THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-01-00306
Supreme Court Case No. 2016-001512

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

v.

LAURA B. WILLIS and JESSE A. DANTICE, individually, and as agents and/or brokers for Southern Risk Insurance Services LLC, Travelers Casualty Insurance Company of America, Allied Property and Casualty Insurance Company, Peerless Insurance Company, Montgomery Mutual Insurance Company, Safeco Insurance Company of America, and Foremost Insurance Company, SOUTHERN RISK INSURANCE SERVICES, LLC, TRAVELERS CASUALTY INSURANCE 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., and Laurie Williams ..... Defendants,

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

and

Of whom Laurie Williams is, ... Petitioner.

BRIEF OF RESPONDENTS

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INTRODUCTION[1]

This appeal raises the question of whether individuals injured by the actions of a rogue employee at an independent insurance agency may be compelled to arbitrate the claims they have asserted against the insurers whose policies the employee purported to sell. The injured individuals filed state court lawsuits alleging the insurers were obliged to screen, investigate, train, supervise, and audit the wrongdoer, but failed to do so, and that if the insurers had performed these tasks, the wrongdoing could have been prevented.

The duties the insurers allegedly failed to perform were imposed on them solely by a contract, namely the Agency Agreement between the insurers and the local agency that employed the wrongdoer. If not for that agreement, the insurers would have neither the right nor the legal duty to screen, investigate, train, supervise, and audit the employees of every agency and brokerage who sells their policies. Stated differently, in the absence of the Agency Agreement and the obligations it imposes, the plaintiffs would have no claims against the insurers.

The Agency Agreement contains an arbitration provision requiring any dispute relating to the interpretation, performance, or non-performance of the Agreement to be submitted to arbitration. Because the plaintiffs' claims against the insurers were premised wholly on the alleged non-performance of duties imposed solely by the Agreement, the insurers moved to compel these lawsuits to arbitration, arguing the plaintiffs—though they did not themselves sign the Agreement—could not rely on some parts of the Agency Agreement while avoiding others such as its arbitration provision.

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[1] Respondents file a single brief in response to the two briefs filed by Petitioners. Argument sections I and II below address the arguments raised by the group of Petitioners, and sections III and IV below respond to the arguments raised by Petitioner Laurie Williams.

The Court of Appeals agreed and correctly applied this Court's established precedent to the allegations raised by these complaints, holding the plaintiffs in these lawsuits were bound by the arbitration provision despite having not themselves signed the contract; the plaintiffs' claims fell within the scope of the arbitration provision; and that arbitration was not barred by statute or the doctrine of waiver. As explained more fully below, the Court of Appeals' analysis was correct, and this Court should affirm the opinion below.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW[2]

1. Did the Court of Appeals correctly hold the Petitioners' claims against the Insurers depend on and seek to enforce and benefit from rights, duties, and obligations found solely in a contract containing an arbitration provision, and, therefore, Petitioners were estopped from avoiding the arbitration provision even though they had not themselves signed the contract?

2. Did the Court of Appeals correctly hold the Petitioners' claims against the Insurers are premised entirely on the Insurers' alleged failures to perform duties that are imposed solely by a contract and thus those claims fall within the scope of the contract's arbitration provision?

3. Did the Court of Appeals correctly hold Petitioner Williams' suit, which does not arise from or involve the interpretation or application of an insurance policy, does not fall within the scope of S.C. Code Ann. § 15-48-10(b)(4)'s exception to arbitration?

4. Did the Court of Appeals correctly hold the Insurers did not waive their right to compel arbitration of Ms. Williams' claims because only a modest period of time passed before they filed the motion to compel arbitration, little or no discovery had yet occurred in the lawsuit, and there was no prejudice to the non-moving parties?

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[2] The Court of Appeals considered and decided several other issues relating to the arbitrability of Petitioners' claims (*e.g.*, whether the Statute of Frauds applied to the contract at issue, whether the Insurers' alleged wrongdoing was so "outrageous" as to be un-arbitrable, etc.). *See Wilson v. Willis*, 416 S.C. 395, 786 S.E.2d 571 (Ct. App. 2016). Petitioners, however, sought certiorari only on the four issues noted above.

COUNTER-STATEMENT OF THE CASE
(AS TO THE GROUP OF PETITIONERS)

This appeal arises from 14 related suits filed between November 1, 2012 and August 28, 2013, all of which allege wrongdoing by Laura Willis, an insurance agent operating under the supervision of Jesse Dantice and Southern Risk 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 other local insurance agents who were competitors with Willis and Southern Risk.

The plaintiffs in the lawsuits named several defendants including Willis, Dantice, Southern Risk and various insurance companies, including Peerless Insurance Company, Montgomery Mutual Insurance Company, and Safeco Insurance Company of America (collectively "the Insurers"). The Complaints allege Willis engaged in a variety of tortious acts and the Insurers had a duty to properly investigate, train, and supervise Willis, and that the Insurers should have but failed to detect and stop her wrongdoing. For example, the suit brought by Jeanette Norman alleges the Insurers had a duty to properly investigate, train, and supervise Willis (*see* Norman Compl. at ¶ 8 (App. 373)), that they failed to detect and stop her wrongdoing (*id.* at ¶ 17 (App. 376)), and that these alleged failures constituted statutory unfair trade practices, common law unfair trade practices, conversion, fraud, and negligent misrepresentation. (*Id.* at ¶¶ 19–48 (App. 378–81.[3])) The claims asserted against the Insurers in the other suits brought by Willis' customers are the same as those in the Norman Complaint.

[3] As explained fully in the "Argument" section below, the sole nexus connecting the Insurers to these claims are the rights, duties, and alleged failures arising from the Agency Agreement. An insurer cannot be vicariously liable for an agent's or subagent's misrepresentations, fraud, unfair and deceptive acts, and conversion, *see Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 412 S.E.2d

The suits brought by Willis' two local competitors assert legal claims similar to those brought by the customers. The suit brought by James Shirley, for example, alleges the Insurers had a duty to properly investigate, train, and supervise Willis (*see* Shirley Amend. Compl. at ¶ 9 (App. 388)), that they failed to detect and stop her wrongdoing (*id.* at ¶ 11 (App. 399)), and that these alleged failures constituted statutory unfair trade practices, common law unfair trade practices or unfair competition, civil conspiracy, and tortious interference with existing and future contractual relations. (*Id.* at ¶¶ 13–31 (App. 391–94.))

