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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
ROBERT J. BONDS, CIRCUIT COURT JUDGE

Appellate Case No. 2025-000076

IN THE MATTER OF: Estate of Paul Brandon Barringer II

Hampton B. 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,

--and--

IN THE MATTER OF: Estate of Paul Brandon Barringer II

Hampton Barringer Luzak, ...Appellant,

v.

Merrill U. Barringer, ...Respondent,

FINAL REPLY BRIEF

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INTRODUCTION

Although Appellant Hampton Luzak has listed numerous errors by the trial court, any one of which would be grounds for reversal and remand, perhaps the most critical error of the trial court was to find that the decedent Paul B. Barringer gave Respondent, his wife, a power of appointment over voting control in the family company even though the trial court failed to identify which, if any, of Mr. Barringer's estate planning documents were valid. (ROA Vol. I, pp. 114-29). Obviously, for a document to create a power of appointment, that document has to be identified and then determined to be valid. Mr. Barringer purportedly executed estate planning documents in 1998, 2012, 2014, and 2015 — as discussed more fully in Ms. Luzak's brief and below, the validity of all of these documents are in dispute and none has yet to be determined to be valid. Without a valid estate planning document, there cannot be a valid power of appointment. Yet the trial court, urged on by Respondent, has magically created a power of appointment out of thin air, with no valid underlying document creating any such power of appointment.

In her brief, Respondent asserts a terse and completely ineffective argument about this concern. She states that each of the estate planning documents purportedly executed by Mr. Barringer, in 1998, 2012, 2014, and 2015, contains language supposedly giving Respondent a power of appointment. That is the sum and substance of her response to Ms. Luzak's argument that the trial court failed to find which document, if any, is valid. Respondent presumes that at least one of the documents in question is valid, but it is possible that none is. That has yet to be determined but must be before a court can find that a power of appointment was even created in the first place.

Moreover, the trial court's failure to identify which estate planning document was valid and creates a power of appointment is related to another critical mistake by the trial court. The

rules governing a power of appointment are determined in accordance with the intent of the donor (the creator of the power of appointment) at the time of the execution of the valid document creating that power of appointment. By not determining which, if any, of Mr. Barringer's estate planning documents was valid, the trial court necessarily failed to determine Mr. Barringer's intent at the time of execution of any valid document.

Thus, critically, the trial court failed to determine which, if any, document was valid to create a power of appointment and to determine what Mr. Barringer's intent about the rules and coverage of any such power would be. Without both of these determinations, the trial court's ruling about the existence of a power of appointment is made of whole cloth.

Even if the trial court had identified a valid estate planning document creating a power of appointment and examined Mr. Barringer's intent at the time of execution about the rules and coverage of that power of appointment, Ms. Luzak makes other arguments, any one of which suffices to create a genuine issue of material fact to preclude the trial court's grant of summary judgment. She asserts evidence that shows: (1) Respondent made an enforceable, binding, noncontractual promise not to exercise any power of appointment she may have over voting control, which is an enforceable promise due to Respondent's confidential and fiduciary relationship with Mr. Barringer; (2) Respondent made an enforceable, binding noncontractual promise not to exercise any power of appointment she may have over voting control, due to promissory or equitable estoppel; and/or (3) Respondent entered into a binding contract not to exercise any power of appointment she may have. Respondent has inaccurately and cutely portrayed Ms. Luzak's numerous arguments as a "secret contract claim," which the trial judge seems to have bought, but as demonstrated above, Ms. Luzak's claims extend far beyond a mere

contract claim — only one of her numerous arguments is based on contract — and none involve any secrecy.

In her brief, Respondent also fails to adequately respond to Ms. Luzak's claim that the trial court failed to address the Supreme Court's directive to reconsider the bifurcation order: "In light of everything that has elapsed in this case—particularly the clarification that Luzak will not pursue any derivative claims—we direct that ***all matters regarding mode of trial, including the order bifurcating trial, shall be reconsidered by the circuit court on remand.***" [emphasis added]. Order of the Supreme Court dated January 17, 2024. (R. Vol. I pp. 81-87). Respondent simply asserts that the grant of summary judgment as to these power of appointment issues negates the need to address the Supreme Court's directive. As Ms. Luzak asserts in her brief, the trial court's grant of summary judgment violates the very same rights that the Supreme Court seemed to be concerned about when issuing its directive to the trial court. The summary judgment order ignores and avoids the Supreme Court's directive, as opposed to rendering it moot, as the trial court and Respondent contend.

A principal dispute in these cases involves the voting stock owned by Ms. Luzak's father, Decedent Paul M. Barringer, wrongfully obtained by Ms. Luzak's sister, Defendant Merrill Light, with the assistance of Mr. Barringer's spouse, Respondent, and the resulting damage to Ms. Luzak. The focus of this appeal is Ms. Luzak's second and third causes of action: whether Respondent Barringer has any power to appoint by will the controlling voting stock in Mr. Barringer's legacy company, Coastal Forest Resources Company ("CFRC"). Ms. Luzak has contended throughout this litigation that Paul Barringer never intended to give Respondent the power to appoint such voting stock and, even if his valid estate planning documents conveyed such a power, then Respondent Barringer cannot exercise any such power because (1) Respondent entered into a valid

contract agreeing not to exercise any such power of appointment, as to the voting stock, (2) and/or Respondent made an enforceable promise in a fiduciary or confidential relationship not to exercise any such power of appointment, (3) and/or Respondent was estopped.[1] There is significant evidence that neither Mr. Barringer nor Respondent had the intent to create this power of appointment or to understand its purpose or intended use.

In Ms. Luzak's second cause of action, for constructive trust and injunction, she alleges Respondent made an express or implied promise not to exercise any testamentary power of appointment she may have in a manner that would redirect the subject property other than as set forth in the default provisions of the estate plan of Mr. Barringer. (ROA Vol. II, pp. 514-15). In Ms. Luzak's third cause of action, for enforcement of contract not to revoke and injunction, she alleges that Mr. Barringer and Respondent entered into a binding contract not to revoke their estate plans, especially with respect to the provision in Respondent's will that expressly declined to exercise any power of appointment. (*Id.* at 516). As an argument in each of these causes of action, Ms. Luzak asserts that Mr. Barringer never intended to give Respondent a power of appointment over any voting stock he had.[2]

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[1] Although Respondent's Brief discusses the court's questioning the ability of Ms. Luzak to assert alternative theories about the existence of the power of appointment and, if so, about a promise not to exercise it, she is certainly entitled to pursue alternate theories, all stemming reasonably from the same set of facts. As noted in Ms. Luzak's Initial Brief at 9 n.11, she is certainly entitled to argue alternative theories. This is particularly relevant in a summary judgment motion, when no final determination of existing facts has yet been made. Importantly, the trial judge's Order is fatally flawed in that it did not even find whether and how any power of appointment existed, or what source created it, as discussed more fully below at pp. 9-10. Ms. Luzak's complaint challenges Respondent's contention that she has a power of appointment: arguing about the existence and intent of any such power of appointment is certainly a reasonable inference from the facts and causes of action pleaded, which Ms. Luzak is allowed to do.

