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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge
Case No. 2022-CP-26-06296

Appellate Case No. 2024-000786

Anna Coggeshall, Bryan Coggeshall, and Katherine Coggeshall ..... Respondents,

v.

William Bertram von Herrmann and The von Herrmann Law Firm. ..... Appellants.

MOTION TO DISMISS APPEAL

Respondents Anna Coggeshall, Brian Coggeshall, and Katherine Coggeshall hereby move this Court to dismiss the above-referenced appeal in its entirety. This interlocutory appeal is from the portion of the Order by the Court of Common Pleas for the Fifteenth Judicial Circuit, County of Horry, filed on November 1, 2023, which denied Appellants' Motion to Dismiss Respondents' claim for violation of the *South Carolina Homeland Security Act*, S.C. Code Ann §§ 17-30-10 to 17-30-145, and barred Appellants from raising the defense of common-law attorney immunity going forward. A copy of the trial court's November 1, 2023, Order is attached as Exhibit 1. Appellants also appeal the trial court's Order of April 17, 2024, denying their Motion to Reconsider. A copy of the April 17, 2024, Order is attached as Exhibit 2.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Appellants William Bertram von Herrman and The Von Hermann Law Firm acted as legal counsel for Justin Fulmer ("Mr. Fulmer") in a prior lawsuit that Mr. Fulmer brought against Respondents ("Fulmer Action"). In the Fulmer Action, Respondents contended in part that Mr. Fulmer surreptitiously acquired an iWatch belonging to Respondent Anna Coggeshall ("Anna") and used the device to unlawfully intercept and access electronic communications made by all three Respondents in violation of the South Carolina Homeland Security Act.

In an Order by a three-judge panel of this Court dated September 2, 2022, ("2022 *Buchannon* Order") and entered in a previous appeal captioned *Justin Shayne Fulmer v. Melissa Emery Buchannon Esq., et al.*, Appellate Case No. 2022-000330, this Court found "the preponderance of the evidence indicates [Anna] Coggeshall was the rightful owner of the iWatch. Accordingly, [Mr.] Fulmer's repeated use of the device to view her text messages amounted to interceptions under the Homeland Security Act." (2022 *Buchannon* Order, at 5.) A copy of the 2022 *Buchannon* Order is attached hereto as Exhibit 3. The appellate panel further found that even if Mr. Fulmer was the original owner of the iWatch, there was "no evidence [Anna] Coggeshall gave him permission to access her communications on the device." (2022 *Buchannon* Order, at 5.)

In the present case, Respondents allege that Appellants, while acting as Mr. Fulmer's legal counsel in the Fulmer Action, had knowledge that Mr. Fulmer unlawfully obtained the subject electronic communications from Respondent Anna's iWatch but knowingly used and disseminated the material in their pursuit of the Fulmer Action against Respondents, in violation of the *South Carolina Homeland Security Act*. Appellants, in turn, moved to dismiss the action against them based on the common-law doctrine of attorney immunity.

On November 1, 2023, the trial court issued an Order denying Appellants' Motion to Dismiss Respondents' claim for violation of the *South Carolina Homeland Security Act*. In that Order, the court concluded that the common-law attorney-immunity defense did not apply to shield Appellants, as Mr. Fulmer's legal counsel, from any potential liability on this claim. (Exhibit A, 11/01/2023 Order, at 4-6.) Consequently, the trial court precluded Appellants from asserting the common-law attorney-immunity defense going forward. (*Id.* at 5-6.)

On November 10, 2023, Appellants filed a Motion for Reconsideration of the portion of the trial court's November 1, 2023, Order denying their Motion to Dismiss. On April 17, 2024, the trial court filed an Order Denying the Motion to Reconsider. The trial court stated that although this is a Novel Issue, it was persuaded that the South Carolina Legislature did not intend to allow "broad common law immunity for disclosure by attorneys in civil and family court narratives." (Exhibit B, 04/17/2024 Order, at 2.)

On May 13, 2024, Appellants filed their Notice of Appeal with this Court, alleging that the trial court's Orders of November 1, 2023, and April 17, 2024, are immediately appealable. Because the Orders in question are not properly appealable on an interlocutory basis under S.C. Code Ann. § 14-3-330, the appeal should be dismissed in its entirety.

ARGUMENT

I. STANDARD FOR APPEAL OF A NONFINAL ORDER

The trial court's Orders of November 1, 2023, and April 17, 2024, are nonfinal. An "appeal ordinarily may be pursued only after a party has obtained a final judgment[.]" *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). However, in certain instances, S.C. Code Ann. § 14-3-330 authorizes a party to pursue an interlocutory appeal of a nonfinal order. Absent the applicability of a specialized statute, a nonfinal order must fall within one of the

categories authorized by § 14-3-330 in order to be immediately appealable. *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005). Moreover, "[t]he provisions of section 14-3-330, including subsection (2), have been narrowly construed, and the immediate appeal of orders issued before or during trial generally has not been permitted." *State v. Wilson*, 387 S.C. 597, 601, 693 S.E.2d 923, 925 (2010).

Here, Appellants' interlocutory appeal is ostensibly brought under S.C. Code Ann. § 14-3-330(1) and (2)(c). Subsection 330(1) permits an immediate appeal from "[a]ny intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions[.]" Subsection 330(2)(c) authorizes an immediate appeal from "[a]n order affecting a substantial right made in an action when such order . . . (c) strikes out an answer or any part thereof or any pleading in any action[.]"