On October 31, 2013, the Insurers filed motions to compel arbitration and to be dismissed from the suits.[4] The motions were based on the ground that each of the Petitioners' claims against the Insurers was premised on the Insurers' alleged non-performance of duties imposed solely by the Insurers' contractual relationship with Southern Risk. The Insurers argued that during the entire period of Willis' alleged wrongdoing, the Insurers' relationship with Willis and Southern Risk was established and governed by contracts, namely Agency Agreements that contained arbitration provisions. Specifically, the 2010 Agency Agreement establishing the relationship, rights, obligations, and duties between the Insurers, Southern Risk, and Willis contained the following arbitration provision:

> If *any dispute or disagreement arises in connection with* the interpretation of this Agreement, *its performance or non-performance*, its termination, the figures and calculations used or any non-payment of accounts, the parties will make efforts to meet and settle their dispute in good faith informally. If the parties cannot agree on a written settlement to the dispute within 30 days after it arises, or within a longer period agreed upon by the parties

425 (Ct. App. 1991)), and, accordingly, the gravamen of every legal claim asserted against the Insurers are the alleged failures to supervise, train, detect, and stop Willis, all of which involve duties arising solely from the Agency Agreement.

[4] The Insurers filed the motions a few days later in the suits brought by Mr. Lawton and the Antoniaks.

> in writing, then the matter in controversy, upon request of either party, will be settled by arbitration.

(2010 Agency Agreement at ¶ 12.A (App. 464) (emphasis added).[5]) Because plaintiffs' claims against the Insurers were premised entirely on the alleged failure to exercise or perform rights, duties, and obligations existing and arising solely from the Agency Agreement, the Insurers argued the plaintiffs could not 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 received briefing and heard arguments on the motions and, on March 25, 2014, denied the Insurers' motions. The trial court subsequently denied motions to alter or amend, and the Insurers appealed.

The appeals were consolidated, and the Court of Appeals received briefing, heard oral argument, and on March 2, 2016, reversed the trial court's ruling. The Court of Appeals held the Agency Agreement was a valid contract, that its arbitration provision encompassed the causes of action raised in the Complaints, that non-signatories who sought to enforce and benefit from its provisions were estopped from avoiding its arbitration provision, that the Insurers' alleged failures were not illegal or outrageous non-arbitrable acts, and the Insurers did not waive their right to compel arbitration. The Petitioners filed motions for rehearing, which the Court of

[5] One disputed issue before the Court of Appeals was whether this 2010 Agency Agreement was a valid and enforceable contract. The Court of Appeals correctly ruled it was, and Petitioners did not challenge that ruling in their Petitions for Certiorari. Accordingly, any implications to the contrary in Petitioners' brief should be disregarded as irrelevant. *See, e.g.*, Brief of Pet. at 9–10 (alleging the insurers failed to authenticate the Agency Agreement or present testimony regarding the relationship between the insurers and Southern Risk); *id.* at 12 (noting that the absence of signature from Southern Risk was, at one time, a basis on which the plaintiffs challenged the enforceability of the Agreement).

Appeals denied on June 24, 2016.[6] This Court subsequently granted the Petitioners' Petition for Certiorari.

COUNTER–STATEMENT OF THE CASE (AS TO PETITIONER LAURIE WILLIAMS)

Ms. Williams was not a plaintiff in any of the underlying actions. Rather, her involvement stems from the fact that she was injured by one of the plaintiffs, Cynthia Gary, when a vehicle driven by Ms. Gary struck Ms. Williams on July 26, 2012. (*See* Insurers' Answer, Counterclaim, and Cross Claim in *Gary v. Willis*, at ¶ 68 (App. 228).) At that time, Ms. Williams was insured by Peerless, but she had declined underinsured motorist coverage. (*Id.* ¶¶ 79–80 (App. 229).) The Garys were uninsured. (*Id.* ¶¶ 61–67 (App. 227–28).) Shortly after the accident, the Garys met with Laura Willis to obtain new car insurance. (*Id.* ¶ 69 (App. 228).) First National Insurance Company of America ("First National") subsequently received a false and backdated insurance application. (*Id.* ¶¶ 70–78 (App. 228–29).)

When First National learned the facts of the matter, it filed a declaratory judgment action in federal court on October 30, 2012 against the Garys and Ms. Williams, seeking a declaration that there was no coverage and that, as a result of the fraudulent insurance application, it had no duty to defend or indemnify the Garys for the collision. The parties subsequently stipulated to dismissal of the action. (App. 106–11.)

Shortly thereafter, the Garys filed a lawsuit in state court against the Insurers. The Insurers answered and cross-claimed against Ms. Williams, again seeking a declaration that there was no coverage under either the Gary's policy or Ms. Williams' policy, and that there was no

[6] The Court issued an Amended Order Denying Rehearing on June 27, 2016.

duty to indemnify and defend the Garys. (*See id.* ¶¶ 83–112 (App. 230–34).) Ms. Williams answered and asserted cross claims of her own against the Insurers including:

(1) That "First National's assertion that it has no duty to indemnify the Garys breaches their contract" (*See* Williams' Answer and Cross Claims in *Gary v. Willis*, ¶ 57 (App. 747));

(2) The Insurers' alleged failure to audit, discover, and stop Willis' conduct constituted a violation of the Unfair Trade Practices Act (*id.* ¶¶ 60–70 (App. 748–49));

(3) The Insurers negligently supervised Willis (*id.* ¶¶ 71–76 (App. 749–50));

(4) Willis and Jesse Dantice conspired to defraud her (*id.* ¶ 79 (App. 750–51)); and

(5) Seeking a declaration that Montgomery failed to make a meaningful offer of underinsured motorist coverage and thus her policy should be reformed to include such coverage (*id.* ¶¶ 81–88 (App. 751–52)).

The Insurers subsequently filed a motion to compel the Garys' claims against them to arbitration. Ms. Williams did not file any opposition to the motion. The trial court denied the motion, and the Insurers appealed. After the appeal was consolidated with the other appeals in the suits brought by Willis' customers and competitors, Ms. Williams filed a motion on October 14, 2014 seeking clarification of her status in the appeal. On November 26, 2014, the Court of Appeals issued an order clarifying that Ms. Williams was a Respondent in the appeal. After the Court of Appeals issued its opinion on March 2, 2016, holding the underlying suits could be compelled to arbitration, Ms. Williams filed a motion for rehearing, which the Court of Appeals denied. This Court subsequently granted her Petition for Certiorari.

