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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

The Honorable 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 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; and Laurie Williams,.....*Defendants,*

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

Of whom Laurie Williams is.....*Petitioner.*

BRIEF OF PETITIONERS

[Submitting Counsel's Information on Next Page]

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SUMMARY OF ARGUMENT

This appeal rests on the "foundational" principle that "arbitration is a matter of consent." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 684 (2010). The requirement of consent is so fundamental that if a person has not agreed to arbitration, a court may not compel her to arbitrate her claims unless she has consistently availed herself of the contract containing the arbitration provision, such that it would be unfair for her to avoid that term. Likewise, even where a person has agreed to arbitrate certain disputes, he "cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001).

The Court of Appeals' decision below turns that foundational principle on its head. The court held that insurance companies charged with violating South Carolina law can force customers and agents allegedly harmed by the companies' conduct to arbitrate their claims based on an arbitration clause in a contract between the insurer and another company. The court did so even though the injured plaintiffs *never* agreed to arbitration; they're *not* parties to the contract containing the arbitration clause; they have *never* sought to enforce the underlying contract or obtain any benefit from it; and *none* of their claims falls within the limited scope of the arbitration clause. That decision cannot be reconciled with this Court's clear precedent, and it must be reversed.

This case stems from the actions of an insurance agent, Laura Willis, who issued policies and made representations on behalf of Defendants-Respondents Peerless Insurance Co., Montgomery Mutual Insurance Co., and Safeco Insurance Co. to customers in Abbeville County. Willis, who was reprimanded by the state insurance commission, allegedly boosted Respondents' profits by forging insurance documents, issuing fake policies, charging people for nonexistent

policies, and undercutting the competition by fraudulently reducing rates. Plaintiffs, customers and insurance agents in Abbeville who were harmed by this unlawful conduct, brought statutory unfair trade practices claims and common-law tort claims against Respondents alleging that they are responsible for Willis' conduct. Respondents moved to compel arbitration arbitration, citing an arbitration clause in a contract (the "Agency Agreement") between Respondents and defendant Southern Risk Insurance Services, LLC, the insurance agency that employed Willis and her boss, Jesse Dantice.

The Agency Agreement, by its own terms, governs only the relationship between each Respondent insurance company and Southern Risk. Plaintiffs are not parties to the Agency Agreement. And the agreement says nothing about customers or competing agents; in fact, it expressly *disclaims* any obligations on the part of Respondents to nonparties like Plaintiffs.

Plaintiffs did nothing to warrant enforcing the arbitration clause against them. As the circuit court found, they never sought to benefit from any part of the Agency Agreement; they do not allege any breach-of-contract claims; and the allegations in their complaints don't rely on any provision in—or any legal duty created by—the Agency Agreement. Their claims arise solely from South Carolina law. Indeed, Plaintiffs were not even aware of the contract or its arbitration clause until Respondents decided to seek arbitration a year into the litigation. And even if Plaintiffs were somehow bound, the arbitration clause itself is expressly limited to five potential disputes between parties Respondents and Southern Risk; it doesn't cover claims like the ones Plaintiffs brought.

Despite these facts, the Court of Appeals held that Plaintiffs must arbitrate their claims. The court admitted that Plaintiffs were not aware of the Agency Agreement before filing their lawsuit and that their claims do not rely on any terms of the agreement. But the court

nevertheless theorized that Plaintiffs would not be able to bring claims against the Insurers but for the Agency Agreement, which establishes the relationship between the Insurers and Southern Risk. On that basis, the court concluded that Plaintiffs were seeking to directly benefit from the Agency Agreement and that they should be bound by the contract's arbitration clause under the doctrine of equitable estoppel.

This ruling misunderstands both the law and Plaintiffs' claims. Equitable estoppel does not apply merely because a dispute would not have arisen but for a contractual relationship between the alleged wrongdoer and another party. *See R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, Inc.*, 384 F.3d 157, 162 (4th Cir. 2001). Nor does it apply where, as here, a nonparty plaintiff seeks to vindicate legal duties that exist independently of a contract between other parties. *See Malloy v. Thompson*, 409 S.C. 557, 562, 762 S.E.2d 690, 692-93 (2014). Plaintiffs have never sought any benefits under the Agency Agreement—they couldn't have, given that the only rights and duties set out in that agreement are those Respondents and Southern Risk undertook to each other. They allege only that Respondents violated their legal duties under South Carolina's unfair trade practices statutes and the common law—duties that Respondents owe to their customers and members of the public separate and apart from any contractual promises they chose to make to Southern Risk.

The court below also ruled that Plaintiffs' claims are within the scope of the Agency Agreement's arbitration clause. First, the court erroneously construed the clause as broad. Broad clauses, however, are those that extend to "all disputes 'arising out of or relating to' the contract." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). In contrast, the clause at issue here restricts the types of arbitrable claims to five topics—meaning that all other claims can be brought in court. For that reason, Respondent's counsel conceded—

and the circuit court found—that the Agency Agreement's clause is narrow. And Plaintiffs' claims are not among the five arbitrable disputes, which makes sense given that the clause was drafted to govern only disputes between Respondents and Southern Risk. That should have resolved the scope question once and for all. Instead, the court below, after interpreting the clause as broad, decided that Plaintiffs' claims are within its scope because they are based on the Insurers' contractual duties to Southern Risk. But this Court has made clear that the mere fact that a dispute would not have arisen but for the existence of a contractual relationship does *not* transform the dispute into one that arises from the contract. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 149-50, 644 S.E.2d 705, 708, *cert. denied*, *World Fin. Corp. of S. Carolina v. Aiken*, 552 U.S. 991 (2007).

Both of the Court of Appeals' rulings—on the nonparty issue and the scope issue—rest on a single flawed assumption: the belief that Plaintiffs' claims are premised on rights and duties that would not exist but for the Agency Agreement. Essentially, the court seems to have equated Plaintiffs' claims to breach-of-contract allegations. But that makes no sense: Plaintiffs have no right to enforce the promises in the Agency Agreement, which disclaims all obligations to them. And the statutory and common-law legal duties Plaintiffs *do* seek to enforce are entirely independent of that contract. Surely Respondents cannot seriously contend that they have no duties to their customers or members of the public under South Carolina law other than whatever commitments they voluntarily make when contracting with insurance agencies. At any rate, the only contractual duties Respondents owe their customers arise not from the Agency Agreement, but from insurance policies or promises made to customers—agreements that do not have arbitration clauses.

If the Court of Appeals' reasoning becomes the law of this state, there will be nothing stopping a corporation from forcing individuals' claims into arbitration based on an arbitration clause in an unrelated contract with another party which those individuals never agreed to, never saw, and never sought to enforce. Nothing in South Carolina law permits such a result.

The decision below should be reversed.

STATEMENT OF ISSUES ON APPEAL

The Court granted review of the following questions:

1. Did the Court of Appeals err by enforcing the arbitration clause in the Agency Agreement against Plaintiffs, who are not parties to that contract and have not sought any benefits under it?

2. Did the Court of Appeals err by holding that Plaintiffs' claims are within the scope of the Agency Agreement's arbitration clause, where the clause is limited to five categories of disputes, none of which is implicated by Plaintiffs' claims; and where Plaintiffs' claims arise from duties established by South Carolina law, not the contract containing the arbitration clause?

STATEMENT OF THE CASE

A. Factual Background

Laura Willis was an insurance agent in Abbeville County. Working under the supervision of broker Jesse Dantice for insurance agency Southern Risk, Willis sold policies for Respondents to local residents. Willis was no ordinary agent. Between 2008 and 2012, she allegedly engaged in extensive unlawful and unethical practices designed to enlist as many customers as possible, corner the retail insurance market, and put her competition out of business—without regard to the law or the fate of the customers who depended on her to ensure that they were adequately protected from risk or for law-abiding insurance agents competing for business. App. 328-31.

