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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Robert Bonds, Circuit Court Judge

Appellate Case No. 2025-000076

In the Matter of the Estate of Paul Brandon Barringer, II

Hampton Barringer Luzak..... Appellant,

v.

Merrill B. Light, Merrill U. Barringer, as Personal Representative of the Estate of Paul Brandon Barringer, II, J. Randolph Light, Jr., Merrill B. Light as putative trustee of the Paul B. Barringer, II, Revocable Trust dated December 4, 1998, and Merrill B. Light as trustee of the Merrill Barringer Light Revocable Trust, Defendants

Of which Merrill U. Barringer, as Personal Representative of the Estate of Paul Brandon Barringer, II, is a Respondent .....Respondent.

AND

In the Matter of the Estate of Paul Brandon Barringer, II

Hampton Barringer Luzak..... Appellant,

v.

Merrill U. Barringer .....Respondent.

INITIAL BRIEF OF RESPONDENT, MERRILL U. BARRINGER

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INTRODUCTION

Appellant Hampton Luzak ("Luzak") seeks to rewrite her father's estate plan, force the distribution of her father's estate in accordance with an alleged secret contract, and prevent her mother from changing the will that she executed in 1998. The circuit court correctly concluded that Luzak has no evidence to support her claims, and this Court should affirm.

Luzak's father died in 2016. Shortly thereafter, Luzak brought a will contest seeking to set aside the estate planning documents that her father executed from 2012 to 2015 on the grounds that he lacked testamentary capacity and was subject to undue influence when he executed them. After three years of seeking to "unwind"[1] her father's estate planning from 2012 forward, Luzak asserted a new, different claim challenging the estate planning documents her father executed before 2012. Specifically, Luzak now seeks to invalidate a provision in the estate planning documents her father executed in 1998—fourteen years prior to 2012—that granted Luzak's mother discretion to decide how his estate should be distributed among the Barringer descendants. Luzak claims that her parents made a secret contract that prohibits her mother from exercising this discretion in her own estate documents. Because South Carolina law specifies the "only" evidence

[1] (Luzak Dep. Tr. 253, R.__.)

that can prove such a claim, and Luzak produced no such evidence, or any evidence at all of such a contract, the circuit court correctly granted summary judgment to Respondent Merrill Barringer ("Mrs. Barringer" or "Luzak's mother").[2]

First, Luzak's secret contract claims are governed by clear and long-standing South Carolina statutory law. To preclude claims like the secret contract claims Luzak asserts here, the South Carolina General Assembly enacted S.C. Code Ann. § 62-2-701, which provides that "contracts regarding succession" can "only" be proven by specific documentary evidence. This Court should affirm the circuit court's finding that Section 62-2-701 governs Luzak's contract claims.

Second, the circuit court correctly ruled that Luzak produced no evidence that complies with Section 62-2-701. Because the statute specifies the "only" categories of evidence with which Luzak can prove her secret contract claims—and Luzak has produced none—this Court should affirm the circuit court's ruling that granted summary judgment to Mrs. Barringer on the two causes of action that seek to enforce the ostensible agreement.

Third, the Court should also affirm the circuit court's conclusion that Luzak produced no evidence, under Section 62-2-701 or otherwise, to support her secret contract claims. Even before the passage of Section 62-2-701, South Carolina courts viewed alleged agreements seeking to modify a decedent's last will and testament with suspicion. Courts allowed such claims to proceed to trial only when supported by clear and convincing evidence: "The evidence to sustain [a contract regarding succession] should be received and scrutinized with the greatest care. The terms of such

[2] While the parties fully briefed this issue years ago when Luzak appealed the first summary judgment order, Mrs. Barringer files this brief addressing the numerous new arguments that Luzak now raises.

an agreement should be definite and certain and established by evidence clear and convincing."[3] The circuit court correctly concluded that Luzak produced no evidence to support her claims, much less clear and convincing evidence. For this reason as well, this Court should affirm the circuit court's grant of summary judgment on the secret contract claims.

Fourth, the Court should reject Luzak's remaining arguments, in which she attempts to circumvent Section 62-2-701 and the absence of evidence to support her contract claims. For example, Luzak alleges that the circuit court must first decide which version of Mr. Barringer's estate planning documents controls before the court could rule on her contract claims. This argument is a red herring because each estate plan that Mr. Barringer executed from 1998 until his death granted Mrs. Barringer a power of appointment. It thus makes no difference which of Mr. Barringer's estate plans controls because Mrs. Barringer held a power of appointment under all of them, and Luzak does not otherwise challenge the 1998 estate plan.[4]

Luzak also argues that Mr. Barringer could not have intended for the power of appointment in his 1998 estate planning documents to apply to assets that he did not own in 1998. But common sense, and more importantly South Carolina law on after-acquired property, holds otherwise. If Luzak's position were the law, every testator would be required to execute new estate planning documents to direct disposition of every asset the testator acquires after estate planning documents are executed.

Luzak next asserts that, because Mr. Barringer's 1998 estate planning attorney allegedly did not discuss the application of a residuary clause to stock in a family company, Mr. Barringer did not "understand" how a residuary clause works. There is no evidence to support Luzak's

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[3] *Looper v. Whitaker*, 231 S.C. 219, 227, 98 S.E.2d 266, 270 (1957) (internal quotation omitted).

[4] (Luzak Dep. Tr. 23–24, R. __.)

allegation that her father did not sufficiently understand his 1998 estate plan. Furthermore, this allegation is at odds with Luzak's claim that her father entered into the alleged secret contract to modify the exact provision in his 1998 estate plan she now claims he did not understand. In any event, no authority requires a testator to understand the legal details of how estate planning works, how changing laws and facts will impact subsequently executed documents, or precisely how the law on wills and trusts is applied under South Carolina law. Regardless, Luzak does not contest Mr. Barringer's competency when he executed the 1998 estate plan.[5]

Finally, Luzak repeatedly claims that her father historically expressed a "plan" for equal treatment of his children and, in the past, treated his children equally. However, historical expressions of a "plan" for the future is not part of the foundation on which estate plans are built, cannot serve as evidence a contract under Section 62-2-701, and cannot be used to vary the clear, express terms of Mr. Barringer's 1998 estate plan, executed under the guise of nationally recognized counsel.

These arguments, along with others more fully rebutted below, appear designed to distract from the straightforward application of Section 62-2-701 here and Luzak's lack of evidence to support the existence of the alleged secret contract. Like the circuit court, this Court should reject these arguments and affirm.

STATEMENT OF THE CASE

Luzak and her father, Paul Barringer ("Mr. Barringer" or "Luzak's father"), had a falling out in 2012, four years prior to his death in 2016. During this time, Mr. Barringer made certain amendments to his estate plan. After Mr. Barringer's death in 2016, Luzak initially filed a lawsuit

[5] (*Id.*)

(Civil Action Nos. 2016-CP-07-1919 & 2016-CP-07-1961[6]) challenging his will and trust, in she which sought to "unwind" and set aside the estate planning documents her father executed between 2012 and 2015. In that suit, which is not at issue in this appeal and remains pending before the circuit court, Luzak asserted that her father's 2012 to 2015 estate planning documents were invalid because her father lacked testamentary capacity and was unduly influenced when he executed the 2012 to 2015 documents. In that case, Luzak consistently maintained that "anything that's happened . . . should be undone . . . starting . . . in February of 2012." (Luzak Dep. Tr. 23–24, R. __.) Luzak specified: "I can tell you that . . . all the amendments to my father's will should be unwound. Anything that happened **as of 2012** should be unwound." (*Id.* at 253 (emphasis added).) Luzak prosecuted that lawsuit for over three years, the gravamen of which requested that the circuit court invalidate her father's estate planning between 2012 and 2015, and enforce his estate plan as it existed before then, when her father was (according to Luzak) competent and free of undue influence.

Luzak commenced the 2016 litigation because she believed that her father's pre-2012 estate plan, executed (in 1998) before her falling out with her father, would favor her. Discovery in that litigation, however, demonstrated that Luzak fared no better under her father's pre-2012 estate plan than under the 2012 to 2015 estate planning documents that she sought to unwind.

Specifically, Luzak learned that the estate plan Mr. Barringer executed in 1998 made no specific distributions to anyone, much less Luzak. Mr. Barringer's 1998 estate planning documents provide that, if Mr. Barringer predeceased Mrs. Barringer (which he did), his assets were held in trust for Mrs. Barringer for her life. Mr. Barringer's estate plan also granted Mrs.

[6] To Respondent's understanding, the multiple civil action numbers result from the filing of the lawsuits in both probate court and the court of common pleas and the removal of the cases from probate court.

Barringer the right, at her death, to dispose of her late husband's remaining estate to their descendants in her discretion: "Upon the death of [Mrs. Barringer], . . . the property remaining . . . shall be distributed . . . as [Mrs. Barringer] may appoint in [her] last will and testament or codicil thereto. . . . [Mrs. Barringer] shall have the power upon her death by her last will and testament or codicil thereto . . . to appoint any part or all of the property . . . to or among my descendants, and in such manner, in trust or otherwise, as she may in such will provide . . . ." (The Paul B. Barringer, II [1998] Revocable Trust, Item IV(g) and Item V(d), R. __.)[7] In other words, Mr. Barringer granted Mrs. Barringer the ability to choose, in her own will or trust, how to distribute his remaining estate among their children and grandchildren.[8] Because this provision existed in every version of Mr. Barringer's estate planning documents since 1998, years before Luzak alleges he became incompetent and subject to undue influence, Luzak realized that her

[7] Mr. Barringer's 1998 estate planning documents contain a "default" provision that applies if, and only if, Mrs. Barringer does not appoint assets in her last will and testament. (The Paul B. Barringer, II [1998] Revocable Trust, Item IV(h), R.__ ("Should my said wife fail to effectively appoint all of the property remaining in either or both trusts at my wife's death, such property as to which my wife fails effectively to exercise her power of appointment [under Item (V)].")); (*id.* at Item V(e), R. __ ("Upon the death of the survivor of myself and my wife, MERRILL U. BARRINGER, the Trustee shall divide the property of this trust not appointed effectively by my wife into a sufficient number of equal shares so that there shall be set aside one (1) such share for each child of mine who is then living and one (1) such share for the collective descendants who are then living of any child of mine who is not then living.").)

[8] Mrs. Barringer's 1998 estate plan contains the same provisions as to Mr. Barringer's, should Mrs. Barringer die first: "Upon the death of [Mrs. Barringer], . . . the property remaining . . . shall be distributed . . . as [Mr. Barringer] may appoint in [his] last will and testament or codicil thereto. . . . [Mr. Barringer] shall have the power upon her death by her last will and testament or codicil thereto . . . to appoint any part or all of the property . . . to or among my descendants, and in such manner, in trust or otherwise, as she may in such will provide . . . ." (The Merrill U. Barringer [1998] Revocable Trust, Item IV(g) and Item V(d), R. __.) This type of arrangement, i.e., married couples deferring disposition of the estate of the first spouse until the death of the second, is a common feature of estate planning as discussed. *See infra* Part II.A.

years-long effort to invalidate her father's estate planning documents from 2012 forward would have no practical effect for her.