A circuit court's order "involves the merits" for purposes of § 14-3-330(1) when it "finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense." *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (internal quotation marks omitted). In other words, "[a]n interlocutory order is appealable under subsection (1) only if it involves the merits, that is, 'finally determines some substantial matter forming the whole or a part of some cause of action or defense." *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988).

An order affects a substantial right within the meaning of subsection 330(2)(c) when it would "strike out an action or defense." *Mid-State Distribs.*, 310 S.C., at 334 n.4, 426 S.E.2d at 780; *see also Edwards v. SunCom*, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006). This commonly occurs when the trial court enters an order "striking out an answer." *Jefferson*, 295 S.C. at 318, 368 S.E.2d at 456.

For the reasons detailed below, Appellants' interlocutory appeal is not appropriate under either § 14-3-330(1) or (2)(c). Accordingly, Respondents' Motion to Dismiss the appeal should be granted.

II. THE TRIAL COURT'S ORDERS DENYING APPELLANTS' MOTION TO DISMISS RESPONDENTS' CLAIM FOR VIOLATION OF THE SOUTH CAROLINA HOMELAND SECURITY ACT ON GROUNDS OF COMMON-LAW ATTORNEY IMMUNITY ARE NOT SUBJECT TO IMMEDIATE APPEAL UNDER S.C. CODE ANN. § 14-3-330(1) OR (2)(c)

The common-law doctrine of attorney immunity provides that "an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." *Gaar v. N. Myrtle Beach Realty Co.*, 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986). However, such immunity is not absolute. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). For example, "an attorney may be held liable for conspiracy where, in addition to representing his client, he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client." *Id.*

In the present case, Respondents allege that Appellants, while pursuing the underlying Fulmer Action on Mr. Fulmer's behalf, deliberately used and disseminated electronic communications that they knew Mr. Fulmer had unlawfully intercepted and accessed from Respondent Anna's iWatch. In analyzing Appellants' Motion to Dismiss, the trial court first concluded that Respondents did not have actionable invasion-of-privacy claims against Appellants because Appellants acted in their capacity as Mr. Fulmer's legal counsel at all relevant times. (Exhibit A, 11/01/2023 Order, at 4.) Even so, the trial court went on to rule (correctly) that the common-law attorney-immunity doctrine did not apply to shield Respondents from all potential liability for violating the *South Carolina Homeland Security Act*. (*Id.* at 5-6.) In reaching this

decision, the trial court determined that "the Act does not exempt attorneys from its application." (*Id.* at 5.)

> The *South Carolina Homeland Security Act* makes it a felony if a person
>
> (1) intentionally intercepts, attempts to intercept, or procures any other person to intercept or attempt to intercept any wire, oral, or electronic communication;
>
> . . .
>
> (3) intentionally discloses or attempts to disclose to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> (4) intentionally uses or attempts to use the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection[.]

S.C. Code Ann. § 17-30-20.

For purposes of the *South Carolina Homeland Security Act*, a "person" includes "any individual, partnership, association, joint stock company, trust, or corporation." S.C. Code Ann. § 17-30-15(5). The trial court properly concluded that both Appellant William Bertram von Hermann and his Appellant law firm met the definition of "persons" for purposes of the South Carolina Act. (Exhibit A, 11/01/2023 Order, at 5.)

Under the Act, "[a]ny person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of this chapter has a civil cause of action against any person or entity who intercepts, discloses, or uses, . . . the communications and is entitled to recover from the person or entity which engaged in that violation relief as may be appropriate[.]" S.C. Code Ann § 17-30-135(A). This statute authorizes the institution of the present civil action against Appellants.

The statute creating a civil cause of action contains one defense against liability: "A good faith reliance on a court order, subpoena, or a request of an agent of the South Carolina Law Enforcement Division under Section 17-30-95 constitutes a complete defense to any civil . . . action, other than an action for preliminary or equitable or declaratory relief." S.C. Code Ann. § 17-30-135(B). The *South Carolina Homeland Security Act* also contains a separate provision that sets forth the circumstances in which an electronic communication is legal. S.C. Code Ann. § 17-30-35. In addition, the Act exempts Federal Communications Commission employees and employees of providers of communications services in certain scenarios. S.C. Code Ann. §§ 17-30-25, 17-30-35.

When the trial court in the present case denied Appellants' Motion to Dismiss the claim for violation of the *South Carolina Homeland Security Act*, this ruling merely allowed the case to go forward. The trial court's Orders in no way represented or signaled the ultimate conclusion that Appellants did, in fact, violate the *South Carolina Homeland Security Act*. Thus, no final determination on the merits has been made that would authorize an interlocutory appeal under S.C. Code Ann. § 14-3-330(1). *See Mid-State Distribs.*, 310 S.C. at 334, 426 S.E.2d at 780; *Jefferson*, 295 S.C. at 318, 368 S.E.2d at 456.

Moreover, the trial court's Orders in question do not affect a substantial right of Appellants within the meaning of S.C. Code Ann § 14-3-330(2). The Orders on appeal did not strike Appellants' Answer but rather allowed the claim to move forward. *See Jefferson*, 295 S.C. at 318, 368 S.E.2d at 456.

