THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2021-001337

IN THE MATTER OF: Estate of Paul Brandon Barringer, II

Hampton Barringer Luzak ..... Appellant,

v.

Merrill U. Barringer.....Respondent.

INITIAL BRIEF OF RESPONDENT

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VIII. Does the law prohibiting contracts relating to the use of a power of appointment serve as an additional sustaining ground for the trial court's Order?

INTRODUCTION

Appellant Hampton Luzak ("Luzak") seeks to unwind and rewrite her father's estate plan. Luzak and her father, Paul Barringer ("Mr. Barringer" or Luzak's "father"), had a falling out in 2012, four years prior to his death in 2016. After he passed away, Luzak challenged amendments to her father's will and revocable trust (as well as a gift of stock) executed between 2012 and 2015 on the grounds of incapacity, undue influence, and mistake. Luzak contended that the 1998 versions of her father's will and trust—which are the last versions executed before the 2012 versions—are the operative versions of those documents, and therefore, the estate planning documents that control the disposition of her father's estate. None of Luzak's claims alleging incapacity and undue influence from 2012 through 2015, however, relate to this discrete appeal.

This appeal involves just two claims asserted by Luzak against her mother, Respondent Merrill Barringer ("Mrs. Barringer" or Luzak's "mother"), in a separate lawsuit. Those two claims have nothing to do with Luzak's claims that her father lacked capacity and was subject to undue influence beginning in 2012. Rather, the two claims at issue in this appeal relate only to a testamentary power of appointment that Mr. Barringer granted to Mrs. Barringer in the 1998 revocable trust that Luzak seeks to enforce. A testamentary power of appointment is commonly included in estate planning documents to authorize the holder of the power (Mrs. Barringer) to "appoint" assets in the grantor's (Mr. Barringer's) estate at the time of the holder's death. By granting Mrs. Barringer this power, Mr. Barringer empowered her to decide who would take the remainder of Mr. Barringer's estate after her death.

In the two claims at issue in this appeal (the "Contract-Based Claims"), Luzak asks the Court to ignore the terms of the 1998 estate planning documents and to enforce an alleged contract or promise between her parents in which her mother allegedly promised her father not to do exactly

what the 1998 documents expressly give her the right to do—namely, exercise the power of appointment. In other words, even though Mr. Barringer executed the 1998 estate plan when Luzak and her father were on good terms—and 14 years before Luzak alleges her father lost capacity—Luzak claims that her parents made a secret promise that directly contradicts, and precludes enforcement of, the documents' plain language. Critically, Luzak has consistently alleged that this contract or promise was made *no later than December 4, 1998*—more than 13 years before her father allegedly became subject to undue influence and diminished capacity. Because the Contract-Based Claims are legally, factually, and temporally distinct from Luzak's remaining claims, the trial court bifurcated these claims from Luzak's remaining capacity and tort-based claims. Thereafter, the trial court granted summary judgment on the Contract-Based Claims. This summary judgment order is the only order at issue in this appeal.

This Court should affirm the trial court's Order granting Mrs. Barringer summary judgment on the Contract-Based Claims for several reasons.

First, Section 62-2-701 of the South Carolina Code bars Luzak's Contract-Based Claims. In 1986, the South Carolina legislature followed the lead of several other state legislatures and passed a statute modeled from the Uniform Probate Code that requires any plaintiff alleging a contract "concerning succession" of an estate, such as the contract Luzak alleges here, to identify a will or other signed writing confirming the existence or material terms of the contract. Luzak has identified no such will or signed writing. Notably, the purpose of statutes such as Section 62-2-701 is "to tighten the methods by which contracts concerning succession may be proved." Unif. Probate Code § 2-701, Comment. Thus, the purpose of Section 62-2-701 is to bar claims precisely like the Contract-Based Claims that Luzak asserts here.

Second, Luzak has no evidence of the alleged contract or promise between her parents. Luzak has identified no estate planning document, no letter, no email, no text message—and no testimony from any witness—that even remotely suggests that her parents made the alleged contract or promise. The reason Luzak cannot identify any evidence of the alleged contract or promise is that no such contract or promise was ever made. Luzak asserted her Contract-Based Claims after it became apparent that, even if she prevailed on her capacity and undue influence claims and successfully set aside her father's gifts and estate planning between 2012 and 2015, she would be left with her father's 1998 estate plan, which allows Mrs. Barringer to decide who gets what upon Mrs. Barringer's death. Three years after she sued to enforce the 1998 documents, Luzak brought the Contract-Based Claims, asserting for the first time that the Court should not follow the terms of Mr. Barringer's 1998 estate plan either.

Third, under settled South Carolina precedent, the holder of a testamentary power of appointment cannot bind herself to exercise the power in a particular way. Thus, a promise by the holder of a testamentary power of appointment to exercise that power in a particular way cannot be enforced in contract or otherwise. Accordingly, even if Luzak had evidence of the alleged contract, the contract would be unenforceable. This law provides an additional sustaining ground for the trial court's decision.

Moreover, none of the arguments in Luzak's Initial Brief supports reversing the trial court's Order.

First, although Luzak concedes that Section 62-2-701 applies to her third cause of action to enforce the alleged contract, she argues that the statute does not apply to her second cause of action for constructive trust because that claim is based on an alleged *promise*, not an alleged *contract*. As the trial court correctly recognized, jurisdictions addressing this argument have

rejected it, in part because statutes like Section 62-2-701 would be meaningless if a plaintiff could circumvent them by merely repackaging a breach of contract claim as a breach of promise claim. Luzak ignores, and does not even attempt to distinguish, the cases cited by the trial court.

Second, Luzak argues that Mrs. Barringer cannot exercise her power of appointment because (1) Mr. Barringer allegedly treated his three children equally prior to 2012 when he had a falling out with Luzak; (2) during unspecified family meetings held prior to 2012, Mr. Barringer allegedly "commented" that he "intended" or "planned" to treat his children equally, and Mrs. Barringer did not respond by stating that, if Mr. Barringer died first, she retained the authority to direct final distributions at the time of her death; and (3) prior to Mr. Barringer's death, Mr. and Mrs. Barringer executed mutual or "symbiotic" wills in which neither of them exercised the power of appointment granted to them by the other. These arguments have no merit. There is no evidence that Mrs. Barringer promised never to exercise her power of appointment. The fact that Mrs. Barringer did not discuss the power of appointment or exercise it during Mr. Barringer's lifetime does not evidence such a promise. Finding otherwise would open the floodgates to claims like Luzak's and jeopardize the validity of virtually every power of appointment.

Third, Luzak argues that Mr. Barringer did not intend to grant Mrs. Barringer a power of appointment even though the 1998 documents unambiguously grant Mrs. Barringer a power of appointment. But Luzak did not plead this theory below. As the trial court correctly held, Luzak's Complaint "does not challenge the power of appointment on the basis that Mr. Barringer did not intend to grant such a power to Mrs. Barringer." (Order, p. 8, R.__.) Nor has Luzak explained how her father could enter a contract or rely on a promise related to the power of appointment if he never intended to give Mrs. Barringer a power of appointment in the first place. Furthermore, there is no evidence that Mr. Barringer did not intend to grant his wife a power of appointment, and the

power of appointment provision in each version of Mr. Barringer's trust is unambiguous and cannot be modified or revoked based on extrinsic evidence.

Fourth, Luzak argues that the trial court erred in granting Mrs. Barringer's motions for partial summary judgment because another circuit court judge denied an earlier motion for partial summary judgment on the same claims. This is not the law. *See Smith v. Breedlove,* 377 S.C. 415, 662 S.E.2d 67 (2008) (holding that the trial court may grant a second summary judgment motion where additional discovery occurred after the denial of the first motion, regardless of whether the additional discovery was favorable to the moving party).

Fifth, Luzak argues that the trial court erred in granting Mrs. Barringer's motions for partial summary judgment because the trial court previously denied Luzak's motion to re-depose Mrs. Barringer in the consolidated litigation. This argument fails both procedurally and on the merits. Luzak raised this argument to Judge Bonds for the first time in her motion to reconsider, and she failed to appeal the trial court's orders denying her motion to re-depose Mrs. Barringer. Thus, this argument is not preserved for appellate review. Further, Luzak's Initial Brief identifies no questions that she would have asked Mrs. Barringer during a second deposition, much less questions that she could not have asked during the first deposition and that could have helped Luzak meet her burden in opposing Mrs. Barringer's motions for summary judgment.[1]

Mrs. Barringer respectfully requests that this Court affirm the ruling of the trial court.

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[1] Luzak attempts to create the appearance of factual disputes by discussing at length her allegations of undue influence and diminished capacity based upon events that began in 2012. (*See* Luzak Br. at 12-25.) Luzak's thirteen page "Statement of Facts" contains only two paragraphs that discuss Mrs. Barringer's power of appointment or other facts relevant to this appeal. (*See id.*) Although Mrs. Barringer denies the allegations in Luzak's Statement of Facts section—and denies that any of Mr. Barringer's estate planning documents or *inter vivos* transfers are invalid based on incapacity, undue influence, or mistake—Mrs. Barringer does not address these allegations here because they are not relevant to this appeal.

STATEMENT OF THE CASE

Mr. Barringer died on May 30, 2016. In August of 2016, Luzak filed the first of four civil lawsuits in Beaufort County. The two 2016 actions are against Mr. Barringer's widow, and Luzak's 89-year-old mother, Mrs. Barringer, as personal representative of Mr. Barringer's estate, and Luzak's sister, Merrill Light, individually and as trustee of Mr. Barringer's revocable trust. These cases have civil action numbers 2016-CP-07-1919 and 2016-CP-07-1961 and are referred to here as "Barringer I." The two 2019 actions, which name Mrs. Barringer individually as the sole defendant, have civil action numbers 2019-CP-07-01253 and 2019-CP-07-01294 and are referred to here as "Barringer II."