Choosing not to accept this outcome, Luzak pivoted. She then crafted a brand new attack on her father's estate planning more than three years after her initial will challenge litigation began. In 2019, Luzak filed a new lawsuit against her mother challenging, for the first time, her father's 1998 estate planning documents. In her new lawsuit (Civil Action Nos. 2019-CP-07-01253 & 2019-CP-07-01294), Luzak alleged that, in connection with their execution of their 1998 estate plans, her parents entered into a secret contract to control the disposition of her father's estate. Luzak claimed that her parents secretly agreed—before they executed their 1998 estate planning documents—never to change those estate plans for any reason. (Resp. to Interrog. No. 9, R.__ ("The promise(s) would have been made no later than December 4, 1998.").) Specifically, Luzak sought an order enforcing the terms of the secret contract. The secret contract, Luzak alleges, overrides the expressed terms of her father's 1998 estate plan, which Luzak argues prohibits Mrs. Barringer from ever revoking her 1998 estate planning documents. (Compl. 58, R. __ ("Paul Barringer and Mrs. Barringer entered into a binding contract not to revoke [the 1998 estate plans, and Luzak seeks] an order from this Court directing Merrill U. Barringer to comply with the contract **not to revoke** [the will she executed in 1998].") (emphasis added).)

Tellingly, Luzak alleged only that this secret contract existed—"upon information and belief." (Compl. 57–58, R.__.) A careful review of the affidavits she and her husband, Kevin Luzak, submitted to the circuit court opposing summary judgment reveals that neither Luzak nor her husband can support the existence of any contract. Luzak's affidavit vaguely refers only to "discussions" among family members and states that her father "planned" to treat her and her siblings equally and that her mother never "spoke up" about the details of her and her husband's

1998 estate planning documents. Luzak's affidavit does not state that her parents *actually made* the alleged contract.

Moreover, although Luzak identified her husband as a witness to the alleged contract, and provided a similar affidavit from him about family "discussions" and what he understood was his father-in-law's plan, he flatly denied knowledge of any such contract or other agreement as alleged in Luzak's contract claims:

> Q. If you have—if you have any evidence that Paul and Merrill Barringer entered into a contract, agreement, pinky swear, anything you want to call it, that they were going to treat their children equally in the future no matter what type of behavior the children engaged in, I want you to tell me that.
>
> [Luzak's counsel.] Asked and answered.
>
> Q. **Do you have any such evidence?**
>
> [Luzak.] **I—I do not.**

(Kevin Luzak Dep. Tr. 482, R.__ (emphasis added).)

Mrs. Barringer filed a motion for partial summary judgment on Luzak's contract claims. Judge Mullen held a hearing on this motion, and, during the hearing, Luzak argued that summary judgment should not be granted because Luzak had not had an opportunity to complete discovery. (Oct. 15, 2020 Hr'g Tr. 59, R.__ ("[U]nder the case law, [] no summary judgment should be granted until, in this case, Plaintiff has had a full and fair opportunity to complete discovery.").) Luzak contended, among other things, the need to depose other witnesses, including the attorney who drafted the 1998 estate planning documents. (*Id.* at 61, R.__ ("[W]e haven't been able to depose a couple of witnesses about these documents yet. We've actually scheduled or sent notice

to depose Mr. McBryde[sic].").) On November 4, 2020, Judge Mullen issued an Order denying the motion.[9] (Order dated November 4, 2020, R. __.)

The parties conducted additional discovery, including the additional discovery Luzak asserted during the 2020 summary judgment hearing she needed before it would be proper for the court to consider summary judgment. Thereafter, in June of 2021, Mrs. Barringer filed a new motion for summary judgment on the secret contract claims. Significantly, in July of 2021, Luzak filed a cross-motion for summary judgment on these same claims. Both parties relied in part on the newly conducted discovery.

In August of 2021, Judge Robert Bonds held a hearing on these motions, and on August 20, 2021, Judge Bonds issued an order granting Mrs. Barringer's motion and denying Luzak's. (Aug. 20, 2021 order, R. __.) Luzak filed a motion to reconsider, which Judge Bonds heard on October 7, 2021. Thereafter, Judge Bonds issued an order denying Luzak's motion to reconsider. (Oct. 8, 2021 order, R. __.)

By the time the circuit court entered summary judgment on Luzak's contract claims in 2021, Luzak had already appealed two other orders previously entered by the circuit court, including an order bifurcating Luzak's contract claims from her capacity and undue influence claims for purposes of trial. When Luzak appealed Judge Bond's summary judgment order, it was consolidated with Luzak's prior appeal. Before oral argument on Luzak's appeals, the Supreme Court vacated the contract claims summary judgment order on the ground that, procedurally, Luzak's appeal of prior orders divested the circuit court of jurisdiction to rule on Mrs. Barringer's motion. Accordingly, Luzak's appeal of the secret contract claims summary judgment order was

[9] On February 19, 2021, Judge Mullen recused herself from this case for undisclosed reasons.

dismissed as moot. *In re Estate of Paul B. Barringer, II*, Appellate Case Nos. 2021-000837 & 2021-001337 (S.C. Sup. Ct. order filed Feb. 10, 2023).

Luzak's remaining appeals related to her capacity and undue influence claims were subsequently resolved by the Supreme Court, with the Court noting that Luzak was expected to "narrow her claims to only non-derivative claims seeking damages," and then directing the circuit court to "consider on remand any remaining dispute as to the question of which claims or elements of damages are derivative." *In re Estate of Paul B. Barringer, II*, Op. No. 2024-MO-003 (S.C. Sup. Ct. filed Jan. 17, 2024) The Supreme Court also directed the circuit court to reconsider its prior order "regarding mode of *trial*, including the order *bifurcating trial* . . . ." *Id.* (emphasis added).

With all of Luzak's appeals now resolved, including the procedural impediment which caused Judge Bonds' contract claims summary judgment order to be vacated, Mrs. Barringer re-filed her motion for summary judgment on the secret contract claims in the circuit court. The circuit court held a hearing, at which Luzak conceded that neither the facts nor law had changed from the court's prior 2021 ruling, and Luzak stood on her prior briefing. (Dec. 13, 2024 Hr'g Tr. 17, R.__ ("But, in any event, Your Honor, Ashley, we agree, no facts, no evidence, nothing has changed since we began the appellate process.").)

On December 31, 2024, the circuit court again granted Mrs. Barringer summary judgment on Luzak's secret contract claims, incorporating and attaching the order it entered in 2021. *In re Estate of Paul Brandon Barringer, II*, Civil Action Nos. 2016-CP-07-01919, 2019-CP-07-01253, & 2019-CP-07-01294 (S.C. Com. Pl. order filed Dec. 31, 2024). In this order, the circuit court noted that nothing had changed to cause the court to revisit its original decision from 2021. Regarding the trial bifurcation order, the court addressed the issue by ruling it was not necessary

to determine if Luzak's contract claims should be bifurcated for a trial because the court was granting summary judgment on the contract claims, which now would not go to trial. The court further ruled that, before any trial, it would revisit the prior order bifurcating trial, if needed. Luzak's motion to reconsider was denied. Luzak then re-appealed the contract claims summary judgment order, which is now the sole appeal before this court, bearing Appellate Case Number 2025-000076.

STANDARD OF REVIEW

"When ruling on a motion for summary judgment . . . the court must review the evidence *using the same substantive evidentiary standard of proof the jury is required to use* in a particular case." *Stokes v. Oconee Cnty.*, 441 S.C. 566, 577, 895 S.E.2d 689, 695 (Ct. App. 2023) (quoting *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 464, 629 S.E.2d 653, 666 (2006)); *see also Huffman v. Sunshine Recycling*, LLC, 426 S.C. 262, 270, 826 S.E.2d 609, 614 (2019) ("This Court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP."); *Hancock v. Mid-South Mgmt. Co., Inc*., 381 S.C. 326, 330–31, 673 S.E.2d 801, 802–03 (2009) ("This Court, however, has consistently held that where the federal standard applies or where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment.").[10]

Here, the circuit court granted Mrs. Barringer summary judgment on Luzak's contract claims (her second and third causes of action), which are subject to a heightened evidentiary burden. Specifically, under South Carolina Code Section 62-2-701, the General Assembly has

[10] The reason for this rule is that, when deciding a motion for summary judgment, the court must determine whether the trier of fact reasonably may resolve the dispute in favor of either party, and this analysis "necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *George v. Fabri*, 345 S.C. 440, 452–54, 548, S.E.2d 868, 874–75 (2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

mandated a plaintiff seeking to enforce "contract concerning succession" of an estate—as in Luzak's third cause of action for "Enforcement of Contract Not to Revoke and Injunction"—must prove the existence of the contract with a will or other writing signed by the decedent. *See* S.C. Code Ann. § 62-2-701. Likewise, Luzak's second cause of action, in which she artfully styles the alleged contract as a "promise in an effort to avoid the statute," is also subject to the proof requirements of Section 62-2-701. Further, even if Section 62-2-701 is inapplicable, long standing South Carolina law requires an agreement or promise, such as the one alleged here, that seeks to change the terms of a decedent's will be proven with "clear, cogent, and convincing evidence." *Kerr v. Kennedy*, 105 S.C. 496, 90 S.E. 178, 179 (1916). Similarly, a plaintiff seeking a constructive trust must prove her entitlement to a constructive trust with clear, definite, and unequivocal evidence. *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987).

Therefore, this appeal is not subject to the "mere scintilla of evidence" standard, as argued by Luzak, which *Hancock* applied only to cases involving the preponderance of the evidence standard. 381 S.C. at 330–31, 673 S.E.2d at 802–03. Rather, the circuit court's order should be affirmed unless this Court determines that Luzak has presented evidence of the alleged contract or promise pursuant to Section 62-2-701, or otherwise by "clear, cogent, and convincing evidence." Nonetheless, Luzak has not identified any evidence, not even a scintilla.[11]

ARGUMENT

Luzak asks the Court to enforce an agreement she alleges her mother and father entered into before both of them executed their 1998 estate planning documents. According to Luzak, this

[11] In any event, the Supreme Court abrogated the "mere scintilla" rule in *Kitchen Planners, LLC v. Friedman*, in favor of the "genuine issue of material fact" standard, which requires the non-moving party to create a *reasonable* inference or a *genuine* issue of fact. 440 S.C. 456, 463–64, 892 S.E.2d 297, 301 (2023). These standards are largely academic because Luzak has no evidence, regardless of the amount she might need.

agreement prohibits Mrs. Barringer from ever changing/revoking her 1998 will, abrogating Mrs. Barringer's right to modify her estate plan at any time and prohibiting Mrs. Barringer from doing what she was expressly empowered to do in those documents. This Court should affirm the circuit court's order granting Mrs. Barringer summary judgment on the contract claims for several independent reasons.

First, Section 62-2-701 applies to Luzak's contract claims.

