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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2023-CP-23-01567
Appellate Case No.: 2023-001599

Full Moon Investments, LLC; Stellar Naomi, a series of Yield Capital, LLC; and John David Engel,

Respondents,

vs.

Campbell Teague, LLC; George A. Campbell, Jr.; Elizabeth Teague; Emily O'Brian; Molly Cash; and Beau Brogdon,

Appellants.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

This is a legal malpractice action. The gravamen of the Complaint is that the Appellant lawyers engaged in a prohibited transaction by seeking to acquire an interest in their client's business and then by seeking to use their ill-gotten position to stage a coup d'état to wrestle control of the Respondent Engel's business from him. When Engel complained about the conduct of the Appellants, the Appellants moved to compel his complaints into arbitration under an arbitration clause that existed in one of the documents used in seeking improperly to acquire an interest in his business. The Honorable Perry Gravely denied the motion to compel arbitration. The issues on appeal include:

1. Was there ever an agreement to arbitrate the Respondents' claims?
2. Can lawyers compel their clients to arbitrate legal malpractice claims arising out of the attorney-client relationship, and if so, under what circumstances?
3. Did the Circuit Court properly conclude that the email fee agreement between the parties did not include an agreement to arbitrate claims arising out of the attorney-client relationship?

INTRODUCTION

Rule 1.8 of the South Carolina Rules of Professional Conduct ("Rule 1.8") provides in pertinent part that a lawyer "**shall not**" enter into a business transaction with a client or knowingly acquire an ownership, possessory, security of other pecuniary interest adverse to a client unless the terms of the transaction are objectively fair to the client, the client is informed in writing of the desirability of seeking independent legal counsel and the client gives informed consent in writing to the essential terms of the transaction. The Appellant lawyers ignored Rule 1.8 in its totality in seeking to acquire an interest in their client's business. Not only did the Appellants seek to obtain an ownership interest in their client's business without advising him of the desirability of seeking independent counsel and without obtaining his informed consent in writing, the Appellants thereafter sought to leverage their ill-gotten position by seeking to oust their client from his business through extraordinary means, including the commencement of a criminal proceeding against him in Spain.

Incredibly, when the Respondents sued the Appellants for malpractice, the Appellants moved the Circuit Court to compel the matter into arbitration by utilizing an arbitration provision related to corporate disputes contained in one of the corporate transaction documents that they prepared for the Respondent as a part of their Rule 1.8 prohibited transaction.[1] Presumably, the Appellants sought to use the arbitration provision from their prohibited transaction because they recognized there was no agreement to arbitrate disputes arising out their attorney-client

[1] Rule 1.8, SCRPC is the public policy of the State of South Carolina. Appellants are subject to these rules. *White v. J.M. Brown Amusement Co*., 601 S.E.2d 342, 360 S.C. 366 (2004) holds that, "[t]he general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." In addition, *Batchelor v. American Health Ins. Co*., 234 S.C. 103, 107 S.E.2d 36 (1959) notes that contracts violating public policy as expressed in constitutional provisions, statutes, or judicial decisions are void. Through this appeal the Appellants are asking this Court to enforce a contract which, on its face, violates the public policy of South Carolina.

relationship. In fact, the only writing that documents the attorney-client relationship is a single email dated November 9, 2017, setting forth the terms upon which the Appellants first undertook to represent the Respondents. There is simply **NO** agreement to arbitrate between these parties and the Appellants' efforts to utilize an arbitration provision of an agreement that they were ethically prohibited from entering into is an affront to the South Carolina Rules of Professional Conduct.