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (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 Court of Appeals correctly applied this Court's established precedent to the allegations and claims raised in the subject complaints. There is no conflict between the Court of Appeals' opinion and this Court's precedent, and the cases upon which Petitioners rely are distinguishable from the cases at bar. As explained below, all of the allegations and claims against the Insurers arise from rights, duties, and obligations imposed solely by the Agency Agreement, and Petitioners cannot seek to enforce and benefit from the Agreement while avoiding its arbitration provision. Accordingly, they are estopped from avoiding the arbitration provision based on the allegations raised. Furthermore, contrary to Ms. Williams' arguments, her suit does not fall within the statutory exception to arbitration for claims arising from an insurance policy, and the Insurers did not waive their right to compel arbitration of her claims against them.

I. The Court of Appeals correctly held Petitioners' claims against the Insurers could be compelled to arbitration pursuant to a contract they did not sign because those claims depend on and seek to enforce rights, duties, and obligations found only in the contract.

The Court of Appeals correctly applied South Carolina precedent holding that one who did not himself sign a contract may nevertheless be estopped from avoiding that contract's arbitration provision if he seeks to enforce or benefit from the contract's terms. In an effort to avoid this conclusion, Petitioners raise two primary arguments.

First, Petitioners attack the sequence in which the Court of Appeals arranged its analysis, arguing the court erred by beginning its analysis with the question of whether the claims against the Insurers fell within the scope of the arbitration provision "without first determining whether Plaintiffs could be bound by that clause in the first place." (*See* Brief of Pet. at 14–17.) Second, Petitioners assert the Court of Appeals erred in holding they are equitably estopped from avoiding the arbitration agreement, arguing that (according to Petitioners) their suits do not rely on or seek to enforce the Agency Agreement, but rather seek only to enforce their rights under South Carolina statutory and common law. (*See id.* at 17–25.)

As explained below, both of Petitioners' arguments should be rejected. The Court of Appeals properly analyzed the claims against the Insurers and concluded they are limited to the Insurers' alleged failure to properly investigate, train, supervise, detect and prevent Willis' wrongdoing, all of which are duties arising solely from the Agency Agreement. Accordingly, the Court of Appeals correctly ruled that under relevant case law regarding the application of arbitration provisions to non-signatories, Petitioners cannot seek to benefit from some of these contractual duties while avoiding the contractual obligation to arbitrate disputes relating to the contract's performance and non-performance.

A. The Court of Appeals did not err in the sequence of its analysis.

Petitioners argue the Court of Appeals erred in the order in which it organized the analysis section of its Opinion. Specifically, Petitioners argue the court erred by placing its analysis of whether their claims fell within the scope of the arbitration provision—a question to which a presumption in

favor of arbitration applies[7]—before analyzing the question of whether they, as non-signatories to the contract, were bound by its arbitration provision. (*See* Brief of Pet. at 14–17.)

The sequence of analysis of these two questions is immaterial. Whether the questions are answered in fact is all that matters. The central question when analyzing if a non-signatory is bound by a contract's arbitration clause is whether he relies on or seeks to benefit from the contract's provisions. *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012). In the instant lawsuits, that question is essentially the same as the inquiry to determine if the claims fall within the scope of the arbitration clause, namely whether the "dispute or disagreement arises in connection with the interpretation of this Agreement [or] its performance or non-performance." (2010 Agency Agreement at ¶ 12.A (App. 464).) Clearly, the disputes involved here arise "in connection with" the "performance" or "nonperformance" of the Agency Agreement. The sequence in which the Court of Appeals' Opinion addressed those issues makes no difference to the outcome.

Furthermore, the Court of Appeals' organization of its Opinion mirrors the sequence in which the trial court analyzed these issues in the Order on appealed. (*See* App. 18–25.) An appellate court's decision to structure the outline of its Opinion to analyze the lower court conclusions *in seriatim* is no basis upon which to fault the appellate court, and the Court of Appeals' decision to lay out its analysis in the order it did was not error.

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[7] Petitioners elsewhere argue this presumption should not apply to the arbitration provision at issue. (*See* Brief of Pet. at 27.) The Insurers respond to that argument in Section II, *infra*.

B. Equitable estoppel requires non-parties to a contract to be bound by the contract's arbitration provision if they, like Petitioners, rely on or seek to benefit from the contract's terms.

The Court of Appeals correctly ruled the Petitioners' claims against the Insurers arise solely from and depend entirely on the Insurers' alleged non-performance of duties imposed only by the Agency Agreement, and thus held Petitioners were equitably estopped from relying on the Agreement's terms while avoiding the Agreement's arbitration provision. Petitioners attack this holding, arguing their claims against the Insurers rely not on the Insurers' contractual obligations but, rather, on statutory and common law duties. (*See* Brief of Pet. at 19–20 ("Plaintiffs have never sought *any* benefit under the Agency Agreement . . . . What Plaintiffs *do* allege is that Respondents, in engaging in the insurance business in Abbeville, had a duty not to violate South Carolina's statutory and common-law protections.").) Petitioners' arguments fail for the following reasons.

1. Petitioners' only claims against the Insurers are that the Insurers allegedly failed adequately to investigate, train, and supervise Willis and to detect and prevent her wrongdoing.

Notwithstanding Petitioners' protestations to the contrary, each of their allegations against the Insurers is premised on rights or duties imposed by and existing solely under the Agency Agreement, namely the Insurers' alleged failure properly to investigate, train, and supervise Willis, and to detect and stop her wrongdoing. On appeal, however, Petitioners belatedly attempt to expand the scope of their Complaints, arguing that what their claims *really* allege is that the Insurers violated South Carolina statutes and common law.[8] As explained

[8] Curiously, despite repeating this assertion throughout their Brief, Petitioners fail to point to any statute or case law imposing on an insurer the legal duty to investigate, train, supervise, and audit the independent agents, brokers, or employees of same who work with customers seeking to purchase an insurers' products. Petitioners cited one statute to the Court of Appeals in support of this argument, but the court correctly noted the cited statute had not appeared in the Code for

below, Petitioners' arguments are belied both by the Complaints themselves and by South Carolina case law.

The underlying Complaints rebut Petitioners' attempt to broaden the scope of the Complaints' allegations. The only alleged wrongful acts asserted against the Insurers in the Complaints are their supposed failures to supervise and control Willis. The Complaints make no other factual allegations regarding the Insurers' conduct nor do they allege the Insurers themselves had any contact or involvement with the Petitioners.