Among other things, Willis allegedly repeatedly forged insurance documents; changed information on applications without customers' permission to omit facts that would have warranted higher rates; submitted applications using her own personal drivers' license and Social Security Number in order to obtain lower rates than those for which customers would have actually qualified; quoted severely reduced premiums in violation of state regulations; issued policies on unsigned applications; appropriated cash payments for her own personal use; issued bogus policies; pretended policies were in effect when losses occurred; fraudulently adjusted loss claims made against the policies; and charged customers for nonexistent and duplicative policies. App. 328-31; 375. When customers inquired whether they indeed had coverage or whether they needed to obtain insurance elsewhere, Willis discouraged them from seeking other coverage, reassuring them all was in order—even as lienholders and government agencies were notifying customers that they were not insured. App. 329. Willis allegedly used these illegal tactics on Respondents' behalf, with their authorization, and for their benefit—and thereby generated rapid growth and profits for Respondents. App. 330.

In 2011, the South Carolina Insurance Commission fined Willis, publicly reprimanded her, and placed her on probation for dishonesty. App. 328. Nonetheless, Respondents allegedly never investigated Willis, never questioned the increased profits she generated, and never stopped her from engaging in these unlawful practices. She continued to work in the industry issuing policies for Respondents. App. 328-31.

Willis' allegedly illegal conduct harmed two groups of people in Abbeville. First, they harmed Respondents' customers ("Customers"), who were led to believe they had purchased legitimate insurance policies. As a result of Willis' allegedly unlawful business practices, Customers lost a great deal of their money, ended up with damaged credit, and had difficulty

obtaining new insurance policies. App. 331. Second, Willis' allegedly unlawful practices harmed local insurance agents who operated responsible, law-abiding businesses in Abbeville and competed with Willis for business ("Agents"). Willis' tactics lowered insurance premiums for the general public, making it impossible for Agents to compete for customers. App. 130. As a result, Agents lost revenue and clients, were unable to compete in the local insurance market, and effectively had their livelihoods destroyed. *See* App. 128.

B. The Trial Court Proceedings and the Arbitration Clause

Plaintiffs-Petitioners Customers and Agents filed lawsuits against Defendants-Respondents Montgomery, Peerless, and Safeco; other insurance companies; the Southern Risk agency; and Willis and her boss Jesse Dantice. They allege that Respondents are liable under a respondeat superior theory for Willis' misrepresentations, fraud, unfair and deceptive acts, and conversion; that Respondents should have been on notice of Willis' activities based on the volume of new business she generated in a short amount of time; and that they should have discovered and stopped her wrongdoing. App. 101-04; 120; 130; 162-63; 330; *see also Wilson v. Willis*, 416 S.C. 395, 405, 786 S.E.2d 571, 576 (Ct. App. 2016); App. 917. Plaintiffs also allege that Respondents had a duty to investigate, train, and supervise her—especially after she was publicly disciplined by the Insurance Commission. App. 127-28; 328. Plaintiffs allege causes of action for violations of the South Carolina Unfair Trade Practices Act and common-law unfair trade practices (App. 130-31; 331-32; 378-79); fraud, conversion, and negligent misrepresentation (Customers only) (App. 332-35; 380-82); and civil conspiracy and tortious interference with contractual relations (Agents only) (App. 132-33). They seek damages, restitution, disgorgement, injunctive relief, and attorneys' fees and costs. *E.g.*, App. 331-35.

In answering the Plaintiffs' complaints, Respondents did not mention the Agency Agreement or any arbitration clause. *Wilson*, 416 S.C. at 406-07, 786 S.E.2d at 577; App. 918.

Instead, they acknowledged that any "duties owed by them to an insured are set forth in certain statutes, in case law, and in the contract of insurance between them and their insured." App. 401. Respondents also filed declaratory judgment actions against some of the Plaintiffs, first in federal court, then state court. App. 30-33; App. 234. In their state court action, Respondents argued that the Court of Common Pleas had jurisdiction over the parties' claims. App. 226. These actions were subsequently dismissed. *E.g.*, App. 106.

Nearly a year into the litigation, after the parties had commenced discovery and motions to dismiss were filed, Respondents filed Motions to Compel Arbitration. App. 24-25, 561; 573. The other party to the Agency Agreement, Southern Risk, did not seek to compel arbitration, nor did any of the other insurance companies. The arbitration clause Respondents sought to enforce appeared in the 2010 Agency Agreement, a contract between "the undersigned Agency [Southern Risk] . . . on behalf of" each Respondent "Company" identified in the addenda. App. 459. Attached to the Agency Agreement are two addenda—one for Montgomery (App. 468), and one for Safeco (App. 470). There is no addendum for Peerless in the record.

The Agency Agreement sets out the business relationship between each Respondent "Company" and the "Agency" Southern Risk. App. 459-67. It addresses the "[a]uthority" of Southern Risk to act as an agent for Respondents; the "[r]esponsibilities" of Southern Risk to Respondents; the allocation of ownership between Respondents and Southern Risk of "expirations" and work product; the payment of commissions by Respondents to Southern Risk; and the handling of "[d]irect-[b]illed" and "[a]gency-[b]illed" business. App. 459-62.

The Agency Agreement expressly disclaims any duties to nonparties such as Plaintiffs, providing that "Company's obligations under this Agreement extend only to the Agency named in this Agreement and not to its employees, sub producers, *or anyone else*." App. 466 (emphasis

added). Numerous other provisions likewise make clear that the agreement is between the two named parties only. *See, e.g.*, App. 466 ("This Agreement and any addenda hereto constitute the entire agreement between Company and Agency . . . ."); App. 465 ("Each party is providing to the other . . . information that is confidential and proprietary . . . ."); *id.* ("neither party will disclose such Confidential or Proprietary Information of the other"). The addenda, likewise, make clear that they apply only to each Respondent and Southern Risk. *See, e.g.*, App. 468 ("This Addendum applies only to Agency's relationship and transactions with Montgomery Insurance . . . .").

The Agency Agreement has an arbitration clause, which, like the contract in which it is contained, makes clear that it is between two parties: each Respondent insurance company and Southern Risk. It states, in relevant part:

> If any dispute or disagreement arises in connection with the interpretation of this Agreement, its performance or nonperformance, its termination, the figures and calculations used or any nonpayment of accounts, the parties will make efforts to meet and settle their disputes in good faith informally. If the parties cannot agree . . ., then the matter in controversy, upon request of either party, will be settled by arbitration . . .; provided, however, that this provision will not apply to claims for equitable relief or, at Company's election, Company's claims for unpaid premiums. . . .

App. 464. The arbitration clause also provides that "[t]he parties will agree to submit the dispute to one arbitrator," that costs are to be borne "equally by the parties," that "[e]ach party is responsible for its own attorneys' fees," and that "either party" may elect to have the dispute decided by a panel of three arbitrators. *Id.*

Despite the fact that the arbitration clause in the Agency Agreement is Respondents' sole basis for their argument that they are entitled to compel Plaintiffs to arbitrate, Respondents provided no admissible evidence whatsoever to authenticate the Agency Agreement, nor any

testimony by a declarant with personal knowledge to verify Respondents' relationships with Southern Risk—only arguments of counsel. *See* App. 563; 575-76.

Respondents conceded that Plaintiffs are not parties to the Agency Agreement or its arbitration clause, but insisted that they should be required to arbitrate anyhow. According to Respondents, the Plaintiffs' claims are "premised on the Insurers' alleged duties that would not exist but for the Insurers' agency agreement with the agency, Southern Risk." App. 561-62. Respondents argued that the mere fact that Plaintiffs "did not personally sign" the Agency Agreement should be no barrier to its enforcement against them. App. 564. Citing cases where courts enforced arbitration clauses against plaintiffs who brought breach of contract claims, Respondents contended that Plaintiffs should be bound by the Agency Agreement under the doctrine of equitable estoppel. *See generally* App. 564-69.

Plaintiffs opposed the motions, explaining that their claims were premised not on the Agency Agreement between Respondents and Southern Risk—of which they were unaware until Respondents' motion to compel arbitration—but on legal duties established by South Carolina law. App. 619; 624-25; 627; 628-30. They also argued that their claims are outside the scope of Respondents' clause, which, unlike the clauses South Carolina courts have found to be broad, limits arbitration to only five kinds of dispute. App. 626-28; 630-31. Plaintiffs also argued that Respondents had waived any right to arbitration they may have had, and that the clause was not validly formed because Southern Risk had not signed the Agency Agreement. App. 620-24.