[2] Respondent's blithe assertion that, if a document uses the term power of appointment, then the document's creator must have intended the creation of a power of appointment, is incorrect. A power of appointment is created only by the donor's intent, and only to the extent of the donor's intent, and in accordance with whatever rules regarding that power of appointment the donor intends. See *infra* at footnotes 10-11 and accompanying text. Moreover, and fundamentally, a power of appointment is not a magical creature that appears at a whim, but only based on some expression of intent. As noted in footnote 1, *supra*, and pp. 9-10 below, the trial judge did not even cite which document validly created any such power of appointment. Although he focused on the 1998 documents, as have Respondents, the 1998 documents are invalid, according to a summary judgment granted by Judge Price finding that

Judge Mullen had previously heard this same motion and the same arguments over a three-day period in 2020 and denied the same summary judgment motion on November 4, 2020, but the trial judge, who had only recently been appointed to preside over this case on July 23, 2021, effectively reversed Judge Mullen's Order even though none of the evidence that created an issue of material fact in 2020 had gone away or evaporated.[3] Respondent contends that the trial judge could give Respondent a second bite of the summary judgment apple because new evidence was produced through discovery[4] since Judge Mullen's denial of summary judgment. But Respondent's assertion misses the point: regardless of whether new evidence was produced, the trial judge reversed Judge Mullen even though *Ms. Luzak had no less evidence,*[5] and nothing lessened its value, for this repeat summary judgment motion than she had when Judge Mullen

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Mr. Barringer's February 28, 2012 will and trust were valid, which necessarily revoked the 1998 documents. (ROA Vol. I, pp. 36-55; Vol. VI, pp. 2715 and 2745). Judge Price's Order was appealed and vacated in Case No. 2021-000837. Nevertheless, Respondent and the other Defendants asset that the 2012, 2014, and 2015 estate planning documents purportedly executed by Mr. Barringer were valid, and Ms. Barringer is presently attempting to probate his 2015 will as valid. Ms. Luzak disputes the validity of any of the foregoing documents. Any of the post-1998 documents, if valid would revoke the 1998 documents. Thus, by asserting the post-1998 documents are valid, Respondent and the other defendants necessarily are asserting that the 1998 documents were revoked and thus not valid. Again, to date, none of Mr. Barringer's purported estate planning documents has been determined to be valid.

[3] Respondent argues that it is significant that, in *response* to Respondent's second summary judgment motion on the same issues, Ms. Luzak sought a counter-summary judgment. Respondent's position is meaningless because Judge Mullen had never granted a summary judgment to Ms. Luzak because she never previously asked for one. Ms. Luzak was not asking for a second bite of the apple, as was Respondent. Respondent's depiction of Judge Mullen's order denying Respondent's initial motion for summary judgment on the very same issues that were granted in trial court's order now being appealed is, at the least confusing, apparently conflating Judge Mullen's denial of Ms. Luzak's motion to continue deposing Respondent, with leave to re-apply, with Judge Mullen's denial of Respondent's power of appointment summary judgment motion. Without question, Judge Mullen denied Respondent's power of appointment summary judgment motion that is the very same motion later granted by the trial court herein.

[4] Respondent lists a number of depositions taken since Judge Mullen's denial of summary judgment but the trial judge's Order deals with only three, which are discussed in Ms. Luzak's Initial Brief at pp. 4-8, 19, 24-25, and 49-50, and below at pp. 7, 8, and 17.

[5] Plaintiff actually had more evidence in her favor for this repeat summary judgment motion than in the prior summary judgment action, as discussed in her initial brief at pp. 3, 4, 6, 32, and 33, and below at pp. 11, 13, and 22, especially related to the testimony of attorneys Neill McBryde and John Jolley. Respondent's brief argues that the trial judge's order could not explain how new evidence allowed him to contradict Judge Mullen's earlier order because she did not specify evidence in her order. That argument is flawed because, regardless of what the earlier order said, the record would indicate whether any significant new evidence appeared in the interim. Regardless, any new evidence did not reduce or eliminate the evidence that was before Judge Mullen. Respondent's argument merely confirms that the trial judge weighed evidence rather than applied the proper review for summary judgment.

denied exactly the same summary judgment motion on November 4, 2020, when Judge Mullen ruled that Ms. Luzak had presented sufficient evidence to avoid summary judgment by showing that a material issue of fact existed. Rather, the trial judge, who clearly weighed the evidence before him instead of focusing on the appropriate summary judgment standard,[6] determined that the sufficient evidence ruled on in Judge Mullen's denial had somehow disappeared in the interim.[7] The proper standard for summary judgment is simply whether there is evidence or reasonable inferences from the evidence that presents a genuine issue of material fact.[8] It is a checklist analysis.

Respondent takes the absolutely incorrect position that S.C. Code § 62-2-701, regarding contracts not to revoke, requires proof by clear and convincing evidence. Respondent cites a case decided long before the 1987 effective date of the South Carolina Probate Code, which supersedes that case. Respondent's brief at 3 and 15. Respondent then bootstraps that incorrect assertion into the position that Ms. Luzak had to prove her case by clear and convincing evidence just to defeat the summary judgment motion — that is, according to Respondent, Ms. Luzak had to prove her entire case at the summary judgment stage. This, of course, is not the law, but demonstrates again that Respondent and the trial court were weighing evidence, rather than merely determining whether a genuine issue of material fact existed. Respondent's assertion that case law decided

[6] See Ms. Luzak's Initial Brief at pp. 6, 31-32. Respondents assert that Ms. Luzak must prove her entire case at summary judgment. Respondent's brief at 12.

[7] The trial judge even disregarded his own statement of evidence, which would show the existence of a contract between Mr. Barringer and Respondent: "At most, these documents suggest that, during a certain time period, Mr. and Mrs. Barringer treated their children equally in the past and intended or planned to treat them (*sic)* children equally with respect to certain assets in the future." (ROA Vol. I, p. 119) (emphasis added). Despite the trial judge's and Respondent's invalid conflation of Ms. Luzak's arguments, Ms. Luzak's asserts other arguments in addition to her contention that a contract not to revoke exists. See, e.g., Ms. Luzak's Initial Brief at pp. 27-34, and below at pp. 8-19).

[8] Regardless of whether "mere scintilla" and "genuine issue of material fact" are synonymous or inconsistent – see *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023) – Appellant's case is much stronger than either formulation as she has shown substantial and sufficient evidence, and reasonable inferences therefrom, supporting genuine issues of material fact.

before the enactment of the South Carolina Probate Code changes the written language of the statute is directly contradictory to her position that the *Chapman* case, discussed below at 14-17, did not apply even though it was decided *after* the enactment of the South Carolina Probate Code. Respondent is wrong in both instances. Importantly, as discussed herein, Ms. Luzak's arguments are numerous and not merely limited to the § 62-2-701 issue.