A. Barringer I

In Barringer I, Luzak alleges 19 causes of action against her sister Merrill Light.[2] (Am. Compl., Case No. 2016-CP-07-1919, R. pp.__.) Luzak claims that, beginning in 2012, Mr. Barringer lacked the mental capacity to execute various wills, trust amendments and transfers, and his family members and others unduly influenced him for their own financial gain. (*Id*. ¶ 119, R. p.__.) Specifically, Luzak challenges Mr. Barringer's 2012, 2014, and 2015 estate planning documents, and a 2012 transfer of stock to Merrill Light, on incapacity, undue influence, and mistake grounds (the "Incapacity/Undue Influence Claims"). (*Id*. ¶¶ 118-154, R. pp.__.) Luzak also asserts tort claims against Merrill Light, including intentional interference with inheritance, civil conspiracy, breach of fiduciary duty, fraud, and conversion, as well as equitable claims for unjust enrichment (the "Tort-Based Claims"). (*Id*. ¶¶ 155-193, R. pp.__.) These claims seek to

[2] Merrill Barringer is named in Barringer I only in her capacity as Personal Representative of the Estate, and no direct relief is sought against Merrill Barringer in Barringer I.

invalidate Mr. Barringer's 2012-2015 estate planning documents, as well as the 2012 transfer of stock to Merrill Light, and to recover money damages from Merrill Light.[3]

B. Barringer II

In Barringer II, Luzak sued only her mother, Mrs. Barringer. (Compl., Case No. 2019-CP-07-01253 (hereafter, "Compl."), R. pp.__.) Barringer II's first cause of action ("Intentional Interference with Inheritance") and fifth cause of action ("Civil Conspiracy") add Mrs. Barringer as an individual defendant to the Barringer I Tort-Based Claims. (*Id*. ¶¶ 123-133, 147-150, R. pp.__.) These two Barringer II claims raise the same factual allegations and legal claims as Barringer I.

The other two causes of action in Barringer II, which are the only two causes of action at issue in this appeal, are Luzak's Contract-Based Claims—namely, her second cause of action ("Constructive Trust and Injunction") and third cause of action ("Enforcement of Contract Not to Revoke and Injunction"). Luzak's Contract-Based Claims—brought for the first time after 3 years of litigation related to her father's estate—are not based on any alleged incapacity of, or any alleged undue influence exerted on, Mr. Barringer. Rather, Luzak's Contract-Based Claims are based on the theory that—in or before 1998, long before Mr. Barringer allegedly became mentally incapacitated and subject to undue influence in 2012—Mr. Barringer purportedly entered into a contract with Mrs. Barringer in which Mrs. Barringer promised never to exercise a power of appointment that she holds over Mr. Barringer's remaining estate. (*Id*. ¶¶ 134-43, R. pp.__.) With her Contract-Based Claims, Luzak seeks to prevent Mrs. Barringer from executing a new will and exercising her power of appointment to Luzak's detriment based on the allegation that Mrs.

[3] Luzak also named Randolph Light, Merrill Light's husband, as a Defendant in Barringer I. However, Mr. Light passed away on March 16, 2020, and Luzak never substituted his estate as a party.

Barringer secretly contracted with or promised her husband never to change her December 4, 1998 will and exercise the power of appointment, regardless of changed circumstances in the future. Luzak alleges that this contract or promise was made no later than December 4, 1998, (*See* Pl's. Responses to Mrs. Barringer's First Set of Interrogatories, p. 18, R. p.__), and further alleges that Mr. Barringer "relied" on the contract or promise when he gave Mrs. Barringer the power of appointment in his December 4, 1998 revocable trust. (Compl. ¶ 138, R. p. __.) The relief Luzak requests in the Contract-Based Claims is an injunction prohibiting Mrs. Barringer from executing a new will and exercising her power of appointment, and a constructive trust for the benefit of Luzak in accordance with the terms of the alleged contract. (*Id*. ¶¶ 140, 143, R. p.__.)

On March 20, 2020, Mrs. Barringer filed a motion for partial summary judgment on Luzak's Contract-Based Claims. Judge Mullen held a hearing on this motion, and on November 4, 2020, Judge Mullen issued an Order denying the motion. (Order dated November 4, 2020, R. pp.__.) In her Order, Judge Mullen stated that a genuine issue of material fact existed for trial but did not identify what the genuine issue was. (*Id.*) On February 19, 2021, Judge Mullen recused herself from this case.

On June 14, 2021, after the parties conducted additional discovery, Mrs. Barringer filed a motion for partial summary judgment on the Contract-Based Claims. Significantly, On July 30, 2021, Luzak filed a cross-motion for summary judgment on these same claims. On August 10, 2021, Judge Robert Bonds held a hearing, and on August 20, 2021, Judge Bonds issued an Order granting Mrs. Barringer's motion and denying Luzak's motion. (Orders dated August 20, 2021, R. pp.__.) On August 30, 2021, Luzak filed a motion to reconsider, which Judge Bonds heard on October 7, 2021. On October 8, 2021, Judge Bonds issued an Order denying Luzak's motion to reconsider. (Order dated October 8, 2021, R. pp.__.) On November 8, 2021, Luzak served a Notice

of Appeal, appealing Judge Bonds' Order granting Mrs. Barringer's motions for partial summary judgment and his Order denying Luzak's motion to reconsider. (Notice, R. pp.__.)

In between Judge Mullen's Order denying summary judgment and Judge Bonds' Order granting summary judgment, the parties conducted significant discovery. This additional discovery included the depositions of the following witnesses: Neill McBryde, who represented Mr. and Mrs. Barringer in the preparation and execution of their 1998 Wills and Trusts; John Jolley, who represented Mr. and Mrs. Barringer in the preparation and execution of their subsequent wills and trust amendments; Rebecca Bostick, a paralegal who worked with John Jolley; two additional former employees of Jolley's law firm; Luzak's husband, Kevin Luzak, whom Luzak identified as a witness who allegedly had evidence of the alleged promise made by Mrs. Barringer to Mr. Barringer; several Coastal Forest Resources Company ("CFRC") employees, including Tom Evans, Stephanie Chapman and Travis Bryant; a Rule 30(b)(6) deposition of CFRC; Robert Scully, another attorney who represented Mr. Barringer; Mr. Barringer's former secretary, Pat Harrell; and Mr. Barringer's primary physician for decades, Dr. Paul Long.

STATEMENT OF THE FACTS

All of Mr. Barringer's wills—the first of which was executed in December 1998 and the last of which was executed in February 2015—are "pour-over wills" that he executed at the same time he executed a corresponding revocable trust.[4] Each of these wills provides that, upon Mr.

[4] The Paul B. Barringer, II Revocable Trust was executed on December 4, 1998. (R. pp.__.) Mr. Barringer subsequently executed the First Amendment and Restatement of Trust Agreement of Paul B. Barringer on February 28, 2012, the Second Amendment and Restatement of Trust Agreement of Paul B. Barringer on July 20, 2012, the Third Amendment and Restatement of Trust Agreement of Paul B. Barringer, II on June 12, 2014, and the Fourth Amendment and Restatement of Trust Agreement of Paul B. Barringer, II on February 5, 2015. (R. pp. __.)

Barringer's death, his estate passes to a trust, with the income to Mrs. Barringer for her life. Importantly for purposes of this appeal, each version of Mr. Barringer's estate plan gave Mrs. Barringer a special testamentary power of appointment permitting her, through her own last will or codicil, to decide who receives the assets remaining in Mr. Barringer's estate when she dies.[5] Each of Mr. Barringer's revocable trusts also includes a default provision that directs distribution of the remainder of the trust assets at Mrs. Barringer's death if she does not exercise the special powers of appointment through her own will.

For example, Mr. Barringer executed a "pour-over will" on December 4, 1998 (the "1998 Will"), which Moore & Van Allen attorney Neill McBryde prepared and witnessed. Mr. Barringer's 1998 Will provided that if Mr. Barringer died before Mrs. Barringer, his personal effects would pass to her, and the remainder of his property would pour over to the Paul B. Barringer, II Revocable Trust dated December 4, 1998 (the "1998 Revocable Trust"). ("1998 Will," R. p.__.) Mr. Barringer's 1998 Revocable Trust provides that, upon his death, his trust estate shall be divided into three sub-trusts: Trust A, Trust B and a Residuary Trust. (1998 Revocable Trust, R. pp.__.) Mr. Barringer's 1998 Revocable Trust also provides that, during her life, Mrs. Barringer is entitled to all income generated by each sub-trust's assets and to principal for her "support, health and maintenance." (*Id.*, R. p.__.) Mr. Barringer also granted Mrs. Barringer a testamentary power of appointment over any assets remaining in the three sub-trusts at the time of her death. (*Id.*, R. p. __.) By this power, Mrs. Barringer is allowed to direct, through her last will or a codicil thereto, how property remaining in the sub-trusts when she dies will be distributed among their descendants: "Upon the death of my said wife . . . the property remaining . . . shall be

[5] Because each version of Mr. Barringer's will grants Mrs. Barringer the special testamentary power of appointment, the version of Mr. Barringer's will that is ultimately determined to be valid is of no practical significance to this appeal.

distributed . . . to or among my descendants, ***and in such manner in trust or otherwise, as my said wife may appoint in such wife's last will and testament or codicil thereto*** . . . ." (*Id.*, R. p.__.) (emphasis added).[6] The 1998 Revocable Trust imposes no additional limitations on Mrs. Barringer's authority to exercise her power of appointment. (*See generally id.*)

Mr. Barringer executed new wills and amended and restated his revocable trust on several occasions beginning in 2012. For example, on February 28, 2012, Mr. Barringer executed a will (the "February 28, 2012 Will"), which, like his 1998 Will, provided that if Mr. Barringer died before his wife, she would receive his personal effects, and the remainder of his property would pass to the Paul B. Barringer, II Revocable Trust Agreement dated December 4, 1998, as amended. Mr. Barringer also executed the First Amendment and Restatement of Trust Agreement of Paul B. Barringer, II on February 28, 2012 (the "February 28, 2012 Trust Restatement," R. pp.__.) The February 28, 2012 Trust Restatement, like the 1998 Revocable Trust, provides that, upon Mr. Barringer's death, his trust estate shall be divided into various sub-trusts. The Trust Restatement further directs, through provisions termed "Special Power of Appointment in Wife . . ." that upon his wife's death, the remaining principal is to be distributed "in such manner and in such proportions as the Settlor's wife may appoint in and by the Last Will of the Settlor's wife, making specific reference to the power of appointment herein conferred upon her." (*Id.*, R. p. __.) McNair Attorney John Jolley prepared the February 28, 2012 Will and February 28, 2012 Trust Restatement, as well as subsequent estate planning documents, which each provide for special testamentary powers of appointment in favor of Mrs. Barringer.[7]

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[6] The exact language of the power of appointment varies slightly between the sub-trusts, but these variations are not substantive.