Further, Appellants did not possess the "substantial right" to knowingly use and disseminate electronic communications that Mr. Fulmer unlawfully intercepted from Respondent Anna's iWatch in their pursuit of the Fulmer Action against Respondents. In the 2022 *Buchannan*

Order, a three-judge panel of this Court found that the preponderance of the evidence indicates that Mr. Fulmer's repeated use of Respondent Anna's iWatch to view Anna's text messages "amounted to interceptions under the [South Carolina] Homeland Security Act", and that S.C. Code Ann. § 17-30-20 prohibits "the intentional interception of electronic communications." (Exhibit 3, 2022 *Bucannon* Order, at 5.) This Court further found that even if Mr. Fulmer was the original owner of the iWatch, there was "no evidence that [Anna] Coggeshall gave him permission to access her communications on the device." (*Id.*) Consequently, Mr. Fulmer violated the *South Carolina Homeland Security Act* when he intercepted and accessed electronic communications from Respondent Anna's iWatch. (*Id.*)

Pursuant to the express language of S.C. Code Ann. § 17-30-20(3) and (4), additional "persons" are similarly liable for violating the *South Carolina Homeland Security Act* if they knowingly used or disseminated the electronic communications that Mr. Fulmer intercepted and accessed in violation of the Act. Because Appellants meet the definition of "persons" subject to the *South Carolina Homeland Security Act*, Respondents have an actionable claim against them for violation of the Act through their knowing use and dissemination of the subject electronic communications in in the Fulmer Action. *See* S.C. Code Ann. § 17-30-15(5) (stating for purposes of the *South Carolina Homeland Security Act*, a "person" includes an "individual, partnership, association, joint stock company, trust, or corporation"). Accordingly, the trial court's denial of Appellants' Motion to Dismiss did not impinge upon any "substantial right' held by Appellants, and Appellants are not entitled to an immediate appeal of this Order. *See* S.C. Code Ann. § 14-3-330(2); *Edwards*, 369 S.C. at 94, 631 S.E.2d at 530; *Mid-State Distribs.*, 310 S.C. at 334 n.4, 426 S.E.2d at 780.

In an attempt to avoid this conclusion, Appellants raise the common-law attorney-immunity defense. No South Carolina court has addressed application of attorney immunity in this context. However, it should be recognized that South Carolina's Homeland Security Act "is patterned after Title Ill of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-22 (2002)." *State v. Guerrero-Flores*, 402 S.C. 530, 534, 741 S.E.2d 577, 580 (Ct. App. 2013); *see also State v. Whitner*, 399 S.C. 547, 553, 732 S.E.2d 861, 864 (2012). This federal act is commonly referred to as a wiretap statute and is referenced herein as the "Federal Wiretap Act." *See, e.g., Nix v. O'Malley*, 160 F.3d 343, 345-46 (6th Cir. 1998). Even though no South Carolina cases have addressed the attorney-immunity issue with reference to the *South Carolina Homeland Security Act*, "federal cases analyzing comparable provisions of the Federal [Wiretap] Act are persuasive in interpreting the provisions of the Homeland Security Act applicable to this case." *Guerrero-Flores*, 402 S.C. at 534, 741 S.E.2d at 580. *See Orr v. Clyburn*, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982) ("Under general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation").

The Federal Wiretap Act "prohibit[s] more than the placing of wiretaps, because [it] forbids both the interception of certain communications -- even if the interceptor does not use or disclose the contents of the communication -- and the use or disclosure of the contents of the communication -- even if the user or discloser did not intercept the communication." *Nix*, 160 F.3d at 345-46. Specifically, 18 U.S.C. § 2511 – like S.C. Code Ann § 17-30-20 -- provides in relevant part:

> (1) Except as otherwise specifically provided in this chapter [18 USCS §§ 2510 et seq.] any person who—
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

. . .

> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . .
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

The text of 18 U.S.C. § 2511(1)(a) "quite clearly expresses a blanket prohibition on all electronic surveillance not specifically authorized by the Act." *Fultz v. Gilliam*, 942 F.2d 396, 400 (6th Cir. 1991). In addition, "[t]he syntax of sections 2511(1)(c) and (d) parallels that in section 2511(1)(a) and carries the same semantic import." *Id.* "Sections 2511(1)(c) and (d) plainly forbid all intentional disclosures and uses of the contents of intercepted communications where the individual knows or should know that the source of the material is an unauthorized interception." *Fultz*, 942 F.2d at 401. "By prohibiting all intentional uses and disclosures of unauthorized interceptions by an individual with knowledge of the violation, subsections (1)(c) and (d) strengthen subsection (1)(a) by denying the wrongdoer the fruits of his conduct." *Id.* Subsections (1)(c) and (d) also "insure protection for the wiretap victim from third parties, unrelated to the wrongdoer, who, having access to the material and a reasonable basis to know its source, might desire to disclose the information for their own purposes." *Id.*

Pursuant to 18 U.S.C. § 2511(1)(c) and (d), a civil action may be brought against any person who "intentionally discloses, or endeavors to disclose, to any other person" or "intentionally uses, or endeavors to use" "the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." *Babb v. Eagleton*, 614 F. Supp. 2d 1232, 1243-44 (N.D. Okla. 2008). For a defendant to be held liable for violation of 18 U.S.C. § 2511(c) or (d), the plaintiff must demonstrate that the defendant knew "1) the information used or disclosed came from an intercepted communication, and 2) sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of Title III [the Federal Wiretap Act]." *Thompson v. Dulaney*, 970 F.2d 744, 749 (10th Cir. 1992).