Judge Griffith held a hearing on the enforceability of the arbitration clause. App. 407. On March 25, 2014, the circuit court denied Respondents' motions to compel arbitration. App. 16-25.

First, the court held that the non-party Plaintiffs are not bound by Respondents' arbitration clause. The court recognized that "South Carolina courts have enforced arbitration clauses [against nonparties] under the doctrine of equitable estoppel," but found that doctrine "inapplicable to the instant claims." App. 21. The court explained that, in "limited instances," a nonparty may be compelled to arbitrate where "'he has consistently maintained that other provisions of the same contract should be enforced to benefit him.'" App. 21 (quoting *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012)). But the court found that:

> In these cases, unlike the factual pattern in *Pearson*, 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. In fact, . . . Plaintiffs assert they had never seen the instant contract prior to the filing of Defendants' motions. . . . Plaintiffs do not seek to receive any benefits from the Agency Agreement and do not utilize its terms to support the allegations in the Complaints. Plaintiffs' claims do not hinge on any alleged rights found in the Agency Agreement but instead are grounded in South Carolina law.

App. 21-22. Judge Griffith concluded: "Since Plaintiffs seek *no direct benefit* from the Agency Agreement, equitable estoppel should not apply to enforce the agreement's arbitration provision." App. 22.

Second, the court rejected the Insurers' argument that Plaintiffs' claims fall within the scope of the Agency Agreement's arbitration clause. Given that the clause limits arbitration to five specific disputes, the court found the clause to be "narrowly worded." App. 19-20. The court noted that the Agency Agreement "control[s] only the business relationship between the agency and the insurance company, not the relationship between the insurers and [their] insureds." App. 20. Comparing the types of dispute covered by the clause to Plaintiffs' claims, the court found that the clause is "inapplicable on its face to the Plaintiffs' claims," which "have no relation to and are not 'in connection with the performance of the Agency Agreement.'" App.

20. Likewise, the court observed, "there are no allegations in the Plaintiffs' tort claims which allege or relate to any dispute or disagreement in connection with the interpretation of the agreement, its performance or nonperformance, or its termination." App. 20-21. As further basis for its holding that Plaintiffs' claims were outside the scope of the arbitration clause, the court noted that Respondents' alleged actions constituted "illegal and outrageous acts" that were "unforeseeable to a reasonable consumer" in the context of normal business dealings. App. 22-23 (citing *Partain v. Upstate Auto Grp.*, 386 S.C. 488, 493-95, 698 S.E.2d 602, 604-05 (2010)).[1]

Finally, the trial court found Respondents' arbitration clause invalid on two additional grounds: (1) because no signature appeared on the Agency Agreement on behalf of Southern Risk, Respondents had failed to establish the existence of a validly formed agreement; and (2) Respondents waived any right they may have had to arbitration by seeking substantive relief from the court and waiting a year before seeking arbitration. App. 18-19; 23-25.

C. The Court of Appeals Decision

On March 2, 2016, the Court of Appeals reversed on all counts. *Wilson*, 416 S.C. 395, 786 S.E.2d 571; App. 915. First, the court held that Plaintiffs should be "equitably estopped from arguing their status as nonsignatories precludes enforcement of the arbitration provision" because, according to the court, Plaintiffs' complaints "seek to benefit from the enforcement of other provisions in the . . . Agency Agreement." *Id.* at 418; 786 S.E.2d at 583; App. 928. The court acknowledged that Plaintiffs are not parties to the Agency Agreement and were not even aware of its existence prior to bringing their claims, but held that Plaintiffs should be required to arbitrate their claims anyway. The court held that "the duties the Insureds and Agents contend the Insurers allegedly breached arise from the . . . Agency Agreement," and therefore that

[1] All internal quotations, citations, and alterations are omitted throughout, unless otherwise indicated.

Plaintiffs "receive a 'direct benefit' from that agreement." *Id.* (quoting *Int'l Paper Co. v. Schawbedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000).)

The court further held that the Agency Agreement's clause should be "broadly construed," and that Plaintiffs' claims "are inextricably linked" to duties that "arose out of the agency relationship" created by the Agency Agreement and thus within the scope of the arbitration clause. *Id.* at 414-15; 786 S.E.2d at 581; App. 925-26. Finally, the Court of Appeals reversed the trial court's rulings on contract formation, waiver, and additional grounds Plaintiffs had raised on appeal. *Id.* at 420-27; 786 S.E.2d at 583-87S; App. 920-24; 930-36. Plaintiffs' motion for reconsideration was denied.[2] App. 991.

Petitioners filed a petition for rehearing on March 30, 2016, and the Court of Appeals summarily denied that petition in an amended order issued on June 27, 2016. App. 937, 991-92. Petitioners sought this Court's review, and the Court granted the Petition on March 28, 2018.

ARGUMENT

I. The Standard of Review is *De Novo*.

"The determination whether a claim is subject to arbitration is reviewed *de novo*." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 130 (2016), *reh'g denied* (Oct. 24, 2016). However, factual findings made by the circuit court "will not be reversed on appeal if any evidence reasonably supports the findings." *Id.*

[2] While Plaintiffs believe that these other rulings are also erroneous, they sought—and this Court granted—review only of the Court of Appeals' rulings on the nonparty and scope issues. Petition at 1; Order granting Petition.

II. The Court of Appeals Erred By Enforcing the Agency Agreement's Arbitration Clause Against the Nonparty Plaintiffs.

The court below enforced the arbitration clause in the Agency Agreement between Respondents and Southern Risk against Plaintiffs who are not parties to that contract and did not agree to arbitrate any disputes with Respondents—despite the fact that Plaintiffs seek only to vindicate their rights under South Carolina law and have never sought to benefit from the agreement or changed positions to Respondent's detriment. This decision conflicts with both this Court's precedent and the relevant rulings by the U.S. Courts of Appeal, and it should be reversed.

A. The Presumption in Favor of Arbitration Does Not Apply to the Threshold Question of Whether the Clause Binds the Nonparty Plaintiffs.

South Carolina law and the FAA both recognize that there is a "heavy presumption of arbitrability," meaning that where a court finds that a valid arbitration clause exists between the parties, it should resolve questions as to whether a particular claim is within the clause's scope "in favor of arbitration." *Landers*, 402 S.C. at 109, 739 S.E.2d at 213.

However, the U.S. Supreme Court recently clarified that this presumption "cannot be divorced from the first principle that underscores all of our arbitration decisions: Arbitration is strictly a matter of consent." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010); *see also Stolt-Nielsen*, 559 U.S. at 684; *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. The presumption *does not apply*, the Court explained, unless and until a court first finds that "a validly formed and enforceable arbitration agreement" exists. *Granite Rock*, 561 U.S. at 301.

Accordingly, courts across the country have consistently recognized that the presumption in favor of arbitration does not apply to the question of whether nonparties like Plaintiffs are bound by an arbitration agreement. *See, e.g.*, *Griswold v. Coventry First L.L.C.*, 762 F.3d 264, 271 (3d Cir. 2014) ("The presumption in favor of arbitration does not extend . . . to non-

signatories to an agreement; it applies only when both parties have consented to and are bound by the arbitration clause."); *Raymond James Fin. Servs., Inc. v. Cary*, 709 F.3d 382, 386 (4th Cir. 2013) (presumption does not apply "when there remains a question as to whether an agreement even exists between the parties in the first place"); *UBS Fin. Servs., Inc. v. Carilion Clinic*, 706 F.3d 319, 324 (4th Cir. 2013) (noting that the "federal policy creating a presumption in favor of arbitration . . . applies only where a validly formed and enforceable arbitration agreement exists and its scope is ambiguous;" that the question of whether a nonparty is bound by the clause is a question of "the existence of a contract to arbitrate, not the scope of an arbitration agreement;" and thus that this question must be resolved "without considering the presumption in favor of arbitration"); *Datatreasury Corp. v. Wells Fargo & Co.*, 522 F.3d 1368, 1372 (Fed. Cir. 2008) ("Federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties; instead ordinary contract principles determine who is bound."); *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.11 (9th Cir. 2006) ("The question here is not whether a particular issue is arbitrable, but whether a particular party is bound by the arbitration agreement. Under these circumstances, the liberal federal policy regarding the scope of arbitrable issues is inapposite."); *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073-74 (5th Cir. 2002) ("federal policy favoring arbitration does not apply" where the question is "not what claims are arbitrable, but rather who must arbitrate"); *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998) ("[W]hen the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away."); *Washburn v. Beverly Enterprises-Georgia, Inc.*, No. CV 106 051, 2006 WL 3404804, at *5-6 (S.D. Ga. Nov. 14, 2006) (distinguishing question of what claims fall within the scope of an arbitration agreement from question of which parties may be bound by that