Petitioners argue that their Complaints allege statutory and common law violations such as the allegation that the Insurers "accepted money from Customers in exchange for insurance policies that were forged, inapplicable, illegal, and in some cases even nonexistent." (*See* Brief. of Pet. at 20 (citing App. 328–30).) But a review of the cited pages of the Complaint reveals they contain primarily factual allegations related to *Ms. Willis'* actions, and the only allegations directed at the Insurers are that they failed to perform their duties to investigate, train, supervise, and monitor her. (*See* App. 328–30 (alleging the Insurers had a "duty to fully investigate . . . properly train and supervise" Willis; that her wrongdoing "could have been discovered, and should have been discovered and stopped by the Defendants, through reasonable direct supervision . . . as well as through auditing computer programs which reveal fraud and/or misconduct of agents"; and that the volume of business generated by Willis "should have put the Defendants on notice that something was being done improperly, giving the Defendants a reason to investigate her activity.").)

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over 30 years and did not support Petitioners' argument. *See Wilson*, 416 S.C. at 418 n.11, 786 S.E.2d at 583 n.11.

Petitioners argue "the rights they seek to vindicate through this lawsuit—the right to be free from fraud, the right not to have one's money misappropriated, the right not to be a victim of unfair competition—are not rights that came into being when Respondents and Southern Risk entered into the Agency Agreement." (Brief of Pet. at 24.) The problem with this argument, however, is that the Complaints allege it was *Ms. Willis*, not the Insurers, who committed fraud, misappropriated money, and competed unfairly. (*See, e.g.*, App. 328–30 (factual allegation of Antoniak Complaint).) Indeed, the Petitioners' Petition for Certiorari conceded the Insurers' wrongs (if any) arise only from their supposed failure to investigate, train, supervise, and audit Willis, not from any other independent tortious acts of their own:

> Plaintiffs allege that Willis' conduct violated South Carolina's unfair trade practices law, and that Defendants are responsible for those violations *because they failed to investigate, train and supervise, and audit Willis*.

(Pet. for Cert. at 22 (emphasis added); *see also id.* at 5 (asserting in the "Factual Background" of the Petition that the only alleged wrongdoing by the Insurers was that they "never investigated Willis, never questioned the increased profits she generated, and never stopped her from engaging in these unlawful practices").)

In addition, Petitioners' belated claim that the Insurers are vicariously liable for Willis' wrongdoing (*see* Brief of Pet. at 37) fails both because it was not appropriately raised in the underlying Complaints and because it is barred by South Carolina law. None of the Complaints assert any claim, theory, or cause of action based on vicarious liability or *respondeat superior*, nor do they allege the Insurers are responsible for Willis' wrongful acts. Rather, they allege the Insurers are liable for their *own* supposed failings to perform adequate background checks, properly train and supervise her, conduct computerized audits, and the like. Even if the

Complaints had raised the doctrine of *respondeat superior*, South Carolina's courts have held an insurer is *not* vicariously liable for conduct like that of Willis as alleged here. *See Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 428–29, 412 S.E.2d 425, 429 (Ct. App. 1991) (rejecting plaintiff's claim that the doctrine of *respondeat superior* made the insurer liable for the agent's acts of "lying on the application" and subsequently assisting the beneficiary in making "a fraudulent claim for benefits," noting the agent was not acting in furtherance of the insurer's business as evidenced by the fact that he lied about his conduct, falsified the application for insurance, never attempted to deliver the policy to the insured, and personally profited financially from his wrongdoing).

In sum, Petitioners cannot now seek to finesse the nature of the claims and allegations actually contained in their Complaints, all of which limit their allegations against the Insurers to their supposed failure to investigate, train, supervise, detect, and stop the Willis wrongdoing.

2. The Insurers' alleged failure to properly investigate, train, supervise, detect, and prevent Willis' wrongdoing rest on rights or duties imposed solely by the Agency Agreement.

As explained above, the only allegations and claims the underlying Complaints raised against the Insurers were that the Insurers failed to properly investigate, train, and supervise Willis, and to detect and stop her wrongdoing. These supposed failings rest exclusively on rights or duties imposed solely by 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 (App. 372).[9]) 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"

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

for insurance from the Insurers. (*See* Agency Agreement at ¶ 1.B (App. 459); *id.* at Safeco Addendum ¶ 2 (App. 470).) Hence, Petitioners wish to seek to enforce and benefit from alleged contract obligations owed by the Insurers without being 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 ¶ 9 (App. 388).[10]) The Insurers' alleged ability to perform or have the agency perform a background check on Willis is also derived from the Agency Agreement. (*See* Agency Agreement at ¶ 2.F (App. 460).) Similarly, it is the Agency Agreement that requires the agents and their employees to be properly licensed and credentialed. (*Id.* at ¶ 2.C (App. 459).) Thus, again, the Petitioners' claims of failure to investigate and check Willis' background are dependent upon the existence of the Agency Agreement.

Third, the underlying Complaints allege the Insurers had "a legal duty to properly train and supervise" Willis. (*See, e.g.*, Norman Compl. at ¶ 8 (App. 373).[11]) 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 (App. 459); *id.* at Safeco Addendum ¶ 3 (App. 470–71).)

Fourth, Petitioners 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 (App. 340).[12]) 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

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[10] The other Complaints contain essentially the same allegations.

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

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

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 (App. 459).)

Fifth, Petitioners allege in their Complaints 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 customers." (*See, e.g.*, Wofford Compl. at ¶ 19 (App. 119).[13]) As noted above, any alleged ability by the Insurers to supervise 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 (App. 462–63).) Similarly, Willis' and Southern Risk's obligation to keep accurate records is an obligation imposed by the Agreement. (*See id.* at ¶ 15.A (App. 465–66).)

Finally, Petitioners' 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 (App. 462–63).) Here, Petitioners' 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 (App. 464).)

In sum, the claims Petitioners have asserted against the Insurers share what Petitioners concede was the "critical fact" compelling arbitration in *Pearson* and *International Paper*, namely that, at bottom, they effectively "alleged breach of the contract that contained the

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

arbitration clause" (*see* Brief of Pet. at 20), even if the Complaints do not expressly assert a cause of action for the breach of the Agency Agreement. Because the Petitioners' allegations against the Insurers depend upon the terms, authority, and obligations created and imposed by the Agency Agreement, they cannot seek to enforce and benefit from some of the Agreement's terms while avoiding its arbitration provision.