Second, Section 62-2-701 bars Luzak's contract claims. In 1986, the South Carolina General Assembly mandated that a "contract concerning succession" of an estate, such as the contract Luzak alleges here, can "only" be proven through three specific forms of signed documentary evidence. Luzak has identified no such signed documentary evidence.

The statute exists to prevent a litigant from bringing precisely the claims Luzak attempts to bring here. The express purpose of Section 62-2-701 is "to tighten the methods by which contracts concerning succession may be proved." Unif. Probate Code § 2-701 cmt. Thus, Section 62-2-701 governs the contract claims that Luzak asserts here.

Third, Luzak is aware of the statute's requirements and that she cannot meet them. Luzak attempts to sidestep Section 62-2-701 and the intent of the General Assembly by artfully styling the agreement as a "promise"—instead of "contract"—and alleging a "constructive trust" related to the purported promise. As the circuit court correctly recognized, jurisdictions across the country have rejected efforts to sidestep similar statutory requirements through such artful pleading. These courts correctly reason that permitting plaintiffs to circumvent the requirements of statutes like Section 62-2-701 by simply labeling a contract as a promise would render the statutes meaningless and undermine the legislative intent. Luzak does not even attempt to distinguish the cases cited by the circuit court or rebut their sound rationale.

In any event, even if Luzak could sidestep Section 62-2-701 through artful pleading (which she cannot), Luzak has produced no evidence of any alleged "promise" between her parents.

Fourth, as an alternative sustaining ground, the power of a surviving spouse to decide/appoint in the future who inherits cannot be alienated under settled South Carolina law. This unalienable power means the holder of the power cannot bind themselves to exercise the power, or not to exercise it, in a particular way in the future, and therefore, even if such an agreement or promise exists, South Carolina law prevents the enforcement of agreements or promises as Luzak alleges. This law provides an additional sustaining ground for affirming the circuit court.

Finally, Luzak's remaining arguments, which appear designed to distract from the application of Section 62-2-701 and her lack of evidence, do not support reversal.

I. The circuit court properly concluded that Section 62-2-701 governs Luzak's contract claims.

In 1986, the South Carolina General Assembly followed the lead of many other state legislatures by passing a statute, modeled from the Uniform Probate Code, addressing the proof required to establish "Contracts Concerning Succession." This section is found in Part 7 of the Probate Code, titled "Contractual Arrangements Relating to Death." Specifically, the General Assembly passed Section 62-2-701, which identifies the "only" three methods by which a plaintiff alleging a contract relating to estate planning may prove such a contract in court:

> A contract to make a will or devise, or to revoke a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this act, can be established **only by (1)** provisions of **a will of the decedent** stating material provisions of **the contract**; **(2)** an express reference in **a will of the decedent** to a contract and extrinsic evidence proving the terms of the contract; or **(3)** a writing **signed by the decedent evidencing the contract** and extrinsic evidence proving the terms of the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

S.C. Code Ann. § 62-2-701 (emphasis added). As explained in the reporter's comment, this statute "allows the proof of a contract binding a decedent and concerning the succession to his estate, testate or intestate, only by way of some signed writing." *Id.* at cmt. The statute requires a plaintiff alleging a contract binding a decedent and concerning his or her estate planning to identify a will or other writing, signed by the decedent, that confirms the existence of the contract or its material terms.[12] Further, the statute confirms that execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

The official comment to Uniform Probate Code § 2-701, from which Section 62-2-701 was modeled, explains that the rationale for this type of statute was to reduce litigation based on alleged contracts affecting estate planning:

> It is the purpose of this section to tighten the methods by which contracts concerning succession may be proved. Oral contracts not to revoke wills have given rise to much litigation in a number of states; and in many states if two persons execute a single document as their joint will, this gives rise to a presumption that the parties had contracted not to revoke the will except by consent of both.

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[12] The General Assembly intended Section 62-2-701 to be *even more demanding* than the already heightened common law approach to such claims before the statute's enactment. Before 1986, the South Carolina Supreme Court held that alleged contracts between spouses relating to their estate planning should be "regarded with suspicion" and require "the strongest evidence":

> But such a contract, especially when it is attempted to be established by parol, is regarded with suspicion, and not sustained, except upon the strongest evidence that it was founded upon a valuable consideration and deliberat[e]ly entered into by the decedent. The evidence to sustain it should be received and scrutinized with the greatest care. The terms of such an agreement should be definite and certain and established by evidence clear and convincing.

Looper v. Whitaker, 231 S.C. 219, 227, 98 S.E.2d 266, 270 (1957) (internal citation omitted); *see also Lamberg v. Callahan*, 455 F.2d 1213, 1218 (2d Cir. 1972) (explaining that the reason for applying a higher standard of proof for claims to enforce an alleged contract not to revoke a will "lies in the serious and far-reaching consequences of such an agreement, which may have the effect of preventing the surviving spouse from altering his or her estate plan to suit intervening changes in circumstances").

See Unif. Probate Code § 2-701 cmt.; *see also* S.C. Code Ann. § 62-2-701 cmt. (noting the policy behind the statute is "protecting the integrity of the process of succession to the estates of decedents in accordance with their own true wills" and that "writings are required in the expectation of increasing the reliability of the proof of the decedent's true will").

In her third cause of action, Luzak alleges that, "**[u]pon information and belief**, Decedent Paul Barringer and Mrs. Barringer entered into a binding contract not to revoke their [1998] estate plans," and asserts that Luzak "is entitled to an order from this Court **directing** Defendant Merrill U. Barringer **to comply with the contract not to revoke**" her 1998 will. (Compl. 58, R.__ (emphasis added).) Luzak's complaint, by which she is bound,[13] alleges that Mrs. Barringer contracted never to revoke the will she executed twenty-seven years ago in 1998. (*Id.*) Luzak further claims that the alleged contract "especially" prohibits Mrs. Barringer from changing her estate plan by exercising the power of appointment granted to Mrs. Barringer in Mr. Barringer's 1998 estate planning documents. (*See, e.g.*, Luzak Br. 41 ("In Ms. Luzak's third cause of action, for enforcement of contract not to revoke and injunction, Ms. Luzak alleges that Paul Barringer and Ms. Barringer entered into a binding contract not to revoke their estate plans, *especially with respect to Ms. Barringer's Will(s) that did not exercise any power of appointment* . . . .") (emphasis added).) Luzak concedes that her third cause of action is subject to the proof requirements of Section 62-2-701. (*See* Luzak Br. 41 ("With respect to contracts not to revoke, Ms. Luzak recognizes that section 62-2-701 governs.").)

In her second cause of action, which is for constructive trust and injunction, Luzak alleges that "Mrs. Barringer made an express or implied promise not to exercise her testamentary power

[13] *See Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) ("It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise.")

of appointment in a manner that would direct the subject property in a manner other than set forth in the default provisions of Decedent Paul Barringer's estate plan."[14] (Compl. 57, R. __.) Luzak further alleges that "Decedent Paul Barringer **relied** on Mrs. Barringer's express or implied promise not to exercise the testamentary power of appointment given to her." (*Id.* (emphasis added).) Finally, Luzak alleges that she "is entitled to an order from this Court directing Defendant Merrill U. Barringer to comply with her promise and the trust reposed in her not to exercise the testamentary power of appointment given her and to impose a constructive trust for the benefit of Plaintiff Hampton Luzak in the subject property with respect to the intended equal treatment of Plaintiff Hampton Luzak." (*Id.*).

Although Luzak frames her third cause of action as one based on a *contract* and her second cause of action as one based on a *promise*, this is a distinction without a difference for purposes of Section 62-2-701. *See* S.C. Code Ann. § 62-2-701 cmt. ("All of these sections are aimed at protecting the integrity of the process of succession to the estates of decedents in accordance with their own true wills. Each of these sections requires that the decedent's will be expressed either in some writing or by way of a physical act done to some writing; the writings are required in the expectation of increasing the reliability of the proof of the decedent's true will."). If Luzak prevails under either cause of action, Mrs. Barringer will be legally prohibited from revoking or changing her 1998 estate planning documents based on an alleged agreement with her husband. In other words, if Luzak prevails here, it will be the terms of the secret contract or promise that control the

[14] Luzak seeks to restrict Mrs. Barringer's right to modify her last will and testament by her contract claims because the 1998 estate plan contains a default provision. The provision specifies that if Mrs. Barringer chooses not to exercise her power of appointment, the remainder of Mr. Barringer's estate is divided among the three children. (*See supra* note 7.) Importantly, again, this provision only applies if Mrs. Barringer does not exercise the power of appointment.

succession of Mr. Barringer's estate, not his estate planning documents. These are precisely the types of agreements that are subject to Section 62-2-701. Therefore, Section 62-2-701 applies.

II. The circuit court properly concluded that Luzak produced no evidence that complies with Section 62-2-701.

Because Luzak's second and third causes of action are governed by Section 62-2-701, Mrs. Barringer is entitled to summary judgment on these claims. The circuit court properly concluded that Luzak has no will or other signed writing that complies with one of the three limited methods allowed for proving a contract under the statute (subsections (1), (2), and (3)).

A. Luzak has no evidence to establish a contract through method one: Mr. Barringer's will does not contain "material provisions of a contract."

Subsection 62-2-701(1) provides that a contract concerning succession may be established by "provisions of a **will of the decedent** stating material provisions of the contract." (emphasis added). Courts have identified examples of contractual provisions in wills, including agreements not to revoke. *See, e.g.*, *Humphries v. Whiteley*, 565 So. 2d 96, 97 (Ala. 1990) (quoting will provision, "[S]uch wills are intended to be and should be construed [as] contractual and reciprocal wills. Neither will[] shall be subject to revocation by it's [sic] maker without the consent of the other party."); *Inouye v. Estate of McHugo*, 328 A.3d 1229 (Vt. 2024) (identifying will provision, "[T]he parties have agreed not to revoke or alter these Wills except with the mutual consent of both."); *Pruss v. Pruss*, 514 N.W.2d 335, 340 (Neb. 1994) (quoting will provision, "[I]t is our intention that our Wills be construed as mutual, reciprocal Wills, they have been executed pursuant to a prior oral agreement, one in consideration of the other, and it is our intention that under no circumstances is the Will of either of us to be changed.").

There are no provisions in Mr. Barringer's 1998 will and trust, or any of his subsequent estate planning documents that Luzak challenges, that mention a contract or otherwise provide that

Mrs. Barringer agreed never to revoke her 1998 will.[15] (*See* 1998 Will and Testament of Paul B. Barringer, II, R. __; *see also* 2012–2015 Wills and Testaments of Paul B. Barringer, II, R.__.) The same applies for his revocable trusts. (*See* 1998 Revocable Trust of Paul B. Barringer, II, R. __; *see also* 2012–2015 Revocable Trusts of Paul B. Barringer, II, R.__.) In fact, Mr. Barringer's 1998 estate planning documents provide for the opposite result, i.e., that Mr. Barringer's estate plan expressly empowers Mrs. Barringer to make dispositions of assets from his estate in the future by exercising her power of appointment through her last will and testament "or any codicil thereto." (*Id.*) This language acknowledges, and expressly anticipates, that Mrs. Barringer will execute a new will or new codicil to her will in the future, if she so chooses. It makes no sense that Mr. Barringer would secretly contract with his wife, such that she would never change her 1998 will, and then execute an estate plan giving his wife the expressed right to change her 1998 will. In sum, Luzak's claims would override the expressed terms of her father's estate plan and provide for a result opposite to its specific terms.