[7] John Jolley also prepared Mr. Barringer's July 20, 2012 Second Amendment and Restatement of Trust, June 12, 2014 Will and June 12, 2014 Third Amendment and Restatement of Trust, and

Before Mr. Barringer died, Mrs. Barringer also executed a pour-over will and corresponding revocable trust on December 4, 1998, as well as subsequent wills on February 28, 2012, June 12, 2014 and February 5, 2015. (R. pp. __.) Mrs. Barringer did not exercise her testamentary power of appointment in any of these wills.

No version of Mr. or Mrs. Barringer's wills or revocable trusts contains or refers to any contract or promise between Mr. and Mrs. Barringer related to their wills or estate plans. This is apparent from a review of the documents and is further confirmed by the testimony of the estate planning attorneys who prepared them. Attorney Neill G. McBryde submitted an affidavit and provided deposition testimony confirming that Mr. Barringer's 1998 Will and 1998 Revocable Trust contained no contract with Mrs. Barringer and did not limit her ability to exercise her power of appointment. (*See* McBryde Aff. ¶¶ 47-51 R. p.__; McBryde Dep. 39:16-40:3, R. pp__.) McBryde confirmed that Mr. Barringer's 1998 Revocable Trust gave Mrs. Barringer authority to divide the remaining assets among the descendants or to exclude any descendant as long as she did so in her own last will or codicil. (*See* McBryde Aff. ¶¶ 31, 39-41, R. pp.__; McBryde Dep. 28:2-29:19, R. pp.__.) Attorney John Jolley also testified that no language in Mr. Barringer's wills and trusts was intended to create a contract between Mr. and Mrs. Barringer, and that in fact "the terms of their – of Mr. Barringer's documents fly in the face of an argument that there's an agreement not to change their estate plans." (Jolley Dep. 87:16-24, R. p. __.)

Luzak's husband, Kevin Luzak, testified that he is aware of no evidence that Mr. and Mrs. Barringer agreed that they would treat their children equally regardless of circumstances. (Kevin Luzak Dep. 481:11-482:11, R. p. ___.) Luzak and her husband each submitted affidavits in this

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February 5, 2015 Will and February 5, 2015 Fourth Amendment and Restatement of Trust. Each of these trust amendments give a special power of appointment to Mrs. Barringer. (R. pp.__.)

litigation, neither of which identify evidence of any contract or promise between Mr. and Mrs. Barringer relating to their estate planning. (*See generally* Hampton Luzak Aff., R. pp.__; Kevin Luzak Aff., R. pp.__.) In sum, there is no evidence in the record of any contract or promise between Mr. and Mrs. Barringer relating to their estate planning generally or Mrs. Barringer's power of appointment specifically.

STANDARD OF REVIEW

An appellate court reviews the grant of a summary judgment motion under the same standard applied by the trial court. *Huffman v. Sunshine Recycling, LLC*, 426 S.C. 262, 270, 826 S.E.2d 609, 614 (2019). Under Rule 56(c), a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. The Court must view the facts in the light most favorable to the non-moving party. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

A plaintiff faces a heightened burden in opposing a defendant's motion for summary judgment, however, where, as here, the motion seeks summary judgment on claims for which the plaintiff would have a heightened burden of proof at trial. *See id.*, 345 S.C. at 452-54, 548 S.E.2d at 874-75; *see also Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009). The reason for this rule is that, when deciding a motion for summary judgment, the court must determine whether the trier of fact reasonably may resolve the dispute in favor of either party and this analysis "necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *George*, 345 S.C. at 452-54, 548, S.E.2d at 874-75. (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

Here, the trial court granted Mrs. Barringer summary judgment on Luzak's second and third causes of action, both of which would be subject to a heightened evidentiary burden at trial. Specifically, under South Carolina Code Section 62-2-701, a plaintiff seeking to enforce a contract concerning succession of an estate—as in Luzak's third cause of action for "Enforcement of Contract Not to Revoke and Injunction"—must prove the existence or material terms of the contract with a will or other writing signed by the decedent. *See* S.C. Code § 62-2-701. Likewise, Luzak's second cause of action, in which she seeks a constructive trust and injunction based on an alleged promise made by Mrs. Barringer and relied upon by Mr. Barringer, is also subject to the proof requirements of Section 62-2-701. Further, a plaintiff seeking a constructive trust must prove her entitlement to a constructive trust with clear, definite, and unequivocal evidence. *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987).

Thus, this appeal is not subject to the "mere scintilla of evidence" standard, as argued by Luzak. Rather, the trial court's Orders should be affirmed unless this Court determines that Luzak has presented clear, definite, and unequivocal evidence of the alleged contract or promise pursuant to Section 62-2-701. Nonetheless, Luzak has not identified any evidence, not even a scintilla.

ARGUMENT

Luzak asks the Court to prohibit Mrs. Barringer from exercising a power of appointment that her husband of nearly sixty years granted to her in every version of his estate planning documents. Luzak claims Mrs. Barringer secretly agreed or promised never to exercise this power of appointment. But Luzak can point to no documents or testimony indicating that this supposed agreement existed. Accordingly, the trial court's Order should be affirmed.

I. The trial court properly granted summary judgment on Luzak's second and third causes of action pursuant to Section 62-2-701 of the South Carolina Code.

A. South Carolina Code Section 62-2-701 bars claims based on alleged contracts concerning succession where the plaintiff has no signed writing confirming the contract's existence or material terms.

In 1986, the South Carolina legislature followed the lead of many other state legislatures by passing a statute, modeled from the Uniform Probate Code, addressing the proof required to establish a "contract concerning succession." Specifically, the South Carolina legislature passed Section 62-2-701, which identifies the "only" three methods by which a plaintiff alleging a contract relating to estate planning may prove such a contract:

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

S.C. Code § 62-2-701 (emphasis added). As explained in the Reporter's Comment, this statute "allows the proof of a contract binding a decedent and concerning the succession to his estate, testate or intestate, only by way of some signed writing." *Id.*, Reporter's Comment. At bottom, the statute requires a plaintiff alleging a contract binding a decedent and concerning his or her estate planning to identify a will or other writing signed by the decedent that confirms the existence of

the contract or its material terms.[8] Further, the statute confirms that execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

Section 62-2-701 was drawn from Section 2-701 of the Uniform Probate Code. *See* Unif. Probate Code § 2-701. The Official Comment to UPC § 2-701 explains that the rationale for this type of statute was to reduce litigation based on alleged contracts affecting estate planning:

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

See id., Comment.

B. Luzak's second and third causes of action are subject to the proof requirements of Section 62-2-701.

In her third cause of action, Luzak alleges that, "[u]pon information and belief, Decedent Paul Barringer and Mrs. Barringer entered into a binding contract not to revoke their [December

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

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

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

4, 1998] estate plans," and asserts that Luzak "is entitled to an order from this Court directing Defendant Merrill U. Barringer to comply with the contract not to revoke her will." (Compl. ¶¶ 142-43, R.__.) Luzak argues that this alleged contract prohibits Mrs. Barringer from changing her estate plan by exercising her power of appointment. (*See, e.g.*, Luzak App. Br. at 41 ("In Ms. Luzak's third cause of action, for enforcement of contract not to revoke and injunction, Ms. Luzak alleges that Paul Barringer and Ms. Barringer entered into a binding contract not to revoke their estate plans, *especially with respect to Ms. Barringer's Will(s) that did not exercise any power of appointment* . . . .") (emphasis added).) Luzak concedes that her third cause of action is subject to the proof requirements of Section 62-2-701. (*See* Luzak App. Br. at 41 ("With respect to contracts not to revoke, Ms. Luzak recognizes that section 62-2-701 governs.").

In her second cause of action, which is for Constructive Trust and Injunction, Luzak alleges that "Mrs. Barringer made an express or implied promise not to exercise her testamentary power of appointment in a manner that would direct the subject property in a manner other than set forth in the default provisions of Decedent Paul Barringer's estate plan." (Compl. ¶ 137, R. p. __.) Luzak further alleges that "Decedent Paul Barringer relied on Mrs. Barringer's express or implied promise not to exercise the testamentary power of appointment given to her." (*Id.* ¶ 139.) Finally, Luzak alleges that she "is entitled to an order from this Court directing Defendant Merrill U. Barringer to comply with her promise and the trust reposed in her not to exercise the testamentary power of appointment given her and to impose a constructive trust for the benefit of Plaintiff Hampton Luzak in the subject property with respect to the intended equal treatment of Plaintiff Hampton Luzak." (*Id.* ¶ 140.)

Although Luzak frames her third cause of action as one based on a *contract* and her second cause of action as one based on a *promise*, this is a distinction without a difference for purposes of

Section 62-2-701. If Luzak prevails under either cause of action, Mrs. Barringer will be legally prohibited from changing her estate planning documents based on an alleged agreement between herself and her husband. In other words, if Luzak prevails, it will be the terms of the contract or promise that control the succession of Mr. Barringer's estate, not his estate planning documents. These are precisely the types of agreements that are subject to Section 62-2-701. *See* S.C. Code § 62-2-701, Reporter's Comment (recognizing that this statute "allows the proof of a contract binding a decedent and concerning the succession to his estate, testate or intestate, only by way of some signed writing").

C. Luzak has no evidence of a contract that complies with Section 62-2-701.

Because Luzak's second and third causes of action are governed by Section 62-2-701, Mrs. Barringer is entitled to summary judgment on these claims unless Luzak can identify a will or other signed writing that complies with one of the three methods of proving a contract under the statute. But, as the trial court correctly held, Luzak has identified no such will or signed writing.

i. Luzak has no evidence to establish a contract through Method One: The Barringers' wills do not contain "material provisions of a contract."