agreement, and holding that "neither the FAA nor any other federal policy favors arbitration for parties who have not contractually bound themselves to arbitrate their disputes"); *Clearwater REI, L.L.C. v. Boling*, 318 P.3d 944, 949 (Idaho 2014) ("The policy favoring arbitration does not justify compelling arbitration by those who have not consented to it."); *Hirsch v. Amper Fin. Servs., L.L.C.*, 71 A.3d 849, 861 (N.J. 2013) ("preference for resolving ambiguities in arbitration clauses in favor of compelling arbitration" does not apply "when parties have not expressly agreed to arbitrate their disputes"); *Carr v. Main Carr Dev., L.L.C.*, 337 S.W.3d 489, 496 (Tex. App. 2011) ("[T]he presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement.").

The Court of Appeals below erroneously applied the presumption in favor of arbitration to the question of whether Plaintiffs' claims were within the scope of the Agency Agreement's arbitration clause without first determining whether Plaintiffs could be bound by that clause in the first place. And then, based on its mistaken belief that Plaintiffs' claims were premised on duties arising from the Agency Agreement, the court went on to hold that Plaintiffs themselves were bound. That approach was misplaced.[3]

In its *de novo* review of questions presented, this Court should *first* address the question of whether Plaintiffs are bound by the Agency Agreement's arbitration clause. *See Landers*, 402 S.C. at 108, 739 S.E.2d at 213 ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate[.]"). This order make sense: If a party isn't bound by an arbitration clause, it doesn't matter whether her claims would otherwise

[3] In addition, as explained in part III.B, below, the presumption in favor of arbitration only applies where the scope of the arbitration clause is both broad and ambiguous.

be within its scope. *See, e.g.*, *Clearwater REI*, 318 P.3d at 949 ("The fact that the claims alleged against the Counterdefendants would be within the scope of the arbitration clause is irrelevant unless the Counterdefendants are bound by the agreement to arbitrate."). Only if the Court finds that the clause binds the nonparty Plaintiffs does the Court need to address the secondary question of whether Plaintiffs' claims are arbitrable under the clause. And as explained below, because Plaintiffs are *not* bound, the Court need not reach the scope question at all.

B. Equitable Estoppel Does Not Require the Nonparty Plaintiffs to Arbitrate Their Claims.

It is undisputed that Plaintiffs are not parties to the Agency Agreement or the arbitration clause in it. By its own terms, the agreement applies only to each Respondent insurance company and the Southern Risk agency. App. 459. Plaintiffs have never relied on or sought to enforce any part of the Agency Agreement, have not alleged breach of contract, and were not even aware of the agreement until Respondents decided to seek arbitration almost a year into the litigation.

Despite these facts, the court below concluded that Plaintiffs must resolve their claims in arbitration. The sole basis for the court's ruling was the doctrine of equitable estoppel. *See Wilson*, 416 S.C. at 417-18, 786 S.E.2d at 582-83; App. 927-29. Equitable estoppel is a narrow exception to the general rule that "a contract cannot bind a nonparty." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). Under "traditional principles of state law," including equitable estoppel, a contract can, in certain narrow circumstances, "be enforced by or against nonparties to the contract." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009). No such circumstances exist here.

As a threshold matter, there has been some uncertainty among South Carolina courts as to whether to apply federal equitable estoppel rules (which developed under federal arbitration law) or state equitable estoppel rules (which developed outside the arbitration context). The U.S.

Supreme Court and this Court have repeatedly instructed that courts determining "whether parties agreed to arbitrate a certain matter . . . should apply ordinary state-law principles." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (courts evaluating the enforceability of an arbitration clause apply "[g]eneral contract principles of state law"). And the Supreme Court recently affirmed that equitable estoppel is a state-law principle. *Carlisle*, 556 U.S. at 631.

South Carolina courts in arbitration cases have addressed both state and federal doctrines, but found that the differences between them were immaterial because neither applied. *See, e.g.*, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 58-60, 784 S.E.2d 679, 687-89 (Ct. App. 2016) (concluding that neither federal nor state estoppel law required a nonsignatory estate to arbitrate its claims against nursing home); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, No. 2015-001183, 2018 WL 1177630, at *4-8 (S.C. Ct. App. Mar. 7, 2018) (same). The same result is warranted here.

The Court of Appeals below, applying only federal equitable estoppel law, concluded that Plaintiffs "are equitably estopped from arguing their status as nonsignatories precludes enforcement of the arbitration provision." *Wilson*, 416 S.C. at 418, 786 S.E.2d at 582-83; App. 927-29.[4] As explained below, that decision was wrong under both federal and state estoppel law.

[4] Other panels of the Court of Appeals have likewise applied federal estoppel law. *See Pearson*, 400 S.C. at 289-90, 733 S.E.2d at 601 (ruling that "no state law question of contract formation or validity" was implicated by the question of "whether a non-signatory is bound by a contract" and "look[ing] to the federal substantive law of arbitrability"); *Swane Co. v. Berkeley Cty. S.C.*, No. 2:15-CV-02586, 2015 WL 6688072, at *6 (D.S.C. Oct. 30, 2015) (noting that, "[f]ollowing the Supreme Court's decision in *Arthur Andersen*, South Carolina state courts have continued to cite pre-*Arthur Andersen* cases when addressing the equitable estoppel issue").

1. Federal equitable estoppel does not apply because the nonparty Plaintiffs have not sought or received any benefits under the Agency Agreement.

The doctrine of equitable estoppel under federal law "precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Int'l Paper*, 206 F.3d at 418. The essence of the rule is that it would be unfair for a nonparty to a contract to "claim the benefit of the contract and simultaneously avoid its burdens." *Id.* In the arbitration context, the doctrine applies when one party "attempts to hold another party to the terms of an agreement while simultaneously trying to avoid the agreement's arbitration clause." *R.J. Griffin*, 384 F.3d at 160-61.

According to the court below, estoppel should bar Plaintiffs from avoiding the Agency Agreement's arbitration clause because the "duties [Plaintiffs] contend the Insurers allegedly breached arise from the . . . Agency Agreement," and thus Plaintiffs "receive a 'direct benefit' from that agreement." *Wilson*, 416 S.C. at 418, 786 S.E.2d at 583; App. 928 (quoting *Int'l Paper*, 206 F.3d at 418).

That holding was wrong on both the law and the facts. It is beyond dispute that one cannot pick and choose contract terms, invoking the benefits of some terms while avoiding others. But Plaintiffs have never sought *any* benefit under the Agency Agreement, let alone a "direct benefit." Nor could they have: The contract expressly states that each Insurer's "obligations under this Agreement extend only to the Agency named in this Agreement and not to its employees, sub producers, *or anyone else*." App. 466 (emphasis added). And as the circuit court found, "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."[5] App. 21.

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. Respondents allegedly accepted money from Customers in exchange for insurance policies that were forged, inapplicable, illegal, and in some cases even nonexistent. *See* App. 328-30. And Respondents allegedly stood by while their agent's unlawful practices nearly forced Agents out of business. Plaintiffs simply allege that Respondents failed to comply with the law. *See* App. 22.