In her Brief, Luzak fails to identify any language from any will or trust of Mr. or Mrs. Barringer that even arguably constitutes the material provisions of a contract of any kind—much less a contract where Mrs. Barringer agreed never to execute a new will exercising her power of appointment, which, again, those documents expressly empower her to do. (Luzak Br. 34–41.) Unable to identify any evidence of a contract in the wills or trusts, Luzak resorts to the argument that the agreement or promise can be "implied" from Mr. and Mrs. Barringer's choice not to exercise their respective powers of appointment in their 1998 estate planning documents. (Luzak

[15] Luzak argues that "[t]he trial court's misunderstanding about section 62-2-701 is further demonstrated by its failure to determine whether the 'decedent' in the statute is Paul Barringer or Ms. Barringer." (Luzak Br. 41.) But the court did not fail to make a necessary determination; rather, the court held that it need not decide whether Mr. or Mrs. Barringer was the "decedent" for purposes of the statute because Luzak's claims fail regardless. (Order 5 n.4, R.__.)

Br. 40 ("As discussed above, the 1998 estate planning documents clearly set forth the material provisions of the contract: in short, the mutual declination of the powers of appointment that each granted to the other and the mutual and mirror provisions otherwise in their 1998 documents—treating the children equally.").) But this argument would impermissibly allow Luzak to prove a contract regarding succession through a method other than the "only" ways permitted by the General Assembly. In addition, this argument is illogical for several reasons.

First, when Mr. and Mrs. Barringer were both alive, neither of them had a power of appointment from the other to exercise. Both of their estate plans grant the other spouse a power of appointment **if** and **when** they predecease their spouse. Therefore, neither of them received a power of appointment to exercise until 2016 when Mr. Barringer passed away.

Second, even if either or both of the Barringer's could have exercised a power of appointment before Mr. Barringer's death, a person's decision not to exercise a power of appointment in the past is not evidence of a contract *never* to exercise the power in the future.[16] There are countless reasons why someone might choose to exercise, or not to exercise, a power of appointment. Mrs. Barringer's decision not to exercise the power in the past therefore proves nothing and, in any event, is not competent evidence under Section 62-2-701. Absent the existence

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[16] Luzak points to the standard language below from the residuary clause in Mrs. Barringer's 1998 will as evidence of Mrs. Barringer's election not to exercise her power of appointment:

> All of the rest, residue, and remainder of my property of every kind and description, and wherever located, including any lapsed or void devise (*but not including any property over which I may have a power of appointment*), I devise to the then acting Trustee or Trustees of The Merrill U. Barringer Revocable Trust . . . ."

(1998 Will and Testament of Merrill U. Barringer, R.__.) (emphasis added). This language, which Luzak buries in a footnote of her Brief, merely indicates that Mrs. Barringer did not exercise her power of appointment *in that will, in 1998*; it does not say, or even imply, that Mrs. Barringer agreed never to exercise her power of appointment in the future.

of a contract that satisfies Section 62-2-701, Mrs. Barringer retains absolute discretion to amend, revoke, or modify her will at any time. *See, e.g.*, *Matter of Est. of Paradeses*, 426 S.C. 388, 391-92, 826 S.E.2d 871, 873 (Ct. App. 2019) ("A will may be freely modified or revoked by a mentally competent testator, acting of the testator's own volition, until the testator's death.").

Third, the entire *purpose* of the power of appointment was to give Mrs. Barringer the opportunity to deal with circumstances that might change after her husband's death. This type of arrangement, i.e., deferring dispositions to descendants until the second spouse's death, is typical and textbook estate planning for several reason. First, if Mr. Barringer dies first (which he did), he ensures his wife is taken care of for life and that his assets are available for his wife's benefit during her life. Second, deferring dispositions until the future, when the surviving spouse dies, allows the surviving spouse the flexibility to make dispositions based on changed circumstances in the interim between the death of the first spouse and the death of the second spouse. *See* Robert H. Sitkoff & Jesse Dukeminier, Wills, Trusts, and Estates 807 (10th ed. 2017) ("Consider a typical example: [Mr. Barringer] devises property to [a trustee] in trust to distribute the income quarterly to [Mrs. Barringer] for life, and on [Mrs. Barringer's] death to distribute the principal to one or more of [Mr. Barringer's] descendants as [Mrs. Barringer] shall appoint in her will . . . . By this power, which [Mrs. Barringer] holds in a nonfiduciary capacity, [Mrs. Barringer] may decide who among [Mr. Barringer's] descendants will take the trust property at her death. In this way, [Mr. Barringer] empowers [Mrs. Barringer] to deal **flexibly** with changing circumstances in the interim between their deaths." (emphasis added)); *see also* Unif. Powers of Appointment Act § 203 cmt. (2013) ("Maximum discretion confers on the powerholder the flexibility to alter the donor's disposition in response to changing conditions."). The breadth of future events that might cause Mrs. Barringer to alter the plan is limitless. *See, e.g.*, W. Bryan Bolich, *The Power of Appointment:*

Tool of Estate Planning and Drafting, 1964 Duke Law Journal 32, 39-40 (1964) ("For example, [Mr. Barringer] may predecease [Mrs. Barringer]; more children may be born; some may predecease [Mr. Barringer]; and others may predecease [Mrs. Barringer] if she outlives [Mr. Barringer]; one or more of such children may leave issue or a widow or both; [one child] may make a million; [one child] may marry a million; and [one child] may become mentally or physically a cripple. Under these circumstances, equality of shares would be a poor distribution. Moreover, family changes are not the only factors which [Mr. Barringer] must consider. Other uncertainties, including ever changing social, political, legal, and economic conditions, must be borne in mind. By using a power of appointment of sufficient flexibility and duration so that the ultimate disposition is left to the discretion of [Mrs. Barringer], [Mr. Barringer] may avoid a too rigid plan of disposition, lessen the necessity for including alternative beneficiaries and complicated contingency provisions in his will, and postpone final settlement of his estate until many years after his death."). Because the purpose of such a power is to allow Mrs. Barringer to deal with changing circumstances after Mr. Barringer dies, it is perfectly logical that Mrs. Barringer would not have exercised the power of appointment until after Mr. Barringer died. In any event, Luzak has no evidence of the alleged contract in Mr. Barringer's wills or trusts as required under Section 62-2-701(1).

B. Luzak does not argue her parents' wills have an express reference of a contract under method two.

Under Section 62-2-701(2), a plaintiff may establish a contract concerning succession by identifying "an express reference in a will of the decedent to a contract and extrinsic evidence proving the terms of the contract." S.C. Code Ann. § 62-2-701(2). Luzak does not argue that she has proven the alleged contract under this subsection. (*See* Luzak Br. 37–41.)

C. Luzak has no evidence to establish a contract through method three: There is no "writing signed by the decedent evidencing the contract."

Section 62-2-701(3) allows a contract concerning succession to be proven with "a writing signed by the decedent." Although a plaintiff may attempt to rely on extrinsic evidence to prove the terms of the contract concerning succession, the existence of such a contract must first be established by a writing *signed by the decedent*. *See* S.C. Code Ann. § 62-2-701 cmt. ("Extrinsic evidence is freely admissible under Section 62-2-701 to prove the important terms of a contract *whose mere existence is proved by a signed writing*." (emphasis added)).

Here, Luzak has identified no writing signed by Mr. or Mrs. Barringer proving the existence of a contract. Instead, Luzak suggests that she has identified such a signed writing based on the "simultaneous and symbiotic 1998 estate planning" executed by the Barringers and their choice not to exercise their powers of appointment while Mr. Barringer was alive. (Luzak Br. 40.) But again, the 1998 estate planning documents *contain no such evidence*. Neither Mr. Barringer nor Mrs. Barringer had a power of appointment to exercise until one of them passed away, *and* a decision not to exercise a power of appointment in the past is not evidence of a contract never to exercise in the future. By attempting to rely on (a) Mrs. Barringer's will (which is not signed by Mr. Barringer), and (b) Mrs. Barringer's will's symbiotic relationship with Mr. Barringer's, Luzak effectively concedes this point. Simply, Luzak cannot point to a writing signed by Mr. Barringer to prove the existence of a contract and cannot satisfy the requirements of Section 62-2-701(3).

Luzak also points to provisions in the Barringers' 1998 estate plans stating that their residuary clauses should not be interpreted as an exercise of any power of appointment. But these provisions do not prove the existence of a contract *never* to exercise those powers of appointment at any time in the future, much less satisfy the requirements of Section 62-2-701.

Finally, Luzak's attempt to rely on the *mutuality* of Mr. and Mrs. Barringer's wills is expressly foreclosed by the final sentence of the statute: "The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills." S.C. Code § 62-2-701. Luzak's reference to "simultaneous and symbiotic 1998 estate planning documents" is a dressed-up term for mutual wills—separate wills that are substantially similar. Mutual wills must still contain clauses which evidence a contract never to revoke. *See, e.g.*, *Humphries*, 565 So. 2d at 97 (quoting mutual wills by spouses that stated: "Neither will[] shall be subject to revocation by it's [sic] maker without the consent of the other party."). But Mr. and Mrs. Barringer's wills do not contain any such clause because they did not agree to never change their 1998 estate plans.

Tellingly, Luzak next attempts to comply with Section 62-2-701 by vaguely referencing "[n]umerous other documents and evidence." (Luzak Br. 40.) If any document evidencing the existence of a contract existed, Luzak would have identified it to the circuit court and in her appellate brief. Luzak also suggests the following categories of documents somehow support her argument that a contract exists: "Family agreements demonstrating Mr. Barringer's intent to keep voting control equal; Gift tax returns joined in by Mrs. Barringer; Corporate documents demonstrating Mr. Barringer's intent to keep voting control equal." (Luzak Br. 39.) But, critically, Luzak does not argue—and cannot argue—that Mr. Barringer's alleged intention in the past regarding voting control and the like, even if accepted as true, establishes a binding agreement for Mrs. Barringer to never exercise the power of appointment that Mr. Barringer expressly granted to her if he predeceased her. Indeed, Luzak does not explain how these documents relate to the requirements of Section 62-2-701 or otherwise support her argument.

Because Luzak has not identified any will or other signed writing that confirms the existence or material terms of the alleged contract (i.e., that Mrs. Barringer will never revoke her 1998 will), the circuit court properly granted Mrs. Barringer summary judgment pursuant to Section 62-2-701.