Section 62-2-701(1) provides that a contract concerning succession may be established by "provisions of a will of the decedent stating material provisions of the contract." In an Alabama Supreme Court case, the Court identified an example of such a provision in a will:

> My spouse and I are executing our wills at or about the same time and such wills are intended to be and should be construed [as] contractual and reciprocal wills. Neither will[] shall be subject to revocation by it's [sic] maker without the consent of the other party.

Humphries v. Whiteley, 565 So. 2d 96, 97 (Ala. 1990). No similar provision appears in Mr. or Mrs. Barringer's will.[9]

In her Brief, Luzak fails to identify language from Mr. or Mrs. Barringer's wills that even arguably constitutes the material provisions of a contract of any kind between Mr. and Mrs. Barringer—much less a contract where Mrs. Barringer agreed never to exercise her power of appointment. (Luzak Br. at 41-48.)

Unable to identify any evidence of a contract in the wills, Luzak resorts to the argument that the agreement or promise can be implied from Mr. and Mrs. Barringer's decision not to exercise their respective powers of appointment in their 1998 estate planning documents. (Luzak Br. at 48) ("As discussed above, the 1998 estate planning documents clearly set forth the material provisions of the contract: in short, the mutual declination of the powers of appointment that each granted to the other and the mutual and mirror provisions otherwise in their 1998 documents — treating the children equally."). But this is nonsensical. A person's decision not to exercise a power of appointment in one will is not evidence of a contract *never* to exercise the power of appointment in the future.[10] Absent language making a will irrevocable, wills may be amended by the testator.

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

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

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

(*See* 1998 Revocable Trust, R. p.__ (granting Mrs. Barringer a power of appointment that she may exercise in her "last will and testament *or codicil thereto*") (emphasis added)). Moreover, the very purpose of this type of power of appointment is to give the surviving spouse the opportunity to deal with circumstances that might change after the death of the initial spouse.[11] In any event, Luzak points to no evidence of the alleged contract within the Barringers' wills as required under Section 62-2-701(1).

ii. Luzak does not argue that she has evidence to establish a contract through Method Two.

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

iii. Luzak has no evidence to establish a contract through Method Three: There is no "writing signed by the decedent evidencing the contract."

Section 62-2-701(3) allows a contract concerning succession to be established if "a writing signed by the decedent evidences the contract and then extrinsic evidence proves the terms." Although a plaintiff may rely on extrinsic evidence to prove the terms of the contract concerning succession, the existence of such a contract must first be established by a *writing*

(Mrs. Barringer Will dated December 4, 1998, R. p. __.) (emphasis added). This language, which Luzak buries in a footnote of her Brief, merely indicates that Mrs. Barringer did not exercise her power of appointment *in that will, in 1998*; it does not say, or even imply, that Mrs. Barringer agreed never to exercise her power of appointment in the future.

[11] *See, e.g.*, Robert H. Sitkoff & Jesse Dukeminier, Wills, Trusts, and Estates 807 (10th ed. 2017) ("Consider a typical example: H devises property to X in trust to distribute the income quarterly to W for life, and on W's death to distribute the principal to one or more of H's descendants as W shall appoint in her will . . . . By this power, which W holds in a nonfiduciary capacity, W may decide who among H's descendants will take the trust property at her death. In this way, H empowers W to deal flexibly with changing circumstances in the interim between their deaths.").

signed by the decedent. *See* S.C. Code 62-2-701, Comment. ("Extrinsic evidence is freely admissible under Section 62-2-701 to prove the important terms of a contract *whose mere existence is proved by a signed writing*.") (emphasis added).

Here, Luzak has identified no writing signed by Mr. or Mrs. Barringer proving the existence of a contract prohibiting Mrs. Barringer from ever exercising her power of appointment. Luzak argues that she has identified such a signed writing based on the following:

> The simultaneous and symbiotic 1998 estate planning documents of Paul Barringer and Ms. Barringer are obviously signed writings. As discussed above regarding subsection (1), Paul Barringer and Ms. Barringer's 1998 documents create special testamentary powers of appointment and Ms. Barringer's Will specifically and expressly declines to exercise any power of appointment. This alone "evidences" a contract. Numerous other documents and evidence also serve as signed writings evidencing a contract and as extrinsic evidence establishing the contract, especially as to equal treatment.

(Luzak Br. at 47-48.) Again, Mr. and Mrs. Barringer stating in their wills that they are not exercising any powers of appointment *in their December 4, 1998 wills* by virtue of a residuary clause does not prove the existence of a contract *never* to exercise those powers of appointment at any time in the future. If the decision not to exercise a power of appointment in the past can serve as evidence of a contract never to exercise the power of appointment in the future, this would make virtually every estate plan where a decedent initially chooses not to exercise a power of appointment, and then subsequently chooses to exercise the power of appointment, subject to a jury trial on a claim such as the Contract-Based Claims Luzak asserts here. This is exactly the type of litigation that Section 62-2-701 was designed to prevent. And even if this Court were to determine that 62-2-701 did not apply, the language relied upon by Luzak would not constitute "definite and certain" contract terms "established by evidence clear and convincing" evidence.

Moreover, Luzak's reference to "simultaneous and symbiotic 1998 estate planning documents" is a dressed-up term for mutual wills—separate wills that are substantially similar. Mutual wills can contain clauses which state that they are not revocable unless the other party, usually a spouse, consents. *See, e.g.*, *Humphries*, 565 So. 2d at 97 (quoting mutual wills by spouses that stated: "Neither will[] shall be subject to revocation by it's [sic] maker without the consent of the other party."). But Mr. and Mrs. Barringer's wills do not contain any such clause. In fact, to the extent Luzak relies on the mutuality of Mr. and Mrs. Barringer's wills, her argument is expressly foreclosed by Section 62-2-701, which states: "The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills." S.C. Code § 62-2-701.[12]

Because Luzak has not identified any will or other signed writing that confirms the existence or material terms of the alleged contract, the trial court properly granted Mrs. Barringer summary judgment pursuant to Section 62-2-701.

[12] Of course, Luzak cannot comply with Section 62-2-701 by generically referencing "[n]umerous other documents and evidence." If a document evidencing the existence of a contract existed, she would have identified it to the trial court and in her appellate brief. Luzak also lists the following categories of documents as somehow supporting her argument that a contract exists—Family agreements demonstrating Mr. Barringer's intent to keep voting control equal; Gift tax returns joined in by Mrs. Barringer; Corporate documents demonstrating Mr. Barringer's intent to keep voting control equal." (Luzak Br. at 46-47.) But, critically, Luzak does not argue—and cannot argue—that any of these documents evidence a contract whereby Mrs. Barringer agreed never to exercise the power of appointment that Mr. Barringer expressly granted to her. Indeed, Luzak does not explain how these documents relate to the requirements of Section 62-2-701 or otherwise support her argument.

II. The trial court correctly held that Luzak cannot circumvent Section 62-2-701 by repackaging her contract claim as a claim based on a promise.

A. Luzak ignores the trial court's reasoning for refusing to permit Luzak to circumvent Section 62-2-701, including the cases cited in the trial court's Order.

According to Luzak, her claim for constructive trust is not subject to Section 62-2-701 because it alleges that her mother is legally prohibited from exercising her power of appointment based on a *promise* rather than a *contract*. Luzak is not the first plaintiff to attempt to circumvent a statute like Section 62-2-701 in this way. As noted above, Section 62-2-701 is modeled from Section 2-701 of the Uniform Probate Code, and numerous states have passed substantively identical or similar statutes. Courts in states with statutes like Section 62-2-701 routinely reject attempts by plaintiffs to circumvent the statute by repackaging a contract claim as an equitable claim based on a promise, reasoning that equity must follow the law, and that permitting such circumvention would render the statute meaningless. *See, e.g.*, *Est. of Gilbert*, 513 S.W.3d 767, 772 (Tex. App. 2017) ("Having reviewed the statute and the relevant case law, we conclude the legislature intended to foreclose a claim relating to a promise to make a will or devise or not to revoke a will or devise if that promise is not in writing . . . . We hold that section 254.004 bars a claim for promissory estoppel on an oral promise to devise property that is disposed of in a will."); *Matter of Estate of Cosman*, 475 A.2d 659, 661–62 (N.J. App. Div. 1984) ("The Legislature has seen fit to prescribe the 'only' way such a contract may be legally established. The statute's clear language leaves no room for judicial construction. This oral agreement is not enforceable. The principles of equitable fraud and promissory estoppel urged by respondents are unavailing in the face of the unequivocal legislative declaration. **Were we to enforce such principles we would nullify the clear purpose of the statute**.") (emphasis added); *Stanley v. Hendershot*, No. 1089 MDA 2017, 2018 WL 2275789, at *12-13 (Pa. Super. Ct. May 18, 2018)

("Thus, as a matter of law, any unjust enrichment claim, raised in the alternative to a breach of contract claim, must fail as legally insufficient when the breach of contract claim requires compliance with Section 2701. To hold otherwise simply renders Section 2701 meaningless."); *In re Est. of Shain*, No. 1 CA-CV 09-0252, 2010 WL 569843, at *1–2 (Ariz. Ct. App. Feb. 18, 2010) ("As a matter of law, Wauneita's alleged oral promise to include Appellant in her will was a promise to make a testamentary disposition. Section 14-2514(A) and public policy preclude such oral promises and therefore the trial court did not err in dismissing Appellant's claim."); *In re McKim Est.,* 238 Mich. App. 453, 459, 606 N.W.2d 30, 33 (1999) ("The clear language of the statute . . . evidences the Legislature's intent to bar agreements to make a will or devise absent a writing . . . . Accordingly, the trial court correctly rejected petitioner's claim for recovery under a contract implied in fact theory."); *Matter of Est. of Hatten*, 440 P.3d 256, 258 (Alaska 2019) (In a case involving a man who died intestate following 20 year cohabitation, the court applied a statute substantially similar to Section 62-2-701 and held: "And to the extent Toland argues Hatten orally promised or assured her after January 1, 1997 that he would give her the house or other property upon his death, we note AS 13.12.514(a) renders such oral agreements unenforceable.").[13]

The trial court correctly held that Luzak cannot circumvent Section 62-2-701 by repackaging her contract claim as an equitable claim based on a promise. (Order, pp. 7-12, R. pp.__.) As the trial court explained: "Courts from several states that have passed statutes similar to Section 62-2-701 have rejected attempts by plaintiffs to circumvent the statute by pleading equitable claims or by characterizing the claim as one based on a promise instead of a contract."