3. Under South Carolina law or federal law, Petitioners are compelled to arbitrate their claims against the Insurers.

Both South Carolina's courts and federal courts have recognized that a non-party to a contract may be bound by an arbitration provision in that contract on the basis of estoppel and common law principles of contract:

> 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 v. Hilton Head Hospital, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012). (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)); *see also Thompson v. Pruitt Corp.*, 416 S.C. 43, 59, 784 S.E.2d 679, 688 (Ct. App. 2016) (same).[14] In keeping with this well–settled case law, the Court of Appeals properly

[14] 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 is estopped from avoiding 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

held the Petitioners cannot assert claims against the Insurers based solely on rights and duties created by the Agency Agreements while simultaneously seeking to avoid other provisions of the Agency Agreement.

Petitioners' Brief reveals no basis upon which to reverse the Court of Appeals. (*See* Brief of Pet. at 19–25.[15]) For example, Petitioners argue the Court of Appeals erred by relying on *International Paper* and *Pearson* when (according to Petitioner) the "single, critical fact" in those cases is absent in the instant lawsuits, namely that in *International Paper* and *Pearson* the plaintiffs' Complaints expressly asserted a claim for breach of the contract containing the arbitration clause. (*See* Pet. Br. at 20–22.) But Petitioners misunderstand the reasoning in *International Paper* and *Pearson*. The dispositive analytical factor in those cases was not that the pleadings included a claim for breach of contract; rather it was that the claims asserted were so factually dependent on rights and duties imposed solely by the contract that the claims were inextricably intertwined with the contract. Tellingly, the Fourth Circuit and other courts have applied this same reasoning and reached the same result in lawsuits that did *not* include a claim

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arises out of that contract."); *Int'l Paper*, 206 F.3d at 413-14 (compelling 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 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 defendant had breached the terms of that contract); *Carlin v. 3V, Inc.*, 928 S.W.2d 291 (Tex. Ct. App. 1996) (holding defendant could compel arbitration of a non-signatory plaintiff's claims, which were premised on the contract containing an arbitration agreement).

[15] Petitioners bifurcate their discussion of case law into two headings, one of which discusses "Federal equitable estoppel" (and the South Carolina cases interpreting and applying that body of law) in the context of arbitration clauses, and the other of which discusses "State equitable estoppel" in non-arbitration contexts. (*See* Brief of Pet. at 19–26.) The South Carolina and federal cases discussed in the former category, dealing specifically with the binding effect of an arbitration provision on a non-signatory, are the relevant authorities in this dispute.

for breach of the contract containing the arbitration agreement. *See, e.g., J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988) (analyzing appeal in which the complaint did not assert a claim for a breach of the contract containing the arbitration provision, and noting the doctrine of equitable estoppel permits a non-signatory to compel claims to be arbitrated); *Fraternity Fund Ltd. v. Beacon Hill Asset Mgt. LLC*, 371 F. Supp. 2d 571 (S.D.N.Y. 2005), amended on other grounds, 2005 WL 1489176 (S.D.N.Y. 2005) ("Although plaintiffs do not allege breach of contract, their claims depend upon obligations and rights set forth in the Partnership Agreement. . . . Plaintiffs' claims therefore are intertwined with rights and obligations in the Partnership Agreement. Accordingly, the Balentine Plaintiffs are estopped from refusing to arbitrate their claims against Asset Alliance.").

Petitioners' reliance on *R.J. Griffin & Co. v. Beach Club II Homeowners Assoc., Inc.*, 384 F.3d 157 (4th Cir. 2004) proves unavailing because that case is distinguishable from the instant lawsuits. (*See* Brief of Pet. at 22–23.) In *R.J. Griffin*, a developer entered a contract with a construction company—R.J. Griffin & Co. ("Griffin")—to build a condominium in North Myrtle Beach. The contract contained an arbitration agreement. After the condominiums were completed and occupied, the residents noticed water leaking through the exterior walls. The homeowners' association sued Griffin in state court. Griffin, in turn, sued the homeowners' association in federal court seeking to enforce the arbitration provision in its contract with the developer. The district court refused to compel arbitration, and the Fourth Circuit agreed, holding the claims against Griffin did not arise from or seek a benefit from the contract. Critically, the Fourth Circuit noted that the two claims against Griffin—negligence in constructing the condos and breach of the implied warranty of good workmanship—were duties imposed on all builders by state law. *Id.* at 162 ("Under South Carolina common law the legal

duties Griffin allegedly violated arise from its role as the builder of the Beach Club condominium; these duties are not dependent on the terms of the general contract.").

The distinction between *R.J. Griffin* and the instant lawsuits is plain. The holding in *R.J. Griffin* hinged on the fact that *every* builder of residences in South Carolina, regardless of the existence or non–existence of any contract, is under a duty imposed by law to construct that residence with due care and in a careful, diligent, and workmanlike manner. In contrast, in the absence of a contractual requirement, an insurer *does not* have a duty or obligation to investigate, train, supervise, and detect and prevent wrongdoing by every employee of any insurance agency or broker that sells its policies. *Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, 330–31, 574 S.E.2d 502, 507–08 (Ct. App. 2002) (holding insurer owes no extra-contractual or fiduciary duties to an applicant for insurance); *see also Consol. Insured Benefits, Inc. v. Conseco Med. Ins. Co.*, No. 6:03–cv–03211–RBH, 2006 WL 3423891, at *13–15 (D.S.C. Nov. 27, 2006) (dismissing breach of fiduciary duty claim brought by independent insurance agency against insurer, noting "that no South Carolina Court has recognized a fiduciary duty in the insurer–independent insurance brokerage agency context").[16]

[16] Other jurisdictions agree. *See, e.g., Bluehaven Funding, LLC v. First Am. Title Ins. Co.*, 594 F.3d 1055, 1055 (8th Cir. 2010) (holding insurer had no extra-contractual common law duty to supervise its agent); *Vigilante v. Phoenix Mut. Life Ins. Co.*, 755 F. Supp. 25 (D. Mass. 1991) (holding insurer had no duty to investigate criminal past of proposed agent or to report an agent's criminal past to customers or regulators, and thus the insurer was not liable for agent's misappropriation of customer's premium payments and had not violated state unfair and deceptive practices statute); *In re Evans*, 464 B.R. 272 (Bkrtcy. S.D. Miss. 2011) ("[An] insurer should have a duty to audit, monitor, or supervise an approved attorney *only* when it is provided for in the policy.") (emphasis added); *Vincent v. Safeco Ins. Co. of Am.*, 29 P.3d 943, 946 (Idaho 2001) ("The district judge granted Safeco's motion for summary judgment on Count IV of the complaint because *Idaho has never recognized a duty for insurance companies to train insurance agents* and he did not think imposing a duty was proper under the Rife considerations. We affirm the grant of summary judgment.") (emphasis added); *Pan–American Life Ins. Co. v. Roethke*, 30 S.W.3d 128 (Ky. 2000) ("[W]e can find no authority which requires an insurer to