III. The circuit court properly concluded that Luzak produced no other evidence to support her contract claims.

A. Luzak cannot circumvent Section 62-2-701.

According to Luzak, her claim for constructive trust is not subject to Section 62-2-701 because this claim alleges that her mother is legally prohibited from changing her 1998 will and exercising her power of appointment based on a *promise* rather than a *contract*. Luzak is not the first plaintiff to attempt to circumvent a statute like Section 62-2-701 in this way. As noted above, Section 62-2-701 is modeled from Section 2-701 of the Uniform Probate Code, and numerous states have passed substantively identical or similar statutes. Courts across the country have routinely **rejected** attempts by plaintiffs to circumvent the statute by labeling a contract claim as an equitable claim based on a promise, reasoning that equity must follow the law and that permitting such circumvention would render the statute meaningless. *E.g.*, *Est. of Gilbert*, 513 S.W.3d 767, 772 (Tex. App. 2017) ("Having reviewed the statute and the relevant case law, we conclude the legislature intended to foreclose a claim relating to a promise to make a will or devise or not to revoke a will or devise if that promise is not in writing . . . . We hold that section 254.004 bars a claim for promissory estoppel on an oral promise to devise property that is disposed of in a will."); *Matter of Estate of Cosman*, 475 A.2d 659, 661–62 (N.J. App. Div. 1984) ("The Legislature has seen fit to prescribe the 'only' way such a contract may be legally established. The statute's clear language leaves no room for judicial construction. This oral agreement is not enforceable. The principles of equitable fraud and promissory estoppel urged by respondents are

unavailing in the face of the unequivocal legislative declaration. Were we to enforce such principles we would nullify the clear purpose of the statute."); *Stanley v. Hendershot*, No. 1089 MDA 2017, 2018 WL 2275789, at *12–13 (Pa. Super. Ct. May 18, 2018) ("Thus, as a matter of law, any unjust enrichment claim, raised in the alternative to a breach of contract claim, must fail as legally insufficient when the breach of contract claim requires compliance with Section 2701. To hold otherwise simply renders Section 2701 meaningless."); *In re Est. of Shain*, No. 1 CA-CV 09-0252, 2010 WL 569843, at *1–2 (Ariz. Ct. App. Feb. 18, 2010) ("As a matter of law, Wauneita's alleged oral promise to include Appellant in her will was a promise to make a testamentary disposition. Section 14-2514(A) and public policy preclude such oral promises and therefore the trial court did not err in dismissing Appellant's claim."); *In re McKim Est.,* 238 Mich. App. 453, 459, 606 N.W.2d 30, 33 (1999) ("The clear language of the statute . . . evidences the Legislature's intent to bar agreements to make a will or devise absent a writing . . . . Accordingly, the trial court correctly rejected petitioner's claim for recovery under a contract implied in fact theory."); *Matter of Est. of Hatten*, 440 P.3d 256, 258 (Alaska 2019) (In a case involving a man who died intestate following 20 year cohabitation, the court applied a statute substantially similar to Section 62-2-701 and held: "And to the extent Toland argues Hatten orally promised or assured her after January 1, 1997 that he would give her the house or other property upon his death, we note AS 13.12.514(a) renders such oral agreements unenforceable."); *Cole v. Rivers*, 861 S.W.2d 551, 553 (Ark. Ct. App. 1993) ("But here the appellants' claim is based on an alleged promise on the part of Quinton Riggins Sr. to make, or not to revoke, a will. We see no reason why the legislature cannot establish rules governing the manner of proving such a contract. The maxim that 'equity follows the law' is strictly applicable whenever the rights of the party are clearly defined and established by law."); *Pool v. Diana*, No. 03-08-00363-CV, 2010 WL 1170234, at *8 (Tex. App.

Mar. 24, 2010) ("Although Leslie attempts to avoid summary judgment by specifically describing her claim as one for constructive/resulting trust, her argument is—in substance—that there was an oral agreement to devise the property. However she may describe the claim, Leslie's pleadings show that her claim is simply this: Donn made an oral promise to devise the 15–acres to her and to Danae. As a matter of law, an oral agreement to devise property otherwise disposed of in a will is unenforceable.").

Moreover, before most of these cases were decided, the South Carolina reporter's comments to Section 62-2-701 acknowledge that, "Presumably Section 62-2-701 will be construed as preempting the field, rendering all other such statutory and case law provisions inapplicable to such contracts in the future." S.C. Code Ann. § 62-2-701 cmt.

The circuit court correctly held that Luzak cannot circumvent Section 62-2-701 by labeling her contract claims as equitable claims based on a promise. (Order 7–12, R.__.) The circuit court correctly relied on and agreed with the decisions from other states' courts and analyzed: "Courts from several states that have passed statutes similar to Section 62-2-701 have rejected attempts by plaintiffs to circumvent the statute by pleading equitable claims or by characterizing the claim as one based on a promise instead of a contract." (*Id.* at 8–10, R.__.); *see also Quail Hill, LLC v. Cty. Of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) ("Simply stated, equity follows the law.").

Luzak attempts quietly to ignore this portion of the trial court's order. (*See* Luzak Br.) She points to no decision holding that statutes like Section 62-2-701 apply only to contracts, and not to promises. Luzak does not attempt to distinguish any of the cases cited by the circuit court that squarely reject the arguments she makes here. Nor does Luzak address the circuit court's reasoning that permitting circumvention of the statute would render it toothless, would undermine the intent

of the General Assembly, and would violate the maxim "equity follows the law." Nevertheless, Luzak argues that, even if she cannot satisfy Section 62-2-701 by producing written evidence of a contract, this Court should reverse the circuit court's order based on the alleged "promise" made by Mrs. Barringer. (Luzak Br. 36–40.) In other words, most of the arguments in Luzak's Brief are only applicable if this Court first reverses the circuit court's holding that Plaintiff cannot circumvent Section 62-2-701. Because Luzak has provided no reason for this Court to reverse that portion of the circuit court's order, this Court should affirm the circuit court and need not consider Luzak's remaining arguments that ask this Court to find an enforceable promise despite the lack of any signed writing complying with Section 62-2-701. Nevertheless, to ensure all of Luzak's arguments were considered in light of Luzak's failure to produce evidence in support of her claims, the circuit court weighed these arguments and rejected them, and this Court should too.

B. The *Chapman* decision does not permit Luzak to circumvent Section 62-2-701.

Luzak argues that *Chapman v. Citizens & S. Nat. Bank of S.C.*, 302 S.C. 469, 395 S.E.2d 446 (Ct. App. 1990), allows her to circumvent Section 62-2-701 by alleging an agreement between Mr. and Mrs. Barringer based on a promise rather than a contract. However, Luzak is incorrect because, as the circuit court correctly held, (i) *Chapman* addresses events that took place before Section 62-2-701 became effective, and (ii) in any event, *Chapman* dealt with a surviving spouse who had made a *written promise* not to exercise her power of appointment and clear evidence that her husband relied on that promise.[17] Here, the probate code controls Luzak's claims, and there is no evidence of a promise, written or otherwise.

[17] Moreover, the tax laws that existed at the time Mr. and Mrs. Chapman executed their estate planning documents incentivized spouses to grant each other a general power of appointment and then enter into a separate agreement whereby they agreed not to exercise those powers. Long before Mr. and Mrs. Barringer executed their estate plans, the tax laws changed and eliminated any incentive to enter into such an arrangement.

i. Section 62-2-701 became effective after the events at issue in Chapman.

Although *Chapman* was decided in 1990 after the 1986 passage of Section 62-2-701, the Court of Appeals had no reason to address Section 62-2-701 because the wills at issue were executed—and Mr. and Mrs. Chapman both died—before the statute's effective date. *See id.* at 474–75, 395 S.E.2d at 449–50 (discussing the wills executed by Mr. and Mrs. Chapman, all of which were executed between 1949 and 1977, and stating Mr. Chapman died in 1975, and Mrs. Chapman died in 1986); S.C. Code Ann. § 62-2-701 cmt. (providing that the statute, which was passed in 1986, "is meant to apply only prospectively, leaving the prior South Carolina law in effect retrospectively"). *Chapman* found a constructive trust was appropriate on those facts at that time. After the passage of Section 62-2-701, for all of the reasons explained by the circuit court here and in the cases cited by the circuit court, including that the statute uses the unambiguous term "only" before describing the three discrete methods of proof, a constructive trust remedy is unavailable absent compliance with Section 62-2-701.[18]

ii. The facts of Chapman are distinguishable.

In *Chapman*, Mr. and Mrs. Chapman re-married later in life, each with their own children from prior marriages. At the time Mr. Chapman executed his estate plans (1944–1979), tax laws that are now wholly inapplicable incentivizes one spouse leaving assets to another spouse with a power of appointment for the surviving spouse to execute at death. Not only did Mr. Chapman seek to take advantage of those tax laws, but also he wanted his assets left to his children after

[18] Luzak argued to the circuit court that this Court could have applied Section 62-2-701 in *Chapman* because, under *White v. Wilbanks*, 301 S.C. 560, 393 S.E.2d 182 (1990), courts apply the law in effect at the time of the opinion. But *White* does not stand for this proposition. In *White*, the Court applied S.C. Code Ann. § 62-1-100(b)(5), which provides that "any . . . *presumption* provided in this Code applies to instruments executed . . . before the effective date unless there is a clear indication of a contrary intent" (emphasis added). In *Chapman*, the Court was not applying a "presumption."

Mrs. Chapman passed away. Therefore, he crafted an estate plan that left his assets in trust for Mrs. Chapman, granted Mrs. Chapman a power of appointment over those assets for tax reasons, and included a default clause leaving his estate to his children if Mrs. Chapman did not exercise the power of appointment. However, after Mr. Chapman died, Mrs. Chapman executed a new will exercising the power of appointment in favor of her children, leaving Mrs. Chapman's children with nothing. 302 S.C. at 473–83, 395 S.E.2d 449–55.

Seeking to undo this injustice, the *Chapman* court granted Mr. Chapman's children from his first marriage a constructive trust over certain assets based on the "undisputed evidence," including Mrs. Chapman's letters in her own handwriting, that Mrs. Chapman *promised* she would not exercise the power of appointment:

- There were "numerous letters of record which establish[ed] that Mrs. Chapman *promised* Mr. Chapman that, upon Mr. Chapman's death and the probate of his will, Mrs. Chapman would either during her lifetime make gifts of the subject property to *Mr. Chapman's children* or die without exercising the power of appointment contained in Mr. Chapman's will." *Id.* at 474, 395 S.E.2d at 450 (emphasis added).

- "The record establishes that . . . consistent with *her promise* to Mr. Chapman." *Id*. at 475, 395 S.E.2d at 450 (emphasis added).

- "The record establishes by letters in Mrs. Chapman's own handwriting that about a year after Mr. Chapman's death she began 'struggling with her conscience' about whether she" would honor *the promise* she made to Mr. Chapman. *Id.*

- "Mrs. Chapman intended, hoped and wanted to abide by the trust reposed in her *and the promise she had made* until the death of Mr. Chapman." *Id.* at 477, 395 S.E.2d at 451 (emphasis added).

