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S.C. SUPREME COURT

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. ..... Petitioners.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

1. Did the Court of Appeals err in dismissing as interlocutory an appeal of the denial of a motion to dismiss a claim that an attorney and his law firm are civilly liable for violating the South Carolina Homeland Security Act?

PETITIONERS HAVE NOT ESTABLISHED GROUNDS FOR GRANTING WRIT UNDER RULE 242(B), SCACR

Although Petitioners generally contend that a Writ of Certiorari should be granted under Rule 242(B), SCACR, they fail to state that any of the five listed grounds for which review is generally considered exist here. *See* Rule 242(B)(1) - (5), SCACR. Indeed, no special circumstances exist to justify the granting of the Petition for Writ of Certiorari here. Instead, Petitioners should be required to proceed with pretrial discovery, as ordered by the trial court.

COUNTERSTATEMENT OF THE CASE

A. The Buchannon Action

Petitioners William Bertram von Herrmann ("Mr. von Hermann") and his law firm represented Justin Shayne Fulmer ("Fulmer") in a civil action filed in the Horry County Court of Common Pleas[1] (the "Buchannon Action"). **Appx. 38.** Fulmer brought the Buchannon Action against Respondents Anna Coggeshall, Bryan Coggeshall, and Katherine Coggeshall and other Co-Defendants, including judge Melissa Buchannon. **Appx. 38, 64.**

Fulmer's claims in the Buchannon Action were based solely on text messages that he intercepted from Respondent Anna Coggeshall's iWatch. **Appx. 38, 64-65.** Specifically, Fulmer, without Respondent Anna Coggeshall's permission or knowledge, intercepted, used, and disclosed Anna Coggeshall's text messages that were synched to her cell phone. **Appx. 38, 64-65.** In an

[1] The Buchannon Action was captioned *Justin Shayne Fulmer v. Melissa Emery Buchannon Esq., et al* and bore Civil Action No. 2021-CP-26-06975.

appeal of the Buchannon Action filed with the South Carolina Court of Appeals, the appellate court ruled that Fulmer's "repeated use" of Respondent Anna Coggeshall's iWatch "to view her text messages amounted to interceptions under the [South Carolina] Homeland Security Act", S.C. Code Ann. §§ 17-30-10, et seq. **Appx. 68.** (No appeal was made of the Court of Appeals' findings.)

The Buchannon Action was tried before a jury on November 27-30, 2023, and the jury issued a verdict in favor of Respondent Anna Coggeshall on her Counterclaim against Fulmer for violation of the South Carolina Homeland Security Act. Although Fulmer filed an appeal that is presently pending before the South Carolina Court of Appeals[2], Petitioners herein mischaracterize the nature of that appeal.

Although the Petition's Statement of the Case suggests otherwise, Fulmer did **not** appeal the underlying jury verdict or the jury's damages award issued against him. Instead, Fulmer's appeal addresses attorney's fees and nothing else. Thus, the issue of Fulmer's liability to Respondent Anna Coggeshall for violating the South Carolina Homeland Security Act has been definitively established.[3] The only question that remains is whether Mr. von Herrmann and his law firm, as Fulmer's attorneys, may likewise be held civilly liable for violation of the South Carolina Homeland Security Act. **Appx. 38, 82-83.**

B. The Underlying Lawsuit

In the underlying action, Respondents allege that Mr. von Herrmann and his law firm violated the South Carolina Homeland Security Act by using and disseminating electronic communications that they knew were unlawfully intercepted by their client, Fulmer, in the

[2] The Appellate Case Number is 2024-000562.