If these criteria are satisfied, an attorney and/or his law firm may be held liable for violation of § 2511(c) or (d). *Nix*, 160 F.3d at 352; *Marsh v. Curran*, 362 F. Supp. 3d 320, 328 (E.D. Va. 2019); *Babb*, 614 F. Supp. 2d at 1243. "There is nothing in the [Federal Wiretap] Act which affords attorneys special treatment." *United States v. Wuliger*, 981 F.2d 1497, 1505 (6th Cir. 1992), *cert. denied*, 510 U.S. 1191, 114 S. Ct. 1293 (1994).

Indeed, courts in several jurisdictions have rejected common-law attorney immunity and litigation privilege defenses in this context. In *Lewton v. Divingnzzo*, 772 F. Supp. 2d 1046, 1060 (D. Neb. 2011), for example, the court concluded that an attorney was liable under the Federal Wiretap Act for "intentionally using and disclosing the plaintiffs' oral communications [ ] for the purpose of advancing [his client's] . . . position in the state court Custody Case."

Similarly, in *Nix*, the Sixth Circuit expressly "decline[d]" the "invitation to immunize attorneys for certain violations of [federal] and Ohio wiretap law." *Nix*, 160 F.3d at 352. This was

so even though the attorneys "disclosed the contents of the intercepted communications in relation to a judicial proceeding." *Id.*

Notably, "[a] client's disclosure of information she obtained in violation of wiretapping laws to her attorneys for a purpose other than defending herself against wiretapping charges violates the wiretapping laws." *Marsh*, 362 F. Supp. 3d at 329; *see* 18 U.S.C. § 2511(1); *Nix*, 160 F.3d at 351 (although a client may disclose the contents of intercepted communications to her attorneys when the facing wiretap charges, the disclosure or use "for purposes other than to prepare a defense against [ ] wiretap charges, exceeds the bounds of the privilege"). Thus, a client's communications with his attorneys "about using information from the intercepted conversations to prepare and prosecute [a] lawsuit fall within the crime/fraud exception to the attorney-client privilege." (N.D. Ill. 1987); *see also Marsh*, 362 F. Supp. 3d at 329; *Sound Video Unlimited, Inc. v. Video Shack, Inc.*, 661 F. Supp. 1482, 1486 (N.D. Ill. 1987).

Here, Respondents allege that Appellants, acting as legal counsel for Mr. Fulmer, violated the *South Carolina Homeland Security Act* when they deliberately accepted, used, and disseminated electronic communications made by Respondents that they knew were wrongfully intercepted by Mr. Fulmer from Respondent Anna's iWatch for the purpose of advancing Mr. Fulmer's position in the underlying Fulmer Action. This constitutes a violation of the Federal Wiretap Act and, by analogy, of the *South Carolina Homeland Security Act*. *See Guerrero-Flores*, 402 S.C. at 534, 741 S.E.2d at 580; *see also Nix*, 160 F.3d at 352; *Wuliger*, 981 F.2d at 1505; *Marsh*, 362 F. Supp. 3d at 328; *Lewton*, 772 F. Supp. 2d at 1060; *Babb*, 614 F. Supp. 2d at 1243; *Sound Video Unlimited*, 661 F. Supp. at 1489. The doctrine of common-law attorney immunity does not apply to shield Appellants from liability for this violation. *See Nix*, 160 F.3d at 352;

Wuliger, 981 F.2d at 1505; *Marsh*, 362 F. Supp. 3d at 328; *Lewton*, 772 F. Supp. 2d at 1060; *Babb*, 614 F. Supp. 2d at 1243.

Because the common-law doctrine of attorney immunity is inapplicable, the trial court's Orders appealed from do not infringe upon a substantial right of Appellants within the meaning of S.C. Code Ann. § 14-3-330(2)(c). Hence, Appellants are not entitled to pursue an interlocutory appeal of such Orders. *See Ex parte Wilson*, 367 S.C. at 13, 625 S.E.2d at 208.

CONCLUSION

For the foregoing reasons, Respondents' Motion to Dismiss the Appeal in its entirety should be granted.

Respectfully submitted:

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ALL COUNSEL FOR THE RESPONDENTS

June 3, 2024
Marion, South Carolina

Exhibit 1

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	CASE NO.: 2022-CP-26-06296
Anna Coggeshall; Bryan Coggeshall; and Katherine Coggeshall, Plaintiffs, vs. William Bertram von Herrmann and The Von Herrmann Law Firm, Defendants.	**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS**

This matter comes before the Court on Defendants' Motion to Dismiss Plaintiffs' claims for (1) violation of the South Carolina Homeland Security Act, (2) invasion of privacy – publicizing private affairs, and (3) invasion of privacy – wrongful intrusion and outrage. For the reasons explained below, this Court GRANTS the motion in part and dismisses both invasion of privacy causes of action but DENIES the motion with respect to the alleged violation of the South Carolina Homeland Security Act.

Background

Plaintiffs Anna, Bryan, and Katherine Coggeshall brought this lawsuit against Attorney William Bertram von Herrmann and his law firm, The Von Herrmann Law Firm, asserting liability for the use and disclosure of Plaintiffs' electronic communications that Mr. von Herrmann was provided by his client, Justin Fulmer.

