THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-01-00306
Appellate Case No. 2014-00946

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

v.

LAURA B. WILLIS and JESSE A. DANTICE, individually, and as agents and/or brokers for Southern Risk Insurance Services LLC, Travelers Casualty Insurance Co. of America, Allied Property and Casualty Insurance Co., Peerless Insurance Co., Montgomery Mutual Insurance Co., Safeco Insurance Co. of America, and Foremost Insurance Co., SOUTHERN RISK INSURANCE SERVICES, LLC, TRAVELERS CASUALTY INSURANCE CO. OF AMERICA, ALLIED PROPERTY AND CASUALTY INSURANCE CO., PEERLESS INSURANCE CO., MONTGOMERY MUTUAL INSURANCE CO., SAFECO INSURANCE CO. OF AMERICA, and FOREMOST INSURANCE CO., ... Defendants,

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

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by ruling there was no valid contract containing an arbitration provision despite the fact that the Federal Arbitration Agreement does not require a signed agreement for an arbitration provision to be enforceable and despite the fact that Appellants and co-defendants Southern Risk Insurance Services and Laura Willis have continuously operated under signed and unsigned agreements containing written arbitration provisions?
2. Did the trial court err by ruling that the arbitration provision at issue was too "narrow" to encompass the plaintiffs' claims, despite the expansive wording of the provision?
3. Did the trial court err by refusing to compel arbitration of the Respondents' claims against the Appellant insurers when each of those claims was based and grounded on provisions of a contract that contained a binding arbitration agreement?
4. Did the trial court err by conflating the allegations made against the Appellants with those made against the co-defendants and thus ruling that Appellants' alleged wrongdoing was so "outrageous" as to render it unforeseeable?
5. Did the trial court err by ruling that Appellants waived their right to compel arbitration despite the de minimis lapse of time between the filing of the lawsuits and the motion to compel and despite the absence of any significant proceedings in the lawsuits?

STATEMENT OF THE CASE

This appeal arises from the trial court's denial of Peerless Insurance Company's, Montgomery Mutual Insurance Company's, and Safeco Insurance Company of America's (collectively "the Insurers") motion to compel arbitration of the claims made against them and to dismiss them from 14 related suits.[1] The suits, which were filed between November 1, 2012 and August 28, 2013, all allege wrongdoing by Laura Willis, an insurance agent operating under the supervision of Jesse Dantice and Southern Risk

[1] The suits are Case Numbers 2012-CP-01-306, 2012-CP-01-340, 2012-CP-01-341, 2012-CP-01-342, 2012-CP-01-343, 2013-CP-01-044, 2013-CP-01-045, 2013-CP-01-066, 2013-CP-01-073, 2013-CP-01-094, 2013-CP-01-123, 2013-CP-01-124, 2013-CP-01-220, and 2013-CP-01-221.

Insurance Services, LLC ("Southern Risk"). Twelve of the suits were brought by residents of Abbeville County who were Willis' customers, and two suits—those brought by Richard Wilson and Robert Shirley—were brought by local insurance agents who were competitors with Willis and Southern Risk.

The plaintiffs in the lawsuits name several defendants including Willis, Dantice, Southern Risk and various insurance companies, including the Insurers. The plaintiffs allege in the complaints that Willis engaged in a variety of tortious acts and assert a number of claims including that the Insurers had a duty to properly investigate, train, and supervise Willis, that they failed to detect and stop her wrongdoing, and that they engaged in unfair trade practices, civil conspiracy, conversion, fraud, and negligent misrepresentation.

On October 31, 2013, the Insurers filed motions to compel arbitration and to be dismissed from the suits.[2] The motions were based on the ground that each of the plaintiffs' claims against the Insurers was premised on the Insurers' alleged duties that would not exist but for the Insurers' contractual relationship with Southern Risk. The Insurers argued that the contract contains a broad, binding arbitration provision, and the plaintiffs cannot rely on and seek to recover monies against the Insurers based on some provisions of the agreement while ignoring others such as the arbitration clause.

The trial court heard arguments on the motions on January 21, 2014, and the plaintiffs filed memoranda in opposition to the Motion to Compel Arbitration that same day. The Insurers filed reply memoranda in support of their motion on February 11, 2014. On March 25, 2014, the trial court issued an order denying the Insurers motions. The

[2] The Insurers filed their motion several days later in the suits brought by Eugene Lawton and the Antoniaks.

Insurers filed motions to alter or amend that ruling on April 8, 2014. The trial court denied these motions on April 21, 2014. This appeal followed.

STATEMENT OF THE FACTS

The claims and allegations in the different suits include that Willis failed to procure the insurance purchased by the plaintiffs, stole their premium payments, improperly submitted their insurance applications, and later improperly backdated insurance applications after the plaintiffs suffered a loss. In the suit brought by Jeanette Norman, for example, she alleges that in September of 2010, she met with Willis to discuss insurance for her automobiles and real property and to fill out insurance applications. (Norman Compl. at ¶¶ 10-14.) Norman alleges that, although she provided Willis with her Social Security number for use on the application, a different Social Security number was used, and Willis did not inquire of Norman's claim history or ask for her automobiles' Vehicle Identification Numbers. (*Id.* at ¶¶ 11 and 14.) At that meeting, Norman paid part of what she believed to be the premium for the real estate policy. (*Id.* at ¶ 12.) She alleges she subsequently received her automobile insurance identification cards, which contained incorrect information, and that she was later contacted by the company financing one of her vehicles to inform her that the vehicle was not insured. (*Id.* at ¶ 15.) Norman alleges that Willis' tortious acts impaired her credit rating and caused her to pay a higher rate for automobile insurance both now and in the future. (*Id.* at ¶ 16.) Norman alleges the Insurers had a duty to properly investigate, train, and supervise Willis (*id.* at ¶ 8), that they failed to detect and stop her wrongdoing (*id.* at ¶ 17), and that they engaged in statutory unfair trade practices (*id.* at ¶¶ 19-23), common law unfair trade practices (*id.* at ¶¶ 24-28), conversion (*id.* at ¶¶ 29-32), fraud (*id.* at ¶¶ 33-41), and negligent misrepresentation (*id.* at ¶¶ 42-48).