STATEMENT OF THE CASE

A. Factual Background

Respondent Campbell Teague's website states that it is a "boutique litigation and corporation firm" that is "dedicated to helping business grow and succeed." (R.___ (Compl. ¶ 12). On the same website, Campbell's bio states that he speaks both English and Spanish "with native fluency." (R.___ (Compl. ¶ 13). Via the following email dated November 9, 2017, Appellant Campbell Teague memorialized its representation of Respondent Engel's business, Full Moon Investments, LLC ("Full Moon"):

Engagement of Full Moon Investments, LLC

George Campbell <george@campbellteague.com> Thu, Nov 9, 2017 at 11:23 AM
To: David Engle <engelcapitaladvisors@gmail.com>
Cc: Jordan Teague <jordan@campbellteague.com>

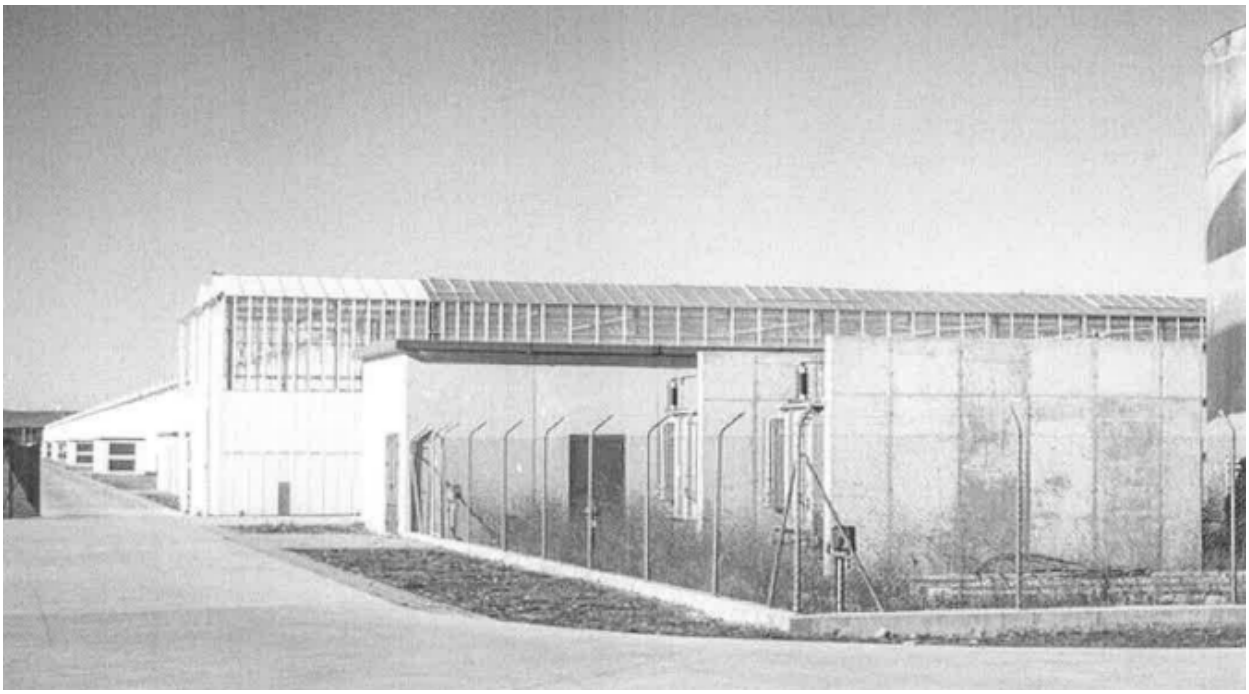
David, thanks for your time this morning. This email confirms the engagement of our firm by Full Moon Investments, LLC to draft documents and assist in the negotiations contemplated by the term sheet you executed with Middlesex Integrative Medicine on October 30. We will bill at $300 per hour and commit to investing at least 1/3 of our fees into the deal. Jordan Teague and I will be primarily responsible for the matter but may use the assistance of others when in your best interest. We will maintain regular contact with you, including updates on how much billable time we have accrued. Please reply to this email if I have correctly summarized our understanding.

If you have any other questions, please call or email me any time. I look forward to seeing you at the event this evening.
Many thanks,
George

George Campbell
Campbell Teague LLC
(864) 326-4445
www.campbellteague.com
16 W North St., Greenville, SC 29601

(R.___ (Memo. In Opposition to Summary Judgment, p.2). Clearly, the email contains no agreement to arbitrate disputes arising out of the attorney-client relationship.

Aleia Roses was a Spanish Company located in Soria, Spain, which commercially cultivated roses in a 36-acre greenhouse containing 1.6 million square feet of space pictured below.