- "After Mr. Chapman's death, of course, Mrs. Chapman had absolute dominance over this trust which had been reposed in her. She violated the trust *and promise* to the benefit of *her own children*." *Id.* (emphasis added).

- "Having held that . . . *Mrs. Chapman promised Mr. Chapman* that she would not exercise the power of appointment contained in his will, the *clear and convincing evidence* of record establishes that she . . . violated her fiduciary

> duty *and broke the promise she made* to her late husband, Mr. Chapman." *Id.* at 478, 395 S.E.2d at 452 (emphasis added).

There can be no doubt that the constructive trust imposed in *Chapman* rested on the tax implications explaining why Mr. Chapman might leave Mrs. Chapman a power of appointment and expect her not to execute it and, more importantly, Mrs. Chapman's undisputed promise to Mr. Chapman and his undisputed reliance on that promise when he gave Mrs. Chapman the power of appointment:

- "These holdings *are based upon the undisputed evidence that Mrs. Chapman agreed [i.e., promised]* to either give the subject property to *Mr. Chapman's children* during her lifetime or, in the alternative, not exercise the power of appointment." *Id*. (emphasis added).

- "Mr. Chapman made his last will and testament and left it in existence until his death *in reliance on Mrs. Chapman's promise* that she would not exercise the power of appointment . . . ." *Id*. at 477-78, 395 S.E.2d at 451-52 (emphasis added).

In contrast, by 1998 when the Barringers executed their estate plans, the tax laws did not provide any reason for Mr. Barringer to leave Mrs. Barringer a power of appoint unless he wanted her to have a power of appointment. Moreover, Luzak offers no evidence that Mrs. Barringer ever made any promise to Mr. Barringer or anyone else about whether or how she would exercise her power of appointment—much less the "clear, definite, and unequivocal" evidence required to obtain a constructive trust. *See Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987) ("In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal.").

Further, in *Chapman*, the Court found that Mr. Chapman detrimentally *relied* on Mrs. Chapman's promise when he executed his estate planning documents. Specifically, the Court found that Mr. Chapman relied on Mrs. Chapman's promise with the objective of passing his assets to his children in a more tax efficient manner. *See Chapman*, 302 S.C. at 481–82, 395 S.E.2d at 454 ("There is no doubt that the objective of Mr. and Mrs. Chapman in entering into the

agreement was to obtain the marital tax deduction while still carrying out Mr. Chapman's wishes that his property would go to his children." (internal quotation omitted)). Here, by contrast, no evidence exists that Mr. Barringer detrimentally relied on Mrs. Barringer promising not to exercise her power of appointment when he gave her the power of appointment in 1998 because *no promise was ever made*.

C. Even if Luzak were permitted to circumvent Section 62-2-701, there is no evidence that Mrs. Barringer promised she would never exercise a new will after 1998 and no evidence that Mr. Barringer ever relied on such a promise.

In further recognition that Luzak has no evidence of a contract or promise, Luzak not only asks this Court to permit her to circumvent Section 62-2-701, but she also argues she can circumvent the statute, and prove the alleged secret contract, based on Mrs. Barringer's *silence*. (Luzak Br. 29, 34.) In other words, Luzak attempts to circumvent the statute not based on words Mrs. Barringer said but on what Mrs. Barringer did *not* say when others were allegedly speaking.

First, setting aside that promises aren't made by silence, Luzak fails to identify any *specific* conversation where Mrs. Barringer, through her silence, could be deemed to have promised Mr. Barringer that she would never exercise her power of appointment. (*See id.*) Luzak's argument that Mrs. Barringer's "silence" supposedly resulted in a legally binding agreement that now prevents Mrs. Barringer from ever changing her 1998 will and exercising her power of appointment is beyond the pale. (*Id.* at 29–30.)

Second, "comments" about siblings "working together" in the future and getting along, even if those conversations occurred, do not equate to evidence of a legally binding obligation to treat children equally in the future, no matter how circumstances might change in the future.

Third, even if Mr. Barringer made "comments" like this in the past indicating a general intent and desire—a "plan"—to treat his children equally, these comments do not remotely suggest

that the Barringers had irrevocably promised each other always to treat their children equally in the future, no matter how circumstances might change, and no matter what type of behavior the children engaged in in the future. It is difficult to understand why any parent would ever agree to such an agreement, prohibiting flexibility in the future to deal with life events that might unfold.

Fourth, the notion that, during these unspecified family meetings, Mrs. Barringer should have interjected and brought up the revocable nature of their estate plans generally or the power of appointment, which she might receive if she outlived Mr. Barringer and then might exercise in the future should she so choose, is both contrary to common sense and basic decorum and unsupported by any case from any jurisdiction. Luzak does not cite any case from any jurisdiction where a court found a contract not to revoke based on silence, much less silence during a family discussion where "comments" were made about general "plans" for the future. This is for good reason. If these types of general family discissions could serve as evidence forcing a trial on whether a legally binding contract exists entitling children to equality in the parents' future estate plans, bar a parent from changing their will in the future, and upend decades of formal, written estate planning, parents would never be able to talk with their children about the future for fear of a contract-based suit. Moreover, even if Mr. and Mrs. Barringer did in fact "plan" to treat their children equally in the future and discussed their plan with their children 1,000 times, that in no way amounts or otherwise suggests an irrevocable agreement never to change the plan, or their will, in the future. Luzak has not come forward with any evidence that anything ever said by anyone could amount to such a radical and far-reaching irrevocable agreement.

Luzak's theory that she can prove a contract not to revoke based on nothing more than Mrs. Barringer's silence in unspecified family meetings where "comments" were made about future "plans" is not supported by any evidence, and, even if it were, it is squarely at odds with

Section 62-2-701 and does not provide the necessary "definite, certain, clear, and convincing" proof of a contract not to revoke in place before the statute was enacted.

For all the reasons stated above, this Court should affirm the circuit court's order.

As an alternative sustaining ground under Rule 220(c), SCACR, even if Section 62-2-701 did not apply, and, even if there were clear, definite, and unequivocal evidence that Mrs. Barringer had agreed not to exercise her power of appointment by not revoking her will, the circuit court also ruled that the agreement could not be enforced under settled trust law.

In *Carmichael v. Heggie*, 332 S.C. 624, 628, 506 S.E.2d 308, 310 (Ct. App. 1998), this Court, relying on the Restatement (Second) of Property, held that a donee of a testamentary power of appointment could not, by a contract, bind herself regarding the exercise of a power of appointment. In that case, Carmichael devised his wife a life estate in his half of an eighty-acre farm and granted her a power of appointment exercisable by her will. *Id*. at 626–27, 506 S.E.2d at 309. She executed a will that exercised the power of appointment in favor of her son and also executed a written contract with her son that she would not revoke or amend her will in exchange for her son's caretaking. *Id*. In that case, it was clear that a written contract existed. Nevertheless, this Court could not enforce it.

Because a testamentary power of appointment, which can only be exercised by a last will and testament, is not presently exercisable while its holder is alive, the holder of the power cannot contract to use or not to use the power. The logic behind the rule is clear: A donor's presumed intent in granting a "testamentary" power of appointment is that the donor intends the donee to have flexibility to change or modify how a testamentary power of appointment might be used throughout the donee's life. This is why testamentary powers of appointment can only be

executed by a last will and testament or codicil. In this way, a done is allowed to wait until their death to determine whether and how to appoint the property. *Id.* at 628, 506 S.E.2d at 310 ("The rationale behind this rule is to fulfill the donor's intent that the selection of the appointees be made in the light of the circumstances that may exist on the date the power becomes exercisable. . . . A contract to appoint in a certain manner made prior to the date the power becomes exercisable, if valid, would defeat the donor's intent." (internal quotations omitted)). Because a donee cannot exercise the power of appointment until death, and because a will does not speak until death, this Court held that the wife's pre-death contract directing how she would or would not exercise the power of appointment was unenforceable. *Id.* at 629, 506 S.E.2d at 310–11. A pre-death contract alienating the power of appointment frustrated the desire of the donor in making the power of appointment a "testamentary" power of appointment. *Id.*

Further, the holding in *Carmichael* is endorsed by Restatement (Third) of Property: Wills and Donative Transfers § 21.2, cmt. b (2011):

> b. Promise not to revoke a will making an appointment. A promise not to revoke an existing will that makes an appointment to the promisee is unenforceable, unless the donee was also the donor of the power and reserved the power in a revocable inter vivos trust.

The reporter's note to that comment states that it is supported by *Carmichael*. The rule against enforcing a contract regarding a power of appointment that is not yet presently exercisable is also codified by the Uniform Powers of Appointment Act § 406 (2013) ("A powerholder of a power of appointment that is not presently exercisable may contract to exercise or not to exercise the power **only if** the powerholder: (1) is also the donor of the power; and (2) has reserved the power in a revocable trust." (emphasis added)), and it is stated in Restatement (First) of Property § 340 (1940).

Here, Mr. Barringer is the donor (the creator) of the power of appointment, Mrs. Barringer is the donee (the holder), and the power is still not yet presently exercisable because it is testamentary, which means it can only be exercised by Mrs. Barringer's last will and testament, which does not speak until the time of her death. Of course, Mrs. Barringer is alive. Therefore, any purported lifetime contract or other agreement made by Mrs. Barringer about how she might exercise (or not exercise) the power of appointment at her death is unenforceable as a matter of law. This serves as an alternative sustaining ground for affirming the circuit court's order.

IV. Luzak's other remaining arguments do not preclude summary judgment.

None of the other arguments in Appellant's Brief have merit, much less support reversing the circuit court's order. Mrs. Barringer addresses each of these arguments in turn.

First, Luzak insists that the circuit court erred because it failed to identify which of Mr. Barringer's estate planning documents is controlling. (Luzak Br. 22–23.) But it does not matter, for purposes of Luzak's contract claims, which of Mr. Barringer's estate plans controls because every version grants Mrs. Barringer the same power of appointment.

Second, Luzak argues that the doctrines of equitable estoppel and promissory estoppel preclude Mrs. Barringer from exercising her power of appointment. (Luzak Br. 32–34.) But Luzak does not assert a claim for equitable or promissory estoppel in her Complaint. (*See* Compl., R.__; *see also* Order Granting Summ. J. 12, R.__ (holding that Luzak "has not asserted a claim for promissory estoppel").) Luzak is bound by her pleadings. *See Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) ("It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise.").[19]

[19] In her Brief, Luzak states in a footnote that she has, in fact, asserted a claim for promissory estoppel. (Luzak Br. 39 n.41.) But the paragraphs of the Complaint that Luzak cites in support of this statement do not assert a claim for promissory estoppel. (*See* Compl. 56–57, R.__.) In fact,

While the Court need not analyze this unpleaded claim further, these arguments have no merit. Luzak argues that Mrs. Barringer cannot exercise her rights under the 1998 documents because (1) Mr. Barringer allegedly treated his three children equally and made comments that he "intended" or "planned" to treat his children equally in the future; (2) when Mr. Barringer made these comments, Mrs. Barringer did not respond by stating that, if Mr. Barringer died first owning certain assets, as the surviving spouse, she retained the authority to direct final distributions of his estate at the time of her death; and (3) prior to Mr. Barringer's death, Mr. and Mrs. Barringer executed mutual or "symbiotic" estate plans in which neither of them exercised the right to make the dispositive decisions in the estate planning documents each of them executed before Mr. Barringer passed away.