[13] *See also Cole v. Rivers*, 861 S.W.2d 551, 553 (Ark. Ct. App. 1993) ("But here the appellants' claim is based on an alleged promise on the part of Quinton Riggins Sr. to make, or not to revoke, a will. We see no reason why the legislature cannot establish rules governing the manner of proving such a contract. The maxim that 'equity follows the law' is strictly applicable whenever the rights of the party are clearly defined and established by law.").

(*Id.* at 9, R. p.__.) The Court cited the above-referenced case law and held that it agrees with the rationale of these decisions. (*Id.* at 8-10, R. pp.__ (citing cases).); *see also Quail Hill, LLC v. Cty. Of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) ("Simply stated, equity follows the law.").

Luzak attempts quietly to ignore this portion of the trial court's Order. (*See generally* Luzak Br.) She points to no decision holding that statutes like Section 62-2-701 apply only to contracts, and not to promises. Luzak also does not attempt to distinguish any of the cases cited by the trial court that squarely reject the arguments she makes here. Nor does Luzak address the trial court's point that permitting circumvention of the statute would render it toothless and would violate the maxim "equity follows the law." Nevertheless, Luzak argues that, even if she cannot satisfy Section 62-2-701 by producing written evidence of a contract, this Court should reverse the trial court's Order based on the alleged "promise" made by Mrs. Barringer. (Luzak Br. at 36-40.) In other words, most of the arguments in Luzak's Brief are contingent on this Court first reversing the trial court's holding that Plaintiff cannot circumvent Section 62-2-701. Because Luzak has provided no reason for this Court to reverse that portion of the trial court's Order, this Court should affirm the trial court and need not consider Luzak's remaining arguments that ask this Court to find an enforceable promise despite the lack of any signed writing complying with Section 62-2-701.

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

Luzak argues that *Chapman v. Citizens & S. Nat. Bank of S.C.*, 302 S.C. 469, 395 S.E.2d 446 (Ct. App. 1990) allows her to circumvent Section 62-2-701 by alleging an agreement between Mr. and Mrs. Barringer based on a promise rather than a contract. But Luzak is incorrect because, as the trial court correctly held, 1) *Chapman* addresses events that took place before Section 62-2-

701 became effective, and 2) in any event, *Chapman* dealt with a surviving spouse who had made a *written promise* not to exercise her power of appointment and clear evidence that her husband relied on that promise. Here, there is no evidence of a promise, written or otherwise. Moreover, the tax laws that existed at the time Mr. and Mrs. Chapman executed their estate planning documents incentivized spouses to grant each other a general power of appointment and then enter into a separate agreement whereby they agreed not to exercise those powers. Long before Mr. and Mrs. Barringer executed their estate plans, the tax laws changed and eliminated any incentive to enter into such an arrangement.

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

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

before describing the three methods of proof, a constructive trust remedy would not be appropriate absent compliance with Section 62-2-701.[14]

ii. The facts of *Chapman* are easily distinguishable.

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

- There were "numerous letters of record which establish[ed] that Mrs. Chapman *promised* Mr. Chapman that, upon Mr. Chapman's death and the probate of his will, Mrs. Chapman would either during her lifetime make gifts of the subject property to *Mr. Chapman's children* or die without exercising the power of appointment contained in Mr. Chapman's will." (emphasis added). *Chapman*, 302 S.C. at 474, 395 S.E.2d at 450.

- "The record establishes that . . . consistent with *her promise* to Mr. Chapman . . . ." *Id*., 302 S.C. at 475, 395 S.E.2d at 450 (emphasis added).

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

- "Mrs. Chapman intended, hoped and wanted to abide by the trust reposed in her *and the promise she had made* until the death of Mr. Chapman." *Id.*, 302 S.C at 477, 395 S.E.2d at 451 (emphasis added).

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

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

- "Having held that . . . *Mrs. Chapman promised Mr. Chapman* that she would not exercise the power of appointment contained in his will, the *clear and convincing evidence* of record establishes that she . . . violated her fiduciary duty *and broke the promise she made* to her late husband, Mr. Chapman." *Id.*, 302 S.C. at 478, 395 S.E.2d at 452 (emphasis added).

There can be no doubt that the constructive trust imposed in *Chapman* rested on the wife's undisputed promise to the husband and the husband's undisputed reliance on that promise when he gave his wife the power of appointment:

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

- "Mr. Chapman made his last will and testament and left it in existence until his death *in reliance on Mrs. Chapman's promise* that she would not exercise the power of appointment . . .." *Id*., 302 S.C. at 477-78, 395 S.E.2d at 451-52 (emphasis added).

In this case, by contrast, Luzak offers no evidence that Mrs. Barringer ever made any promise to Mr. Barringer or anyone else about whether or how she would exercise her power of appointment—much less the "clear, definite, and unequivocal" evidence required to obtain a constructive trust. *See Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987) ("In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal.").

Moreover, in *Chapman*, the Court found that Mr. Chapman detrimentally *relied* on Mrs. Chapman's promise when he executed his estate planning documents. Specifically, the Court found that Mr. Chapman relied on Mrs. Chapman's promise with the objective of passing his assets to his children in a more tax efficient manner. *See Chapman*, 395 S.E.2d at 454 ("There is no doubt that the objective of Mr. and Mrs. Chapman in entering into the agreement was to obtain the marital tax deduction while still carrying out Mr. Chapman's wishes that his property would go to his children.") (internal quotation marks omitted). Here, by contrast, no evidence can

possibly exist that Mr. Barringer detrimentally relied on Mrs. Barringer promising not to exercise her power of appointment when he gave her the power of appointment in 1998 because *no promise was ever made*.

iii. Luzak's Contract-Based Claims are untenable in light of changes in the tax law that occurred long before Mr. and Mrs. Barringer's estate planning documents were executed.

The decision in *Chapman* made sense at the time not only because this Court found undisputed evidence of a secret agreement, but also because Mr. Chapman had a good reason to grant his wife a power of appointment while securing her promise never to exercise it. In *Chapman,* each spouse had remarried, with children from a prior marriage. The Court found that "[t]here *is no doubt* that the objective of Mr. and Mrs. Chapman . . . was to obtain the *marital tax deduction* while still carrying out Mr. Chapman's wishes that his property would go to *his children*." *Chapman*, 302 S.C. at 481-82, 395 S.E.2d at 454 (emphasis added). When the Chapmans executed their estate planning documents in 1958, the estate tax exemption was only $60,000, and the estate tax brackets ranged from 28% to as high as 77% (*See* 26 U.S. Code Ann. §§2001, 2010 (1954)). As the Court in *Chapman* recognized, testators like Mr. Chapman could take advantage of the marital deduction to reduce estate taxes by leaving their estate to the surviving spouse in a trust for life and giving the surviving spouse a general power of appointment over the assets in the trust at the time of the surviving spouse's death. *See Chapman*, 302 S.C. at 481-82, 395 S.E.2d at 454. The testator could still attempt to control the disposition of the estate after the surviving spouse died, provided that the surviving spouse agreed not to exercise the power of appointment and to allow the default distribution plan in the trust to control. *See id*. The federal tax laws, therefore, incentivized married couples to give each other a general power of appointment in their estate planning documents to take advantage of the marital

deduction but then promise each other secretly not to exercise the powers of appointment after the other spouse's death, allowing the default provision to control as the true plan for distribution. That explains why in *Chapman*, Mr. Chapman had to rely on Mrs. Chapman's explicit agreement outside of the will not to exercise her power of appointment.

After 1981, however, the federal estate tax laws changed to allow a testator to take advantage of a martial deduction without giving a general power of appointment to his surviving spouse. After this change, the only reason for a testator to include a general or special power of appointment in his estate planning documents is to empower the surviving spouse to change the distribution plan upon the surviving spouse's death. Because Mr. Barringer executed his estate planning documents in 1998—17 years after the tax laws changed—the only reason for Mr. Barringer to have granted Mrs. Barringer a power of appointment was to empower her to exercise it.[15] If Mr. Barringer did not want Mrs. Barringer to exercise a power of appointment, all he had to do *was not grant her a power of appointment*.

III. Even if Luzak were permitted to circumvent Section 62-2-701, she has not created a genuine issue of material fact as to whether Mrs. Barringer made a promise never to exercise her power of appointment.

Luzak not only asks this Court to permit her to circumvent Section 62-2-701; she also argues that Mrs. Barringer should be prohibited from exercising her power of appointment based on nothing more than her "silence." (*See* Luzak Br. at 34-40.) But even if Mrs. Barringer's mere

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[15] Moreover, the power of appointment Mr. Barringer gave to Mrs. Barringer here is a special, limited power of appointment, which Mrs. Barringer can only exercise "to or among my descendants, **and in such manner in trust or otherwise, as my said wife may appoint in such wife's last will and testament or codicil thereto** . . . ." (1998 Revocable Trust, R. p.__.) (emphasis added). This type of limited power of appointment would have been insufficient to invoke the marital deduction, such that it would have provided no tax benefit even under the tax laws in effect when *Chapman* was decided. This further shows that there is no reason why Mr. Barringer would have granted Mrs. Barringer the power of appointment other than to allow her to decide which Barringer decedents inherited and which ones did not.

silence could have the same legal effect as a contract proven pursuant to Section 62-2-701, Mrs. Barringer would still be entitled to summary judgment. Luzak does not identify any specific conversation where Mrs. Barringer, through her silence, could be deemed to have promised Mr. Barringer that she would never exercise her power of appointment. (*See generally* Luzak Br.)