(R.___ (Compl. ¶ 15). In October 2019, Aleia Roses entered into bankruptcy in Spain. (R.___ (Compl. ¶ 16). In 2020, Full Moon sought to bid on the assets of Aleia Roses through the Spanish Bankruptcy Court. (R.___ (Compl. ¶ 17). Full Moon was seeking to enter the legal medicinal cannabis industry in Spain and planned on converting the Aleia Roses greenhouse for the cultivation of medicinal cannabis. (R. ___ (Compl. ¶ 18). The Appellants agreed to represent Full Moon in the "Aleia Roses Transaction." (R. ___ (Compl. ¶ 19).

As a vehicle to raise the capital required for the bankruptcy bid, Full Moon utilized Yield Capital, LLC ("Yield Capital"), a Delaware limited liability company, located in Greenville, South Carolina. (R. ___ (Compl. ¶ 20). In June 2020, Yield Capital sought to raise capital for the Spanish

bankruptcy bid by offering the sale of membership interests in Stellar Naomi via a Private Placement Memorandum ("PPM"), as well as a PPM Supplement ("Supplement") dated June 23, 2020. (The PPM and the PPM Supplement were attached as **Exhibit B** to the Complaint). (R. ___ (Compl. ¶ 21). Full Moon is the manager of Stellar Naomi. (R. ___ (Compl. ¶ 22). Stellar Naomi was a "Series" created to raise funds to purchase the assets of Aleia Roses. (R. ___ (Compl. ¶ 23). The Appellants drafted the Stellar Naomi PPM and Supplement, as well as the "standard documents, which control the governance of Stellar Naomi…" (the 8/13/20 email from George Campbell, Esq. of Campbell Teague, LLC with attachments was included as **Exhibit C** to the Complaint). (R.___ (Compl. ¶ 24).[2]

On or about July 8, 2020, Full Moon and Stellar Naomi utilized the PPM to raise funds and eventually purchase the assets of Aleia Roses through Stellar Naomi's wholly owned Spanish entity Ondara Directorship, S.L. ("Ondara"). (R.___ (Compl. ¶ 25). The investment by Stellar Naomi in the "Aleia Roses Transaction" was approximately $20,000,000.00 with the total investment being approximately $29,000,000.00. (R.___ (Compl. ¶ 26). Although a prohibited transaction under Rule 1.8, the Appellants wished to invest in Stellar Naomi. To that end, Appellant Campbell created or caused to be created a company known as Soria, a series of Belltower, LLC ("Soria"), which is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business in Greenville County, South Carolina, to invest the purported sum of $150,000.00. (R.___ (Compl. ¶ 28). The Appellants claim their $150,000.00 investment in Stellar Naomi was "paid" in whole or in part through

[2] The Appellants point to an alleged contradiction between the allegations of Plaintiff's Complaint and his testimony in arbitration. To the extent that there is an inconsistency, at summary judgment all inferences are made in favor of the non-moving party. Furthermore, even under Appellants' version of the facts, they do not dispute that they reviewed the transaction documents in their capacities as legal counsel for their client.

uncharged legal work performed for the Respondents. (R.___ (Compl. ¶ 33).[3]

Soria's Subscription Agreement in Stellar Naomi was signed by George Campbell as the "Managing Member." The address for Soria was listed as 16 West North Street, Greenville, South Carolina, which is the same address as Campbell Teague' law office (Soria's Subscription Agreement was attached as **Exhibit D** and incorporated by to the Complaint). (R.___ (Compl. ¶ 28). The members and equity owners of Soria are Campbell, Teague, O'Brian, Cash and Brogdon and all these members are also lawyers practicing with Campbell Teague. The Appellants did not abide by Rule 1.8, SCRCP in their business transaction with the Respondents. To be specific, Rule 1.8 was never mentioned in any manner by Appellants to Respondents much less disclosed in writing prior to Campbell, Teague, O'Brian, Cash, and Brogdon entering into a business transaction with their client. (R.___ (Compl. ¶ 33). Respondents were never told to or allowed to seek independent legal advice as is required by Rule 1.8, and as such could never have given their informed consent to the Appellants for this business transaction. (R.___ (Compl. ¶ 34).