As a threshold matter, Luzak has no standing to assert a promissory estoppel claim on behalf of Mr. Barringer. *See, e.g.*, *Mac Papers, Inc. v. Genesis Press, Inc.*, 426 S.C. 393, 404, 826 S.E.2d 874, 880 (Ct. App. 2019) (holding that a party asserting estoppel must establish reliance upon conduct of the party estopped and that "[r]eliance **by the party seeking to assert estoppel** must be reasonable" (emphasis added) (internal citations omitted)). Regardless, the fact that parents treated their children equally in the past and may at one point in time intend or plan to treat them equally in the future in no way means a contract exists obligating parents to always treat their children equally in the future. Additionally, a claim for equitable or promissory estoppel based on Mrs. Barringer's "silence" would be barred by the unambiguous provision in Mr. Barringer's trust granting Mrs. Barringer a power of appointment. *See Rodarte v. Univ. of S.C.*, 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017) (holding that "an unambiguous, written contract is inherently

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the word "estoppel" does not appear anywhere in Luzak's Complaint. (*See generally* Compl., R.__.) Luzak does not argue that she asserted a claim for equitable estoppel. (*See generally* Luzak Br.) Finally, Luzak never attempted to amend her complaint to assert any such claims.

incompatible with the doctrine of equitable estoppel," and that a plaintiff "cannot use equitable estoppel to let in through the back door what the parol evidence rule prevents from coming in the front door"). Luzak has not asserted a claim alleging that Mr. Barringer's 1998 estate planning documents are ambiguous.

Luzak also argues that *Satcher v. Satcher*, 351 S.C. 477, 570 S.E. 2d 535 (Ct. App. 2002), supports her estoppel argument. (Luzak Br. 33–34.) This is misplaced. In *Satcher*, the court addressed a post probate code contract. However, there is no evidence that either party in *Satcher* ever mentioned or otherwise relied on 62-2-701, and no evidence that the trial court or the appellant court ever considered such an argument. *See Satcher* (not mentioning Section 62-2-701); *see also* S. Alan Medlin, Howard M. Zaritsky, & F. Ladson Boyle, *Construing Wills and Trusts During the Estate Tax Hiatus in 2010*, 36 ACTEC L.J. 273, 309 (2010) ("Apparently, the grandson asserted the theory of an oral contract to make a will only as to the house because the court stated that, having ruled in his favor on the promissory estoppel argument, it did not need to address the contract to make a will argument. The applicable state statute, based on Uniform Probate Code section 2-514, allowed oral proof of a contract to will if the contract was entered into before the effective date of the probate code."). And Luzak never argued to the circuit court that the court in *Satcher* considered the estoppel argument in that case in light of Section 62-2-701. By contrast, Mrs. Barringer has always raised Section 62-2-701 as a defense to Luzak's claims. (*See* Answer 27, R.__.) Luzak's attempt to rely on a case where the parties failed to mention or argue Section 62-2-701 is misplaced.[20]

[20] The facts of *Satcher* are easily distinguishable. In *Satcher*, a grandson brought an action against his grandfather's estate seeking title to a house and farm, which the grandfather had left to the grandson's uncle. The court found that the grandson was entitled to the house under a promissory estoppel theory. Specifically, the court found that the grandfather had promised the grandson that, if the grandson quit his job and moved in with his grandfather, the grandfather would leave the

Third, Luzak argues that Mr. Barringer did not intend to grant Mrs. Barringer a power of appointment even though the 1998 documents expressly and unambiguously grant Mrs. Barringer that power. (Luzak Br. 29–34.) This argument has no merit because the power of appointment provisions are the only provisions in Mr. Barringer's 1998 estate plan that make a disposition of assets. In other words, it is these provisions, and only these provisions, that describe to whom, and in what manner, Mr. Barringer's estate will be transferred at the time of his death. The idea that Mr. Barringer did not intend to include the only provision in his estate that says who receives what is illogical and manifestly unsupported by any evidence.

In any event, Luzak did not plead or otherwise seek to reform any of Mr. Barringer's estate planning documents or otherwise seek a declaration that those documents are ambiguous, or otherwise unclear, as to Mr. Barringer's intent. The circuit court recognized this in its order. (Order 8 n.6, R.__.) Luzak's contract claims simply do not allow a court to change Mr. Barringer's estate plan because of his daughter's assertion as to his intent. (*See* Complaint, R.__.) Even if Luzak had pleaded this theory, it is diametrically at odds with her assertion that Mr. Barringer gave Mrs. Barringer a power of appointment only after he entered into a contract with Mrs. Barringer, or after Mrs. Barringer promised him—a promise Luzak alleges Mr. Barringer "relied on"—that she would never exercise. Luzak cannot have it both ways. In any event, the unambiguous

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house to the grandson upon the grandfather's death. The court found that, "[i]n reasonable reliance on that promise, [grandson] moved to the house and provided Grandfather with companionship and other services for more than twenty years." *Satcher*, 351 S.C. at 486, 570 S.E.2d at 539. Grandson then filed suit to enforce the promise and his reliance on the same, and again, no one appears to have argues 62-2-701 to the trial or appellant court. By contrast, Luzak does not allege that she took any action in reliance on her mother's alleged promise not to exercise her power of appointment. And Mrs. Barringer has denied that any promise was ever made. (*See* Answer 24, R.__.) As the circuit court correctly concluded, "[Luzak's] reliance on cases that never addressed Section 62-2-701 are unavailing, and even if these cases did apply, they are distinguishable from the facts of the case at bar." (Order 12, R.__.)

language in Mr. Barringer's trust granting Mrs. Barringer a power of appointment cannot be altered based on Luzak's belief about what is logical or based on any other extrinsic evidence.[21] *See In re Est. of Hyman*, 362 S.C. 20, 26, 606 S.E.2d 205, 207 (Ct. App. 2004) ("Where the testator's intent is ascertainable from the will and not counter to law, we will give it effect. Only when the will's terms or provisions are ambiguous may the court resort to extrinsic evidence to resolve the ambiguity." (internal citations omitted)); *see also Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603, 799 S.E.2d 912, 917–18 (2017) ("Interpretation of a contract is governed by *the objective manifestation of the parties' assent at the time the contract was made*, rather than the subjective, after-the-fact meaning one party assigns to it.") (internal citation omitted)).

Luzak argues that she is permitted under Rule 8(a), SCRCP, to pursue "alternate theories, all stemming reasonably from the same set of facts." (Luzak Br. 9 n.11.) But the circuit court did not hold that Luzak cannot pursue alternative theories; rather, the court held that Luzak has not pleaded a claim challenging Mrs. Barringer's power of appointment on the basis that Mr. Barringer

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[21] Luzak argues that Neill McBryde, the estate planning attorney who drafted Mr. and Mrs. Barringer's 1998 estate planning documents, gave deposition testimony that was "devastating" to Mrs. Barringer, primarily based on Mr. McBryde being unable to recall the details of his conversations with Mr. Barringer that occurred more than twenty years ago. (Luzak Br. 31–32.) This argument is baseless. First, when asked what he recalls about discussing the powers of appointment with Mr. and Mrs. Barringer, Mr. McBryde testified: "All I can say is, I can absolutely state that I would have spent considerable time going over that because—and—and considerable time over the documents generally because these, you know—any time you're dealing with a new set of documents, you want to make darn sure they—it's exactly what they want and that they understand all of the implications. . . . And they were fully informed. I can't tell you exactly what I said, but I know what I've done for over 50 years, and I think you—and I'm very thorough and very good and make sure they know what they're—they're doing and that that's what they want to do." (McBryde Dep. Tr. 123–124, R.__.) More importantly, the extent to which Mr. McBryde explained the power of appointment provisions to the Barringers is irrelevant to the question of whether Mrs. Barringer contracted or promised never to exercise her power of appointment. Further, a power of appointment provision in a validly executed trust is effective regardless of the extent to which the attorney who drafted the provision explained it to the client.

never intended to grant her such a power. (*See* Compl., R.__.) This holding is correct and unaddressed in Luzak's Brief.

Luzak also suggests that the power of appointment could not apply to certain assets because Mr. Barringer did not own those assets in 1998. (Luzak Br. 25–26.) However, it is elementary that estate plans apply to after-acquired property, and Mr. Barringer acquired the CFRC Stock after he executed the 1998 estate planning documents. *See* S.C. Code Ann. § 62-2-602 ("A will is construed to pass all property which the testator owns at the testator's death including property acquired after the execution of the will and all property acquired by the testator's estate after the testator's death."). Furthermore, there is no evidence that Mr. Barringer did not intend to grant his wife a power of appointment over only the property he owned at that time.

Fourth, Luzak argues that the circuit court erred in granting Mrs. Barringer's motions for partial summary judgment because another circuit court judge denied an earlier motion for partial summary judgment on the same claims. In November 2020, Judge Mullen denied summary judgment on the contract claims without discussing the facts of the case, identifying any genuine issues of material fact, or otherwise providing any substantive analysis. (Order, R.__.) Then, in February 2021, Judge Mullen recused herself, and the case was later assigned to Judge Bonds. In June 2021, Mrs. Barringer filed a new motion for summary judgment on Luzak's contract claims. On July 30, 2021, Luzak filed her own motion for summary judgment on those claims. (Luzak Mot. Summ. J., R. __.) On August 20, 2021, Judge Robert Bonds granted Mrs. Barringer's motions and denied Luzak's motion, issuing the order that is attached to and incorporated into the subject of this appeal. (Order, R.__.)

The Court should reject Luzak's argument as untimely and procedurally improper. "An issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prod. Co.*,

381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009). In her memorandum in opposition to Mrs. Barringer's motions for summary judgment, Luzak conceded that a second motion for summary judgment **could be** filed by Mrs. Barringer on the same issue for which summary judgment had previously been denied so long as Mrs. Barringer could point to "new evidence." (*See* Memo. Opp. 1, R.__ (arguing that Mrs. Barringer "has no new evidence").) **Luzak's new argument** that Judge Bonds could not consider the merits of Mrs. Barringer's motion due to the specific language in Judge Mullen's order is belied by the fact that **Luzak also filed for summary judgment** on the same claims months after Judge Mullen's order. Luzak also attempts to support this argument by relying on Rule 43(l), SCRCP, which applies only when a second motion is filed "upon the same state of facts" as a prior motion. (*See id.* 2, R.__.) In her motion to reconsider the first summary judgment order, however, Luzak argued for the first time that, even if new evidence exists, and regardless of whether Rule 43(l) applies, the specific language contained in Judge Mullen's November 4, 2020 order prohibited the court from granting Mrs. Barringer's subsequent motions for summary judgment. (*See* Mot. Recons. 1, R.__.) Luzak cannot raise this new argument for the first time on reconsideration. In any event, these grounds were not raised to and ruled on by Judge Bonds before his December 31, 2024 order, which is the subject of this appeal.