Similarly, Anita Belton alleges in her Complaint that around April 19, 2011, she contacted Laura Willis regarding the purchase of insurance for her vehicles and her home. (Belton Compl. at ¶ 9.) Belton paid what she believed to be the insurance premium to Willis. (*Id.*) Belton's vehicle was subsequently involved in a collision and, when Belton informed Willis of this, Willis allegedly stated she would complete the requisite insurance verification form and would take care of any damages claimed by the third party involved in the collision. (*Id.* at ¶¶ 10-11.) Belton was subsequently contacted by the State of South Carolina, which had not received the insurance verification form, with the result that her license and registration were suspended and she was required to obtain insurance. (*Id.* at ¶ 12.) Belton alleges that Willis engaged in a variety of tortious acts. (*Id.* at ¶ 13.) She further alleges that the Insurers had a duty to properly investigate, train, and supervise Willis (*id.* at ¶ 8), that they failed to detect and stop her wrongdoing (*id.* at ¶ 13), and that they engaged in unfair trade practices (*id.* at ¶¶ 14-18), civil conspiracy (*id.* at ¶¶ 19-23), conversion (*id.* at ¶¶ 24-27), fraud (*id.* at ¶¶ 28-35), and negligent misrepresentation (*id.* at ¶¶ 36-42).[3]

The suits brought by Willis' two local competitors assert similar legal claims. In the suit brought by James Shirley, for example, he alleges is the owner and operator of Ayers-Shirley Insurance Agency in Abbeville, South Carolina, and that beginning in 2008, his business was hindered by Willis' tortious acts. (Shirley Amend. Compl. at ¶¶ 1, 10-11.) Shirley alleges the Insurers had a duty to properly investigate, train, and supervise Willis (*id.* at ¶ 9), that they failed to detect and stop her wrongdoing (*id.* at ¶ 11), and that they

[3] The factual allegations in the other suits brought by Willis' customers are variations on this theme, and the legal claims asserted against the Insurers are the same as those in the Norman and Belton Complaints.

engaged in statutory unfair trade practices (*id.* at ¶¶ 13-18), common law unfair trade practices or unfair competition (*id.* at ¶¶ 19-23), civil conspiracy (*id.* at ¶¶ 24-27), and tortious interference with existing and future contractual relations (*id.* at ¶¶ 28-31).

During the entire period of Willis' alleged wrongdoing, the Insurers' relationship with Willis and Southern Risk was established and governed by contract. Southern Risk was formed on May 17, 2004. (*See* S.C. Sec. of State Database, attached as Ex. F to Insurers' Reply in Support of Motion to Compel Arbitration.) Upon its formation, Southern Risk and Dantice became agencies, sub-agents, or sub-producers of the South Carolina Agent Network ("SCAN"). (*See* Aff. of James Berry at ¶¶ 6-8, attached as Ex. K to Insurers' Reply in Support of Motion to Compel Arbitration.)

The Montgomery Companies had previously entered into a master agency agreement with SCAN on December 1, 2003. (*See* Dec. 1, 2003 Agreement.) That agreement contained an arbitration provision. (*Id.* at ¶ 11.) The Safeco Companies subsequently entered a similar agency agreement with SCAN on December 15, 2006 (see Dec. 15, 2006 Agreement), and thereafter entered a Limited Agency Agreement directly with Southern Risk on or around March 14, 2007 (*see* March 14, 2007 Agreement).

On September 13, 2007, after SCAN changed its name to Assure Alliance, Inc., Safeco renewed its "master" Agency Agreement with Assure Alliance. (*See* Sept. 13, 2007 Agreement.) This master agreement, which contained an arbitration provision, expressly applied to Assure Alliance's sub-producers and employees such as Southern Risk and Willis. (*Id.* at 1.) Similarly, on August 15, 2007, Montgomery, acting through Liberty Mutual, entered an Agency Agreement directly with Assurance Alliance. (*See* August 15, 2007 Agreement.) This Agreement also contained an arbitration agreement. (*Id.* at ¶ 12.) Finally, on or around

April 1, 2010, Montgomery and Safeco, acting through Liberty Mutual, signed and sent an Agency Agreement directly to Southern Risk (the "Agency Agreement").[4] (*See* April 1, 2010 Agency Agreement.) This Agency Agreement also contained an arbitration agreement. (*Id.* at ¶ 12.)

The Agency Agreement requires the parties to attempt informal resolution when "any dispute or disagreement arises in connection with the interpretation of this Agreement, its performance or nonperformance." (2010 Agency Agreement at ¶ 12.A.) If the disputing parties cannot informally resolve the dispute, it will be resolved by arbitrators who "have particular knowledge and experience with independent insurance agency/company issues" and who apply the American Arbitration Association's ("AAA") Commercial Arbitration Rules. (*Id.*) The arbitration will be conducted by a single arbitrator chosen impartially by the AAA unless the amount in controversy exceeds $50,000, in which case either party may demand a three-arbitrator panel and each party may select one of the arbitrators. (*Id.* at ¶ 12.B.) The costs of the arbitration are to be borne equally by the parties, and each party is responsible for its own attorneys' fees. (*Id.* at ¶ 12.C.)