Petitioners' argument that the Court of Appeals' ruling conflicts with *Malloy* similarly fails. (*See* Brief of Pet. at 23–24.) Indeed, the *Malloy* Court recognized, reiterated, and applied the same rule established in *Pearson* and applied by the Court of Appeals in the cases at bar. The outcome in *Malloy* differed due to distinguishable facts, namely that the *Malloy* complaint expressly alleged wrongdoing *unrelated to the contract at issue there*. The relevant facts of *Malloy* are as follows. Mr. Malloy had at one time been the beneficiary of the decedent's last will and testament, life insurance, and other instruments. The decedent later executed a new will, changed the beneficiaries of his life insurance, and rearranged his other financial assets. After the decedent's passing, Mr. Malloy sued Merrill Lynch, Mr. Argo (an accountant), and Mr. Thompson (the decedent's nephew and the new beneficiary), arguing they had taken advantage of the decedent's Alzheimer's disease during his waning years by engaging in a number of wrongful acts related to the new will, beneficiary changes, liquidations, and transfers. Merrill Lynch sought to compel arbitration of the dispute, arguing any duty it violated was derivative of duties it owed the decedent under its contract with him. *Id.* at 562, 762 S.E.2d at 692. The Supreme Court disagreed. The Court acknowledged there are multiple reasons that support "'binding nonsignatories to arbitration agreements,'" *Malloy*, 409 S.C. at 561–62, 762 S.E.2d at

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train its soliciting agents. Although it would greatly benefit insurers to train their agents well so as to avoid the type of claim presented here, no such legal duty to train exists."); *Dusina v. Bowers,* No. 13311, 1992 WL 246033 (Ohio Ct. App. 1992) ("The issues before the court concern (1) the vicarious liability of an insurer for negligence of an independent agent during negotiations with the insured and (2) whether such insurer has a duty to control and supervise an independent agent during such negotiations. We answer both questions in the negative."); *see also Lumbermans Mut. Cas. Ins. Co. v. First Ins. Servs., INc.,* 417 Fed. Appx. 247 (4th Cir. 2011) (applying North Carolina law and holding there were no extra-contractual obligations between an insurer and an independent insurance agency); *Joyce v. Benefits Marketing Group, Inc.*, 32 F.3d 562 (4th Cir. 1994) (Table) (holding insurer owed an insurance broker "no duty independent of those contained in the 'Producer Contract' which governed the contractual relationship between the Insurers and [the broker]").

692 (quoting *Pearson*, 400 S.C. at 288, 733 S.E.2d at 601), but concluded the allegations against Merrill Lynch arose not from its contractual duties but from "the duty owed by all persons not to intentionally interfere with another's expected inheritance," *id.* at 562, 762 S.E.2d at 693.

The distinctions between *Malloy* and the cases at bar are simple. In *Malloy*, the complaint expressly alleged wrongdoing by Merrill Lynch unrelated to its contractual duties to the decedent, and the plaintiff sought to undo—not enforce or benefit from—the contract and the actions taken pursuant to it. *See, e.g.*, Malloy Complaint at ¶¶ 44, 106–07 (Malloy ROA at 26, 41–42) (alleging Merrill Lynch knowingly entered into and engaged in an investment and advisory relationship with the decedent based on "invalid powers of attorney and Decedent's signature both obtained as a result of Decedent's mental incompetence and/or through Thompson's undue influence"); *id.* at ¶¶ 54–57, 114–17 (Malloy ROA at 32–33, 43–44) (alleging Merrill Lynch knowingly and intentionally took actions prohibited by the powers of attorney upon which its purported authority to act were based); *id.* at ¶¶ 119–20 (Malloy ROA at 44) (alleging the defendants, including "defendant Merrill Lynch . . . conspired among themselves for the purpose of injuring Malloy"); *see also* Trial Court Order Denying Merrill Lynch's Motion to Compel Arbitration at 10 (Malloy ROA 278) ("Plaintiff is not seeking benefits from the trust but instead seeks to *annul* the transfers to the trust held in accounts at Merrill Lynch. Plaintiff's claims, therefore, do not pertain to the relationship between Merrill Lynch and Decedent.") (emphasis added).[17]

[17] This Court may take judicial notice of matters of public record such as the Record on Appeal in appeals filed at this Court. *See Cox v. Fleetwood Homes of Georgia, Inc.*, 329 S.C. 157, 160 n.2, 494 S.E.2d 462, 463 n.2 (Ct. App. 1997), rev'd on other grounds, 334 S.C. 55, 512 S.E.2d 498 (1999); *State v. Little*, 227 S.C. 60, 69, 86 S.E.2d 875, 879 (1955); *see also Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984) ("[A] court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its

Here, in contrast to the claims in *Malloy*, the *only* wrongdoing alleged against the Insurers arises directly from their contractual duties, and Petitioners seek to enforce and benefit from those alleged duties and responsibilities. Accordingly, when the rule set out in *Pearson* and reiterated by *Malloy* is applied to the allegations in the cases at bar, the Court of Appeals correctly held the non–signatory Petitioners should be compelled to arbitrate their claims arising from the performance or non–performance of the Agency Agreement.

In sum, when the rule recognized in *Pearson* and reiterated in *Malloy* is applied here, the Court of Appeals correctly held the Petitioners should be compelled to arbitrate their claims against the Insurers, which arose solely from the performance or non–performance of the Agency Agreement

II. The Court of Appeals correctly held the Petitioners' claims against the Insurers fall within the scope of the contract's arbitration provision.

A claim will be compelled to arbitration when "the factual allegations underlying the claim are within the scope of the arbitration clause." *See Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 7, 791 S.E.2d 128, 131 (2016) (citation omitted); *see also Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012) ("To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim."). If there is any question whether the claims fall within the scope of the arbitration provision, the court must err in favor of compelling arbitration. *Parsons*, 418 S.C. at 7, 791 S.E.2d at 131 ("The heavy presumption in

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records."); Rule 201(b), SCRE ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

favor of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.") (citations omitted).

Petitioners labor to establish a formulaic distinction between "broad" and "narrow" arbitration agreements and argue that because their claims—"unfair trade practices, fraud, conversion, civil conspiracy, tortious interference with the competing agent's contractual relations, and Defendants' failure to investigate and stop Willis' actions"—are not expressly listed in the Agency Agreement's arbitration provision they are outside the scope of that supposedly "narrow" provision. (*See* Brief of Pet. 28–37.)