[3] *See* n.2, *supra*,

prosecution of the Buchannon Action. **Appx. 38, 82-83.** In this regard, Mr. von Herrmann used the electronic communications that Fulmer intercepted from Respondent Anna Coggeshall's iWatch in the prosecution of the Buchannon Action. **Appx. 38, 82-83.** Respondents contend that Mr. von Herrmann knew that the intercepted messages were illegally obtained by Fulmer but, despite this knowledge, Mr. von Herrmann used and disseminated the text messages in his prosecution of the Buchannon Action. **Appx. 38, 82-83.**

Mr. von Herrmann and his law firm unsuccessfully moved to dismiss Respondents' claim for violation of the South Carolina Homeland Security Act. The motion to dismiss was brought under Rule 12(b)(6), SCRCP, for failure to state facts sufficient to constitute a cause of action. **Appx. 86-87.**

The trial court's Order issued on November 1, 2023, found that attorneys are "persons" subject to the provisions of the South Carolina Homeland Security Act, and that "the attorney-immunity defense does not apply to the Act." **Appx. 86.** The trial court then concluded that because the Act applies to attorneys and the common-law attorney-immunity defense does not apply to claims arising under the Act, Petitioners' motion to dismiss would be denied, and Petitioners "cannot assert the defense going forward." **Appx. 86-87.**

On November 10, 2023, Mr. von Herrmann and his law firm moved the trial court for reconsideration. A hearing was held on the matter on December 19, 2023. On April 17, 2024, the trial court issued an Order Denying the Motion to Reconsider. **Appx. 27-28.**

Respondents served pretrial discovery requests on Mr. von Herrmann, but Mr. von Herrmann refused to provide any responses. Similarly, Mr. von Herrmann and his law firm did not file any Answer.

Instead, on May 13, 2024, Mr. von Herrmann and his law firm filed an interlocutory Notice of Appeal with the South Carolina Court of Appeals. **Appx. 1-6.** The Notice of Appeal contended that an immediate appeal should be granted under S.C. Code Ann. § 14-3-330 because the trial court's Order involved the merits and affected a substantial right. **Appx. 3-6.** Respondents, in turn, filed a motion to dismiss the interlocutory appeal. **Appx. 37.**

In an Order filed on August 14, 2024, the Court of Appeals granted Respondents' motion to dismiss. **Appx. 33.** The one-paragraph Order repeatedly cites to S.C. Code Ann. § 14-3-330. **Appx. 33.** The Order also cites numerous South Carolina cases holding that a trial court's denial of a motion to dismiss is not immediately appealable under § 14-3-330.

On August 28, 2024, Mr. von Herrmann and his law firm filed a Petition for Rehearing with the Court of Appeals. **Appx. 113-120.** On September 20, 2024, Respondents filed their Response in Opposition to the Petition for Rehearing. **Appx. 125-136.** Mr. von Hermann and his law firm filed a Reply on October 2, 2024. **Appx. 141-144.**

By Order dated November 4, 2024, the Court of Appeals denied the Petition for Rehearing. **Appx. 35.** The Order states that "[o]n August 14, 2024, the court dismissed this appeal concluding the order on appeal was interlocutory and not immediately appealable." **Appx. 35**. The Order denying the Petition for Rehearing further provides that "[a]fter careful consideration of the filings, the court is unable to discover any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing." **Appx. 35.**

In response, Mr. von Herrmann and his law firm filed the instant Petition for Writ of Certiorari with this Court.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY DISMISSED PETITIONERS' INTERLOCUTORY APPEAL BECAUSE THE TRIAL COURT'S ORDER DENYING PETITIONERS' MOTION TO DISMISS DOES NOT FIT INTO ANY OF THE CATEGORIES OF IMMEDIATELY APPEALABLE ORDERS LISTED IN S.C. CODE ANN. § 14-3-330

"Absent a specialized statute, an order must fall into one of several categories set forth Section 14-3-330 in order to be immediately appealable." *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). 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).

S.C. Code Ann. § 14-3-330 authorizes an immediate appeal of the following categories of orders:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
>
> (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

Here, the trial court's Order denying Petitioners' motion to dismiss Respondents' claim for violation of the South Carolina Homeland Security Act does not fall into any of the categories of immediately appealable orders listed in S.C. Code Ann. § 14-3-330. Hence, the Court of Appeals correctly dismissed the appeal as interlocutory. *See Capital U-Drive-It*, 369 S.C.at 6, 630 S.E.2d at 467.