Although the Insurers have to date only been able to locate a version of the 2010 Agency Agreement unsigned by Southern Risk, the parties performed under that agreement, and prior agreements between the Insurers and Southern Risk that governed the privilege of Southern Risk, Dantice, and Willis to place insurance for the Insurers also

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[4] Because Peerless is a member of the Montgomery Insurance division of Liberty Mutual, any of Peerless' dealings with Southern Risk or Willis would only be pursuant to and governed by the terms of Liberty Mutual/Montgomery's 2010 Agency Agreements with Southern Risk. *See* www.montgomery-ins.com/omapps/ContentServer?pagename=MontgomeryInsurance/Views/MontgomeryInsurance&ft=1&fid=2237825802125 (noting Peerless is one of Montgomery's underwriting companies) (last visited August 11, 2014).

contained arbitration provisions. *See* Aff. of James Berry ¶¶ 6-8, 13; *see also* Tr. 15:11-16:2, 32:4-14. Southern Risk, Dantice, and Willis operated under the terms of the 2010 Agency Agreement until it was terminated in November 2012.

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, __, 759 S.E.2d 727, 731 (2014) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)). "'[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.'" *Id.* (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)).

ARGUMENT

The plaintiffs' claims against the Insurers should be compelled to arbitration despite the fact that the plaintiffs did not personally sign the Agency Agreement(s) containing the arbitration agreement. The various agreements between Southern Risk and the Insurers, including the 2010 Agency Agreement, contain valid and enforceable arbitration provisions. These provisions encompass the claims and allegations made here, and South Carolina courts have recognized that one who has not signed an arbitration agreement may nevertheless be bound by the agreement. *See Pearson v. Hilton Head Hospital*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). Because valid, enforceable arbitration agreements existed and the Insurers did not waive the right to compel arbitration, the trial court erred by refusing to compel arbitration.

I. The trial court erred by ruling that no valid contract exists containing an arbitration agreement.

In its Order denying the motion to compel arbitration, the trial court ruled that because the Insurers could not locate a copy of the 2010 Agency Agreement that was signed by Southern Risk, there was no valid, binding contract by which the plaintiffs could be forced to arbitrate their claims. *See* Order at 3-4. As explained below, however, neither contract law, the Federal Arbitration Act ("FAA"),[5] nor the Statute of Frauds require that the 2010 Agency Agreement must be signed to be enforceable. Furthermore, the absence of a signed copy of *that* agreement—if that absence were significant—is entirely mitigated by the existence of prior, signed agency agreements that were in force during the time of Willis' alleged wrongdoing and which contain arbitration provisions.

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[5] The FAA applies "whenever an arbitration agreement involves interstate commerce." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, __, 759 S.E.2d 727, 731 (2014) (citations omitted). If the FAA applies, it preempts any conflicting state arbitration statute with which it conflicts. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984). For purposes of determining whether a contract is one "involving commerce" such that the FAA applied, the word "involving" is interpreted broadly and is the functional equivalent of "affecting commerce," which "normally signaled Congress' intent to exercise its Commerce Clause powers" in full. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273 (1995). *See also Dean*, 408 S.C. at __, 759 S.E.2d at 731 (noting that the FAA's reach is "coextensive with the broad reach of the Commerce Clause") (citations omitted).

Here, the Agency Agreement, the insurance business, and the alleged wrongful acts involve interstate commerce. The Agreement and its addenda note that the Insurers are located outside of South Carolina, which is true, and which is alleged in the Complaints. In addition, some or all of the insurance premiums and resulting commissions that the plaintiffs alleged they were deprived of would have been sent out of or received from outside the State of South Carolina. Accordingly, because the arbitration agreement involves interstate commerce, it is covered by the FAA. *See Dean*, 408 S.C. at __, 759 S.E.2d at 732 (noting that a residency agreement between a South Carolina nursing home and a South Carolina resident implicated interstate commerce and was thus governed by the FAA because the residency contract required the provision of "meals and medical supplies, which are instrumentalities of interstate commerce") (citation omitted).

A. The 2010 Agency Agreement need not be signed by Southern Risk to be an enforceable contract.

Contrary to the trial court's ruling, there is no requirement in contract law or under the FAA that a contract must be signed by both or all parties in order to be enforceable. "[I]t has long been a paradigm of South Carolina law that when a contract signed by one party only is accepted by the other party, it becomes binding upon both just as if it were signed by both." *Jaffe v. Gibbons*, 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct. App. 1986) (citing *Peddler, Inc. v. Rikard*, 266 S.C. 28, 221 S.E.2d 115 (1975)); *see also Peddler*, 266 S.C. at 32, 221 S.E.2d at 117 ("'It is not always necessary, in order to give validity to a contract, that it should be signed by both parties; it may be sufficient if it be signed by one party and accepted, held, and acted upon by the other.'") (quoting *Gladden v. Keistler*, 141 S.C. 524, 140 S.E. 161 (1927)).