Plaintiffs allege Mr. Fulmer illegally acquired Plaintiff Anna's iWatch, and accessed her and Plaintiffs Bryan and Katherine's electronic communications. Plaintiffs assert Mr. Fulmer "or his agent" copied the electronic communications, and Defendants printed them. They assert Defendants used the electronic communications to bring a lawsuit against the Plaintiffs on Mr. Fulmer's behalf (Fulmer Action). Plaintiffs allege Mr. Fulmer intercepted the electronic

communications and Defendants, with knowledge the information was "unlawfully obtained" disseminated the material. The Fulmer Action is still ongoing.

As a result of Defendants' actions, Plaintiffs brought this lawsuit in the Horry County Court of Common Pleas. Defendants removed the case to federal court because Plaintiffs' original complaint asserted a federal claim. Plaintiffs amended their complaint in federal court to remove the federal claim. Defendants moved to dismiss the amended complaint in federal court, Plaintiffs responded, and Defendants replied. Plaintiff also moved to remand the case back to state court. The federal court remanded the case to the Horry County Court of Common Pleas without deciding the motion to dismiss. This Court heard Defendants' Motion to Dismiss on August 14th, 2023.

Procedural Standard

When ruling on a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP, "[t]he circuit court may dismiss a claim when the defendant demonstrates the plaintiff's 'failure to state facts sufficient to constitute a cause of action' in the pleadings filed with the court." *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006). If, in viewing the complaint in the light most favorable to the plaintiff, the court determines the facts in the complaint are insufficient to entitle the plaintiff to the relief it seeks, the court should grant the motion. *Baird v. Charleston Co.*, 333 S.C. 519, 527, 511 S.E.2d, 69, 73 (1999). Dismissal at the pleading stage is warranted when a complaint against an attorney by a non-client fails to state facts sufficient to remove the attorney from the ambit of general immunity. *Hager v. McCabe, Trotter & Beverly, P.C.*, 435 S.C. 740, 747, 869 S.E.2d 886, 889 (Ct. App. 2022); *see also Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995).

Legal Analysis

Defendants argue Plaintiffs' claims should be dismissed based on the attorney-immunity doctrine. After considering Defendants' arguments in their motion and reply, Plaintiffs' response, and the arguments at the hearing, this Court finds the attorney-immunity doctrine shields Defendants from the invasion of privacy claims, but the defense does not apply to the alleged violation of the South Carolina Homeland Security Act.

Attorney-Immunity and Invasions of Privacy

Attorneys are immune from liability to a third party arising from the performance of their professional activities on behalf of and with the knowledge of the client. *Hager*, 435 S.C. at 746, 869 S.E.2d at 889; *see also Stiles*, 318 S.C. at 298, 457 S.E.2d at 602; *Gaar v. North Myrtle Beach Realty Co.*, 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986). Attorneys normally conduct litigation solely in their professional capacity and have no personal interest in the lawsuit. *Garr*, 287 S.C. at 529, 339 S.E.2d at 889. Even if the client has no probable cause to bring a lawsuit, the attorney who brings the lawsuit is not liable to the party sued if the attorney acts primarily to aid the client in obtaining an adjudication of the client's claim. *Id.* (citing *Restatement (Second) of Torts*, § 674 cmt. d. (1975)). An attorney is not liable to a third-party in giving the client poor advice. *Hager*, 435 S.C. at 747, 869 S.E.2d at 889. "The purpose of the doctrine of attorney immunity is to encourage zealous representation of clients without fear of lawsuits by disgruntled opposing parties." *Hunt v. Mortgage Electronic Registration*, 522 F. Supp. 2d 749, 758 (D.S.C. 2007).

Immunity will not shield an attorney, however, if in addition to representing the client, the attorney (a) breaches an independent duty to a third party, or (b) "acts in his own personal interest[] outside the scope of his representation of the client." *Stiles*, 318 S.C. at 300, 457 S.E.2d at 602. A complaint that fails to allege the lawyer acted in his own personal interest and

outside the scope of his representation of the client should be dismissed. *Hager*, 435 S.C. at 747, 869 S.E.2d at 889; *see also Stiles* 318 S.C. at 300, 457 S.E.2d at 602. The doctrine has barred many different common law claims against attorneys, including those for fraud, conversion, civil conspiracy, and malicious prosecution. *See, e.g.*, *Hager*, 435 S.C. at 747, 869 S.E.2d at 889 (fraud and conversion); *Stiles*, 318 S.C. at 300; 457 S.E.2d at 603 (civil conspiracy); *Gaar*, 339 S.E.2d at 889 (malicious prosecution).

This Court finds that Plaintiffs' claims for Invasion of Privacy are barred by the attorney-immunity defense. Attorney-immunity is a common law defense that has prevented common-law claims, such as civil conspiracy and malicious prosecution, when the attorney was acting with the client's knowledge and within scope of the representation. Taking the allegations of the amended complaint as true at the motion to dismiss stage, the amended complaint makes clear that the invasions of privacy took place while Defendants were representing Mr. Fulmer—alleging that Defendants used the communications to bring a lawsuit against Plaintiffs on Mr. Fulmer's behalf. The amended complaint is devoid of any allegations Defendants breached some independent duty to the Plaintiffs or acted in their own interests and outside the scope of their representation of Mr. Fulmer. This is precisely the scenario for which attorney immunity exists and Courts have relied upon to dismiss common law claims previously. Accordingly, this Court agrees with Defendants and DISMISSES with prejudice Plaintiffs' causes of action for (1) invasion of privacy – publicizing private affairs, and (2) invasion of privacy – wrongful intrusion and outrage.