In concluding that Plaintiffs must arbitrate under the doctrine of equitable estoppel, the court below relied on two cases: the Court of Appeals' decision in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, and the Fourth Circuit's decision in *International Paper*, 206 F.3d 411. *Wilson*, 416 S.C. at 416-18, 786 S.E.2d at 582-83; App. 927-29. But, as explained below, both *Pearson* and *International Paper* turned on a single, critical fact: in both cases, the plaintiffs alleged breach of the contract that contained the arbitration clause. *See Pearson*, 400 S.C. at 292-93, 733 S.E.2d at 602-03; *Int'l Paper*, 206 F.3d at 418. That decisive fact is completely absent here.

In *International Paper*, the purchaser of an allegedly defective industrial saw sued the saw's manufacturer, seeking to enforce guarantees and warranties in the contract between the manufacturer and the distributor. 206 F.3d at 413-14. That contract included a broad clause that required arbitration of "any dispute arising out of the contract." *Id.* at 414. While the plaintiff was not a party to the contract, its complaint expressly alleged that the manufacturer "failed to honor the warranties in the . . . contract, and it [sought] damages, revocation, and rejection in

[5] This factual finding is entitled to deference. *See Parsons*, 418 S.C. at 6, 791 S.E.2d at 130.

accordance with that contract." *Id.* at 418. The Fourth Circuit concluded that, not only did the contract "provide[] part of the factual foundation for every claim" in the complaint, but the plaintiff's "*entire case* hinge[d] on its asserted rights under the . . . contract." *Id.* Thus, equitable estoppel clearly applied. *Id.*; *see also Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 361-62 (5th Cir. 2003) ("Direct benefits estoppel applies when a nonsignatory 'knowingly exploits the agreement containing the arbitration clause.'") (quoting *E.I. DuPont de Nemours & Co. v. Phone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 199 (3d Cir. 2001)).

Likewise, in *Pearson*, a doctor entered into a contract with a medical placement firm, and that firm also entered into a contract with a hospital. Both contracts had identical arbitration clauses. 400 S.C. at 285-86, 733 S.E.2d at 599. When the doctor was fired, he sued both the placement firm and the hospital for breach of contract, and both moved to compel arbitration. *Id.* at 286, 736 S.E.2d at 599. The circuit court denied the hospital's motion on grounds that the doctor had not agreed to arbitrate disputes with the hospital. But the Court of Appeals reversed, reasoning that the doctor was either "seeking either to receive damages under [the hospital's contract], or to hold the hospital accountable under [his contract]." *Id.* at 297, 733 S.E.2d at 605. Given that both contracts had arbitration clauses, the court concluded that the doctor "should not be allowed to hold the Hospital to one of the contracts to allege a breach but not be subject to the arbitration provisions." *Id.*

The holdings of *Pearson* and *International Paper* make perfect sense: where a nonparty seeks a direct benefit from a contract—such as seeking damages for its breach, or invoking its warranty protections—that party should be estopped from avoiding an arbitration clause in that same contract. But because Plaintiffs here have not sought to benefit from or enforce the Agency Agreement, the reasoning of those cases is inapplicable here.

The court below reasoned that Respondents' only connection to the dispute is through their contractual relationship with Southern Risk, and that "in the absence of the agreement establishing the agency relationship," Plaintiffs would not be able to bring any claims against Respondents. *Wilson*, 416 S.C. at 418, 786 S.E.2d at 583; App. 928. On that basis, the court concluded that Plaintiffs must be effectively "seek[ing] to benefit from the enforcement of the . . . Agency Agreement." *Id.*

But the mere fact that the dispute would not have arisen were it not for the contractual relationship between the defendant and another party does *not* transform it into a contract dispute such that equitable estoppel requires the nonparty to arbitrate. Thus, in *R.J. Griffin*, the Fourth Circuit rejected a construction contractor's attempt to force a homeowners' association to arbitrate its claims pursuant to an arbitration clause in the construction contract between the contractor and the developer. 384 F.3d at 162-64. The homeowners sued the contractor for breach of implied warranty and negligence after their condominium building started leaking. *Id.* at 159. The contractor moved to compel arbitration, arguing that the homeowners' claims were based on the construction contract and thus that the contract's arbitration clause was enforceable against the homeowners through the doctrine of equitable estoppel. *Id.* at 159-60. The Fourth Circuit disagreed. The court explained that the legal duties the homeowners sought to enforce were "not dependent on the terms of the general contract," but rather arose from South Carolina common law. *Id.* at 162. The contractor insisted that, but for the general contract, it would not have built the condominium and thereby assumed those common-law legal duties. But the Fourth Circuit emphatically rejected that argument, explaining that "equitable estoppel does not apply when a benefit results from the contractual relation of parties to an agreement and not from

the agreement itself." *Id.* Thus, the nonparty homeowners were not bound by the clause and could pursue their claims in court. *Id.*

In *Malloy*, likewise, this Court refused to enforce an arbitration clause against a nonparty who, like Plaintiffs here, sought to vindicate legal rights that existed independently of the contract containing the arbitration clause. 409 S.C. 557, 762 S.E.2d 690. The plaintiff in *Malloy* sued Merrill Lynch for allegedly interfering with the inheritance he was owed by the estate of a deceased client of the company. *Id.* at 559-60, 762 S.E.2d at 691. The investment company moved to compel arbitration on the basis of an arbitration agreement in its contract with the decedent, arguing—like Respondents here—that the contract containing the arbitration clause was "its only connection to this dispute," that "any duty" it had to the plaintiff was "derivative of its duty to Decedent under the [contract]," and that the plaintiff was therefore bound by the arbitration clause despite not being a party to the contract. *Id.* at 560, 562, 762 S.E.2d at 691, 692. This Court rejected that argument, holding that Merrill Lynch's position "conflate[d] the duties created by the . . . contract[]" with "general tort duties." *Id.* at 562, 762 S.E.2d at 692. The Court concluded that nonparty Malloy "cannot be compelled to arbitrate under these agreements." *Id.* at 559, 762 S.E.2d at 691.

Here, unlike the nonparty plaintiffs in *Pearson* and *International Paper*, Plaintiffs have not and do not seek to exploit or benefit from the underlying contract. Rather, as in *Malloy* and *R.J. Griffin*, the legal duties Plaintiffs allege Respondents violated arise from South Carolina statutory and common law. Plaintiffs have not claimed—and could not claim—that Respondents violated any contractual duty to them under the Agency Agreement, because they have no rights under that contract. Nor have Plaintiffs ever alleged that Respondents breached their contractual duties to their co-defendant Southern Risk. Indeed, Plaintiffs would have no reason to make that

argument, because 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.

Surely Respondents cannot seriously contend that they would have no obligation to comply with South Carolina's unfair trade practices laws and other consumer protection laws were it not for the Agency Agreement. Respondents' contract with Southern Risk is irrelevant to Plaintiffs' claims. *See Malloy*, 409 S.C. at 562, 762 S.E.2d at 693 ("The contractual duties between Decedent and Merrill Lynch are irrelevant to whether Merrill Lynch intentionally interfered with Malloy's expected inheritance.").

The real reason Respondents sought to enforce the Agency Agreement is not that it has any application to Plaintiffs or their claims, but that it's the only contract with an arbitration clause. But to the extent there are any *contractual* duties owed by the Respondent Insurers to Plaintiffs, those duties are set out in the only contracts that exist between Respondents and Customers: the insurance policies sold by Willis on Respondents' behalf, to the extent Willis actually issued policies. (Agents, of course, have no contractual relationship whatsoever with Respondents.) Respondents have acknowledged that any duties they owe to the Customer Plaintiffs are set forth in statutory and case law and "in the contract of insurance between them and their insured." App. 401. But, of course, Respondents could not have compelled arbitration of any claims Customers brought under the insurance policy contracts, because those policies do not have arbitration clauses. *See, e.g.*, App. 53-85 (Safeco policy). South Carolina, like many other states, "prohibits the enforcement of arbitration clauses in insurance policies under South

Carolina law."[6] *Am. Health & Life Ins. Co. v. Hayward*, 272 F. Supp. 2d 578, 582 (D.S.C. 2003) (citing S.C. Code § 15-48-10(b)(4)); *see also Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 556 S.E.2d 397 (Ct. App. 2001). By seeking to compel Customers to arbitrate their claims pursuant to a different contract to which Plaintiffs are not parties, Respondents are attempting to do indirectly what South Carolina law prevents them from doing directly.