Accordingly, courts have held that an arbitration provision in a contract signed by only one of the parties to that contract is nevertheless enforceable under the FAA. *See Poteat v. Rich Prods. Corp.*, 91 F. App'x 832, 834 (4th Cir. 2004) (finding an agreement to arbitrate was enforceable under South Carolina law despite the fact that the employer never signed the agreement that contained the arbitration provision); *Carter v. MasTec Servs. Co.*, No. 2:09-2721-PMD, 2010 U.S. Dist. Lexis 10338, *11 (D.S.C. Feb. 5, 2010) ("Under South Carolina law, an arbitration provision located within an employment agreement signed by an employee but not the employer can be enforceable and binding on both parties.") (citations omitted); *Collie v. Wehr Dissolution Corp.*, 345 F. Supp. 2d 555, 558-59 (M.D.N.C. 2004) (ruling that the lack of one party's signature did not undermine the arbitration agreement's enforceability); *Clar Prods., Ltd. v. Isram Motion Picture Prod. Servs., Inc.*, 529 F. Supp. 381, 383 (S.D.N.Y. 1982) ("[I]t is settled law in

this Circuit that 'a party may be bound by an agreement to arbitrate even in the absence of a signature,' [] as long as the arbitration provision itself is in writing.").

As made clear by binding South Carolina precedent and the persuasive authority from other jurisdictions, there is no requirement that Southern Risk have signed the 2010 Agency Agreement to make that agreement binding. Further, Southern Risk, Dantice, and Willis have continuously operated under a series agreements with the Insurers containing arbitration provisions. Because those co-defendants accepted and acted upon each of the agreements, including the 2010 Agency Agreement, those agreements became binding. *Jaffe*, 290 S.C. at 473, 351 S.E.2d at 346. The trial court erred by ruling otherwise.

B. The Statute of Frauds is inapplicable to the 2010 Agency Agreement.

The trial court also erred by ruling that the 2010 Agency Agreement is "invalid because it violates the Statute of Frauds." Order at 4. That statute states that certain enumerated types of actions may not be brought "unless the agreement upon which such action shall be brought . . . shall be in writing and signed by the party to be charged therewith." S.C. Code Ann. § 32-3-10. The trial court concluded that the 2010 Agency Agreement "is unenforceable because it cannot be performed within one year's time and was not signed by Southern Risk." Order at 4. This ruling was a clear legal error because the 2010 Agency Agreement, like the prior agreements between the Insurers and Southern Risk, were for indefinite terms and could be terminated at will with as little as 90 days notice by either party, with or without cause. Because it was possible for the contract to be performed within a year, the Statute of Frauds does not apply:

> It is equally well established that the Statute of Frauds applies only to contracts which are *impossible* of performance within one year. . . . If there is a *possibility* of performance within a year, the contract is not barred by the

> Statute of Frauds. [] The fact that performance within a year is highly improbable or not expected by the parties does not bring a contract within the scope of this clause.

Roberts v. Gaskins, 327 S.C. 478, 485, 486 S.E.2d 771, 774 (Ct. App. 1997) (emphasis added, citations omitted). Accordingly, the Statute of Frauds does not apply "when by the happening of a contingency the defendant may be required to perform his contract within a year." *Joseph v. Sears Roebuck & Co.*, 224 S.C. 105, 112, 77 S.E.2d 583, 586 (1953).

South Carolina and federal courts have held that a contract of an indefinite term that is terminable at will subject to reasonable notice is not subject to the Statute of Frauds. *See Center State Farms v. Campbell Soup Co.*, 58 F.3d 1030 (4th Cir. 1995); *Weber v. Perry*, 201 S.C. 8, 21 S.E.2d 193, 194 (1942) (stating that "contracts of employment for an indefinite term or on a contingency" do not fall within the statute). In sum, contrary to the trial court's unsupported assertion that the 2010 Agency Agreement cannot be performed within one year's time and thus is subject to the Statute of Frauds, the courts of this State and surrounding federal jurisdictions have held that contracts such as this are ***not*** subject to the Statute of Frauds.

C. Pre-2010 signed agreements containing arbitration agreements were in force during much or all of the time of Willis' alleged wrongdoing.

As explained in the Statement of the Facts, *supra*, arbitration provisions were present in the December 1, 2003 master agency agreement between Montgomery and SCAN (which applied to Southern Risk upon its formation), the September 13, 2007 master Agency Agreement between Safeco and Assure Alliance (which applied to Southern Risk and Willis), and the August 15, 2007 Agency Agreement between Montgomery and Assure Alliance. Accordingly, Southern Risk and Willis were at all times relevant to these lawsuits operating pursuant to agreements containing arbitration

agreements. Furthermore, if the 2010 Agency Agreement never took effect, it would therefore never have replaced or superseded the prior agreements, which continued in force until the Insurers terminated their relationship with Southern Risk in 2012. Thus even leaving aside the validity of the 2010 agreement, the Insurers' relationship with Willis was governed by contracts containing arbitration provisions at all times relevant to these lawsuits, and the trial court erred in ruling otherwise.

II. The trial court erred by ruling that the plaintiffs' allegations here did not fall within the ambit of the supposedly "narrow" arbitration provision.

In its Order denying the motion to compel arbitration, the trial court ruled that the arbitration provision in the 2010 Agency Agreement "is too narrowly worded for the Court to enforce in the instant litigation." Order at 4. The Order also concludes that the arbitration provision "is inapplicable on its face to the Plaintiffs' claims because these claims have no relation to and are not 'in connection with the performance of the Agency Agreement.'" Order at 4 (quoting 2010 Agency Agreement). As explained below, these rulings ignore the expansive wording of the arbitration agreement and fail to recognize that each of the claims asserted against the Insurers are premised on rights and duties that would not exist but for the Agency Agreements between the Insurers and Southern Risk.