In arguing otherwise, Mr. von Hermann and his law firm incorrectly contend that the trial court's Orders denying their motion to dismiss affect a substantial right within the meaning of S.C. Code Ann. § 14-4-330(2). "Orders affecting a substantial right discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." *Edwards v. SunCom*, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006). The trial court's Orders in question do none of these things.

As stated in *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526, 443 S.E.2d 539, 540 (1994) -- one of the cases cited in the Court of Appeals' August 14, 2024, Order dismissing the interlocutory appeal -- a trial court's order denying a motion to dismiss under Rule 12(b)(6), SCRCP, is not an interlocutory order that affects a substantial right. This is exactly the type of Order that the trial court issued here. **Appx. 85-87.** Hence, the trial court's denial of Petitioners' motion to dismiss is not the proper subject of an interlocutory appeal under S.C. Code Ann. § 14-3-330(2), and the Court of Appeals correctly dismissed the appeal. *See McLendon*, 313 S.C. at 526, 443 S.E.2d at 540.

In an attempt to avoid this conclusion, Petitioners wrongly insist that the Court of Appeals relied on the label given to the motion to dismiss and/or the trial court's Orders and not the effect of the Orders. Specifically, Mr. von Herrmann contends that the Orders had the effect of striking a defense by precluding Mr. von Herrmann and his law firm from raising the attorney-client

privilege going forward. This argument is fundamentally flawed in that it misconstrues the nature of the attorney-client privilege.

"The attorney-client privilege protects against disclosure of confidential communications by a client to his attorney." *State v. Owens*, 309 S.C. 402, 407, 424 S.E.2d 473, 476 (1992), *cert. denied*, 507 U.S. 1036, 113 S. Ct. 1861 (1993). It is an evidentiary privilege. *Drayton v. Indus. Life & Health Ins. Co.*, 205 S.C. 98, 108, 31 S.E.2d 148, 152 (1944). "An evidentiary privilege is '[a] privilege that allows a specified person to refuse to provide evidence or to protect the evidence from being used or disclosed in a proceeding.'" *Hartsock v. Goodyear Dunlop Tires N. Am. Ltd.*, 422 S.C. 643, 647, 813 S.E.2d 696, 698-99 (2018) (quoting Evidentiary Privilege, Black's Law Dictionary (10th ed. 2014)).

Notwithstanding Mr. von Herrmann's contentions, the trial court's initial Order barring Mr. von Herrmann from raising the attorney-client privilege going forward must be classified as an evidentiary ruling. *See Drayton*, 205 S.C. at 108, 31 S.E.2d at 152. It is not tantamount to the striking of a defense that affects a substantial right. *See Hartsock*, 422 S.C. at 647, 813 S.E.2d at 698-99. Instead, an evidentiary ruling is an interlocutory determination that is not immediately appealable. *See Levi v. N. Anderson Cty. EMS*, 409 S.C. 374, 383, 762 S.E.2d 44, 49 (Ct. App. 2014), *cert. denied*, 2015 S.C. LEXIS 32, at *1 (Jan. 15, 2015).

In further contravention to Petitioners' contentions, an objective examination of the effect of the trial court's Orders herein reinforces the conclusion that the Court of Appeals properly dismissed Petitioners' interlocutory appeal. The practical effect of the trial court's evidentiary ruling is simply that Mr. von Herrmann must provide pretrial discovery concerning his receipt and use of the electronic communications that Fulmer intercepted from Respondent Anna Coggeshall's iWatch.