Luzak makes the following argument as to why Mrs. Barringer's "silence" supposedly resulted in a legally binding agreement that now prevents her from exercising her power of appointment:

> The record in this matter shows that the Barringers and their children held regular family estate planning meetings from at least 1992 through 2011, and at each one of those meetings, Mr. Barringer made his intent clear to treat his children equally, and then after son Victor had received his inheritance in advance, to treat the two daughters equally. That is why Mr. Barringer would ***comment*** that his daughters would share equal control of CFRC and would have to "work together," and never once did Ms. Barringer speak up or state any contrary intention. (Affids. of H. Luzak filed 9/28/2020, ⁋⁋ 51-56 and K. Luzak filed 9/28/2020, ⁋⁋ 57-65). Her silence confirmed ***the plan***.

(Luzak Br. at 36.) (emphasis added). This argument is meritless.

First, "comments" about siblings "working together" in the future and getting along do not equate to evidence of a legally binding obligation to treat children equally in the future. Second, even if Mr. Barringer made such "comments" when on good terms with all of his children that indicated a general intent and desire—a "plan"—to treat his children equally, these comments do not remotely suggest that the Barringers had irrevocably promised each other always to treat their children equally in the future, no matter how circumstances might change. Third, the notion that, in these family meetings, Mrs. Barringer should have interjected and brought up the revocable nature of their estate plans generally or her power of appointment specifically is both contrary to common sense and unsupported by any case from any jurisdiction in America. Indeed, Luzak does not cite any case from any jurisdiction where a court found a contract not to revoke based on

silence, much less silence during a family discussion where "comments" were made about general "plans" for the future. And for good reason. If these types of general family discissions could serve as evidence forcing a trial on whether a legally binding contract exists entitling children to equality in the parents' future estate plans, parents would never be able to talk with their children about the future for fear of a contract-based suit. Even if Mr. and Mrs. Barringer both "planned" to treat their children equally in the future, and discussed their plan with their children 100 times, that in no way amounts to an irrevocable agreement never to change the plan in the future. Luzak has not come forward with any evidence that anything that was ever said by anyone could amount to such a radical and far-reaching irrevocable agreement.

Moreover, Luzak's theory that she can prove a contract not to revoke based on nothing more than Mrs. Barringer's silence in unspecified family meetings where "comments" were made about future "plans" is squarely at odds with Section 62-2-701 and does not provide the necessary "definite, certain, clear, and convincing" proof of a contract not to revoke. If Luzak were correct, then virtually every child in America—so long as their parents discussed their "plans" to divide their assets evenly among their children in the future—would be entitled to a jury trial on whether their parents entered into a legally binding contract never to revoke those plans. Such an outcome turns the policy behind Section 62-2-701—as well as the policy supporting the common law that applied before Section 62-2-701—on its head. *See* Unif. Probate Code § 2-701, Comment ("It is the purpose of this section to tighten the methods by which contracts concerning succession may be proved."); *see also Looper*, 231 S.C. at 227, 98 S.E.2d at 270 ("The evidence to sustain [such a contract] should be received and scrutinized with the greatest care. The terms of such an agreement should be definite and certain and established by evidence clear and convincing.") (internal citations omitted).

IV. Luzak has not pleaded a claim for equitable or promissory estoppel, and even if she had, Mrs. Barringer would have been entitled to summary judgment on such a claim.

Luzak argues that the doctrines of equitable estoppel and promissory estoppel preclude Mrs. Barringer from exercising her power of appointment. (Luzak Br. at 39-40.) But Luzak does not assert a claim for equitable or promissory estoppel in her Complaint. (*See generally* Compl., R. pp.__; *see also* Order Granting Summ. J. at 12, p.__ (holding that Luzak "has not asserted a claim for promissory estoppel").) Luzak is bound by her pleadings. *See Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) ("It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise.").[16] The Court need not analyze this unpled claim further.

Nonetheless, even if Luzak had asserted a claim for equitable or promissory estoppel based on Mrs. Barringer's alleged promise through "silence," Mrs. Barringer would have been entitled to summary judgment on such a claim for several reasons.

First, Section 62-2-701 would bar such a claim because it prescribes the "only" three ways that a plaintiff may prove a contract concerning succession, all of which require a writing signed by the decedent.

Second, Luzak has not alleged, much less identified evidence supporting an allegation, that *she* relied on any representation made by Mrs. Barringer relating to her power of appointment.

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[16] In her Brief, Luzak states in a footnote that she has, in fact, asserted a claim for promissory estoppel. (Luzak Br. at 39 n.41.) But the paragraphs of the Complaint that Luzak cites in support of this statement do not assert a claim for promissory estoppel. (*See* Compl. ¶¶ 134-40, R.__.) In fact, the word "estoppel" does not appear anywhere in Luzak's Complaint. (*See generally* Compl., R.__.) Luzak does not argue that she asserted a claim for equitable estoppel. (*See generally* Luzak Br.) Finally, Luzak never attempted to amend her complaint to assert any such claims.

Although Luzak alleges in her "Constructive Trust and Injunction" cause of action that *Mr. Barringer* relied on Mrs. Barringer's alleged promise not to exercise her power of appointment, (*id.* ¶ 138, R. p.__), Luzak has no standing to assert a promissory estoppel claim on behalf of Mr. Barringer, who is not a party to this litigation. *See, e.g.*, *Mac Papers, Inc. v. Genesis Press, Inc.*, 426 S.C. 393, 404, 826 S.E.2d 874, 880 (Ct. App. 2019) (holding that a party asserting estoppel must establish reliance upon conduct of the party estopped and that "[r]eliance **by the party seeking to assert estoppel** must be reasonable") (emphasis added) (internal citations omitted).

Third, even if Luzak did have standing to assert claims on behalf of her father, Luzak has not identified any evidence that Mr. Barringer relied on an alleged promise by Mrs. Barringer never to exercise her power of appointment. Indeed, in her Brief, Luzak makes the argument—wholly inconsistent with the allegations in her Complaint—that Mr. Barringer never intended to grant Mrs. Barringer a power of appointment. (*See* Luzak Br. at 31-32.) If Mr. Barringer never intended to grant Mrs. Barringer a power of appointment, as Luzak now argues, he could not have relied on a promise by Mrs. Barringer never to exercise that power.

Fourth, Luzak has no evidence that Mrs. Barringer made any promise—to Luzak or to Mr. Barringer—relating to her power of appointment, much less "a promise **unambiguous in its terms**," as is required to establish a claim for estoppel. *Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993) (emphasis in original).

Fifth, a claim for equitable or promissory estoppel based on Mrs. Barringer's "silence" would be barred by the unambiguous provision in Mr. Barringer's trust granting Mrs. Barringer a power of appointment. *See Rodarte v. Univ. of S.C.*, 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017) (holding that "an unambiguous, written contract is inherently incompatible with the doctrine of

equitable estoppel," and that a plaintiff "cannot use equitable estoppel to let in through the back door what the parol evidence rule prevents from coming in the front door").

Finally, Luzak's reliance on *Satcher v. Satcher*, 351 S.C. 477, 570 S.E. 2d 535 (Ct. App. 2002), in support of her estoppel argument is misplaced. In *Satcher*, the Court did not cite or discuss Section 62-2-701, presumably because the defendant/respondent did not argue that the statute applied. (*See* Respondent App. Br., R. pp.__ (not mentioning Section 62-2-701)). And Luzak never argued to the trial court that the Court in *Satcher* considered the estoppel argument in that case in light of 62-2-701. By contrast, Mrs. Barringer has always raised Section 62-2-701 as a defense to Luzak's claims. (*See* Mrs. Barringer's Answer, ¶ 169, R. p.__.) Also, the facts of *Satcher* are easily distinguishable. In *Satcher*, a grandson brought an action against his grandfather's estate seeking title to a house and farm, which the grandfather had left to the grandson's uncle. The Court found that the grandson was entitled to the house under a promissory estoppel theory. Specifically, the Court found that the grandfather had promised the grandson that, if the grandson quit his job and moved in with his grandfather, the grandfather would leave the house to the grandson upon the grandfather's death. The Court found that, "[i]n reasonable reliance on that promise, [grandson] moved to the house and provided Grandfather with companionship and other services for more than twenty years." *Satcher*, 351 S.C. at 486, 570 S.E.2d at 539. Grandson then filed suit to enforce the promise and his reliance on the same. By contrast, Luzak does not allege that she took any action in reliance on her mother's alleged promise not to exercise her power of appointment. (*See generally id.*) And Mrs. Barringer has denied that any promise was ever made. (*See* Mrs. Barringer's Answer, ¶¶ 137-38, R. p.__.) As the trial court correctly concluded, "[Luzak's] reliance on cases that never addressed Section 62-2-701 are

unavailing, and even if these cases did apply, they are distinguishable from the facts of the case at bar." (Order at 12, R. p.__.)

V. The trial court properly rejected Luzak's argument that Mr. Barringer lacked the intent to grant Mrs. Barringer a power of appointment.

The very first argument in Luzak's Brief is that the trial court's Order "failed to even consider the evidence showing that Paul Barringer never intended to give Ms. Barringer a power to appoint voting stock." (Luzak Br. at 29–34.) It is puzzling that Luzak would make this argument because, as correctly held by the trial court, "[Luzak]'s Complaint does not challenge the power of appointment on the basis that Mr. Barringer did not intend to grant such a power to Mrs. Barringer." (Order, p. 8 n.6, R. p.__.) Nowhere in the Complaint does Luzak allege that Mr. Barringer never intended to grant his wife a power of appointment, much less assert a cause of action seeking to invalidate the power of appointment on that basis. (*See generally* Compl., R. pp.__.) In fact, as the trial court recognized, Luzak's theory that Mr. Barringer did not intend to grant Mrs. Barringer a power of appointment is not merely missing from Luzak's Complaint; this theory is squarely at odds with the allegation in Luzak's Complaint that Mr. Barringer granted Mrs. Barringer a power of appointment *in reliance* on her promise not to exercise it. (Order, p. 8 n.6, R. p.__) ("[Luzak] does not explain how Mr. Barringer could have relied on Mrs. Barringer's promise never to exercise the power of appointment he granted to her, as [Luzak] alleges in her Complaint, without intending to grant her a power of appointment in the first place."). Again, Luzak is bound by her pleadings. *See Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992).