Respondent's brief makes numerous other misstatements. Respondent contends that Ms. Luzak asserts that Mr. Barringer does not understand how a residuary clause works. Respondent's brief at 3. Rather, Ms. Luzak asserts that Mr. Barringer did not intend to give Respondent a power of appointment over voting stock. Respondent contends that the power of appointment effectively moots Ms. Luzak's case. Respondent's brief at 6-7. Rather, Ms. Luzak's overall case, along with significant damages, survives despite any power of appointment. Respondent asserts that Ms. Luzak's overall case is based only on undue influence and lack of testamentary capacity. Respondent's brief at 1. Rather, Ms. Luzak has alleged and shown evidence of, *inter alia*, undue influence, fraud, mistake, tortious interference with an inheritance, civil conspiracy, and lack of capacity.

ARGUMENT

I. RESPONDENT DOES NOT HAVE ANY POWER OF APPOINTMENT OVER ANY CFRC VOTING STOCK.

A critical issue that must be determined is whether Respondent has a power of appointment and, if so, to what extent and subject to what rules imposed by the donor. Most importantly, Ms. Luzak points to evidence that suggests Mr. Barringer did not intend to give Respondent a power of appointment over any voting stock that may have been in trust, and certainly not as to any power in Respondent to change the equal control of CFRC between Ms. Luzak and Defendant Light

consistently intended by Mr. Barringer[9] while he was competent and free from undue influence, fraud, mistake, and tortious interference.[10] Respondent asserts that, if a document uses the term "power of appointment," then the document's creator must have intended the creation of a power of appointment. Respondent's assertion is manifestly incorrect. A power of appointment is created only by the donor's intent, and only to the extent of the donor's intent, and in accordance with whatever rules regarding that power of appointment the donor intends.[11] A power of appointment is not a magical creature that appears out of thin air, but only from some expression of intent. Whether a putative donor (creator) intended to create a power of appointment is a question of the putative donor's intent.[12] Even Respondent recognizes that the donor's intent governs.[13]

Moreover, even if a donor intends to create a power of appointment, the donor's "rules" about the extent and exercise of the power are also determined by the donor's intent. These rules include when and to whom the powerholder (donee) may exercise the power, *what property is covered by the power of appointment*, and how the power may be exercised. The donor's rules, as

[9] The trial judge's Order recognizes this intent. See footnote 7, *supra*.

[10] Despite Respondent's contention otherwise (mentioned for the first time in Respondent's brief at pp. 36-7), Ms. Luzak has been making her argument about the non-existence of the power of appointment since the first summary judgment hearing before Judge Mullen. Ms. Luzak's complaint challenges Respondent's contention that she has a power of appointment: arguing about the existence and intent of any such power of appointment is certainly a reasonable inference from the facts and causes of action pleaded, which Ms. Luzak is allowed to do.

[11] The donor must express an intent to create a power of appointment in a valid document. See, e.g., Uniform Powers of Appointment Act ("UPAA") §201 and comment, referring to Restatement (Third) of Property § 18.1; see also footnote 12 *infra*.

[12] See, e.g., *Bowles v. Bradley*, 319 S.C. 377; 461 S.E.2d 811 (S.C. 1995)*; Rogers v. Rogers*, 221 S.C. 360, 70 S.E.2d 637 (S.C. 1952); Restatement (Third) of Property, §18.1; Restatement (Second) of Property §12.1. Also see, e.g., *Bredin v. Wilmington Trust Co.*, 42 Del. Ch. 563, 216 A.2d 685 (I 965); *Marx v. Rice*, I N.J. 574, 65 A.2d 48 (1949); *In re Estate of Jackson,* 57 Misc.2d 896, 293 N.Y.S.2d 982 (Sur. Ct. 1968).

[13] See Respondent's brief at 35. Respondent is wrong about the ultimate point and result in that discussion (see below at pp. 23-24), but at least recognizes that intent matters as to powers of appointment.

evidenced by the donor's intent, control and must be followed. Numerous cases examine appropriate evidence to determine the intent of a donor about the rules of a power of appointment.[14]

A further refutation of Respondent's assertion is that both the South Carolina Probate Code and the South Carolina Trust Code recognize that language contained in a will or trust may not accurately express the true intent of a testator or settlor, in which case the document language can be reformed and rectified to accurately reflect the creator's true intent.[15] This examination necessarily can involve the use of extrinsic evidence; if a court were limited to an examination of only the words on the document, then these statutes would be meaningless because a court could not determine that the words failed to reflect the creator's true intent.

Under the trial court's Order, it is impossible to determine any intent by Mr. Barringer to create any power of appointment, and if so, to determine its rules, because the Order fails to identify which valid document, if any, may have created the power of appointment. Although Respondent focuses on the 1998 Barringer estate planning documents, these documents cannot be valid for the purposes of this motion because Respondent and the other Defendants argue that Mr. Barringer's 2012, 2014, and 2015 estate planning documents are valid: if any is valid, then the 1998 documents are revoked. In fact, Respondent is pursuing the probate of the 2015 will in

[14] See, e.g., Restatement (Third) of Property § 19.1; Restatement (Second) of Property § 11.5; Bowles, *supra* at note 12; *Newton v. Bullard,* 181 Ga. 448, 182 S.E. 614 (1935); Weston, 264 N.C. 432, 142 , S.E.2d 23; *Hutchinson v. Farmer*, 190 Md. 411, 58 A.2d 638 (1948); (donor's intent re timing of exercise); *Equitable Trust Co. v. Foulke*, 28 Del. Ch. 238, 40 A.2d 713 (1945); *Loring v. Karri-Davies*, 371 Mass. 346, 357 N.E.2d 11 (1976); *In re Nicholas' Will*, 204 Misc. 965, 126 N.Y.S.2d 277 (1953) (donor's rules re appointment in trust); *In re Kennedy's Will*, 279 N.Y. 255, 18 N.E.2d 146 (1916); *McLean v. Mclean*, 174 A.O. 152, 160 N.Y.S. 949, aff'd, 223 N.Y.695,119 N.E. 1056 (1918); *Nat'l State Bank of Newark v. Morrison*, 9 N.J. Super. 552, 75 A.2d 916 (1950); *In re McClellan's Estate*, 221 Pa. 261, 70 A. 737 (1908). *Cf Jennert v. Houser*, 4 Ohio C.C. 353, 2 Ohio Cir. Dec. 591 (1890); *Wickersham v. Savage*. 58 Pa. 365 (1868) (donor's intent re appointing in further trust); *Harlan v. Citizens Nat'l Bank of Danville*, 251 S.W.2d 284 (Ky. 1952); *Moore v. Emery*, 137 Me. 259, 18 A.2d 781 (194I) (donor's intent re exclusivity of appointment).