In August 2020, Campbell, with his family, moved to Spain to operate Stellar Naomi's wholly owned Spanish entity Ondara as the "Joint Administrator" while simultaneously still being "primarily responsible" for Full Moon, as well as doing substantive legal work for Stellar Naomi. (R.___ (Compl. ¶ 35). To assist in Campbell's international move, on August 6, 2020, Full Moon signed a letter, requested by Campbell and ghost written by the Appellants, stating as follows:

> "This Letter is written to request entry into Spain for George Anthony Campbell, Jr., to complete our acquisition of Aleia Roses in Soria, Spain. ***Mr. Campbell is an investor and the designated legal representative of Full Moon Investments***. His presence is absolutely

[3] In their Initial Brief, the Respondents miscite the Complaint in this regard by stating as fact "the individual Appellants are members of Soria" and that "Soria invested $150,000.00, and is a member of Stellar Naomi" referencing paragraphs 28-29 and 31 of the Complaint. Significantly, the Appellants ignore the word "purported" as it relates to the investment and or that the word "paid" is in quotes.

necessary to close this transaction before the Notary Public and to facilitate the transition of the company operations…" (emphasis supplied by Plaintiff; the 8/6/20 letter was attached as **Exhibit E** to the Complaint). (R.___ (Compl. ¶ 36).

Campbell utilized the letter in moving to Spain. (R.___ (Compl. ¶ 37).

In January 2021, Ondara received its provisional cannabis license from the Spanish government department called the Spanish Agency for Medicines and Health Products. (R.___ (Compl. ¶ 38). Full Moon, Stellar Naomi, Yield Capital, and Ondara are all managed by David Engel. (R.___ (Compl. ¶ 39). On May 18, 2021, Campbell wrote a letter on Campbell Teague letterhead stating that, "For the avoidance of doubt, this letter is written to confirm that George Campbell has served as legal counsel for David Engel and his companies for over 5 years" (the 5/18/21 letter was attached as **Exhibit F** to the Complaint). (R.___ (Compl. ¶ 40).

By legal invoice #2538, the Appellants' time reflects the representation of the Respondents in the "Aleia Roses Transaction," including in a detailed statement of account and multiple entries related to "Stellar Naomi funding for Ondara." (the invoice was attached as **Exhibit G** to the Complaint). (R.___ (Compl. ¶ 41).

Unbeknownst to the Respondents, in or about June 2021, Campbell concocted a surreptitious plan to oust Full Moon from its ownership position in Ondara so that Campbell's new investment group could stage a coup and take over Ondara. (R.___ (Compl. ¶ 42). As part of Campbell's plan, in August 2021, Campbell threatened to bankrupt Ondara so his investment group could buy its assets in Spanish Bankruptcy Court just as Full Moon and Stellar Naomi had done approximately one year before via the legal representation of the Appellants. (R.___ (Compl. ¶ 43). On August 24, 2021, Appellants sent David Engel a "Notice of Termination of Representation" stating that "an irreparable conflict has arisen" (the 8/24/21 letter was attached as

Exhibit H to the Complaint). (R.___ (Compl. ¶ 44). On August 30, 2021, the Respondents terminated Campbell from Ondara. (R.___ (Compl. ¶ 45).

In response to his termination, on August 31, 2021, Campbell wrote Full Moon a letter admitting he was "an investor in Ondara..." and in violation of Rule 4.5 of the South Carolina Rules of Civil Procedure, he threatened criminal prosecution against his client to gain an advantage in a civil dispute. (the 8/31/21 letter was attached as **Exhibit I** to the Complaint). (R.___ (Compl. ¶ 46). On September 27, 2021, Soria's attorney filed an "Arbitration Demand" against Stellar Naomi seeking an accounting so the Campbell Teague attorney "investors" could seek information related to their investment into Stellar Naomi, their former client (the 9/27/21 Arbitration Demand was attached as **Exhibit J** to the Complaint). (R.___ (Compl. ¶ 47).