Regardless, Luzak's new argument fails on the merits. The test in South Carolina to decide whether one circuit judge may change a ruling made by a prior circuit judge in the same case and on the same issue is whether the original determination constitutes the law of the case. *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989). "The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022) (internal quotation omitted). "Therefore, despite the long-standing rule in this State that one judge of the same court cannot overrule

another[,] . . . interlocutory orders may be reconsidered and corrected by the court before entering a final order on the merits." *Id.* at 340, 878 S.E.2d at 894 (internal quotations and citations omitted). This Court has applied this rationale to the denial of a summary judgment motion. *See In re Rabens*, 386 S.C. 469, 473, 688 S.E.2d 602, 604 (Ct. App. 2010) ("A denial of summary judgment does not establish the law of the case and is not directly appealable."); *see also Watson v. Underwood*, 407 S.C. 443, 456–57, 756 S.E.2d 155, 162 (Ct. App. 2014) (stating the denial of summary judgment does not finally determine anything about the merits, does not establish the law of the case, does not decide anything except that the case should proceed to trial, and does not preclude a later motion for summary judgment).

Further, even under Rule 43(l), a denial of summary judgment may be revisited by a subsequent circuit judge when the state of facts has changed. *See Smith v. Breedlove*, 377 S.C. 415, 662 S.E.2d 67 (2008) ("The fact that a different trial judge previously denied a motion for summary judgment does not preclude the moving party from renewing its motion once new evidence is gathered.")[22]; *Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 325, 605 S.E.2d 12, 18 (2004) ("That a different trial judge previously denied the motion did not preclude [Defendant] from renewing its motion once new evidence came to light."); *PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc.*, 297 S.C. 176, 183, 375 S.E.2d 331, 334 (Ct. App. 1988) (rejecting the argument that a trial judge erred by granting summary judgment after previously denying summary judgment and holding: "A trial judge, until final judgment, controls

[22] Luzak argues that *Breedlove* is distinguishable because, in that case, "no depositions had been taken before the first summary judgment." (Luzak Br. 49.) But, in *Breedlove*, the Court did not hold that a trial court may consider a second motion for summary judgment only where the first motion was denied based on the absence of any discovery. Rather, the Court held that a trial court may consider a second motion for summary judgment where, as here, it is based on a different "set of facts." *Breedlove*, 377 S.C. at 421, 661 S.E.2d at 70–71.

the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of fact and conclusions of law before entry of judgment or decree.").

Here, it is undisputed that the parties conducted significant additional discovery between Judge Mullen's order denying summary judgment and Judge Bonds' order granting Mrs. Barringer's later-filed motion for summary judgment. This additional discovery included the depositions of the following witnesses: Neill McBryde, who represented Mr. and Mrs. Barringer in the preparation and execution of their 1998 Wills and Trusts; John Jolley, who represented Mr. and Mrs. Barringer in the preparation and execution of their subsequent wills and trust amendments; Rebecca Bostick, a paralegal who worked with John Jolley; two additional former McNair employees; Luzak's husband, Kevin Luzak, whom Luzak identified as a witness who has evidence of the alleged promise made by Mrs. Barringer to Mr. Barringer; several Coastal Forest Resources Company (CFRC) employees, including Tom Evans, Stephanie Chapman and Travis Bryant; a Rule 30(b)(6) deposition of CFRC; Robert Scully, another attorney who represented Mr. Barringer; Mr. Barringer's former secretary, Pat Harrell; and Mr. Barringer's primary physician for decades, Dr. Paul Long. Thus, Mrs. Barringer's motions for summary judgment before Judge Bonds were based on a different state of facts from the previously denied motion, and the circuit court therefore properly considered Mrs. Barringer's motions on the merits.

Luzak also argues that the circuit court's order granting summary judgment fails to explain how the discovery that occurred after Judge Mullen's order "made a difference" in the summary judgment analysis. (Luzak Br. 6–7.) However, the South Carolina Supreme Court specifically held in *Breedlove* that it does not matter whether the additional discovery after denial of summary judgment is favorable to the non-moving party; a subsequent trial judge may revisit a denial of

summary judgment so long as a new set of facts exists at the time the new motion for summary judgment is filed. *See Breedlove*, 377 S.C. at 421, 661 S.E.2d at 70–71. Luzak is asking this Court to create a new requirement for judges deciding a second motion for summary judgment to review how subsequent discovery undertaken would have affected the original order denying summary judgment, and this Court should decline to do so.

Fifth, Luzak argues that the circuit court erred by declining to allow Luzak to re-depose Mrs. Barringer a second time in the consolidated litigation. (Luzak Br. 41–42.) This argument fails both procedurally and on the merits. Luzak's effort to depose her mother a second time was the subject of two court orders, one entered on April 24, 2019, and June 4, 2020. In those orders, the Court found: "Plaintiff was given more than enough time to depose Mrs. Barringer . . . [and] used much of the time making an excessive amount of objections and asking the same questions repeatedly;" "[R]eopening the deposition would be futile and harassing;" "[I]t is obvious from my review of the video and transcript that Mrs. Barringer disclosed everything she knows;" and "Mrs. Barringer has remained steadfast in her assertion that no such agreement exists, and nothing revealed in her estate planning documents revealed that such an agreement exists." (April 24, 2019 Order, R.__; June 4, 2020 Order, R.__.) Luzak never appealed these orders.[23] Therefore, this argument is not preserved for appellate review because Luzak raised this argument for the first time in her motion to reconsider. (*See* Luzak Opp. Mot. Summ. J., R.__ (failing to raise this argument); Mot. Reconsider 22, R.__ (raising this argument for the first time)); *Johnson*, 381 S.C.

[23] The Court should not permit Luzak to challenge these orders on appeal without specifically and timely appealing them. The appealability of those orders is immaterial because, even if those orders were not immediately appealable, Luzak declined to "bootstrap" an appeal of those orders with other previous appeals. (*See, e.g.*, Return to Resp't's Mot. to Dismiss, R. __ ("[T]he issue is the appealability of the Bifurcation Order, whether interlocutory or not, when other immediately appealable orders have been appealed.").)

at 177, 672 S.E.2d at 570 ("An issue may not be raised for the first time in a motion to reconsider."). In addition, neither in 2021 when summary judgment was entered the first time nor in 2024 when summary judgment was entered the second time, did Luzak file a Rule 56(f) supporting affidavit as she was required to do under the rules.[24] If Luzak contended that she needed to take a second deposition of Mrs. Barringer to fully develop her opposition to Mrs. Barringer's motions for summary judgment, Luzak was required to submit a Rule 56(f), SCRCP, affidavit or otherwise notify Judge Bonds before the summary judgment hearing of her supposed need for the second deposition. *See Matter of Est. of Smith*, 419 S.C. 111, 120, 796 S.E.2d 158, 162-63 (Ct. App. 2016) (Few, J., concurring) (stating that Rule 56(f) "provides parties an easy mechanism for notifying the circuit court in advance of a scheduled hearing of the party's need for additional time in which to complete discovery before defending a motion for summary judgment," and stating that where, as here, "a party seeks additional time, but fails to comply with the Rule setting forth the procedure for requesting additional time, an appellate court should be very hesitant to say the trial court abused its discretion in denying the request").

Luzak complains that she did not have Mrs. Barringer's estate planning documents at the time of Mrs. Barringer's first deposition, but as discussed above, Mrs. Barringer's estate planning

[24] Luzak also argues that the circuit court's order granting summary judgment fails to explain how the discovery that occurred after Judge Mullen's order "made a difference" in the summary judgment analysis. (Luzak Br. 6–7.) However, the South Carolina Supreme Court specifically held in *Breedlove* that it does not matter whether the additional discovery after denial of summary judgment is favorable to the non-moving party; a subsequent trial judge may revisit a denial of summary judgment so long as a new set of facts exists at the time the new motion for summary judgment is filed. *See Breedlove*, 377 S.C. at 421, 661 S.E.2d at 70–71. Luzak is asking this Court to create a new requirement for judges deciding a second motion for summary judgment to review how subsequent discovery undertaken would have affected the original order denying summary judgment, and this Court should decline to do so. In any event, Judge Bonds could not have explained how his analysis of the new facts relating to Mrs. Barringer's motion changed from the analysis of the facts in Judge Mullen's order because Judge Mullen's order did not specify the facts that existed at that time.

documents contain no reference to any contract or agreement and, in any event, are not signed by the decedent as required by Section 62-2-701. Further, Mrs. Barringer has categorically and repeatedly denied the existence of any contract or promise relating to her power of appointment. (*See* Answer and Counterclaims 24, R.__ (denying allegations of a contract or promise and demanding strict proof thereof); *id.* 30–31, R.__ (Mrs. Barringer alleging in her counterclaims that Luzak's allegations of a contract or promise "are frivolous and exist only in Plaintiff's mind," and alleging that Luzak "has no evidence to support [these] factual allegations"); *see also* June 4, 2020 order, 2, R.__ (rejecting Luzak's request to re-depose Mrs. Barringer and finding that "Mrs. Barringer has remained steadfast in her assertion that no such agreement exists . . . .").) Notably, Mrs. Barringer's deposition testimony could not possibly assist Luzak in proving the existence of a contract or agreement under Section 62-2-701, which requires the alleged contract or its material terms to be proven expressly in a will or with a signed writing by the decedent.

Sixth, Luzak claims that the circuit court erred in not reconsidering the trial bifurcation order as directed by the Supreme Court. However, in the December 31, 2024 order, the court did address trial bifurcation. Specifically, the court determined it was not necessary re-evaluate the trial bifurcation order because it granted summary judgment on the claims initially bifurcated for purpose of trial, and further, because it would address the bifurcation of an initial trial before an initial trial, if needed. The Supreme Court directed only matters regarding "mode of trial, including the order bifurcating trial, shall be reconsidered by the circuit court on remand." *See In re Estate of Paul B. Barringer, II*, Op. No. 2024-MO-003 (S.C. Sup. Ct. filed Jan. 17, 2024). Therefore, the circuit court complied with the Supreme Court's directive when it held that, in the event the appellate courts reverse its order granting summary judgment on the contract claims and before any trial is held, it would re-evaluate whether to bifurcate claims for purposes of trial. To state

the obvious, the circuit court cannot bifurcate the contract claims for trial now that it has granted Mrs. Barringer summary judgment on those claims. Luzak's suggestion that it should is misplaced.

In summary, none of Luzak's remaining arguments, which appear designed to distract from the straightforward application of the law and from Luzak's lack of evidence, save her contract claims or otherwise preclude summary judgment in Mrs. Barringer's favor.

CONCLUSION

For the foregoing reasons, Mrs. Barringer respectfully requests that this Court affirm the decision of the circuit court granting Mrs. Barringer summary judgment on Luzak's second and third causes of action.

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