In sum, the Court of Appeals' ruling that the nonparty Plaintiffs are equitably estopped from avoiding enforcement of the arbitration clause because they sought or obtained benefits from the Agency Agreement should be reversed.

2. State equitable estoppel does not apply because the nonparty Plaintiffs have not asserted claims that are contrary to their prior conduct or misled Respondents to their injury.

"The essence of equitable estoppel" under South Carolina state law "is that the party entitled to invoke the principle was misled to his injury." *S.C. Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). This Court recently explained that "equitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct." *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017). Here, there is no evidence that the Customers or Agents have misled Respondents to their injury, or that Plaintiffs' argument that the Agency Agreement does not bind them is somehow inconsistent with their prior conduct—and Respondents do not so allege. Accordingly, state equitable estoppel does not apply here.

[6] The federal McCarron-Ferguson Act permits states to regulate or ban arbitration clauses in insurance contracts, effectively "reverse preempting" the FAA. *Hayward*, 272 F. Supp. 2d at 581-82.

Under South Carolina law, "[t]he essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel." *Id.* Courts look at three elements with respect to the party to be estopped:

> (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts.

Id. In addition, the party asserting estoppel must show:

> (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped.

Id. at 601, 799 S.E.2d at 916-17; *see also Thompson*, 416 S.C. at 60, 784 S.E.2d at 689; *Zabinski*, 346 S.C. at 589, 553 S.E.2d at 114.

Here, not one of those six factors is met. There is no evidence in the record that Plaintiffs have engaged in false or inconsistent conduct of any kind. It's undisputed that Plaintiffs had no knowledge (actual or otherwise) of the Agency Agreement until long after they filed their lawsuits. Nor do Respondents claim to have lacked knowledge, or to have relied—let alone to their prejudice—on Plaintiffs' conduct. If anything, Plaintiffs relied on Respondents and their agents not to sell them bogus insurance policies, appropriate their hard-earned money, violate unfair competition laws, and defraud them.

In sum, nothing in South Carolina's doctrine of equitable estoppel provides *any* basis for depriving Plaintiffs of their day in court and forcing their claims into arbitration under the Agency Agreement's arbitration clause.

III. The Court of Appeals Erred by Holding that Plaintiffs' Claims Are Within the Scope of the Agency Agreement's Arbitration Clause.

Because equitable estoppel does not apply, and the nonparty Plaintiffs are therefore not bound by the Agency Agreement between Respondents and Southern Risk, the Court need not reach the question of whether Plaintiffs' claims fall within the scope of the clause. But even if Plaintiffs were somehow bound by the clause, the court below was wrong to hold that the clause encompasses Plaintiffs' claims.

First, because the Agency Agreement's clause is both narrow and clear, the presumption in favor of arbitration does not apply here. In *Granite Rock*, the U.S. Supreme Court held that the presumption applies "only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand." 561 U.S. at 301. And because narrow clauses like the one in the Agency Agreement expressly define which disputes are covered, there's no need to apply the presumption. *See, e.g.*, *Cummings v. FedEx Ground Package Sys., Inc.*, 404 F.3d 1258, 1262 (10th Cir. 2005) ("When an arbitration clause is narrowly drawn, the policy in favor of arbitration does not have the strong effect here that it would have if we were construing a broad arbitration clause."); *Salsbery v. Verizon Wireless (VAW), L.L.C.*, No. 2:13-CV-26419, 2014 WL 3876635, at *5 (S.D. W. Va. Aug. 7, 2014) (recognizing that "if a court has any doubts concerning the scope of arbitrability, those doubts should be resolved in favor of arbitration" and citing cases for the proposition that "the strong presumption of arbitrability applies exclusively to broad arbitration agreements"); *Kalispell Educ. Ass'n v. Bd. of Trustees, Kalispell High Sch. Dist. No. 5*, 255 P.3d 199, 204 (Mont. 2011). Here, Respondents have conceded that the clause is narrow. And it unambiguously states that only five specific disputes are subject to arbitration (and everything else is not). Since Plaintiffs' claims are not included among the claims listed in the clause, they are simply not arbitrable.

Second, even if the clause were somehow construed as broad, Plaintiffs' claims do not bear a significant relationship to or touch upon the Agency Agreement because they are legally independent from that agreement. And even if Respondents would not be responsible for the alleged harm were it not for their contract with Southern Risk, that fact is not sufficient to transform Plaintiffs' claims into claims arising from that contract.

A. The Agency Agreement's Arbitration Clause is Narrow, and Plaintiffs' Claims Are Not Among Its Specified Arbitrable Disputes.

Since the decision to submit disputes to arbitration is itself a contract, the "parties are free to make that promise as broad or as narrow as they wish." *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 570 (1960). "[T]he range of issues that can be arbitrated is restricted by the terms of the agreement." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118. South Carolina, like many jurisdictions, distinguishes between broad arbitration clauses and narrow clauses. *See Landers*, 402 S.C. at 109-10, 739 S.E.2d at 213-14. Here, the parties to the Agency Agreement—each Respondent Insurer and Southern Risk—chose to make their promise narrow by restricting the range of issues to be arbitrated.

Broad arbitration clauses "embrace[] *every* dispute between the parties having a significant relationship to the contract." *Id.* at 109-10, 739 S.E.2d at 214 (emphasis added). For example, a clause requiring arbitration of "any dispute arising out of the relationship of the parties" is broad. *Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterm., Co., Inc.*, 356 S.C. 202, 210, 588 S.E.2d 136, 140 (Ct. App. 2003).

Narrow arbitration clauses, in contrast, "limit arbitration to the literal interpretation or performance of the contract" or other specific disputes. *Landers*, 402 S.C. 109-10, 739 S.E.2d at 214. For example, an arbitration clause that applied to disputes regarding the "performance or interpretation of the agreement" did not cover the plaintiff's ERISA claims involving the

defendant's false and misleading statements. *CardioNet, Inc. v. Cigna Health Corp.*, 751 F.3d 165, 177 (3d Cir. 2014); *see also Chelsea Family Pharmacy, P.L.L.C. v. Medco Health Sols., Inc.*, 567 F.3d 1191, 1195-1200 (10th Cir. 2009) (arbitration clause covering disputes related to "payments by Medco" and "audit disputes" was a narrowly drawn arbitration clause that did not require arbitration of statutory claim alleging breach of contract and unfair trade practices).

Here, the Agency Agreement's arbitration clause expressly restricts the types of arbitrable claims to five topics: (1) the "interpretation" of the Agency Agreement; (2) the Agreement's "performance or nonperformance"; (3) the Agreement's "termination"; (4) "the figures and calculations used"; and (5) "any nonpayment of accounts." App. 464. This is a narrow arbitration clause, as Respondents have conceded. *See* App. 437.[7]

The Court of Appeals mistakenly held that the Agency Agreement's clause "should be broadly construed." *Wilson*, 416 S.C. at 414, 786 S.E.2d at 581; App. 925. In reaching that conclusion, the court emphasized that the clause features the phrase "*arises in connection with*," language which, the court noted, is no less broad than the similar phrase "may arise out of or in relation to." *Id.* (emphasis in decision); App. 464. This misses the point. What matters for purposes of a scope analysis is not that disputes "arise in connection with" something, but *what* they arise in connection *with*.

The broad clauses at issue in the cases relied on by the court below required arbitration of all disputes arising out of or relating to the contract. *See J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 318 (4th Cir. 1988) ("[a]ll disputes arising in connection with the present contract"); *Landers*, 402 S.C. at 103, 739 S.E.2d at 210 ("any controversy or claim

[7] At the hearing before the circuit court, Mr. Wood, counsel for Respondents argued, "[L]ooking at the brea[d]th, it's a narrow agreement but it covers what's going on here." App. 437, lines 24-25.

arising out of or relating to this contract, or breach thereof"); *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118 ("any controversy or claim arising out of the partnership agreement"). In contrast, the Agency Agreement's clause provides for arbitration of only disputes arising "in connection with" the five specified topics. App. 464. By focusing myopically on the phrase "in connection with," the court below missed this key difference.