The Agency Agreement requires arbitration of "any dispute or disagreement [that] arises in connection with the interpretation of this Agreement, its performance or nonperformance, its termination, the figures and calculations used or any non–payment of accounts." (2010 Agency Agreement at ¶ 12.A (App. 464).) As explained above, all of the Complaints' factual allegations against the Insurers involve rights, duties, and obligations arising solely from the Agency Agreement. Petitioners seek to enforce contractual provisions relating to hiring, training, supervising, auditing, and the like. These are contractual duties owed pursuant to the Agency Agreements and they undeniably concern the "performance or non-performance" of that Agreement and fall within the scope of the Agreement's arbitration provision.

Regardless of whether one labels the Agreement's arbitration provision "broad" or "narrow," the relevant question here is whether the provision is broad enough to encompass the claims Petitioners have asserted against the Insurers.[18] The Court of Appeals properly held it is.

[18] Petitioners repeatedly state the Insurers' counsel "conceded" at a hearing before the trial court that the Agreement's arbitration provision was "narrow." (*See, e.g.*, Brief of Pet. at 3–4, 27, and 29.) But the real thrust of this supposed "concession" was simply that regardless of how the scope of the provision was characterized, it was broad enough to encompass the Petitioners'

Petitioners, however, fault the lower court for "mistakenly" holding the arbitration provision "'should be broadly construed.'" (*See* Brief of Pet. at 29 (citing *Wilson*, 416 S.C. at 414, 786 S.E.2d at 581).) The Court of Appeals' statement, however, relied on and comports with this Court's precedent, which have held "[t]he phrase 'arising out of' should be broadly construed in a clause of inclusion." *Town of Duncan v. State Budget & Control Bd., Div. of Ins. Servs.*, 326 S.C. 6, 13, 482 S.E.2d 768, 772 (1997) (citation omitted); *see also Howard v. State Farm. Mut. Auto. Ins. Co.*, 316 S.C. 445, 450, 450 S.E.2d 582, 585 (1994) (requiring "clauses of inclusion to be broadly construed" and noting a "broad construction of 'arising from' includes 'causal relation to,' 'incident to,' 'flowing from,' or 'having connection with'") (citations omitted).

Petitioners' reliance on *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 739 S.E.2d 209 (2013) misses the point. (*See* Brief of Pet. at 32–33.) The three relevant principles laid out in *Landers* actually *support* the Court of Appeals ruling in the instant appeal:

(1) If an arbitration agreement affects interstate commerce, it is subject to the FAA, and federal substantive law regarding arbitrability controls, *Landers*, 402 S.C. at 108, 739 S.E.2d at 213 (citations omitted);

(2) "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," and "when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration," *id.* at 109, 739 S.E.2d at 213 (citations and internal quotation marks omitted); and

(3) Where the Complaint reveals there is a "clear nexus between the underlying factual allegations" of the claims and the performance or breach of contractual obligations, the claims are sufficiently related to the contract to fall within the scope of an arbitration clause covering "'any controversy or claim arising out of [sic] relating to this contract, or the breach thereof.'" *Id.* at 103 and 117, 739 S.E.2d 210 and 218.

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claims against the Insurers. (*See* App. 437:24 –25 (transcript from trial court' hearing on January 21, 2014 on the Motion to Compel Arbitration) (stating "it's a narrow agreement *but it covers what's going on here*") (emphasis added).)

The *Landers* Court applied the three principles enumerated above and concluded the arbitration provision encompassed not only plaintiff's claims for breach of contract but also his claims for slander, intentional infliction of emotional distress, and illegal proxy solicitation under the Code. Applied to the case at bar, the principles of *Landers* support the Court of Appeals' reliance on state *and* federal case law, its inclination to resolve any doubt in favor of arbitration, and its conclusion that the clear nexus between the facts alleged and the contractual obligations found in the Agency Agreement placed Petitioners' claims squarely within the Agreement's arbitration clause.

Petitioners further argue that the cases at bar conflict with the holding in *Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705 (2007). (*See* Brief of Pet. at 34–36.) But the issues in the instant lawsuits are not analogous to *Aiken*. In *Aiken*, the plaintiff's contract with World Finance—a loan agreement containing plaintiff's personal identifying information that was stolen by World Finance's employees—had nothing to do with the legal claims against World Finance (namely, negligence, negligent hiring/supervision, and unfair trade practices). The loan agreement did not impose on World Finance the right or obligation to hire, train, and supervise the employees. Rather, the loan agreement was merely the repository from which the plaintiff's information was stolen. The plaintiff did not allege World Finance failed to perform any contractual duty or obligation and did not seek to enforce or benefit from the contract. Not surprisingly then, the Court held the relationship between the contract and World Finance's alleged wrongdoing "hardly rises to the level of 'significant'" and thus did not warrant compelling the plaintiff's claims to arbitration. *Id.* at 150, 644 S.E.2d at 708.

Here, in contrast, Petitioners' claims against the Insurers are premised on the alleged non–performance of rights and duties imposed solely by the Agency Agreement and seek to

enforce and benefit from the contractual duties. The sole "factual allegations underlying the claims" against the Insurers are the alleged failure to investigate, train, supervise, detect, and prevent Willis' wrongdoing, and thus the claims against the Insurers "are within the scope of the arbitration clause." *Parsons*, 418 S.C. at 7, 791 S.E.2d at 131. Accordingly, the Court of Appeals properly held the Petitioners' claims should be compelled to arbitration.

Finally, the Petitioners argue the decision below conflicts with *Zabinski's* statement in *dicta* that, in some jurisdictions, the arbitrability of a claim turns on whether it "is so interwoven with the contract that it could not stand alone." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597 n.4, 553 S.E.2d 110, 119 n.4 (2001) (citations omitted). (*See* Brief of Pet. at 35 n.9.) This *dicta*, however, is not the test in South Carolina, and thus the Court of Appeals' failure to mention or apply this "test" is not a conflict with this Court's precedent. *See Aiken*, 373 S.C. at 150 n.3, 644 S.E.2d at 709 n.3 ("We note that the *Zabinski* articulation of this test is found in a footnote containing references to tests used by 'other jurisdictions' and therefore has not been adopted by this Court as a separate test applicable specifically to tort claims in this context."). In any event, the claims and allegations Petitioners level against the Insurers *are* inextricably intertwined with the contractual duties and rights, and thus *are* arbitrable under this *dicta*. Accordingly, the Court of Appeals did not err by holding Petitioners claims should be compelled to arbitration.