[15] South Carolina Probate Code § 62-2-601(b), § 62-7-415. Respondent has also asserted that all post-1998 estate planning documents are valid, each of which, if valid, revoked all prior documents.

probate court.[16] Based on the position of Respondent and the other Defendants, resort to the 1998 documents for the creation of any power of appointment is meaningless — the 1998 documents, having been revoked, cannot create anything.[17] Nor can any of the other purported estate planning documents unless and until they are determined to be valid, which has yet to occur. In any event, one cannot assume that a power of appointment exists when a valid document creating such a power of appointment has not been identified by the trial court, a flaw fatal to summary judgment. A power of appointment does not magically exist without some valid document creating it. And any such document would have to be examined as to *that* document to determine the donor's intent.[18] That cannot be done, and was not done, because of this fatal flaw in the trial judge's Order.

Because the trial court's Order specifically mentioned the deposition of Neill McBryde, the attorney who drafted the 1998 estate planning documents, Ms. Luzak addresses the (supposedly now revoked) 1998 documents,[19] which do not create any power of appointment over any controlling voting stock.[20] A power of appointment is not an intuitive or familiar device to a non-

[16] Respondent and the other Defendants previously joined in a summary judgment before Judge Price to recognize Mr. Barringer's purported February 2012 will and trust as valid. Although Judge Price granted their motion, his order was vacated for lack of subject matter jurisdiction at the time. Case No. 2021-000837. That summary judgment sought by Respondent and the other Defendants would have effectively revoked the 1998 estate planning documents.

[17] A power of appointment can be created only by a valid document. See, e.g., UPAA § 201. The trial judge did not identify which document was valid to create the power of appointment.

[18] See, e.g., *Estate of Fabian*, 362 S.C. 349, 483 S.E.2d 474 (Ct .App. 1997).

[19] Respondent makes contradictory statements in her brief: first, that only the 1998 documents matter, and later, that each subsequent document contains power of appointment language. Again, Respondent misses the point: a document can create a power of appointment only if it is valid. Ms. Luzak is contesting all post-1998 documents and Respondent and the other Defendants are effectively contesting the 1998 documents by asserting subsequent documents as valid, which would revoke the 1998 documents.

[20] As Respondent has done consistently throughout this litigation, Respondent contends that the validity of any post-1998 document relates to this appeal. Respondent's brief at 5. Thus, Respondent fails to recognize that a power of appointment must arise from some document that has to be determined to be valid. Respondent also continues to misstate Ms. Luzak's response to an interrogatory, claiming that Ms. Luzak takes the position that the contract or promise was made no later than the date of the 1998 documents' execution. Respondent's brief at 7. Rather, Ms.

estate planning attorney and certainly not to a layperson. Ms. Luzak has produced evidence sufficient to demonstrate that it is doubtful whether Mr. Barringer had any intent to create a power of appointment over any controlling voting stock he may have had — for example, (1) Mr. Barringer never had any power of appointment in his estate planning documents prior to 1998;[21] (2) Mr. Barringer did not have enough stock at the time of the execution of the 1998 documents to affect voting control in CFRC;[22] (3) Mr. Barringer never let Respondent have anything to do with the operation or ownership of his legacy company, raising the question of why he would give Respondent the power to cede control to someone after he died, especially to a failed businessperson such as Defendant Light's husband;[23] (5) the 1998 documents gave his trustees[24] the power to sell and/or distribute trust property — if Mr. Barringer contemplated that the trust would have voting control shares, he would never have empowered his trustees to so change the equal control of the company he had intended for a long time;[25] (6) despite Respondent's assertion

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Luzak takes the position that the contract or promise was *first* made no later than the date of the 1998 documents' execution, but subsequent events also prove the contract and promise.

[21]McBryde, the drafting attorney for the 1998 documents, mailed a lengthy letter from Charlotte explaining the complex 1998 documents to Mr. Barringer and Respondent in Hilton Head two days before they signed those complex documents in Charlotte. (ROA Vol. IX, pp. 4398-4402). The earliest they could have received the documents in the mail, if at all, was the next day after mailing, and yet the following day they were in McBryde's office in another city and state signing the voluminous complex documents. McBryde admits that this was the first time he mentioned a power of appointment in a letter to them. (R. Vol. X, p. 4643, lines 1-3). The letter observed that this is the first time Mr. Barringer and Respondent would have a power of appointment in their estate plan. (R. Vol. X, p. 4645, lines 20-23). McBryde volunteered that, not only might the concept of a power of appointment not be understood by a non-lawyer without proper explanation, but "I suspect you may have lawyers that don't know." (R. Vol. X, p. 4645, lines 14-17). (*Id.*)

[22] As discussed above, the intent of a testator or settlor is determined according to the facts and circumstances existing at the time of the creation of the documents. Respondent's argument that this renders any power of appointment meaningless misses the point: in this case, the issue is whether Mr. Barringer knew that he might later gain voting control stock — he actually did after a company reorganization in 2004 — when he executed his will. If he did not think voting control stock was subject to the power, then he did not intend for after-acquired stock to be subject to the power.

[23] See Ms. Luzak's Initial Brief at p. 15.

[24] Respondent was not the trustee.

[25] See footnote 7, *supra*.

to the contrary, the drafting attorney for the 1998 documents did not remember specifically discussing any power of appointment with the Barringers;[26] (7) despite that drafting attorney's inability to recall specifically much of his discussions with the Barringers, he interestingly did specifically recall that he *never* discussed a disposition of the company stock with Mr. Barringer;[27] and (8) that drafting attorney did specifically recall that he *never* discussed any company stock being subject to the power of appointment.[28] It is certainly reasonable to conclude that a fact-finder could determine that Mr. Barringer never intended to subject any voting control stock to any power of appointment, and Ms. Luzak certainly passes muster at the summary judgment stage.

The trial judge's Order also specifically mentions the deposition of John Jolley, who drafted the 2012, 2014, and 2015 purported estate planning documents.[29] Just as McBryde's deposition creates problems for Respondent's position with respect to the 1998 documents, Jolley's deposition creates problems for Respondent's position with respect to the post-1998 documents.[30] Ms. Luzak's evidence and arguments as to any power of appointment under post -1998 documents are similar to a number of her preceding arguments, with related evidence, about the 1998 documents: for example, (1) Jolley could not recall any specific discussions with the Barringers

[26] See Ms. Luzak's Initial Brief at pp. 24-25. This is one example of how discovery subsequent to Judge Mullen's prior order denying summary judgment enhanced the facts supporting Ms. Luzak's position of a dispute about materials facts. See, *e.g.*, McBryde dep. (R. Vol. X, pp. 4633, line 7-p. 4634, line 14; p. 4635, lines 15-20; p. 4636, lines 5-7 and p 4642, lines 7-9).