Following through on his unethical threat, on October 13, 2021, Campbell commenced criminal charges in Spain against David Engel, and in Campbell's criminal "Written Complaint" he boasted that, "Mr. George Campbell is a lawyer and businessman of recognized prestige in the United States hired by Mr. Engel to manage the ONDARA project" (the 10/13/21 criminal complaint was attached as **Exhibit K** to the Complaint). (R.___ (Compl. ¶ 49). In this criminal "Written Complaint," Campbell further admitted that: "Please note that Mr. Campbell had full confidence ***in his client*** to the point of having invested the amount of $150,000 and contributed to the incorporation of investors of his trust "more than one million dollars in Mr. Engel's investment vehicle" and Campbell states that "Campbell Teague's account" was used to make bank transfers related to this transaction (emphasis supplied by Plaintiff, the Written Complaint was filed as **Exhibit K** to the Complaint). (R.___ (Compl. ¶ 50).

Continuing with his attempted takeover of Ondara, in November 2021, Campbell undertook a public relations campaign when he contacted various Spanish newspapers to defame

David Engel by accusing him of committing criminal acts and fraud (the 11/19/21 and 11/21/21 newspaper articles was attached as **Exhibit L** to the Complaint). (R.___ (Compl. ¶ 52). Failing in his coup, Campbell left Spain in December 2021, and returned to Greenville, South Carolina. (R.___ (Compl. ¶ 53).

On or about October 28, 2022, in a Spanish court, Campbell testified against the Respondents under oath as follows:

a. Campbell Teague's Investment

> **Campbell:** So, we started with the roses. During that time, Mr. Engel started to raise money from other investors in the United States: some of my lawyers, even me, also some of my other friends...
>
> **Your Honor**: I mean, did you personally make an investment in this project?
>
> **Campbell**: On behalf of a company that I control in the United States. So, well, between my friends and us, there was an investment of almost a million dollars, and from other people I know who have put quite a lot of money in that project in an SPV, which is called STELLAR NAOMI which is a Delaware company in the United States.

b. Campbell Teague's Escrow Account

> **Your Honor**: Very good. And were the salaries paid? Was anyone paying the salaries of the employees?
>
> **Campbell**: From employees, ONDARA. We were paying the payroll, but I don't have any information after September 2021.
>
> **Your Honor:** But up to that point where they paid, was the payment maintained? And where did they get the money to make those payments?

> **Campbell**: Mr. Engel always insisted that money for payroll [go] through my account. In my law firm we have a "Scrow" (sic Escrow) account, I don't know if you have the same word here. It is an account that lawyers keep for the benefit of their clients in various transactions. (R.___ (Compl. ¶ 56).

In their factual recitation, the Appellants incorrectly assert that the document governing the transaction that the Complaint alleges as a basis for the lawsuit is the Stellar Naomi Series Agreement which contains an arbitration provision. Rather, the document that governs the basis for this lawsuit is the email fee agreement between the lawyers and the clients. The Appellants efforts to recast the issue and to the seek to gorge themselves on the fruit of the poisonous tree that they planted is nothing more than a transparent attempt to escape the fact that in drafting the document that governs its attorney-client relationship, the Appellants failed to draft an arbitration provision – that is, if such a provision would be enforceable in South Carolina, even if written. To put a finer point on the matter, the Stellar Naomi Series Agreement **IS** the malpractice. But for the conduct of the Appellants in breach of the duties owed to their clients, there would be no Stellar Naomi Series Agreement. It affords the Appellants no safe harbor against the claims now asserted.

STANDARD OF REVIEW

The standard of review for an appeal of the denial of a motion to compel arbitration is *de novo Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 631, 611 S.E.2d 305, 307 (Ct. App. 2005) ("Appeal from the denial of a motion to compel arbitration is subject to *de novo* review."). However, the Court must honor the factual findings of the circuit court pertinent to its arbitration ruling if those findings are reasonably supported by evidence in the record. *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). Contrary to the Appellants' contention that the Circuit Court made no factual findings, the Order Denying Motion to Compel Arbitration ("Order") makes two significant factual findings as follows:

- "In reviewing the record, the Court finds that none of the defendants are actual parties to this agreement nor does the arbitration provisions relate to the issues presented by the pleadings." (R. ___, Order, p. 2).