A. South Carolina case law establishes that the arbitration provision here is a broad one.

The arbitration provision contained in the 2010 Agency Agreement requires arbitration of "any dispute or disagreement [that] arises in connection with the interpretation of this agreement, [or] its performance or nonperformance . . ." (*See* 2010 Agency Agreement at ¶ 12.A.) This broad language encompasses *any* dispute that has a connection with the contract's performance or nonperformance. Indeed, the trial court's

attempt to distinguish this language from arbitration agreements enforced in binding precedent merely serves to highlight the similarities between this provision and others that were interpreted broadly and enforced. (*See* Order at 4 ("[A] clause which provides for arbitration of all disputes "arising out of and relating to" the contract is construed broadly.") (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (labeling as "broad" a clause that required arbitration of "[a]ny controversy or claim arising out of and relating to this Agreement").)

The trial court cites no South Carolina precedent for its assertion that "[n]arrowly worded" arbitration clauses, on the other hand, are subject to strict scrutiny." (Order at 5.) However, our Supreme Court has held that "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) (emphasis added) (citations omitted). Similarly, the Court has described an arbitration agreement similar to the one at issue here as "a broad arbitration provision." *Landers v. FDIC*, 402 S.C. 100, 103, 739 S.E.2d 209, 210 (2013) (describing a provision "requiring arbitration of 'any controversy or claim arising out of or relating to this contract, or breach thereof'").

B. All of the claims against the Insurers fall within the scope of the arbitration provision because those claims are entirely premised on rights and duties that would not exist but for the Agency Agreement.

The trial court erred in concluding that the claims asserted against the Insurers fall outside that scope of the arbitration provision because the claims have no relation or connection with the performance of the Agency Agreement. *See* Order at 5. To the contrary, each of the plaintiffs' allegations against the Insurers is premised on the Insurers' alleged rights or duties that would not exist but for the Agency Agreement.

First, the plaintiffs allege in their Complaints that the alleged wrongdoer, Willis, operated "under the direct supervision of" the Insurers. (*See*, *e.g.*, Norman Compl. at ¶ 2.[6]) The Insurers' supervisory authority over Willis, however, if any, is grounded ***solely*** in the Agency Agreement. Further, it is only pursuant to the Agency Agreement that Willis "is authorized to solicit and submit applications" for insurance from the Insurers. (*See* Agency Agreement at ¶ 1.B; *id.* at Safeco Addendum ¶ 2 (noting that Southern Risk, "including its employees and subproducers, is authorized to solicit and submit business" for Safeco insurance products).) Hence, plaintiffs wish to seek compensation as a result of alleged contract obligations owed by the Insurers, yet the plaintiffs do not wish to be bound by the arbitration provision in the same contract.

Second, the plaintiffs allege in their Complaints that the corporate defendants had "a legal duty to fully investigate and do full background research on" Willis. (*See*, *e.g.*, Shirley Amend. Compl. at ¶ 8.[7]) The Insurers' alleged ability to perform or have the agency perform a background check on Willis is also derived from the Agency Agreements. (*See* Agency Agreement at ¶ 2.F (requiring agency to assist insurer in completing background checks on agency personnel).) Similarly, it is the Agency Agreements that require the agents and their employees to be properly licensed and credentialed. (*Id.* at ¶ 2.C (representing that all agency employees and subproducers have the requisite consents, authorizations licenses, certificates, and permits).) Thus, again, the

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[6] Each of the Complaints asserts the same allegation.

[7] The other Complaints contain essentially the same allegations. (*See*, *e.g.*, Norman Compl. ¶ 8 ("Defendants Dantice, Southern Risk, Peerless and Montgomery had a legal duty to fully investigate any prospective insurance agent and/or employee."); Wofford Compl. at ¶ 6 ("Defendants Jesse A. Dantice, Southern Risk Insurance Services LLC, Safeco Ins. Co, at all times have a legal duty to fully investigate any prospective insurance agent and/or employee.").)

plaintiffs' claims of failure to investigate and check Willis' background are dependent upon the existence of the Agency Agreement.

Third, the plaintiffs allege in their Complaints that the Insurers had "a legal duty to properly train and supervise" Willis. (*See*, *e.g.*, Norman Compl. at ¶ 8.[8]) Yet again, this alleged duty to train and supervise, as far as it goes, is grounded in the Agency Agreements. (*See* Agency Agreement at ¶ 1.C ("Agency is only authorized to act as agent for Company and bind Company pursuant to written authority and guidelines furnished to Agency by Company."); *id.* at Safeco Addendum ¶ 3 (limiting agency's and Willis' authority to situations outlined "in product underwriting and binding authority guides . . . or in other written instructions").)

Fourth, the plaintiffs allege in their Complaints that all of Willis' wrongful acts were performed "with the express or implied permission of the other Defendants." (*See*, *e.g.*, Lawton Compl. at ¶ 9.[9]) As noted above, the only source of Willis' authority or permission to act in relation to the Insurers is derived from the Agency Agreements. In addition, the Agency Agreements expressly limit the permission given to Willis to the acts expressly permitted by the Agreements. (*See* Agency Agreement at ¶¶ 1.C, 1.F, and 2.A.)

Fifth, the plaintiffs allege in their Complaint that the Insurers had the ability and duty to detect and stop Willis' wrongful acts, and that Willis' wrongful acts "could have been discovered and should have been discovered and stopped by the Defendants through reasonable direct supervision of Defendant Laura B. Willis' activities as well and through auditing computer programs which reveal fraud and/or misconduct of agents and/or

[8] Each of the Complaints contains an identical or substantially identical assertion.