Attorney Immunity and South Carolina Homeland Security Act (Act)

Defendants argue attorney immunity applies to the Act because the legislature enacts against the backdrop of common law and, pursuant to statutory interpretation rules of plain meaning and strict construction, the Act does not clearly and unambiguously change the common

law in a way that abrogates the attorney-immunity defense. Plaintiffs, on the other hand, argue that attorney-immunity does not apply because the Act does not expressly exempt attorneys from its application. Although this is a novel question in South Carolina, this Court agrees with Plaintiffs and finds the attorney-immunity defense does not apply to the Act.

The Act makes it a felony for any "person" to intentionally disclose to another person, or use, the contents of any electronic communication, "knowing or having reason to know that the information was obtained through the interception" of an electronic communication. *See* S.C. Code Ann. § 17-30-20(3) & (4). The Act creates a civil cause of action, stating that "[a]ny person whose . . . electronic communication is intercepted, disclosed, or used in violation of this chapter has a civil cause of action against any person or entity who intercepts, discloses, or uses . . . the communications." S.C. Code Ann. § 17-30-135(A). The statute creating the civil cause of action lists one defense: "A good faith reliance on a court order, subpoena, or request of an agent of the South Carolina Law Enforcement Division under [s]ection 17-30-95 constitutes a complete defense to any civil . . . action, other than an action for preliminary or equitable or declaratory relief." S.C. Code Ann. § 17-20-135(B). The statute is otherwise silent on the application of any defenses. Further, the Act explains in what circumstances the interception of an electronic communication is legal, section 17-30-35, and exempts the employees of the Federal Communications Commission and employees of providers of communications services in certain scenarios. *See* §§ 17-30-25, 17-30-35.

This Court finds that attorneys fall within the common meaning of "any person" as used in the Act and, therefore, the Act applies to attorneys. This Court finds that if the South Carolina legislature had intended to exempt attorneys from liability under the Act, it could have expressly included that group as it did employees of certain entities. Because the Act applies to attorneys and the legislature did not expressly exempt attorneys, this Court finds the common law

attorney-immunity defense does not apply to claims arising under the Act. Therefore, Defendants' Motion to Dismiss the claim under the Act is DENIED and Defendants cannot assert the defense going forward.

Conclusion

After considering the arguments and authorities cited by Defendants in their Motion to dismiss and reply, by Plaintiffs in response to the Motion to Dismiss, and the arguments at the hearing, it is ORDERED:

1. Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is GRANTED as to the Plaintiffs' claims for (1) invasion of privacy – publicizing private affairs, and (2) invasion of privacy – wrongful intrusion and outrage, and such claims are hereby dismissed with prejudice; and

2. Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is DENIED as to Plaintiffs' claim for violation of the South Carolina Homeland Security Act and Defendants cannot assert the attorney-immunity defense going forward.

SO ORDERED!

The Honorable Kristi F. Curtis
Fifteenth Judicial Circuit

[Electronic Signature Page Follows]

Horry Common Pleas

Case Caption: Anna Coggeshall , plaintiff, et al VS William Bertram Von Herrmann , defendant, et al

Case Number: 2022CP2606296

Type: Order/Dismissal

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

Exhibit 2

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	2022-CP-26-06296
Anna Coggeshall; Bryan Coggeshall; and Katherine Coggeshall,	)	**ORDER DENYING THE MOTION TO RECONSIDER**
Plaintiff,	)	
vs.	)	
William Bertram von Herrmann and The Von Herrmann Law Firm,	)	
Defendant,	)	

PRESIDING JUDGE:	The Honorable Krisi F. Curtis
DATE OF HEARING:	December 19, 2023
ATTORNEY FOR PLAINTIFF:	Steve Abrams, *Esq.* and Richard Whiting, *Esq.*
ATTORNEY FOR DEFENDANT:	Skyler C. Wilson, *Esq.* and Douglas W. MacKelcan, *Esq.*

This matter comes before the court pursuant to the Defendants' Notice of Motion and Motion for Reconsideration of its Order filed November 10, 2023.

After further review of the Defendants' Motion for Reconsideration in this matter, the Defendants' Motion is respectfully denied. The court recognized that this is a Novel Issue, but is persuaded by the reasoning contained in Plaintiffs' original Reply to the Defendants' original Motion, filed May 7, 2023.

The controlling statute is extremely broad. This statute mirrors the Federal Wiretap Action in many respects in that it prohibits the interception of electronic communications as well as the disclosure of illegally intercepted communications. The South Carolina Homeland Security Act is the State's equivalent of the Federal Electronic Communication Privacy Act, which also expressly

prohibits any evidence derived from the illegally intercepted communication from being entered into evidence in any trial, hearing or other proceeding before any court. See South Carolina code §17-30-65. The only exception for court proceedings is that set forth in South Carolina code §17-30-75, which allows for disclosure while giving testimony under oath in criminal and grand jury proceedings. This statute also specifically allows disclosure by SLED to attorneys who are authorized by law to investigate and prosecute certain alleged crimes.