It is understandable why the Appellants would seek to distance themselves from these findings as they are not parties to the arbitration agreement they seek to employ and the disputes giving rise to the Complaint do not relate to the arbitration clause. Both findings are significant impediments to Appellants' arbitration demand. Still, and respectfully, these findings are supported by the record and this Court must honor them.

ARGUMENT

1. There was never an agreement to arbitrate the Respondents' claims.

The agreement that gives rise to these claims is the agreement between the Appellants and Respondents to provide legal services. The agreement consists of a single email and a subsequent course of conduct. The agreement contains no arbitration provision. It is axiomatic that to compel a party into arbitration there must first be an agreement between the parties to arbitrate. The Circuit Court has correctly found that no such agreement existed between the parties to the appeal. "Although arbitration is viewed favorably by the courts, it is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts." *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019). "Even though arbitration has a favored place, there still must be ***an underlying agreement between the parties to arbitrate***." Emphasis supplied and see *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997). "Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Moreover, because arbitration, while favored, exists solely by agreement of the parties, a presumption *against* arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate." *Wilson*, 426 S.C. at 337-38, 827 S.E.2d at 173.

Here, the Appellants did not take the time to draft a formal engagement letter with their clients, nor did they even attempt to draft an arbitration provision that would compel disputes between themselves and their clients arising out of their attorney-client relationship into arbitration. Instead, the Appellants urge the Court that it is the arbitration provision of the Subscription Agreement between Soria (a non-party owned and managed by Appellant Campbell) and Yield Capital (a non-party owned and managed by Full Moon) that covers the Respondents' claims of legal malpractice and defamation, even though none of the parties to the present action are parties to the Subscription Agreement and

even though the malpractice contends in large part that the Subscription Agreement itself is the byproduct of the malpractice. The Appellants are wrong.

First, the Subscription Agreement itself does not contain the bold and capitalized notices required by the South Carolina Uniform Arbitration Act and clearly does not comply with its technical requirements. In an apparent recognition of this fact, the Appellants argue instead that the Federal Arbitration Act ("FAA") controls. To that point, the Appellants suggest that the question or arbitrability under the FAA is a question for the arbitrator. Again, they are mistaken. The FAA presumes parties intend that the court, rather than an arbitrator, will decide "gateway" issues related to arbitration, including whether the arbitration agreement is valid and enforceable and whether it covers the parties' dispute. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). The parties may, of course, delegate these gateway issues to an arbitrator as long as there is "clear and unmistakable" evidence of such delegation. *Id.* at 944-45; *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530, 202 L. Ed. 2d 480 (2019); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). If such a delegation occurred, the court still retains the right and duty to determine whether the delegation is valid and enforceable as long as the party resisting arbitration has made a direct and discrete challenge to the validity and enforceability of the delegation clause specifically, rather than the arbitration agreement as a whole. See *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). The record here is absent any "clear and unmistakable" evidence of a delegation of the arbitrability question to the arbitrator. The question was properly before Judge Gravely, who correctly found as a matter of fact that the parties to the appeal were not parties to the arbitration agreement and that the arbitration agreement did not embrace the matters complained of in the Complaint.

Although Judge Gravely has properly ruled that the parties to this action were not parties to the arbitration provision (which fact is supported by the record), the Appellants argue that the misalignment of parties is cured by law that would make non-signatories bound by the agreement of their affiliates, and that the Respondents cannot disavow the arbitration provision because they have benefited by raising millions through the Subscription Agreements. To the former point, the Appellants articulate no clear theory as to how or why these parties are bound as non-signatories other than to state that in "an appropriate case" a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties. The closest the Appellants come is to suggest that because parties affiliated with the Respondents allegedly benefited from the "Subscription Agreements," they are estopped from arguing against having the same agreements enforced against them.