[9] Each of the Complaints contains an identical or substantially identical assertion.

customers." (*See, e.g.*, Wofford Compl. at ¶ 19.[10]) As noted above, any alleged ability by the Insurers to supervise Laura Willis exists, if at all, only via the Agency Agreements. In addition, the Insurers' alleged ability to audit Willis' work is provided solely pursuant to the Agency Agreements. (*See* Agency Agreement at ¶¶ 6.C, 6.D, and 8.) Similarly, Willis' and Southern Risk's obligation to keep accurate records is an obligation imposed by the Agreement. (*See id.* at ¶ 15.A.)

Finally, the plaintiffs' claims implicate the Agency Agreement by giving rise to the Insurers' rights to make a demand against co-defendant Southern Risk for indemnification. (*See* Agency Agreement at ¶ 7.B (requiring Southern Risk to indemnify the Insurers for any "liability, claims, losses, damages, costs, and expenses . . . arising out of or incurred by reason of any error or omission on the part of Agency, its directors, officers, agents, employees, affiliates or subproducers in placing business pursuant to or carrying out the terms and conditions of this Agreement").) Here, the plaintiffs' claims against the Insurers are precisely the type of claims against which the agency must indemnify the Insurers and, pursuant to the Agency Agreement, this claim for indemnification is subject to arbitration. (*Id.* at ¶ 12.)

In sum, because the plaintiffs' allegations against the Insurers depend upon the terms, authority, and obligations created and imposed by the Agency Agreement, they fall within the scope of the Agency Agreement's arbitration provision. The Agreement's arbitration provision applies to "*any* dispute or disagreement [that] arises *in* connection with the interpretation of this Agreement, its performance or nonperformance." (Agency Agreement at ¶ 12.A (emphasis added).) All of the plaintiffs' claims against the Insurers

[10] Each of the Complaints contains an identical or substantially identical assertion.

are connected with the interpretation of the Insurers' obligations under the Agency Agreement and the alleged nonperformance of those obligations. Accordingly, the claims fall within the purview of the arbitration provision. *See Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d 209, 213-14 (2013) ("A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly" and is "capable of an expansive reach.") (citations omitted); *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603-04 (2010) (noting that because "[t]he policy of the United States and of South Carolina is to favor arbitration of disputes," arbitration should generally be ordered, "[u]nless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute."); *see also York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 95 S.E.2d 139, 154 (Ct. App. 2013) ("[A] claim is within the scope of an arbitration clause that purports to cover all related disputes, so long as a significant relationship exists between the claim and the contract containing the arbitration agreement.") (citation omitted).

III. The trial court erred by refusing to compel arbitration of the plaintiffs' claims that seek to enforce and take advantage of a contract containing a binding arbitration agreement.

The trial court erred in concluding that the arbitration provision is not enforceable against non-signatories because "there is absolutely no evidence whatsoever that the Plaintiffs have consistently maintained the provisions of the Agency Agreement between defendants and Southern Risk should be enforced to benefit them." Order at 6. The trial court based this conclusion on two premises: (1) that the Plaintiffs had not previously seen a copy of the Agency Agreements prior to filing their suits and (2) that some of the wrongdoing alleged in

the complaint was not contemplated by the Agency Agreement. *Id.* at 6-7. As explained below, the trial court's premises and conclusion are incorrect.

A. South Carolina and other jurisdictions permit a defendant to compel arbitration of the claims of a plaintiff who was not a signatory to the arbitration agreement.

As an initial matter, South Carolina courts have recognized that one who has not signed an arbitration agreement may nevertheless be bound by the agreement. *See Pearson v. Hilton Head Hospital*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). In such instances, the non-signatory may be bound on the basis of common law principles of contract and agency law such as estoppel. *Id.* at 289, 733 S.E.2d at 601 (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 (4th Cir. 2000)). Here, as in *Pearson*, the Insurers may compel arbitration of the plaintiffs' claims because their claims against the Insurers are premised on the contract(s) containing an arbitration provision:

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

Pearson, 400 S.C. at 290, 733 S.E.2d at 601 (quoting *Int'l Paper*, 206 F.3d at 418). As explained below, the allegations of the plaintiffs' Complaints against the Insurers depend on the terms, authority, and obligations created and imposed by the Agency Agreements.

As the South Carolina Court of Appeals held in *Pearson*, a party may not argue that the lack of his signature on a contract precludes enforcement of the contract's arbitration clause when his Complaint seeks the benefit of enforcing other provisions of the same contract. *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601. Here, each of the

plaintiffs' claims against the insurers are premised on rights and duties that exist solely because of the Agency Agreement. *See* Part II.B, *supra*. Accordingly, the plaintiffs' claims against the Insurers should be compelled to arbitration.