It is illogical for the legislation to specifically carve out this narrow exception while also intending to allow broad common law immunity for disclosure by attorneys in civil and family court narratives.

The court finds that it would be illogical for the legislation to prohibit a pro se individual from disclosing the contents of electronic communications (and to make any such disclosure actionable) while allowing that individual's attorney to take the exact same actions with absolute immunity. Accordingly, the Defendants' Motion for Reconsideration is denied.

AND IT IS SO ORDERED.

_____

The Honorable Kristi F. Curtis
Presiding Circuit Judge

_____, 2024.

Horry, South Carolina.

Horry Common Pleas

Case Caption: Anna Coggeshall , plaintiff, et al VS William Bertram Von Herrmann , defendant, et al

Case Number: 2022CP2606296

Type: Order/Other

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

Exhibit 3

The South Carolina Court of Appeals

Justin Shayne Fulmer, Respondent,

v.

Melissa Emery Buckhannon Esq., Frazier Law Firm P.C., SC House Calls, Inc., Anna Coggeshall, Bryan Coggeshall, Katherine Coggeshall, Lauren Trent Fulmer, and Thomas Buckhannon, Defendants.

Of whom Anna Coggeshall is the Petitioner.

Appellate Case No. 2022-000330

ORDER

This case involves two ongoing family court and circuit court actions: Justin Fulmer (Fulmer) is the plaintiff in an ongoing civil matter (Civil Case) [1] against Anna Coggeshall, Lauren Trent Fulmer (Trent), and Frazier Law Firm, P.C. (Frazier), and a party in a divorce action (Divorce Action) with Trent. Coggeshall filed a motion to suppress the contents of text messages pursuant to section 17-30-110 of the South Carolina Code (2014), a part of the South Carolina Homeland Security Act. *See* S.C. Code Ann. §§ 17-30-10 to -145 (2014). Sections 17-30-110 and 17-30-15 require that this court hear the motion to suppress. *See* § 17-30-110(A) (requiring motions to suppress the contents of intercepted wire or oral communications be made to the "reviewing authority"); § 17-30-15(9) (defining "[r]eviewing authority" as "a panel of three judges of the South Carolina Court of Appeals"). Coggeshall contends Fulmer illegally intercepted text messages sent between her and several individuals utilizing an Apple iWatch that was stolen from her home. Trent and Frazier moved to join the motion because their communications with Fulmer were among those

---

[1] Justin claims he filed the Civil Case because he believed the communications involved "a scheme to undermine his relationship with his young daughter."

obtained by Fulmer using the iWatch. We grant the motions to join and the motion to suppress.

FACTS

Coggeshall and Fulmer have one child together, a daughter (Daughter). According to Coggeshall, she discovered her Apple iWatch—which was "synched" with her phone and received copies of text messages between herself and others—went missing while she and Fulmer were in the midst of paternity, child support, and custody litigation (Custody Litigation) over Daughter. When that litigation concluded in December 2021, Coggeshall discovered text messages obtained from her missing iWatch were being used by Fulmer as the basis for the Civil Case against Coggeshall, Trent, Frazier, and others.[2]

Fulmer claims the iWatch in question belongs to him and that he "allowed" Coggeshall to use his iWatch in the past. He asserts Coggeshall later returned the device to him and he noticed her "messages began appearing on the watch." He argues Coggeshall failed to delete her electronic information from the iWatch or take other "precautions to secure the contents of the device." While the parties dispute ownership of the iWatch, they agree Fulmer currently possesses the watch and used it to view text messages that were sent to and from Coggeshall's cell phone.

INTERPRETATION OF THE HOMELAND SECURITY ACT

"The Homeland Security Act is patterned after Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–22 (2002) (Federal Act)." *State v. Guerrero-Flores*, 402 S.C. 530, 534, 741 S.E.2d 577, 580 (Ct. App. 2013). "[F]ederal cases analyzing comparable provisions of the Federal Act are persuasive in interpreting the provisions of the Homeland Security Act . . . ." *Id.*

MOTIONS TO JOIN

"The decision to grant or deny a motion to join an action pursuant to Rule 19, SCRCP, or intervene in an action pursuant to Rule 24, SCRCP, lies within the sound discretion of the trial court." *Ex parte Gov't Emps. Ins. Co. (Ex parte*

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[2] The Civil Case includes other named defendants, but they did not move to join Coggeshall's motion.

GEICO), 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007). Rule 24(a), SCRCP provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"Generally, the rules of intervention should be liberally construed where judicial economy will be promoted by declaring the rights of all affected parties." *Ex parte GEICO*, 373 S.C. at 138, 644 S.E.2d at 702. Accordingly, this court "should consider the practical implications of a decision denying or allowing intervention." *Id.* "A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a 'real party in interest.'" *Id.* (quoting *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)).

> Prior to any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority, *any aggrieved person* may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, on the grounds that the: (1) communication was unlawfully intercepted . . . . The reviewing authority may, in its discretion, conduct a hearing and require additional testimony or documentary evidence.

§ 17-30-110(A) (emphasis added).

We find Frazier and Trent are "aggrieved person[s]" pursuant to the Homeland Security Act because their communications with Coggeshall were among those obtained by Fulmer and resolution of Coggeshall's motion inevitably impacts their rights in the Civil Case. *See* § 17-30-110(A) (stating any aggrieved person may move to suppress the contents of intercepted communications); Rule 24(a)(2), SCRCP (stating anyone claiming an interest related to the transaction at issue and "so situated that disposition of the action may . . . impair or impede his ability to

protect that interest" should be permitted to intervene in an action). Accordingly, we grant both motions to join.