First, there is but one Subscription Agreement that is at issue here, and that is the Subscription Agreement that the Appellants entered in violation of the duties owed to their clients and the South Carolina Rules of Professional Conduct. To suggest that the Respondents have benefited from the Subscription Agreement is to turn a stunningly blind eye at the wreckage left behind in the wake of their unconscionable conduct. The Respondents have not benefited from the Subscription Agreement at issue here. The Respondents have not benefited from criminal proceedings in Spain. The Respondents have not benefited from being delayed in their plans to operate Aleia Roses. The Respondents have not benefited from being thrown into expensive and protracted legal proceedings to unwind and/or to mitigate the harm inflected upon them by the Appellants. Respondents reject the idea that the Court of Appeals should sit as a court of equity and at first blush based on an undeveloped record (other than the facts pleaded in the Complaint

which are presumptively true) decide in equity that the Respondents are estopped from denying the enforceability of the arbitration provision.

Moreover, South Carolina has recognized five theories "'aris[ing] out of common law principles of contract and agency law' could provide a basis 'for binding nonsignatories to arbitration agreements: 1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel.'" *Pearson v. Hilton Head Hosp.,* 400 S.C. 281, 288, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 416 (4th Cir. 2000)). In addition to these theories, some federal courts have recognized that a third-party beneficiary of a contract containing an arbitration clause may be compelled to arbitrate as a non-signatory. See *Bridas S.A.P.I.C. v. Gov't of Turkmenistan,* 345 F.3d 347 (5th Cir. 2003). Other than taking a half-hearted stab and an estoppel argument, the Appellants do not even articulate a legal basis recognized in South Carolina to bind non-signatories to arbitration agreements. Without debating the issue of whether South Carolina or Delaware law would control here on the issue of binding non-signatories to arbitration provisions, Delaware appears to recognize the same five theories as South Carolina and the result would be the same:

> "It is not unusual for courts to require arbitration of claims involving parties who were not formally parties to an arbitration agreement, a situation that especially arises when affiliates of signatories are subject to or make claims. A non-signatory to a contract cannot be bound by an arbitration clause unless traditional principles of contract and agency law equitably confer upon that party signatory status with regard to the underlying agreement. Courts have recognized five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *BuzzFeed, Inc. v. Anderson*, 2022 Del. Ch. Lexis 308, 2022 WL 15627216 (2022), Internal Citations Omitted.

Clearly, there was no agreement between the parties to arbitrate these disputes. There was certainly no agreement to arbitrate the damages resulting from the malpractice committed by the Appellants in obtaining an interest adverse to their client. And finally, there was certainly no

agreement to extend arbitration to non-signatories, nor would such extension be recognized under any existing theory of binding non-signatories.

As it relates to the arbitration that is ongoing, the Appellants' arguments evidence a fundamental misunderstanding of the arbitration's relationship to the malpractice claims. Per the allegations of the Complaint, the Appellants committed malpractice and the Respondents were harmed. The decision as to whether the Appellants actually acquired an interest by virtue of their "investment" through the Subscription Agreement will inform the scope of damages in the malpractice action. If the Appellants succeeded in acquiring an interest adverse to their client in violation of their duties and Rule 1.8, then the Respondents' damages in malpractice will include not only the loss of the value of the interest wrongfully obtained, but also the extraordinary legal expenses incurred, the delays caused by the Appellants in the Respondents ability to get the new operation in Spain online and related losses. If the Appellants did not so succeed in obtaining an interest, then the damages will be limited to the extraordinary legal expenses incurred, the delays caused by the Appellants in the Respondents ability to get the new operation in Spain online and the related losses. The damages caused by the malpractice are properly pleaded for a jury trial in Circuit Court. The issue of the ownership of the interest itself is a matter pending in arbitration.[4]

2. Lawyers may be able to compel their clients to arbitrate legal malpractice claims arising out of the attorney-client relationship under limited circumstances.