[27] *Id*. This is another example of how discovery subsequent to Judge Mullen's prior order denying summary judgment enhanced the facts supporting Ms. Luzak's position of a dispute about materials facts. See, *e.g.*, McBryde dep. (R. Vol. X, p. 4645, line 24-p. 4646, line 11).

[28] *Id*. This is yet another example of how discovery subsequent to Judge Mullen's prior order denying summary judgment enhanced the facts supporting Ms. Luzak's position of a dispute about materials facts. See, *e.g.*, McBryde dep. (ROA Vol. X, p. 4646, line 24-p. 4647, line 10; p. 4768, lines 18-25).

[29] Although now vacated, Respondent and Defendants sought from Judge Price, in a separate partial summary judgment motion, a holding that the February 28, 2012 will and trust were valid, which Judge Price granted. (Case No. 2021-000837.)

[30] Jolley also represented the Light Defendants. See (ROA Vol. II, pp. 759-60 & Vol. VIII, pp. 3801, ¶ 9 and pp. 3804-05, ¶ 3).

about any power of appointment;[31] (2) Jolley's notes do not mention any power of appointment, let alone any stock being subject to any power of appointment;[32] and (3) included in Jolley's notes were the notes of Robert Slane, an insurance agent who assisted, and corrected, Jolley with the drafting, which do not mention any power of appointment, let alone any stock being subject to any power of appointment.[33]

By asserting post-1998 estate planning documents as valid, Respondent and Defendants assert that any estate planning documents executed before whichever documents, if any, are determined to be the most recent valid documents, are revoked and ineffective. [34]

The pivotal issue is Mr. Barringer's intent. That intent is a state of mind. That is a factual issue and not a legal issue, and Ms. Luzak has produced ample evidence cited above, including reasonable inferences, to create a reasonable question about that material fact. The analysis is again that simple: are ***all*** of the material facts beyond dispute so that it is not necessary for twelve (12) jurors to even begin to consider the issue. The effect of the trial court's Order is to render the question of Mr. Barringer's state of mind beyond reasonable dispute, and the trial court substituted

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[31] See Ms. Luzak's Initial Brief at 25 n.27.

[32] *Id*.

[33] Pl.'s MIO MSJ (R. Vol. VI, pp. 2989-3000- Vol. VII, pp.3001-3098).

[34] See *White v. Wilbanks*, 301 S.C. 560, 393 S.E.2d 182 (1990), in which this Court and the Supreme Court determined that an earlier will was revoked as soon as a subsequent revoking will was executed, even though the subsequent revoking will was never probated because the original of the subsequent revoking will could not be produced --- upon execution, the subsequent revoking will revoked the earlier will. Respondent argues that *White v. Wilbanks* does not stand for the proposition that the courts apply the law in effect at the time of the decision because the *White v. Wilbanks* courts were merely applying a "presumption." Respondent is mistaken: the presumption in that case arose from statutes (which are law), which involved a version of the law in effect at the date of execution and the date of death, yet the courts applied the subsequent date of decision version of the law. Moreover, case law prior to the effective date of § 62-2-701 also recognized contracts not to revoke, yet the *Chapman* court nevertheless recognized an alternative to contracts not to revoke – i.e., the enforceable non-contractual confidential or fiduciary promise. Moreover, *Satcher v. Satcher*, 351 S.C. 477, 570 S.E.2d 535 (Ct. App. 2002), was decided long after the 1987 effective date of the South Carolina Probate Code and applied promissory estoppel as an exception to the applicability to § 62-2-701. As with *Chapman*, 302 S.C. 469, 395 S.E.2d 446 (Ct. App. 1990), this demonstrates that this Court has recognized that non-contractual promises are not subject to§ 62-2-701.

its assessment of the evidence for that of a jury, instead of merely determining whether any evidence existed to support Ms. Luzak's claim.

II. FIDUCIARY PROMISES NOT TO APPOINT ARE BINDING AND PRECLUDE RESPONDENT FROM EXERCISING ANY POWER OF APPOINTMENT SHE MAY HAVE OVER CFRC VOTING STOCK.

The trial judge erred in concluding that *only* South Carolina Probate Code ("SCPC") § 62-2-701 disposes of this case. Like Respondent, he fails to differentiate between a *contract* — which is governed by § 62-2-701 in certain situations — and *a promise enforceable by some means other than a contract* — which the law in this state, through this Court in particular, recognizes.[35] Section 62-2-701 specifically and expressly limits its coverage to "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…." (emphasis added.) It does not, therefore, cover a non-contractual enforceable promise not to exercise a power of appointment or not to revoke a will. *See Chapman v. Citizens & So. Nat'l Bank of S.C.*, 302 S.C. 469, 395 S.E.2d 446 (Ct. App. 1990). It does not provide that the sole means of enforcing a promise not to revoke a will or a promise not to exercise a power of appointment is through a contract. In fact, the section does not even cover a promise not to exercise a power of appointment — whether that promise is contractual or non-contractual. Thus, as to any non-contractual promises generally and any promise — contractual or non-contractual — not to exercise a power of appointment, § 62-2-701 clearly does not apply or limit any common law means of recovery. To be sure, SCPC § 62-1-103 provides that probate common law survives unless supplanted by statute. Stated another way, § 62-2-701 does not and cannot govern the common law unilateral fiduciary or confidential relationship enforceable promise issue because

[35] See Ms. Luzak's Initial Brief at pp. 27-32, 41; footnote 34 *supra*; footnote 36, *infra*; below at pp. 14-19.

the unilateral fiduciary or confidential relationship enforceable promise issue *does not involve a contract.*[36] The refusal by the trial judge to consider non-contractual promises as a valid means of recovery is clearly in error.

Respondent argues that Ms. Luzak's Initial Brief "ignores, and does not even attempt to distinguish the cases cited by the trial court." Ms. Luzak did not address those cited cases directly because they are from other jurisdictions and not relevant. Ms. Luzak focuses on *South Carolina* law, especially the decisions of this Court (*Chapman and Satcher*), and the plain language of the *South Carolina* statute (discussed above), which are the only relevant citations of law and, which of course, support Ms. Luzak's position.[37]

What Respondent continues to avoid recognizing is that this Court, in *Chapman*,[38] ruled that a *non-contractual promise* is binding when made by someone in a fiduciary or confidential capacity. The facts in *Chapman* may differ to some extent from the facts in this case — as is common and as was recognized by Ms. Luzak — but the law is the same: that a binding non-contractual promise from someone in a fiduciary or confidential capacity can be express or can be *inferred*, *even by silence.*

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[36] Similarly, SCPC § 62-2-701 does not preclude an estoppel claim.

[37] For example, Respondent cites a portion of the Reporter's Comment from Uniform Probate Code § 2-701. Respondent's brief at 17. Respondent cites only the uniform version because the applicable South Carolina comment does not include that language, even though South Carolina obviously could have chosen to adopt that language. Respondents argue that *Chapman* is outdated because the tax law has changed. That is the opposite of the reality of *Chapman*, in which this Court focused not on any tax issue but instead on the enforceability of confidential or fiduciary promises without limitation to tax issues.