Luzak argues that she is permitted under Rule 8(a) to pursue "alternate theories, all stemming reasonably from the same set of facts." (Luzak Br. at 8 n.9.) But the trial court did not hold that Luzak cannot pursue alternative theories; rather, the trial court held that Luzak

has not pleaded a claim challenging Mrs. Barringer's power of appointment on the basis that Mr. Barringer never intended to grant her such a power. (*See generally* Compl., R.__.) This holding is correct and unaddressed in Luzak's Brief.

Moreover, even if Luzak had pleaded that the power of appointment is void because Mr. Barringer did not intend to grant it to Mrs. Barringer, she has not created a genuine issue of material fact in support of such a claim. Luzak argues that it was illogical for Mr. Barringer to grant Mrs. Barringer a power of appointment, even though Mrs. Barringer was his wife for nearly sixty years, and even though granting a spouse a power of appointment is textbook estate planning.[17] But even if Luzak were correct that it was illogical for Mr. Barringer to grant Mrs. Barringer a power of appointment, the fact remains that Mr. Barringer *did* grant Mrs. Barringer a power of appointment. Mr. Barringer's December 4, 1998 revocable trust creates three sub- trusts, and Mr. Barringer gives Mrs. Barringer a power of appointment over all three sub-trusts. In fact, the power of appointment provisions are the dispositive provisions in the trust.[18] The unambiguous language in Mr. Barringer's trust granting Mrs. Barringer a power of appointment cannot be altered based on Luzak's belief about what is logical or based on any other extrinsic evidence. *See In re Est. of Hyman*, 362 S.C. 20, 26, 606 S.E.2d 205, 207 (Ct. App. 2004) ("Where the testator's intent is ascertainable from the will and not counter to law, we will

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[17] *See, e.g.*, Robert H. Sitkoff & Jesse Dukeminier, Wills, Trusts, and Estates 807 (10th ed. 2017) ("Consider a typical example: *H* devises property to *X* in trust to distribute the income quarterly to *W* for life, and on *W*'s death to distribute the principal to one or more of *H*'s descendants as *W* shall appoint in her will . . . . By this power, which *W* holds in a nonfiduciary capacity, *W* may decide who among *H*'s descendants will take the trust property at her death. In this way, *H* empowers *W* to deal flexibly with changing circumstances in the interim between their deaths.").

[18] Likewise, Mrs. Barringer's December 4, 1998 trust gives powers of appointment to Mr. Barringer, which are the only dispositive provisions in her 1998 trust. (*See* Mrs. Barringer's December 4, 1998 Trust, R. p. __.)

give it effect. Only when the will's terms or provisions are ambiguous may the court resort to extrinsic evidence to resolve the ambiguity.") (internal citations omitted); *see also Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603, 799 S.E.2d 912, 917–18 (2017) ("Interpretation of a contract is governed by *the objective manifestation of the parties' assent at the time the contract was made*, rather than the subjective, after-the-fact meaning one party assigns to it.") (emphasis in original) (internal citation omitted).[19]

Luzak also makes the meritless argument that Mr. Barringer could not have intended for the power of appointment granted to Mrs. Barringer to apply to the voting stock of CFRC because, at the time Mr. Barringer executed the 1998 estate planning documents, he did not own the CFRC voting stock. (Luzak Br. at 32.) Of course, if the Court accepted this argument, then every estate planning document containing a power of appointment would need to be amended every time the testator acquired a new asset.

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[19] Luzak argues that Neill McBryde, the estate planning attorney who drafted Mr. and Mrs. Barringer's 1998 estate planning documents, gave deposition testimony that was "devastating" to Mrs. Barringer, primarily based on Mr. McBryde being unable to recall the details of his conversations with Mr. Barringer that occurred more than twenty years ago. (Luzak Br. at 31-32.) This argument is baseless. First, when asked what he recalls about discussing the powers of appointment with Mr. and Mrs. Barringer, Mr. McBryde testified: "All I can say is, I can absolutely state that I would have spent considerable time going over that because -- and -- and considerable time over the documents generally because these, you know -- any time you're dealing with a new set of documents, you want to make darn sure they -- it's exactly what they want and that they understand all of the implications. . . . And they were fully informed. I can't tell you exactly what I said, but I know what I've done for over 50 years, and I think you -- and I'm very thorough and very good and make sure they know what they're -- they're doing and that that's what they want to do." (McBryde Dep. Tr. at 123:7–124:11, R. pp. __.) More importantly, the extent to which Mr. McBryde explained the power of appointment provisions to the Barringers is irrelevant to the question of whether Mrs. Barringer contracted or promised never to exercise her power of appointment. Further, a power of appointment provision in a validly executed trust is effective regardless of the extent to which the attorney who drafted the provision explained it to the client.

VI. The trial court properly held that the denial of Mrs. Barringer's previous motion for partial summary judgment did not mandate the denial of her later-filed motions for partial summary judgment that were filed after the parties conducted additional discovery.

On March 20, 2020, Mrs. Barringer filed a motion for partial summary judgment on Luzak's second and third causes of action. On November 4, 2020, Judge Carmen Mullen denied the motion in a one-paragraph order. (November 4, 2020 Order, R. pp.__.) Judge Mullen's Order does not discuss the facts of the case, identify any genuine issues of material fact that existed with respect to Luzak's claims, or otherwise provide any substantive analysis. (*See id.*) After Judge Mullen issued this Order, the parties conducted extensive additional discovery, including taking more than a dozen depositions. On February 19, 2021, Judge Mullen recused herself from this litigation.

In June 2021, Mrs. Barringer filed new motions for partial summary judgment on Luzak's second and third causes of action. On July 30, 2021, Luzak filed her own motion for summary judgment on Luzak's second and third causes of action. (Luzak Mot. Summ. J., R. pp. __.) On August 20, 2021, Judge Robert Bonds granted Mrs. Barringer's motions and denied Luzak's motion, issuing the Order that is the subject of this appeal. (Order, R. pp.__.)

In her Brief, Luzak argues that, even if the Judge Bonds determined that Mrs. Barringer is entitled to summary judgment on Luzak's second and third causes of action, the trial court was not allowed to grant Mrs. Barringer summary judgment, and instead was required to hold a trial on these two causes of action, because of Judge Mullen's one paragraph Order. Luzak also argues that the specific language of Judge Mullen's Order—which states, without any elaboration or citation, that "there is evidence in support of Ms. Luzak's two causes of action at issue in the summary judgment motion, creating a genuine issue of material fact for jury determination"—

prohibited Judge Bonds from granting Mrs. Barringer's motions. Luzak's argument is contrary to the law and common sense.

First, to the extent Luzak relies on the specific language of Judge Mullen's Order as the basis for her argument, the Court should reject her argument as untimely and procedurally improper. *Johnson v. Sonoco Prod. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."). In her memorandum in opposition to Mrs. Barringer's motions for summary judgment, Luzak conceded that a second motion for summary judgment could be filed by Mrs. Barringer on the same issue for which summary judgment had previously been denied so long as Mrs. Barringer could point to "new evidence." (*See* Memo. Opp., p. 1, R. p.__ (arguing that Mrs. Barringer "has no new evidence," but not arguing that the Court cannot consider the merits of Mrs. Barringer's motions because of the specific language in Judge Mullen's Order).) In support of this argument, Luzak relied on South Carolina Rule of Civil Procedure 43(l), which applies only when a second motion is filed "upon the same state of facts" as a prior motion. (*See id.*, p. 2, R. p.__ (relying upon Rule 43(l)).) In her motion to reconsider, however, Luzak argued for the first time that, even if new evidence exists, and regardless of whether Rule 43(l) applies, the specific language contained in Judge Mullen's November 4, 2020 Order prohibited this Court from granting Mrs. Barringer's subsequent motions for summary judgment. (*See* Mot. Recons., p. 1, R. p.__.) Luzak cannot raise this new argument for the first time in a motion to reconsider. *Johnson,* 381 S.C. at 177, 672 S.E.2d at 570.[20]

[20] Of course, Luzak's new argument—that the language in Judge Mullen's prior Order ruling that there are issues of fact for "jury determination" precludes any effort to revisit summary judgment on these claims—is belied by the fact that Luzak also filed for summary judgment on the same claims months after Judge Mullen's Order.

Moreover, Luzak's new argument fails on the merits. Luzak argues that, once a trial judge denies a motion for summary judgment—even where, as in this case, the prior judge subsequently recused herself and the Order denying summary judgment does not specifically identify any genuine issues of material fact—summary judgment may never be granted later in the case, even after additional discovery takes place. This is the opposite of the law. The test in South Carolina to decide whether one circuit judge may change a ruling made by a prior circuit judge in the same case and on the same issue is whether the original determination constitutes the law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). Because denials of motions to dismiss and summary judgment are unquestionably not the law of the case, this rule does not apply to a denial of summary judgment. That is precisely why this Court has ruled, "[A] judge deciding a case on the merits is not bound by a prior order of another judge denying summary judgment. If the law were otherwise, a party could never obtain relief from an erroneous order denying summary judgment since orders denying summary judgment are never appealable, not even after final judgment." *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989).

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

the argument that a trial judge erred by granting summary judgment after previously denying summary judgment and holding: "A trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of fact and conclusions of law before entry of judgment or decree.").

In *Breedlove*, the South Carolina Supreme Court held that, where one trial judge previously denied summary judgment, a different trial judge may grant summary judgment after additional discovery takes place, *regardless of whether the new discovery is favorable to the moving party*.

> Contrary to Smith's contentions, it does not matter that Smith conducted the discovery or that some of the evidence was arguably favorable to Smith. The rule requires a different "set of facts," which were established due to the substantial amount of discovery that occurred after Breedlove's first summary judgment motion. Accordingly, the circuit court did not err in hearing Breedlove's second motion for summary judgment after discovery had taken place.