By limiting their clause to these five issues, Respondents and Southern Risk made clear that they did not intend to arbitrate every possible dispute that might possibly arise. Rather, this shows that the parties intended for all other disputes *not* to be arbitrable. *See, e.g.*, *Simon v. Pfizer Inc.*, 398 F.3d 765, 775 (6th Cir. 2005) ("[W]hen an arbitration clause by its terms extends only to a specific type of dispute, then a court cannot require arbitration on claims that are not included."); *Chelsea Family Pharmacy*, 567 F.3d at 1196 ("an explicit limitation of scope is analytically equivalent to an express exclusion of other issues").

Accordingly, if the Court determines that Plaintiffs' claims are not among the disputes listed in the Agency Agreement's clause, they are not arbitrable. The trial court recognized that the clause is "inapplicable on its face to the Plaintiffs' claims" because Plaintiffs' claims do not "relate to any dispute or disagreement in connection with the interpretation of the agreement, its performance or nonperformance, or its termination." App. 20-21; *see also* App. 21-22 ("[A] close reading of the contract evidences that the allegations for which Plaintiffs seek to recover"—which include "stealing, misappropriation of funds, artificial premium calculations, fraud, and forgery—are not contemplated by the Agency Agreement[.]"); App. 459-67.

The trial court's ruling was consistent with decisions by other courts involving similar clauses. *See, e.g.*, *Bridgestone/Firestone, Inc. v. Local Union No. 998, et al.*, 4 F.3d 918, 922-23 (10th Cir. 1993) (clause requiring arbitration of grievances concerning "the interpretation or

application of [the collective bargaining agreement]" did not encompass claims under employer's employee incentive program); *Ridgeway v. Litchfield Co. of South Carolina Ltd. P'ship*, No. 2004-UP-631, 2004 WL 6339730, at *1, *4 (D.S.C. Dec. 15, 2004) (claims for unfair trade practices, negligent misrepresentation, fraud, and civil conspiracy were outside the scope of clause in condominium purchase agreement that required arbitration of "dispute[s] or claim[s] . . . with respect to any of the terms or provisions of this Master Deed, . . . [including] claims for negligent or improper construction, failure to meet specifications, and other claims related to structural improvements").

In sum, even if Plaintiffs were somehow bound by the Agency Agreement, their claims are plainly outside the scope of its narrow arbitration clause.

B. Even If the Agency Agreement's Arbitration Clause Were Broad, Plaintiffs' Claims are Outside its Scope Because They Do Not Touch Upon—or Bear a Significant Relationship to—the Agency Agreement.

Broad arbitration clauses have a more "expansive reach" than narrow clauses. *Landers*, 402 S.C. at 109, 739 S.E.2d at 214. If a clause is broad, a claim need not be expressly specified in the clause to be arbitrable. Rather, the question becomes whether "a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." *Id.*; *see also id.* at 117, 739 S.E.2d at 217-18 (clarifying that the "significant relationship" test does not "differ in any meaningful way" from the question of whether the claims "touch matters" covered by the arbitration clause). "In applying this standard, [a] court must determine whether the factual allegations underlying the claim are within the scope" of the clause. *Id.* at 110, 739 S.E.2d at 214.

Even broad arbitration clauses "must not be so broadly construed as to encompass claims and parties that were not intended by the original contract." *Ridgeway*, 2004 WL 6339730 at *2. Here, even if the Agency Agreement's clause could somehow be considered broad despite its

limiting language, Plaintiffs' claims are still outside its scope because there is no nexus between the claims and any alleged violations of the contract.

This Court's decision in *Landers* is instructive. In *Landers*, a former bank vice president sued the bank, alleging constructive termination in breach of his employment contract; tort claims including slander and intentional infliction of emotional distress; and a shareholder claim. 402 S.C. at 103, 739 S.E.2d at 210. He alleged that his superior's abusive conduct had effectively destroyed his ability to perform his job and that he was punished for raising concerns about allegedly misleading information the bank provided to shareholders. *Id.* at 103-07, 739 S.E.2d at 210-12.

The bank moved to compel arbitration, citing a "broad arbitration provision" in the employment contract that required arbitration of "any controversy or claim arising out of or relating to this contract, or breach thereof." *Id.* at 103, 739 S.E.2d at 210. The plaintiff, who was of course a party to the employment contract, argued that his claims were not within the scope of the contract's arbitration clause. But the Court disagreed, reasoning that all of the plaintiff's claims—not just the termination claim—bore a significant relationship to the employment contract. With respect to the tort claims, the Court explained that "[t]he perceived inability to perform one's *job* certainly relates to an *employment* contract." *Id.* at 112, 739 S.E.2d at 215. And with respect to the shareholder claim, the Court noted that the plaintiffs' allegations "provide a direct link between his status as a shareholder" and the bank's alleged act of forcing him out in violation of the Agreement. *Id.* at 113, 739 S.E.2d at 215-16. The Court saw "a clear nexus between the underlying factual allegations" and the plaintiff's "inability to perform the employment Agreement and the alleged breach thereof, such that all of his causes of action bear a significant relationship to the Agreement." *Id.* at 115, 739 S.E.2d at 217.

Here, in contrast, there is no nexus between Plaintiffs' allegations against the Respondent Insurers and the Agency Agreement between Respondents and Southern Risk. As the trial court recognized, the Agency Agreement controls only the business relationship between the Southern Risk agency and each Respondent insurance company. App. 20. According to the plain language of the contract, each "[Insurer's] obligations under this Agreement extend only to the [Southern Risk] Agency . . . and *not* to . . . *anyone else*." App. 466 (emphasis added). Plaintiffs, as nonparties, have no rights under the Agency Agreement. And as explained above, Plaintiffs' claims arise solely from South Carolina law—not from any duties Respondents undertook to Southern Risk in the Agency Agreement. *See, e.g.*, App. 130-32; 331-35.

The Court of Appeals below attempted to fit the square pegs of Plaintiffs' claims into the round holes of the Agency Agreement, theorizing that allegations about Respondents' alleged duty to train and supervise agent Willis must arise out of provisions authorizing Southern Risk "'to act as agent for [Respondents] pursuant to written authority and guidelines furnished'" by Respondents. *Wilson*, 416 S.C. at 415; 786 S.E.2d at 581; App. 926 (quoting App. 459). Likewise, the court speculated that a provision addressing "Agency-Billed Business," which outlines the basic procedures under which premiums will be accounted for, collected, and paid by Southern Risk to Respondents, could implicate Respondents' duty to audit and monitor agents' conduct; and that a paragraph in the agreement requiring agents to be licensed could be the source of Respondents' alleged duty to investigate and conduct background checks. *Id.* But this attempt to match Plaintiffs' allegations to Respondents' contract does not survive scrutiny.

Essentially, the court below concluded that Plaintiffs' claims must be within the scope of the Agency Agreement's arbitration clause because, according to the court, agent Willis would not have harmed Plaintiffs while acting on Respondents' behalf had Respondents not entered

into the Agency Agreement with Southern Risk (the insurance agency that employed Willis). *Id.* at 416, 786 S.E.2d at 581-82; App. 926. But this Court rejected that exact reasoning in *Aiken*, 373 S.C. 144, 644 S.E.2d 705.