Courts of other jurisdictions agree that a plaintiff who did not sign a contract but whose suit is premised on and seeks to enforce the contract's terms may not avoid the contract's arbitration clause. *See Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1312 (11th Cir. 2005) (compelling non-signatory plaintiff to arbitration under equitable estoppel theory because "Mrs. Blinco may not rely upon the Note to establish her RESPA claims while avoiding her obligation under the Note to arbitrate such claims"), rev'd on other grounds by *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *Flexi-Van Leasing Inc. v. Transp. Mut. Ins. Ass'n.*, 108 Fed. Appx. 35, 40 (3d Cir. 2004) ("[W]e have recognized that non-signatories to an arbitration agreement may be bound by that agreement through the application of 'traditional principles of contract and agency law.' One such traditional principle, applicable in the arbitration context, is the principle that a third-party beneficiary is bound by the terms of a contract where its claim arises out of that contract."); *Int'l Paper*, 206 F.3d at 413-14 (compelling the plaintiff's claims to arbitration despite the fact that the plaintiff-buyer had not signed the agreement containing the arbitration clause, noting that "the buyer cannot sue to enforce the guarantees and warranties of the distributor-manufacturer contract without complying with its arbitration provision"); *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp.*, 659 F.2d 836, 838 (7th Cir. 1981) (holding that non-signatory plaintiff was equitably estopped from avoiding an arbitration agreement in a contract between defendant and a third party because the basis of the plaintiff's suit was that the defendant

had breached the terms of that contract); *Carlin v. 3V, Inc.*, 928 S.W.2d 291 (Tex. Ct. App. 1996) (holding the defendant could compel arbitration of a non-signatory plaintiff's claims, which were premised on the contract containing an arbitration agreement). Hence, the trial court should be reversed.

B. Whether the plaintiffs saw the Agency Agreements prior to filing suit is irrelevant to the question of whether their claims should be arbitrated.

In its Order, the trial court concluded that the plaintiffs' claims were not dependent on the Agency Agreement because the plaintiffs "had never even seen the instant contract prior to the filing of Defendants' motions." Order at 6. Whether they had seen the Agency Agreements, however, is irrelevant to the question of whether their claims are dependant on and seek to benefit from provisions of those contracts. None of the cases cited above compelling arbitration of a non-signatories' claims reached that conclusion based on whether the non-signatory had seen the contract prior to filing his suit or whether the non-signatory was aware of the details of the contract. Rather, the relevant question is whether a non-signatory plaintiff is asserting claims that assume or rely upon rights, duties, or obligations that exist solely as a result of the contract containing an arbitration provision.

Here, the plaintiffs cannot assert claims against the Insurers based entirely on the Insurers' alleged failure to exercise rights and duties created solely by the Agency Agreements while simultaneously asserting they are seeking to avoid other provisions of the Agency Agreement. Simply put, they cannot have one without the other. The plaintiffs expanded their dispute beyond Willis' wrongdoing to specifically include claims against the Insurers. This expansion is necessarily dependent on the alleged rights and duties that would not exist but for the Agency Agreements. Thus, regardless of

whether they had previously set eyes on the agreements, there can be no question that they are seeking to enforce or take advantage of the agreements for their benefit and are subject to the arbitration provision despite their status as non-signatories.

In an effort to bolster its erroneous conclusion that the plaintiffs' claims are not premised on rights and duties created solely by the Agency Agreements, the trial court also conflates the claims against Willis with the claims against the Insurers. *See* Order at 7 ("[T]he allegations for which Plaintiffs seek to recover—stealing, misappropriation of funds, artificial premium calculations, fraud, and forgery—are not contemplated by the Agency Agreement at hand."). Those, however, are not the claims made against the Insurers. The plaintiffs do not allege the Insurers committed theft, misappropriation, misleading calculations, fraud, or forgery. Rather, the plaintiffs allege that Insurers failed to properly train, investigate, supervise, and audit Willis—all of which are rights and duties that are contemplated and imposed solely by the Agency Agreements. The trial court's attempt to lump the claims against the Insurers in with the claims against Willis cannot obscure the fact that all of the claims against the Insurers are, in fact, based on rights and duties contemplated by the Agency Agreements.

IV. The trial court erred by ruling the Insurers' alleged wrongdoing was so "outrageous" as to be unforeseeable and thus not subject to arbitration.

In its Order, the trial court ruled that the claims against the Insurers were not encompassed by the arbitration provision "because the alleged actions of Defendants constitute 'illegal and outrageous acts' unforeseeable to a reasonable consumer in the context of normal business dealings." Order at 7-8. This ruling is erroneous in two ways.

First, as noted in Part III.B, *supra*, the trial court's ruling fails to distinguish between the claims asserted against the Insurers and the claims asserted against Willis

and Southern Risk. Rather, the trial court erroneously conflates them and concludes that the alleged wrongdoing was illegal and outrageous. With respect to the Insurers, however, even assuming *arguendo* the truth of the Complaints' allegations, the alleged wrongdoing of the Insurers—failure to sufficiently investigate, train, supervise, and audit a sub-producer—is neither illegal, outrageous, or entirely unforeseeable.

Second, the trial court ignored the recent ruling in which the South Carolina Supreme Court held that even a claim for intentional infliction of emotional distress—the quintessential "outrage" claim—can be subject to arbitration. *Landers v. FDIC*, 402 S.C. 100, 739 S.E.2d 209 (2013). Hence, the trial court must be reversed.

V. The trial court erred by ruling that Appellants waived their right to compel arbitration.

Finally, the trial court erred by ruling that the Insurers waived the right to compel arbitration by waiting "approximately eleven months" after the lawsuits were filed before seeking to compel arbitration. *See* Order at 8-9. The trial court correctly noted three factors to determine whether a party waived its right to compel arbitration, though it erred significantly in its subsequent analysis and application of those factors:

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

Order at 9 (quoting *Rhodes v. Benson Chryslter-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007)).