Breedlove, 377 S.C. at 421, 661 S.E.2d at 70–71.[21]

Here, it is undisputed that the parties conducted significant additional discovery between Judge Mullen's Order denying summary judgment and Judge Bonds' Order granting Mrs. Barringer's later-filed motions for summary judgment. This additional discovery included the depositions of the following witnesses: Neill McBryde, who represented Mr. and Mrs. Barringer in the preparation and execution of their 1998 Wills and Trusts; John Jolley, who represented Mr. and Mrs. Barringer in the preparation and execution of their subsequent wills and trust

[21] Luzak argues that *Breedlove* is distinguishable because, in that case, "no depositions had been taken before the first summary judgment." (Luzak Br. at 5.) But, in *Breedlove*, the Court did not hold that a trial court may consider a second motion for summary judgment only where the first motion was denied based on the absence of any discovery. Rather, the Court held that a trial court may consider a second motion for summary judgment where, as here, it is based on a different "set of facts." *See Breedlove*, 377 S.C. at 421, 661 S.E.2d at 70–71.

amendments; Rebecca Bostick, a paralegal who worked with John Jolley; two additional former McNair employees; Luzak's husband, Kevin Luzak, whom Luzak identified as a witness who has evidence of the alleged promise made by Mrs. Barringer to Mr. Barringer; several Coastal Forest Resources Company (CFRC) employees, including Tom Evans, Stephanie Chapman and Travis Bryant; a Rule 30(b)(6) deposition of CFRC; Robert Scully, another attorney who represented Mr. Barringer; Mr. Barringer's former secretary, Pat Harrell; and Mr. Barringer's primary physician for decades, Dr. Paul Long. Thus, Mrs. Barringer's motions for summary judgment filed on June 14, 2021, were based on a different state of facts from the previously denied motion, and the trial court therefore properly considered Mrs. Barringer's motions on the merits.

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

specify the facts that existed at that time.[22] Notably, if a trial judge granting summary judgment after a prior trial judge denied summary judgment were required to explain the ways in which the analysis had changed, every judge denying summary judgment would be required to make specific findings of fact and conclusions of law to give a subsequent judge the opportunity to revisit summary judgment. But South Carolina law is clear that, in denying motions for summary judgment, a trial judge is not required to make *any* findings of fact or conclusions of law. *Watson v. Underwood*, 407 S.C. 443, 457, 756 S.E.2d 155, 163 (Ct. App. 2014) ("[I]t is unnecessary to make findings of fact and conclusions of law in denying motions for summary judgment.").

VII. The Court should reject Luzak's argument that summary judgment is not proper because Luzak did not have the opportunity to depose Mrs. Barringer a second time.

As her final argument, Luzak argues that the trial court should have denied Mrs. Barringer's motion for summary judgment because the trial court previously denied Luzak's motion to re-depose Mrs. Barringer after Mrs. Barringer produced her estate planning documents. (Luzak Br. at 49-50.) The Court should reject this argument for several independent reasons.

First, Luzak raised this argument to Judge Bonds for the first time in her motion to reconsider. (*See generally* Luzak Opp. Mot. Summ. J., R. pp.__ (failing to raise this argument); *see also* Mot. Reconsider, p. 22, R. p. __ (raising this argument for the first time).) Thus, this argument is not preserved for appellate review, and this Court should not consider it. *Johnson*, 381 S.C. at 177, 672 S.E.2d at 570 ("An issue may not be raised for the first time in a motion to

[22] For example, Judge Mullen may have relied on Luzak's husband's affidavit filed November 9, 2020 (R. __) suggesting the existence of a contract or promise; however, his subsequent deposition conclusively established that he had no such evidence. (Kevin Luzak Dep. 481:11-482:11, R. p. ___.)

reconsider."). If Luzak contended that she needed to take a second deposition of Mrs. Barringer to fully develop her opposition to Mrs. Barringer's motions for summary judgment, Luzak was required to submit a Rule 56(f) affidavit or otherwise notify Judge Bonds before the summary judgment hearing of her supposed need for the second deposition. *See Matter of Est. of Smith*, 419 S.C. 111, 120, 796 S.E.2d 158, 162-63 (Ct. App. 2016) (Few, J., concurring) (holding that Rule 56(f) "provides parties an easy mechanism for notifying the circuit court in advance of a scheduled hearing of the party's need for additional time in which to complete discovery before defending a motion for summary judgment," and holding that where, as here, "a party seeks additional time, but fails to comply with the Rule setting forth the procedure for requesting additional time, an appellate court should be very hesitant to say the trial court abused its discretion in denying the request").

Second, Luzak has not appealed the trial court Orders denying her requests to re-depose Mrs. Barringer. (Order dated April 14, 2019, R. pp.__.; Order dated June 14, 2019, R. pp __.; Order dated June 4, 2020, R. pp.__;) The trial court found that any additional deposition of Mrs. Barringer would be "futile and harassing," and further found that "Plaintiff's counsel had more than adequate time to depose Mrs. Barringer on [March 15, 2019], and it is obvious from my review of the video and transcript that Mrs. Barringer disclosed everything she knows." (Order dated June 4, 2020, R. pp.__.) The Court should not permit Luzak to challenge these Orders on appeal without appealing them.

Third, Luzak's argument fails on the merits. Luzak has not identified any questions that she would have asked Mrs. Barringer in a second deposition, much less questions that she could not have asked in her first deposition. (Luzak Br. at 49-50.) Luzak complains that she did not have Mrs. Barringer's estate planning documents at the time of Mrs. Barringer's first deposition, but as

discussed above, the estate planning documents contain no reference to any contract or agreement relating to Mrs. Barringer's power of appointment. Further, the testimony that Mrs. Barringer would have provided if questioned in a deposition about the alleged contract or promise is no mystery because, in her pleadings, Mrs. Barringer has categorically and repeatedly denied the existence of any contract or promise relating to her power of appointment. (*See* Answer and Counterclaims, ¶¶ 137-40; 142-43, R. pp.__ (denying allegations of a contract or promise and demanding strict proof thereof); *id.*, ¶¶ 191-94, R. pp.__ (Mrs. Barringer alleging in her counterclaims that Luzak's allegations of a contract or promise "are frivolous and exist only in Plaintiff's mind," and alleging that Luzak "has no evidence to support [these] factual allegations"); *see also* Order dated June 4, 2020, p. 2, R. p.__ (rejecting Luzak's request to re-depose Mrs. Barringer and finding that "Mrs. Barringer has remained steadfast in her assertion that no such agreement exists . . . .")) Notably, Mrs. Barringer's deposition testimony could not possibly assist Luzak in proving a contract or agreement under Section 62-2-701, which requires the alleged contract or its material terms to be proven with a will or other signed writing.

Finally, Luzak was free to ask Mrs. Barringer questions relating to her Contract-Based Claims through interrogatories and requests to admit but did not do so. (*See generally* Luzak Interrogatories, R. pp.__.) In fact, neither the word "contract" nor "promise" even appears in Luzak's Barringer II interrogatories or requests to admit. (*See generally id.*)[23]

[23] Luzak also criticizes Mrs. Barringer for not submitting an affidavit in support of her motions for summary judgment. (Luzak Br. at 36.) But Plaintiff is required to come forward with evidence to support her claims; it is not Mrs. Barringer's burden to disprove them. And it is unclear what else Luzak contends Mrs. Barringer should have said in an affidavit in light of Mrs. Barringer's categorical denial in her pleadings of the allegation that a contract or promise exists.

VIII. The law prohibiting contracts relating to the use of a power of appointment serves as an additional sustaining ground for the trial court's Order.

Even if Section 62-2-701 did not apply, and even if there were clear, definite and unequivocal evidence that Mrs. Barringer had agreed not to exercise her power of appointment by not revoking her will, under settled trust law, that agreement could not be enforced. In *Carmichael v. Heggie*, 506 S.E.2d 308, 310 (S.C. Ct. App. 1998), the Court of Appeals held that a donee of a testamentary power of appointment could not, by a contract to will, bind herself regarding the exercise of a power of appointment. In *Carmichael*, William Carmichael devised to his wife Doris a life estate in his half of an 80-acre farm and granted her a power of appointment exercisable by her will (a testamentary power of appointment). *Id*. at 309. Doris executed a will that exercised the power of appointment in favor of her son and also executed a written contract with her son that she would not revoke or amend her will in exchange for her son's caretaking. *Id*. In that case, it was clear Doris and her son executed a written contract.

Although there was a contract in writing, the South Carolina Court of Appeals relied on the Restatement (Second) of Property to conclude that the contract Doris entered during her life regarding how her testamentary power of appointment would be exercised was unenforceable. The rationale for the decision is that the holder of a power that is not yet presently exercisable cannot contract regarding that power. A testamentary power of appointment, which can only be exercised by a last will and testament, is not presently exercisable while its holder is alive. The donor's presumed intent in granting a "testamentary" power of appointment is that the donor intended the donee to wait until the moment before death to determine whether and how to appoint the property.

Accordingly, the Court held that Doris' pre-death contract regarding how she would or would not exercise the power of appointment was unenforceable because it frustrated the desire of the donor in making the power of appointment a "testamentary" power of appointment. Quoting

the Restatement, the Court explained: "The rationale behind this rule is to fulfill the donor's intent that the selection of the appointees be made 'in the light of the circumstances that may exist on the date the power becomes exercisable.'" *Id.* at 310 (quoting Restatement (Second) of Property § 16.2 cmt. a (1986)). Because the power of appointment could only be exercised by Doris at the time of her death, her pre-death contract agreeing how she would exercise it before she died was unenforceable.

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

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

Indeed, the Reporter's Note to that comment states that it is supported by *Carmichael v. Heggie*, 506 S.E.2d 308 (S.C. Ct. App. 1998). The rule against enforcing a contract regarding a power of appointment that is not yet presently exercisable is also codified by the 2137 Uniform Powers of Appointment Act § 406 (2013), and it is stated in Restatement (First) of Property § 340 (1940).

In this case, Mr. Barringer is the donor (the creator) of the power of appointment, Mrs. Barringer is the donee (the holder), and the power is still not yet presently exercisable because it is testamentary, which means it can only be exercised by Mrs. Barringer at the time of her death. Of course, Mrs. Barringer is alive. Therefore, any purported agreement made by Mrs. Barringer about how she might exercise (or not exercise) the power of appointment at her death is unenforceable as a matter of law. This law serves as an additional sustaining ground for the trial court's Order.

CONCLUSION

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

Respectfully submitted,

_s/J. Ashley Twombley_____
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