[38] In asserting the incorrect position that *Chapman* does not create a non-contractual legal basis to enforce a promise not to revoke a will, even though it was decided after the effective date of § 62-2-701, Respondent argues that the *Chapman* court did not even address § 62-2-701. However, the reason the *Chapman* court did not address § 62-2-701 is because *Chapman* was *not a contract case:* § 62-2-701 addresses only contracts but does not exclude the enforcement of noncontractual promises, as was also the case in *Satcher*. Respondent also asserts that a will is ambulatory, which is technically correct; however, a contract not to revoke supersedes the law on wills to provide a result consistent with any contractual agreement — the same is true for noncontractual promises not to revoke.

Despite Respondent's continuous refrain that Ms. Luzak has no evidence of any such promise by Respondent, she has cited numerous specific facts. This is particularly compelling when, according to *Chapman*, the donee's promise can be inferred from mere silence, such as a failure to speak up. For example, from 1992 through 2011, Mr. Barringer regularly convened family meetings to discuss his estate plans, including his succession plan for CFRC. He consistently expressed his intent that Ms. Luzak and Defendant Light have equal voting rights. His intentions of equal treatment were expressed numerous times in documents, such as his 1998 documents and even the February 28, 2012 will and trust. Respondent's 1998 will expressly declined to exercise any power of appointment. Other documents, also joined in by Respondent, included voting agreements and gifting documents. Ms. Luzak's evidence included 40 exhibits of such estate planning and succession planning related documents.[39] At no time did Respondent state her contrary intention or objection, or even speak up.[40] She acquiesced in his plan, which would mean that she would not be able to direct Mr. Barringer's voting stock to Defendant Light, despite Respondent's contention now.[41] Respondent never attempted to exercise any power of appointment until after Mr. Barringer died.

The issues of the existence of a confidential and/or fiduciary and a promise, whether express or implied (even if by silence) are factual determinations. Ms. Luzak's evidence creates issues of fact on these material elements, making summary judgment inappropriate.

[39] See, e.g., Ms. Luzak's Initial Brief, footnote 4.

[40] See, e.g., Affids. of H. Luzak filed 9/28/2020, and K. Luzak filed 9/28/2020 (R. Vol. V, pp. 2031-2076); Ms. Luzak's Initial Brief at 29-32.

[41] This confirmation of the plan by Respondent applies whether the Barringers did not believe that Respondent had any power to control Mr. Barringer's voting stock.

III. PROMISSORY ESTOPPEL PRECLUDES RESPONDENT FROM EXERCISING ANY POWER OF APPOINTMENT SHE MAY HAVE OVER CFRC VOTING STOCK.

Ms. Luzak's second cause of action is also supported by the doctrine of equitable estoppel, which enforces a promise that is not contractual.[42] In South Carolina, equitable estoppel can apply based on silence.[43]

Respondent argues that accepting *Satcher* and *Chapman* would render § 62-2-701 meaningless. But the opposite is the case. Section 62-2-701 deals only with contracts, while *Satcher* and *Chapman* deal with binding non-contractual promises based, obviously, on something other than a contract. It is Respondent who wants § 62-2-701, despite expressly applying only to contracts, to render the law of equitable estoppel (*Satcher*) and fiduciary/confidential obligations (*Chapman*) meaningless. But Respondent's position is not the law in South Carolina.

Just as he mistakenly did with the non-contractual fiduciary or confidential promise issue discussed immediately above, the trial judge failed to distinguish the difference between equitable estoppel, which *does not require a contract*, and a *contract* not to revoke, which is governed by § 62-2-701.[44]

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[42] The trial judge's order states that Ms. Luzak has not asserted a claim for promissory estoppel. (ROA Vol. I, p. 125). Respondent makes this claim as well, but that assertion is incorrect. Ms. Luzak's complaint alleges that, separate and apart from any promise pursuant to a contract, Respondent promised not to exercise any power of appointment. Promissory estoppel involves a promise, as does the fiduciary/confidential relationship argument involve a promise, neither of which need be part of a contract.

[43] See, e.g., *Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528 (Ct. App. 2012); S*tate v. Hinojos*, 393 S.C. 517, 713 S.E.2d 351 (Ct. App. 2011); *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006); *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001); *Maher v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998).

[44] Respondent contends that Ms. Luzak is precluded from asserting this argument because she failed to do so in her Complaint and that she lacks standing to assert promissory estoppel (Respondent's brief at 36-37). The trial judge's Order provided similarly as to the former point. Ironically, this is the first time Respondent has raised the latter point and is thus precluded from doing so. In any event, Ms. Luzak has been asserting this argument since the first summary judgment hearing before Judge Mullen and, as noted in her Initial Brief at pp. 32-34, the promissory estoppel argument obviously involves a promise, which is contained within her cause of action that Respondent promised not to exercise

The *South Carolina* comment to § 62-2-701 recognizes the continuing viability and enforceability of *noncontractual promises*, such as promissory estoppel:

> However, it may be questioned whether Section 62-2-701 should not be subject, in its operation, to the familiar legal and equitable exceptions to the operation of the other Statutes of Frauds provisions. See § 62-1-103 and Walsh, supra, at 258-270. These include the remedies of restitution of monies advanced and the imposition of a constructive trust to force the restitution of other specific assets advanced by the promisee on an oral contract, and the effects of part performance of the oral contract by the promisee as well as equitable and promissory estoppel, either matter binding the promissor to the oral contract notwithstanding any applicable Statute of Frauds. One case has reached such a conclusion after the enactment of § 62-2-701. See Satcher v. Satcher, 351 S.C. 477, 570 S.E. 2d 535 (Ct. App. 2002) (emphasis added).

There is sufficient evidence Mr. Barringer relied on his wife's promise, whether express or implied, by declining to exercise the power of appointment she gave him and by his knowledge that she had promised to honor and acquiesce to his intent to treat their children equally by declining to exercise any power in her 1998 will [45] or in any will she executed thereafter while he was alive, by participating in family and estate planning meetings and never indicating that she would contradict his intention of equal treatment, and by participating in or acquiescing in other

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any power of appointment, and the same cause of action also asserts reliance — a promise and reliance being essential elements of promissory estoppel. Ms. Luzak may argue reasonable inferences therefrom.