As to the first of the three factors, the trial court noted that many of the cases here had been pending for 11 months before the Insurers sought to compel arbitration. The

trial court, however, neglected to consider that South Carolina cases finding waiver generally involve time ranges of 18 months to five years and involve extensive or even complete discovery and actions invoking the power of the court by the parties seeking arbitration. *See, e.g., Liberty Builders v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999) (noting litigation had been ongoing for two-and-a-half years, and the party seeking to compel arbitration had sought assistance from the court approximately 40 times including motions to amend, compel, dismiss, add parties, and restore under Rule 40(j)); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2013) (noting litigation had been ongoing for 19 months and the moving party had made motions, deposed the opponent, and generally had extensive discovery resulting in increased costs to the other side); *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 594 S.E.2d 523 Ct. App. 2004) (noting litigation had been ongoing for five-and-a-half years and that thousands of documents had been produced and one claim had actually been tried to the court); *Davis v. KB Home of S. Carolina, Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011) (noting litigation had been ongoing for 18 months and parties had engaged in extensive discovery including one deposition that was rescheduled five times).[11] In contrast to the cases cited above, these lawsuits had not progressed much beyond the filing of pleadings and motions to dismiss. *See* Order at 9 ("Plaintiffs have

[11] Although *Rhodes v. Benson Chryslter-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007) found waiver after a delay of ten months, the parties in that case had conducted virtually all discovery, including written interrogatories, requests to produce, and five depositions, and the case was to the point where it had been set on the docket for trial when the moving party attempted to compel arbitration. Thus, *Rhodes* is distinguishable from this case.

served Complaints and Amended Complaints, and Defendants have answered and filed Motions to Dismiss.").[12]

In analyzing the second of the three waiver factors, the trial court noted that the parties "have *commenced* discovery." Order at 9-10. However, this was of a very limited nature.[13] No depositions have been taken by or of the Insurers in these cases.

The trial court omitted any reasoning or analysis regarding the third of the three factors beyond the conclusory assertion that an order compelling arbitration would prejudice the plaintiffs. Order at 10. No such prejudice would occur.

In sum, the lapse of time before the Insurers filed the motions to compel arbitration was minimal, the Insurers had not previously engaged in extensive discovery or invoked the power of the court, and the trial court identified no prejudice to the plaintiffs that resulted from the delay in seeking arbitration. Accordingly, the trial court erred in concluding that the Insurers waived their right to compel arbitration.

CONCLUSION

For the foregoing reasons, the Insurers respectfully request this Court reverse the trial court's order denying the Insurer's Motion to Compel Arbitration and Dismiss the

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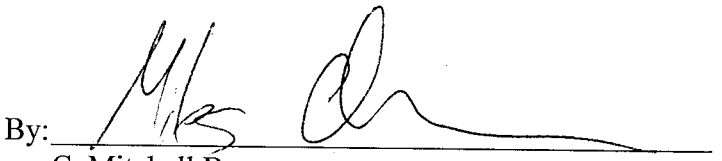
[12] In one of the lawsuits (*Wilson v. Willis et al.*), the Insurers had filed a Motion for Judgment Regarding the Claims for Civil Conspiracy and Unfair Trade Practices on January 22, 2013 and a Motion for Judgment on the Pleadings on the Claim for Common Law Unfair Trade Practices on June 28, 2013. On November 6, 2013, however, after filing their motions to compel arbitration, the Insurers withdrew the motions for judgment before they were responded to or ruled upon.

[13] While the Insurers did serve discovery requests on the plaintiffs, the Insurers subsequently moved to compel arbitration before receiving any responses, and specifically notified the plaintiffs' counsel there was no need to respond to those discovery requests in light of the motions to compel arbitration. Similarly, the Insurers have declined to respond to discovery requests in light of these motions, and have sought to stay discovery pending resolution of the arbitration issue, so as to avoid needless and costly proceedings. In short, the Insurers have not engaged in "extensive discovery" as would be required to waive the right to compel arbitration.

Claims and remand with instructions to the trial court to compel all claims against the Insurers to arbitration and to dismiss the claims against them in these suits.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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August 18, 2014
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-01-00306
Appellate Case No. 2014-00946

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

v.

LAURA B. WILLIS and JESSE A. DANTICE, individually, and as agents and/or brokers for Southern Risk Insurance Services LLC, Travelers Casualty Insurance Company of America, Allied Property and Casualty Insurance Company, Peerless Insurance Company, Montgomery Mutual Insurance Company, Safeco Insurance Company of America, and Foremost Insurance Company, SOUTHERN RISK INSURANCE SERVICES, LLC, TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA, ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY, PEERLESS INSURANCE COMPANY, MONTGOMERY MUTUAL INSURANCE COMPANY, SAFECO INSURANCE COMPANY OF AMERICA, AND FOREMOST INSURANCE COMPANY, ... Defendants,

Of Whom Peerless Insurance Company, Montgomery Mutual Insurance Company, and Safeco Insurance Company of America are..... Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Montgomery Mutual Insurance Company, Peerless Insurance Company, and Safeco Insurance Company of America, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Initial Brief of Appellants Peerless Insurance Company, Montgomery Mutual Insurance Company, and Safeco Insurance Company of America

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August 18, 2014

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, South Carolina 29201

RE: Richard W. Wilson v. Laura B. Willis, and Jesse A. Dantice, et al.
Civil Action No. 2012-CP-01-306
Appellate Case No. 2014-00946
Our File No. 00350/01679

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Appellants Peerless Insurance Company, Montgomery Mutual Insurance Company, and Safeco Insurance Company of America, as well as Appellant's Designation of Matter for the Record on Appeal in regard to the above-referenced matter. We ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with copies of these pleadings. With kind regards, I remain

Sincerely,

Miles E. Coleman

cc: Thomas E. Hite, Jr., Esquire
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Mason A. Goldsmith, Esquire
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