III. The Court of Appeals correctly held Ms. Williams' claims do not arise from or involve the interpretation or application of an insurance policy and thus do not fall within the exception to arbitration found in S.C. Code Ann. § 15–48–10(b)(4).

Petitioner Laurie Williams asserts the Court of Appeals erred by holding her claims do not fall within the scope of the statute that excludes from arbitration any claims arising from an

insurance policy. (*See* Williams' Brief at 5–9.[19]) This statute, however, does not prohibit the enforcement of the arbitration agreements in this case, and is wholly inapplicable to Ms. Williams' claims. South Carolina's state and federal courts have interpreted this provision as invalidating arbitration agreements found *in insurance policies. See Am. Health & Life Ins. Co. v. Heyward*, 272 F. Supp. 2d 578, 582 (D.S.C. 2003) (holding § 15–48–10(b)(4) "prohibits the enforcement of arbitration clauses *in insurance policies* governed by South Carolina law") (emphasis added); *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 210, 731 S.E.2d 324, 326 (Ct. App. 2012) (holding § 15–48–10(b) was "intended to apply directly to an insurance contract"); *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 468, 556 S.E.2d 397, 401 (Ct. App. 2001) (noting § 15–48–10(b) "expressly invalidates a provision contained *in an insurance policy*") (emphasis added).

Here, the arbitration agreement is not found in an insurance policy and thus section 15–48–10(b) does not apply. The claims are not personal injury claims arising under insurance policies. The focus of the Complaints are based on the conduct of the insurance agents. Our courts have previously held that this statute does ***not*** apply to arbitration agreements found in documents other than insurance policies, even if the document has some tangential relationship to insurance. *See Walden*, 399 S.C. at 209, 731 S.E.2d at 326 ("The contract in dispute here is not an insurance contract, and the provision in the lease did not create an insurance policy or a

[19] Ms. Williams also argues at some length that Willis had an agent/principal relationship to the Insurers, who were thus allegedly vicariously liable for her wrongdoing. (*See* Williams' Brief at 6–9.) South Carolina's courts, however, have held an insurer is *not* vicariously liable for conduct like that of Willis as alleged here. *See Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 428–29, 412 S.E.2d 425, 429 (Ct. App. 1991) (rejecting plaintiff's claim that the doctrine of *respondeat superior* made the insurer liable for the agent's acts of "lying on the application" and assisting the beneficiary in making "a fraudulent claim for benefits," noting the agent was not acting in furtherance of the insurer's business in so doing).

duty to insure. Therefore, Mary's causes of action against Harrelson are not the claims of 'any insured or beneficiary under any insurance policy' that would exempt this action from arbitration."). The *Walden* court expressly held that this statute was ***not*** intended to apply to "agreements that only have a tangential relationship to an insurance policy, but was instead intended to apply directly to an insurance contract." *Id.* at 210, 731 S.E.2d at 326.

The arbitration agreements at issue in this case are not found in insurance policies. Therefore, the statutory exemption does not apply. Hence, the Court of Appeals correctly rejected the argument offered by Petitioner Williams.

IV. The Court of Appeals correctly held the Insurers did not waive their right to compel arbitration of Ms. Williams' claims.

Petitioner Williams asserts the Court of Appeals erred by holding the Insurers did not waive their right to compel arbitration by a modest delay between the filing of the state court complaint and the filing of the motion to compel arbitration. (*See* Williams' Brief at 9–15.) Ms. Williams incorrectly argues that the Insurers' supposed delay in moving to compel arbitration involves a greater length of time (one year and one day) in her case than in others. (*See id.* at 3.) She reaches this year-long time period by measuring the lapse in time between the date First National filed a subsequently-dismissed federal declaratory judgment suit[20] and the date the Insurers filed their motions to compel arbitration in the state court action giving rise to this appeal. As the Court of Appeals correctly noted, however, the relevant calculation is the lapse of time from when the Complaint was filed in *this* lawsuit (February 22, 2013) to the date the Insurers filed the motion to compel arbitration (November 1, 2013)—a span of only eight months. In the absence of extensive discovery or other affirmative acts by which a defendant

[20] This action was dismissed *without prejudice* pursuant to stipulation of dismissal.

avails himself of the court, the passage of eight months does not waive the right to compel arbitration. *Compare Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 788 S.E.2d 216 (2016) (holding defendants waived their right to compel arbitration by waiting eight months during which there was *extensive discovery and several court hearings*), *with Toler's Cove Homeowners Ass'n, Inc.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (holding the passage of thirteen months did not waive arbitration where there had been only very limited discovery); *Rich v. Walsh*, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct. App. 2003) (same); *Gen. Equip. & Supply Co., Inc. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001) (holding a passage of eight months and participation in limited discovery did not waive the right to arbitration).

Here, written discovery *requests* had been served by the Petitioners on the Insurers and vice versa, but once the Insurers moved to compel arbitration, the Insurers alerted Petitioners in writing that the Petitioners need not respond to the Insurers' written discovery. Depositions of the Insurers have not been taken and the Insurers have taken no depositions.

Ms. Williams' reference to "significant discovery" and prejudice refer not to *this* lawsuit but to her separate personal injury lawsuit against the Garys, which is stayed pending the resolution of this lawsuit. Her suit against the Garys, however, was stayed based on the decision of the judge in that suit *with her consent*. *See* Consent Order dated July 18, 2014 (App. 706). Stated differently, the stay is not the result of the *Insurers' delay* in moving for arbitration and she cannot now direct that blame at the Insurers. *See Rhodes v. Benson Chrysler–Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007) (noting that waiver may be found if "the non–moving party was prejudiced by the delay in seeking arbitration"). Ms. Williams cites no case law in support of the proposition that when a motion to compel arbitration in one suit leads

to a consented stay of another suit, the movant has thereby waived his right to compel arbitration. While Ms. Williams undoubtedly desires an expeditious resolution to her negligence suit, its stay is not a result of the Insurers' delay, thus the stay in ***that*** suit is not the type of prejudice that results in waiver of the right to compel arbitration in ***this*** suit.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals.

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Columbia, South Carolina
May 29 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAY 29 2018
S.C. SUPREME COURT

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-01-00306
Appellate Case No. 2016-001512

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

v.

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

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

Of Whom Laurie Williams is a ..... Respondent.

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:

Brief of Respondents

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