discovery in the instant case and did not produce any items. 305 S.C. at 519–20, 409 S.E.2d at 436. Indeed, had the Insurers engaged in further discovery, such action could have caused them to waive their right to compel arbitration of the claims in this case. Further, in *Sea Cabin*, the defendant failed to produce an important piece of evidence until the final day of trial, leaving the plaintiffs with no time to properly investigate it. 305 S.C. at 520, 409 S.E.2d at 436. In this case, however, the Insurers produced the 2010 Agency Agreement—along with the prior agreements—well in advance of the hearing on the motion to compel arbitration, giving the Insureds and Agents sufficient time to review, challenge, and respond to this evidence.

Our review of the record reveals the Insurers, who admittedly found themselves in a bit of a Catch-22 situation,[13] did not intentionally withhold the 2010 Agency Agreement to prevent the Insureds and Agents from challenging it. Nor did the Insurers, or their counsel, violate any of the procedural or ethical rules cited above in turning over the documents when they did. Instead, the Insurers properly waited to serve copies of the 2010 Agency Agreement and its predecessors with their motions to compel arbitration. Accordingly, we find it would be inappropriate to invade the province of the circuit court by deciding this appeal on the unsupported ground that the court abused its discretion by not sanctioning the Insurers. *See Davis*, 409 S.C. at 281, 762 S.E.2d at 543 (noting the decision of whether to impose sanctions is left to the sound discretion of the circuit court).

B. Arbitration Exemption for Insureds

As a second additional sustaining ground, the Insureds and Agents argue the circuit court should have denied the Insurers' motion to compel arbitration on the basis

[13] *See generally* JOSEPH HELLER, CATCH-22 1–453 (1961) (setting up a plot in which the main character finds himself in a paradoxical, no-win situation).

that section 15-48-10 of the South Carolina Code (2005) "specifically exempts any insured or beneficiary under any insurance policy from arbitration." We disagree.

Subsection 15-48-10(b)(4) states the South Carolina Uniform Arbitration Act[14] "shall not apply to . . . [a]ny claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract." As this court has held, subsection 15-48-10(b)(4) "was enacted for the purpose of regulating the business of insurance" and, as such, reverse preempted the FAA through application of the McCarran-Ferguson Act.[15] *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 468, 556 S.E.2d 397, 401, 402 (Ct. App. 2001). Nevertheless, "[t]he FAA and section 15-48-10(b)(4) conflict with one another only when a litigant seeks to enforce an arbitration agreement contained in an insurance policy governed by South Carolina law." *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 210, 731 S.E.2d 324, 326 (Ct. App. 2012).

Similar to the contract in *Walden*, the 2010 Agency Agreement at issue in the instant case is not an insurance policy. 399 S.C. at 210, 731 S.E.2d at 326. Like the *Walden* court, we find the causes of action against the Insurers are, therefore, not the claims of "any insured or beneficiary under any insurance policy" that would exempt this action from arbitration pursuant to subsection 15-48-10(b)(4). 399 S.C. at 209, 731 S.E.2d at 326. Accordingly, we reject the Insureds and Agents' expansive interpretation of the statute and decline to decide the case on this alternate sustaining ground. *See id.* at 210, 731 S.E.2d at 326 (holding subsection 15-48-10(b)(4) was not intended to apply to "agreements that only have a tangential relationship to an insurance policy, but was instead intended to apply directly to an insurance contract"); *Cox*, 347 S.C. at 468, 556 S.E.2d at 401 (noting subsection 15-48-10(b)(4) "expressly invalidates a[n arbitration] provision contained in an insurance policy"); *see also Am. Health & Life Ins. Co. v. Heyward*, 272 F. Supp. 2d 578, 582 (D.S.C. 2003) (holding subsection 15-48-10(b)(4) "prohibits the enforcement of arbitration clauses in insurance policies governed by South Carolina law").

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[14] S.C. Code Ann. §§ 15-48-10 through -240 (2005).

[15] 15 U.S.C. §§ 1011–15 (2012).

CONCLUSION

Based on the foregoing analysis, we **REVERSE** the order of the circuit court and **REMAND** with instructions to grant the Insurers' motions to dismiss the Insureds and Agents' claims and compel them to arbitration.

HUFF, A.C.J., and THOMAS, J., concur.