"It is permissible under the Model Rules to include in a retainer agreement with a client a provision that requires the binding arbitration of disputes concerning fees and malpractice claims,

[4] The Appellants would contend that this Court has the ability to opine, and should so opine, on the impropriety of the Appellants ever having sought to acquire the interest and/or to go so far as to find that the Appellants should be estopped from continuing to seek an interest.

provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement." ABA Formal Opinion Number 02-425. The same sentiment is reflected in Comment 14 to Rule 1.8 which states that an agreement between lawyer and client to submit malpractice claims to arbitration does not violate Rule 1.8 "***if the agreement is legally enforceable and the client is fully informed of the scope and effect of the agreement***." Emphasis supplied.

Even if the email fee agreement contained an arbitration provision – and it does not – and even if somehow the arbitration provision of the Subscription Agreement embraced these parties and the legal malpractice claims – and it does not – the record is absent **ANY** evidence that any of the Appellants apprised any of the Respondents of the scope and effect of the alleged agreement to arbitrate. Under Rule 1.8, a client's "informed consent" would require a full disclosure of all risks and benefits associated with arbitrating malpractice claims. Therefore, a lawyer must advise clients of the rights they would relinquish in the arbitration process. For example, by agreeing to arbitrate future disputes, a client waives their rights to a jury trial, to significant discovery, and to the formal appeals process that is provided to litigants in Court. Also, unlike court, the parties will also be responsible for the arbitrators' fees and the costs of the arbitration process. Even in the presence of an actual written agreement to arbitrate, all of these issues must be explained to the client prior to signing an arbitration agreement to litigate future disputes. In this instance, the subject of arbitration was never even mentioned, much less disclosed through a thorough review of the pros and cons. Clearly and by any standard, the Respondents never gave "informed consent" to arbitrate disputes against their lawyers.

It is not this Court's place to write the agreement for the parties, and it is certainly not this Court's place to cure the failures of Appellants in the discharge of their professional and ethical

duties to their clients. Appellants' failures to abide by Rule 1.8 make the proposed enforcement of any contract the Appellants reply upon to force arbitration unconscionable under South Carolina law and thus, unenforceable. Respectfully, we do not think this Court should accept the invitation to write new and unprecedented law that would compel clients to arbitrate malpractice claims against their attorneys, not based upon "valid" arbitration provisions in written fee agreements, but based upon arbitration provisions contained within other corporate documents prepared by attorneys for their clients in violation of Rule 1.8.

3. The Circuit Court properly concluded that the email fee agreement between the parties did not include an agreement to arbitrate claims arising out of the attorney-client relationship.

Engagement of Full Moon Investments, LLC

George Campbell <george@campbellteague.com> Thu, Nov 9, 2017 at 11:23 AM
To: David Engle <engelcapitaladvisors@gmail.com>
Cc: Jordan Teague <jordan@campbellteague.com>

David, thanks for your time this morning. This email confirms the engagement of our firm by Full Moon Investments, LLC to draft documents and assist in the negotiations contemplated by the term sheet you executed with Middlesex Integrative Medicine on October 30. We will bill at $300 per hour and commit to investing at least 1/3 of our fees into the deal. Jordan Teague and I will be primarily responsible for the matter but may use the assistance of others when in your best interest. We will maintain regular contact with you, including updates on how much billable time we have accrued. Please reply to this email if I have correctly summarized our understanding.

If you have any other questions, please call or email me any time. I look forward to seeing you at the event this evening.
Many thanks,
George

George Campbell
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THERE IS NO ARBITRATION PROVISION. THERE ARE NO RULE 1.8 DISCLOSURES.

CONCLUSION

The Appellant lawyers violated Rule 1.8 and the duties owed to their clients in seeking to obtain an interest in their clients' business, and then after having allegedly acquired an interest, in using the interest to oust their client from his business. The Appellants' conduct has been outrageous. Through a twisted application of law and logic, the Appellants urge the Court that they are entitled to the benefit of an arbitration provision found in one of the corporate control documents for an entity in which they unethically attempted to acquire an interest to shield them from a lawsuit seeking recompense for the very same wrongful acquisition. Unfortunately, for Appellants, the only agreement between the parties here that relates to the Appellants' provision of legal services to the Respondents is a single email – and it does not provide for arbitration. The Circuit Court correctly denied the Appellants' Motion to Compel Arbitration. The decision should stand.

Charleston, South Carolina
March 15, 2024

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