In *Aiken*, this Court held that a borrower's claims for negligence, negligent supervision, and unfair trade practices against a lender for its failure to prevent its agents' theft of the borrower's personal identity could *not* be forced into arbitration based on a clause in the loan contract—even though the borrower, unlike Plaintiffs here, was a party to that contract. The lender's employees had allegedly used the consumer plaintiff's personal information "to obtain sham loans and embezzle the proceeds for [their] personal benefit." *Id.* at 147, 644 S.E.2d at 707. Like Plaintiffs, the consumer in *Aiken* sought to hold the company responsible for the actions of the individual, and brought claims against the company for negligence, negligent hiring/supervision, and unfair trade practices. *Id.* The company moved to compel arbitration, citing a clause in the loan agreement that provided for arbitration of "[a]ll disputes, controversies or claims of any kind . . . arising out of or in connection with the loan agreement, or arising out of any transaction or relationship between lender and borrower or arising out of any prior or future dealings between lender and borrower[.]" *Id.* This Court acknowledged that this was a "broadly-worded" arbitration clause, but ruled that the consumer's identity theft claims were not within its scope because they did not bear a "significant relationship" to the underlying contract. The company argued that the employees would not have had access to the plaintiff's personal information but for the plaintiff's contract with the company. *Id.* at 149-50, 644 S.E.2d at 708. But the Court held that the fact that intentional identity theft by the company's employees may have been "factually related" to the contract did not bring the plaintiff's claims within the scope of the contract's arbitration clause, because the unlawful conduct was "legally distinct from the

contractual relationship between the parties." *Id.* at 152, 644 S.E.2d at 709. The Court explained its reasoning:

> Applying what amounts to a 'but-for' causation standard essentially includes every dispute imaginable between the parties . . . . Such a result is illogical and unconscionable. . . . The mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement.

Id. at 150, 644 S.E.2d at 708. Under *Aiken*, the mere fact that Plaintiffs' dispute with Respondents would not have arisen were it not for the contractual relationship between Respondents and Southern Risk does not transform Plaintiffs' claims into claims that arise from the Agency Agreement.[8]

Like any company doing business in South Carolina, Respondents have a duty to comply with South Carolina law in their dealings with the public, regardless of any contracts they may enter into with other companies.[9] And South Carolina law is clear that, where the legal duties a company allegedly breached are legally distinct from the contract containing the arbitration

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[8] The court below refused to consider Plaintiffs' underlying fraud, forgery, and misappropriation claims in its analysis of the arbitration clause's scope, claiming that "these allegations related specifically to Willis's conduct." *Wilson,* 416 S.C. at 415-16; 786 S.E.2d at 581; App. 926. That was error. In *Aiken*, the Court specifically examined the claims related to the underlying identity theft by employees—not just those claims against the company for negligent hiring/supervision—in holding that the arbitration clause did not encompass the plaintiff's tort and consumer protection claims against the defendant company. *See Aiken*, 373 S.C. at 151, 644 S.E.2d at 709.

[9] The decision below also conflicts with this Court's decision in *Zabinski*. In *Zabinski*, four law partners agreed to arbitrate "any controversy or claim arising out of the partnership agreement." 346 S.C. at 596, 553 S.E.2d at 118. The Court recognized that this clause was broadly-worded, and held that the claims related to payment and distribution of assets were within the clause's scope. *Id.* But the Court held that two other kinds of claims were *not* subject to arbitration. First, the Court held that malpractice actions by two of the partners against two other lawyers (including the lawyer who had drafted the partnership agreement) "concern the partnership agreement only indirectly, and cannot be considered claims 'arising out of the partnership agreement.'" *Id.* at 598, 553 S.E. at 119. And second, the Court determined that a dispute over the purchase of one lawyer's interest in the partnership was likewise not subject to arbitration. *Id.* No significant relationship existed between this "third party claim" and the partnership agreement, the Court reasoned, because the facts involved in the controversy were "independent of any dispute arising out of the partnership agreement." *Id.*

clause, the fact that the harm would not have occurred "but for" the contractual relationship is insufficient to bring those claims within the scope of the arbitration provision. *See id.*; *see also Hatcher v. Edward D. Jones & Co., LP*, 379 S.C. 549, 551, 554, 666 S.E.2d 294, 297 (Ct. App. 2008) (investor's claims against brokerage for negligence and unfair trade practices arising from an unauthorized transfer of funds were outside scope of clause requiring arbitration of "any controversy arising out of or relating to any of my accounts or transactions with you, your officers, directors, agents, and/or employees for me, to this agreement, or to the breach thereof," because they were "legally distinct from the contractual relationship between the parties"); *Simpson v. World Fin. Corp. of S.C.*, 367 S.C. 184, 190-91, 623 S.E.2d 877, 881 (Ct. App. 2005), *aff'd*, 373 S.C. 178, 644 S.E.2d 723 (2007) (holding that claims for negligence, negligent hiring/supervision, and unfair trade practices arising from alleged misuse of personal information and embezzlement by defendant's former employees were outside the scope of broad arbitration clause contained in loan agreement, and rejecting defendant's argument that claims should be subject to arbitration "simply because [the defendant's] employees would not have had access to Simpson's personal financial information but for the loan agreement"); *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 634, 611 S.E.2d 305, 308 (Ct. App. 2005) (homeowner's claims against pool company for violations of South Carolina law arising from harassment by company's employees were not subject to arbitration under clause in construction contract because they did not arise out of, and could be proved independently of, the contract); *Reuben v. Palmetto Traditional Homes, LLC*, No. 2004-UP-283, 2004 WL 6306628, at *3 (S.C. Ct. App. Apr. 29, 2004) (unpublished) (negligence and tort claims against home manufacturer arose from legal duty existing independently of contract and thus were not subject to arbitration clause).[10]

[10] South Carolina law is in keeping the law of other jurisdictions. *See, e.g.*, *Tracer Research Corp. v.*
cont'd on next page

The rationale of *Aiken*, *Hatcher*, *Simpson*, and *Chassereau* applies here in spades. Plaintiffs allege that Willis' conduct violated South Carolina's unfair trade practices law, and that Respondents are liable under a respondeat superior theory for those violations as well as for their failure to investigate, train and supervise, and audit Willis. While it may be true that Willis would not have acted on Respondents' behalf "but for" the Agency Agreement, and that her actions may thus be factually related to the Agency Agreement, Plaintiffs' claims are legally distinct from that contract because they arise from South Carolina law. If the broad arbitration clause in *Aiken* did not encompass the consumer's tort and consumer protection claims against the company based on the actions of its employees, clearly Respondents' clause does not encompass Plaintiffs' claims against Respondents based on the actions of their agent. *See Aiken*, 373 S.C. at 152, 644 S.E.2d at 709.

In sum, the unlawful conduct alleged by Plaintiffs would give rise to tort and consumer protection claims under South Carolina law whether or not a contractual relationship existed between Respondents and Southern Risk. The court below erred in finding these claims within the scope of the Agency Agreement's arbitration clause.

CONCLUSION

The decision of the Court of Appeals below should be reversed and the case should be remanded to the trial court for resolution on the merits.

Nat'l Envtl. Servs. Co., 42 F.3d 1292, 1295 (9th Cir. 1994) (claims for misappropriation of trade secrets were outside scope of arbitration clause in parties' licensing agreement where they arose from independent legal duty, despite fact that claim would not have arisen but for the agreement); *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 641-42 (Fla. 1999) (tort claim against manufacturer for failing to warn of known risks from defective design arose from legal duty existing independently of sales agreement and therefore was not arbitrable, despite the fact that dispute would not have arisen but for agreement); *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney*, 950 So. 2d 170, 176-77 (Miss. 2007) (claim of misappropriation of personal identity through forgery was not related to underlying contract).

Respectfully submitted,

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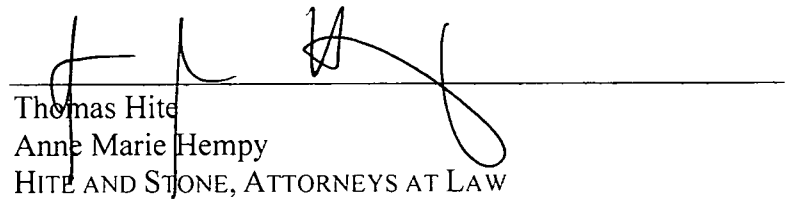

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April 27, 2018

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 27 2018

S.C. SUPREME COURT

No. 2016-001512

APPEAL FROM ABBEVILLE COUNTY
Court of Common Please
Eugene G. Griffith, Jr., Circuit Court Judge

Opinion No. 5387 (S.C. Ct. App. Filed March 2, 2016)
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, ... *Plaintiffs/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 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.; and Laurie Williams, ... *Defendants,*

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

PROOF OF SERVICE

I, the undersigned legal assistant with the law offices of Hite and Stone, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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