MOTION TO SUPPRESS

"The interception of wire, electronic, or oral communications is hereby authorized only in the manner permitted by this chapter." § 17-30-10. The Act is violated when a person "intentionally intercepts . . . any wire, oral, or electronic communication"; "intentionally discloses or attempts to disclose to any other person the contents of any . . . electronic communication, knowing or having reason to know the information was obtained through the interception of a[n] . . . electronic communication"; or when a person "intentionally uses or attempts to use the contents of any . . . electronic communication, knowing or having reason to know that the information was obtained through the interception of a[n] . . . electronic communication." § 17-30-20(1), (3), (4).

"'Intercept' means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." § 17-30-15(3). An "'[e]lectronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire, electronic, or oral communication." § 17-30-15(4). An "aggrieved person" is any person "who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." § 17-30-15(10). "Whenever any wire, oral, or electronic communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . ." § 17-30-65(A).

In *United States v. Szymuszkiewicz*, the Seventh Circuit observed an interception must be "contemporaneous" with the sending of the communication, which includes communications obtained while in transit between intended devices and also communications that are received by an intended recipient but then, through programming, automatically forwarded to an unintended recipient. 622 F.3d 701, 705-06 (7th Cir. 2010). In *Epstein v. Epstein*, the Seventh Circuit clarified its reasoning in *Szymuszkiewicz*, noting an interception "need not occur at the time the wrongdoer *receives* the [communication]" because "'copying [the communication] at the server was the unlawful interception.'" 843 F.3d 1147, 1150 (2016) (quoting *Szymuszkiewicz*, 622 F.3d at 704).

Based on the affidavits provided by the parties, we find the preponderance of the evidence indicates Coggeshall was the rightful owner of the iWatch. Accordingly, Fulmer's repeated use of the device to view her text messages amounted to interceptions under the Homeland Security Act. *See* § 17-30-15(3) (defining an interception as the acquisition of electronic communications through the use of any electronic device); § 17-30-20 (prohibiting the intentional interception of electronic communications). Further, even if Fulmer was the original owner of the iWatch, we find there is no evidence Coggeshall gave him permission to access her communications on the device. *See Berry v. Funk*, 146 F.3d 1003, 1010-11 (D.C. Cir. 1998) (stating that implicit consent to an interception, absent actual notice, may only be implied "when '[t]he surrounding circumstances [] convincingly show that the party knew about and consented to the interception'" (quoting *United States v. Lanoue*, 71 F.3d 966, 981 (1st Cir. 1995))).

CONCLUSION

Accordingly, we grant Coggeshall's motion to suppress and prohibit Fulmer from using these communications in the Civil Case and Divorce Action and any potential future litigation. *See* § 17-30-65(A) ("Whenever any wire, oral, or electronic communication has been *intercepted*, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in *any* trial, hearing, or other proceeding . . . ." (emphases added)). Additionally, we deny Coggeshall's request for attorney's fees.[3] Any further motions concerning these cases should be addressed to the family and circuit courts.

C.J.

J.

J

[3] However, the parties may still pursue attorney's fees and damages in a civil action. *See* § 17-30-135(A)(4) ("Any person whose wire, oral, or electronic communication is *intercepted* . . . has a civil cause of action . . . and is entitled to recover . . . a reasonable attorney's fee and other litigation costs reasonably incurred." (emphasis added)).

Columbia, South Carolina

cc:
William Bertram von Herrmann, Esquire
Richard Giles Whiting, Esquire
Steven Marc Abrams, Esquire
Amanda A. Bailey, Esquire
Hayes Kirkland Stanton, Esquire
Kevin Mitchell Barth, Esquire

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge
Case No.: 22-CP-26-06296

Appellate Case No. 2024-000786

Anna Coggeshall; Bryan Coggeshall; and Katherine Coggeshall.....Respondents

v.

William Bertram von Hermann and The Von Herrmann Law Firm.....Appellants.

PROOF OF SERVICE

I certify that I have served ***Motion To Dismiss Appeal,*** upon the parties below by electronic mail, addressed as follows:

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Attorneys for Appellants

This 3rd day of June, 2024

S/ Robert E. Lee
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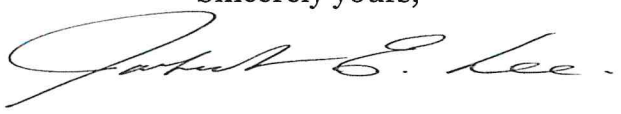
RE: Anna Coggeshall, Bryan Coggeshall, and Katherine Coggeshall v William Bertram von Herrmann and The Von Herrmann Law Firm
Appeal case No.: 2024-000786

Dear Ms. Kitchings:

Enclosed find Respondents, Anna Coggeshall, Bryan Coggeshall, and Katherine Coggeshall's Motion to Dismiss Appeal in the above-referenced case, Proof of Service, and Respondents' service email and letter to Appellants counsel.

Sincerely yours,



ROBERT E. LEE

REL:bss
Enclosures: *as stated above*

cc: Douglas MacKelcan, Esq.; Skyler C. Wilson
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