In any event, Ms. Luzak has standing to assert this claim. Ms. Luzak was a beneficiary of the original 1998 revocable trust as well as the February 28, 2012 revocable trust (declared to be valid by separate, although now vacated, summary judgment order of Judge Price), both of which Respondent claims gave her a power of appointment. Applicable law precludes a revocable trust beneficiary from asserting claims involving the trust while the settlor is alive, but allows a beneficiary to assert those claims once the settlor dies. SCPC section 62-7-603. See also Bogert section 964; *Estate of Giraldin*, 55 Cal. 4th 1058, 290 P.3d 199 (2012); *Tseng v. Tseng*, 271 Or. App. 657, 352 P.3d 74 (2015); *Cruz v. Cmty. Bank & Tr. of Fla*., 277 So. 3d 1095 (Fla. Dist. Ct. App. 2019). See *Estate of Brown*, 430 S.C. 474, 846 S.E.2d 342 (S.C. 2020).

[45] See M. Barringer Last Will & Testament of Dec. 4, 1998, Item III, where Merrill Barringer expressly declines to appoint to her own revocable trust any property from any other person's estate over which she may have had a power of appointment, stating: "All of the rest, residue, and remainder of my property… (*but not including any property over which I may have a power of appointment*), I devise to the then acting Trustee of The Merrill U. Barringer Revocable Trust…" (emphasis added). (R. Vol. II, pp. 964-965). The Last Will and Testament of Paul Barringer executed at the same time contains reciprocal language in Item III. See P. Barringer Last Will & Testament of Dec. 4, 1998, Item III. (R. Vol. II, pp. 902-903).

acts evidencing the intent to treat the children equally.[46] The same voluminous evidence discussed above at pages 14-17 also serves to prove promissory estoppel —a classic case of promissory estoppel.

The issues of promise, reliance, and justifiable and foreseeable reliance are factual determinations. Ms. Luzak's evidence creates issues of fact on these material elements, making summary judgment inappropriate.

IV. RESPONDENT IS PRECLUDED FROM EXERCISING ANY POWER OF APPOINTMENT SHE MAY HAVE OVER CFRC VOTING STOCK BY A BINDING CONTRACT NOT TO REVOKE.

With respect to contracts not to revoke, Ms. Luzak recognizes that § 62-2-701 governs, *but only as to contracts not to revoke*. Nevertheless, Ms. Luzak satisfied the requirements of § 62-2-701, and certainly sufficient evidence suffices to avoid summary judgment.

Although Ms. Luzak asserts other grounds for her position, any of which cause her to prevail, she also asserts that a contract not to revoke exists. Section 62-2-701(1) provides for the decedent's will stating material provisions of the contract. Presumably in the context of § 62-2-701(1), the trial judge held that Ms. Luzak has identified no provision stating the material provisions of a contract; he is mistaken. But that subsection does not require that the entire contract be contained in the decedent's will, but rather only that the will state material provisions of the contract. Paul Barringer's 1998 revocable trust executed in conjunction with his 1998 will stated material provisions as to the existence of a power of appointment and the intent to treat their children equally. Respondent's 1998 will, executed simultaneously and symbiotically with Paul Barringer's 1998 will and revocable trust, stated material provisions as to the existence of a power

[46] See Ms. Luzak's Initial Brief at pp. 34-42. Respondent asserts that it is difficult to understand why any parent would agree not to revoke a will, but if that were an accurate statement, there would be no need for § 62-2-701, which allows the enforcement of a contract not to revoke.

of appointment and the intent to treat their children equally, as well as, importantly, expressly and specifically declining to exercise the power of appointment set forth in Paul Barringer's estate plan.

Respondent's will states the material provisions of the contract in itself and is corroborated by the material provisions stated in Paul Barringer's will, which include equal treatment of the children and a mutual declination of the right to exercise any power of appointment. The mutuality of the contract is also confirmed by Paul Barringer's will, which declines to exercise the special testamentary power of appointment that Respondent gave him in her 1998 revocable trust.

If Paul Barringer understood what a power of appointment was and he understood that his 1998 revocable trust gave that power to Respondent, then he also understood that Respondent had agreed at the same time, in documents prepared by the same lawyer representing them both and executed at the same time, not to exercise that power of appointment, just as he declined to exercise the power of appointment she apparently gave him. This creates a contract. He relied on that contract. These documents each treat the children equally.

Thus, the material provisions are stated in each of the 1998 will documents: Mr. Barringer and Respondent treat Ms. Luzak and Defendant Light equally, and each decline to exercise any power of appointment the other may have given them. That alone should suffice to prove the contract. Numerous other documents, including voting agreements and gift tax returns, confirm Mr. Barringer's intent about equal treatment and the agreement by Respondent.[47]

SCPC § 62-2-701(3) provides different, and alternative, requirements from subsection (1): "a writing signed by the decedent evidencing the contract and extrinsic evidence proving the terms of the contract." Under subsection (3), a contract can be established by the signature of the

[47] See, e.g., Ms. Luzak's Initial Brief, footnote 4.

decedent on a writing evidencing a contract as augmented by extrinsic evidence. Thus, subsection (3) broadly and effectively allows the terms of the contract to be established by extrinsic evidence. Just as with subsection (1), there is no requirement that the will (subsection (1)) or the signed writing (subsection (3)) expressly and specifically include the term "contract."

The simultaneous and symbiotic 1998 estate planning documents of Paul Barringer and Respondent are obviously signed writings. As discussed above regarding subsection (1), Paul Barringer and Respondent's 1998 documents create limited testamentary powers of appointment and Respondent's will specifically and expressly declines to exercise any power of appointment, and both provide for equal treatment of the children. This sufficiently "evidences" a contract, as required by subsection (3). Numerous other documents, including voting agreements and gift tax returns, provide evidence extrinsic to those signed writings to confirm Mr. Barringer's intent about equal treatment and the agreement by Respondent.[48]

Presumably in the context of § 62-2-701(3), the trial judge held that Ms. Luzak had failed to identify *any writing* signed by Paul Barringer and Respondent evidencing an alleged contract; again, he is mistaken. Again, as discussed above, Ms. Luzak alleges numerous writings, including but not limited to the 1998 documents, but in addition to writings, other evidence as well. Moreover, § 62-2-701(3) does not limit the use of extrinsic evidence to prove the contract. In addition to documentary evidence, Ms. Luzak has produced testimony, including affidavits,[49]

[48] See, e.g., Ms. Luzak's Initial Brief, footnote 4.

[49] See, e.g., Affids. of H. Luzak filed 9/28/2020, and K. Luzak filed 9/28/2020. (R. Vol. V, pp. 2031-2076). Respondent's brief (p. 8) argues that, in his deposition, Kevin Luzak refuted his affidavit concerning evidence of a binding promise by Respondent. However, Respondent cherry-picks language from the deposition and does not accurately portray the deposition testimony. Kevin Luzak did not say in his deposition, as the Respondent claims, that he had no evidence of a contract or promise, nor did he directly address the question whether Mr. Barringer and Respondent agreed to treat the children equally "regardless of circumstances." (Appellate Case No. 2021-001337, R. Vol. IX, pp. 4092-4101). The confusing questioning focused on an "agreement," "no matter what type of behavior the children engaged in." The transcript shows that the response was focused on a written contract and that neither the questioning nor the response addressed any noncontractual promise. The response also clearly indicated that the

showing their intent. The trial judge generally focuses on "Mr. and Mrs. Barringer's estate planning documents," overlooking that § 62-2-701(3) allows extrinsic evidence, not limited to estate planning documents, and not even limited to documents.[50]

The issues involving the existence of a contract not to revoke the 1998 documents that expressly declined to exercise any power of appointment are factual determinations. Ms. Luzak's evidence creates issues of fact on these material elements, making summary judgment inappropriate.

V. RESPONDENT MISUNDERSTANDS THE LAW REGARDING THE ABILITY OF A DONEE OF A POWER OF APPOINTMENT TO CONTRACT WITH OR PROMISE THE DONOR NOT TO EXERCISE THE POWER.

Citing *Carmichael v. Heggie*,[51] Respondent contends that it is not even possible for the donor of a testamentary power of appointment to enter into a binding agreement with the donee of that power of appointment not to exercise that power of appointment. Respondent argues that such a binding agreement would violate the rules that the donor created for that power of appointment — that is, by creating the power of appointment, the donor wanted the donee of the power of appointment to have until death to decide whether, and if so how, to exercise the power of appointment. Thus, in *Carmichael*, the Court held that the *donee* of a testamentary power of

pattern of equal treatment was acquiesced in by Mr. Barringer and Respondent, but that neither ever used a term such as "no matter what type of behavior the children engaged in" which would not be a required term of any contractual arrangement.

[50] With respect to the contract claim, the trial judge also focuses on the 1998 documents as never promising not to exercise any power of appointment but, again, § 62-2-701(3) does not limit evidence to wills, even though the 1998 documents themselves contain sufficient evidence to show a contract under subsections (1) or (3). In addition, the court cites the provision in § 62-2-701 that mutual wills do not create a presumption of a contract, but that provision does not preclude mutual wills from creating a contract, especially when supported by other evidence.

[51] 506 S.E.2d 308, 310 (Ct. App. 1998).

appointment was precluded from entering into a binding inter vivos contract with a *potential appointee* of that power.

However, Respondent's reliance on *Carmichael*, and its underlying rationale, is misplaced. *Carmichael* has nothing to do with our case. In our case, the agreement or promise not to exercise involves the *donor* and the *donee* of the testamentary power, not the *donee* and a *potential appointee* as in *Carmichael*. A *donor* and a *donee* can always be involved in an agreement or promise not to exercise because the *donor* sets the rules[52] for the donee to follow and, if the donor allows the donee to relinquish a testamentary power of appointment, by being involved in an agreement or promise not to exercise it, then the donor is obviously recognizing that such an agreement or promise is permissible. The donor's intent about the rules of the power of appointment is what controls, and the donor is the paramount indicator of the intent of those rules.[53] Moreover, a donee of a testamentary power can release that power during lifetime, and such a release is binding, having the same effect as a contract not to exercise.[54]

Thus, Mr. Barringer as donor and Respondent as donee could certainly be involved in a binding agreement or promise for Respondent not to exercise any testamentary power of appointment.[55]

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[52] See text and notes at pp. 8-10, *supra*; see also UPAA § 402 and comment.

[53] See text and notes at pp. 8-10, *supra*; see also UPAA § 402 and comment.

[54] See, e.g., *Wood v. Am. Sec. & Trust Co.*, 253 F. Supp. 592 (D.D.C. 1966); see also *Estate of Minot v. C.I.R.*, 45 T.C. 578 (1966); see also UPAA § 402 and comment.

[55] Otherwise, this Court would have been in error by allowing such a binding promise in *Chapman* between donor and donee; and this Court was not in error in *Chapman*.

VI. RESPONDENT FAILS TO ADDRESS THE TRIAL COURT'S FAILURE TO RECONSIDER THE BIFURCATION ORDER AS DIRECTED BY THE SUPREME COURT.

Despite having stated that it would not consider the bifurcation order issue during oral argument, the Supreme Court nevertheless reversed field and expressed such concern about that issue that it directed the trial court to reconsider the bifurcation order: "In light of everything that has elapsed in this case—particularly the clarification that Luzak will not pursue any derivative claims—we direct that ***all matters regarding mode of trial, including the order bifurcating trial, shall be reconsidered by the circuit court on remand.***" [emphasis added]. Order of the Supreme Court dated January 17, 2024. (R. Vol. I, pp. 81-87). Rather than address the legal arguments raised by Ms. Luzak, Respondent's brief simply asserts that the grant of summary judgment as to these power of appointment issues negates the need to address the Supreme Court's directive, following the trial court's ostensible rationale. However, the trial court is in error, and in avoidance of the direct order from the Supreme Court, because deferring the consideration of the bifurcation order is not a "reconsideration" of it.

Following the Respondent's lead, the trial court reasoned that, if its power of appointment summary judgment order is upheld, then the bifurcation order becomes moot." The trial court thereby completely misses the issues with the bifurcation order, as demonstrated by the Supreme Court's expressed concern. Rather than mooting the bifurcation issue, the trial court's granting of the power of appointment summary judgment violates Ms. Luzak's very basic due process rights that the bifurcation order violated. By issuing its power of appointment summary judgment order, the trial court necessarily made a determination of facts. This violates Ms. Luzak's rights to have one fact-finder determine common issues of facts, to have legal issues determined before equitable

issues, and to have her legal causes of action completely determined by a jury. Appellant's Initial Brief at 42-47.

The trial court should have followed the Supreme Court's directive to reconsider the Bifurcation Order and vacated it, irrespective of any summary judgment. Vacating the Bifurcation Order would have resolved the issue of bifurcation once and for all regardless of the outcome of the present appeal of Ms. Barringer's summary judgment, and there was no reason not to presently reconsider other than the possibility that the issue would become moot, no matter how remote.

CONCLUSION

Substantial and sufficient evidence exists, through the pleadings, depositions, affidavits, and discovery on file, such that Ms. Luzak must prevail. Ms. Luzak demonstrates substantial and sufficient evidence no power of appointment over voting stock exists, and even if it did, of a contract not to revoke, an express promise not to revoke arising from a fiduciary and confidential relationship, an implied promise not to revoke arising from a fiduciary and confidential relationship, and equitable estoppel. Moreover, the trial court's issuance of the power of appointment summary judgment order violates the directive of the Supreme Court to reconsider the bifurcation order.

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May 19, 2025

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
ROBERT J. BONDS, CIRCUIT COURT JUDGE

Appellate Case No. 2025-000076

IN THE MATTER OF: Estate of Paul Brandon Barringer II

Hampton B. 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,

--and--

IN THE MATTER OF: Estate of Paul Brandon Barringer II

Hampton Barringer Luzak, ...Appellant,

v.

Merrill U. Barringer, ...Respondent,

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

[signature block next page]

Respectfully submitted,

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