In *Tucker v. Honda of S.C. Mfg.*, 354 S.C. 574, 577, 582 S.E.2d 405, 407 (2003), this Court held that a trial court's order compelling discovery of information allegedly protected by the attorney-client privilege is not immediately appealable. In other words, a trial court's order compelling discovery is not immediately appealable even if the appealing party contends that the order violates the attorney-client privilege. *See id.*

Similarly, in *Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc.*, 381 S.C. 332, 332-33, 673 S.E.2d 417, 418 (2009), this Court vacated the court of appeals' review of a discovery order that may have resulted in the disclosure of confidential information. This decision was based on the fundamental principle that a discovery order is interlocutory and not immediately appealable. *Id.*

As *Tucker* and *Wieters* demonstrate, the effect of the trial court's Orders denying Petitioners' motion to dismiss Respondents' claim for violation of the South Carolina Homeland Security Act on the grounds of attorney-client privilege simply requires that the case move forward to pretrial discovery. Mr. von Herrmann's claim that discovery would violate the attorney-client privilege does not provide a credible basis for the grant of an interlocutory appeal. *See Wieters,* 381 S.C. at 332-33, 673 S.E.2d at 418; *Tucker*, 354 S.C. at 577, 582 S.E.2d at 407.

In arguing otherwise, Petitioners incorrectly rely on *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015). However, *Morrow* is easily distinguishable from and, therefore, is inapplicable to the present case.

Unlike Respondents here, the *Morrow* plaintiffs brought two different sets of claims against two diverse groups of defendants. First, the Morrows filed personal injury claims against the nursing home in which plaintiff Lawrence Morrow resided. These claims related to an injury that Lawrence suffered while being assisted in the shower as well as the nursing home's alleged failure

to properly monitor Lawerence's diabetes or care for his pressure wounds. *Id.* at 535-36, 773 S.E.2d at 145. The Morrows also filed separate corporate negligence claims against the owners of the nursing home pertaining to underfunding and corollary issues regarding staffing, training, and nutrition. *Id.* at 536, 773 S.E.2d at 145.

The corporate entities filed a motion to bifurcate the trial between the Morrows' negligence claims against the nursing home and their separate negligence claims against the corporate entities. The trial court granted the motion, "finding that without first proving negligence against the nursing home the Morrows' claims for corporate negligence could not proceed." *Id.* The Morrows appealed, and the court of appeals dismissed the appeal on the grounds that an order granting bifurcation was not immediately appealable. *Id.*

On petition to this Court for writ of certiorari, the order was reversed. This court ruled that the trial court's order was immediately appealable under S.C. Code Ann. § 14-3-330 because it was "based on a material misunderstanding of [the Morrows'] claims against the [corporate entities]." *Morrow*, 412 S.C. at 538, 773 S.E.2d at 146. Specifically, the trial court's order "conflate[d] the theories of vicarious liability and direct liability by determining the Morrows [could] move forward on their claims against the corporate defendants only if they first recover[ed] against [the nursing home]." *Id.* The trial court incorrectly applied the theory of vicarious liability to the Morrows' claims against the corporate entities when the claims were actually "grounded in direct corporate liability which follows independent, albeit interconnected, duties owed to the Morrows." *Id.* at 539, 773 S.E.2d at 146. By incorrectly considering the Morrows' claims against the corporate entities as dependent on their claims against the nursing home, "the trial court's order effectively grants the [corporate] Entities potential summary judgment on the issues of direct corporate liability." *Id.*

Accordingly, the Supreme Court in *Morrow* concluded that the trial court's order fit "neatly within the statutory provision allowing immediate appeals where a substantial right is implicated. S.C. Code Ann. § 14-3-330(2)(a). The effect of this order [was] to prevent the Morrows from being architects of their own complaint, and deprive[d] them of bringing their case against the defendant of their own choosing." *Morrow*, 412 S.C. at 539, 773 S.E.2d at 146.

Contrary to Mr. von Herrmann's contentions, *Morrow* differs fundamentally from the present case. Unlike the trial court in *Morrow*, the trial court here did not apply an incorrect legal theory to effectively grant potential summary judgment on the issue of liability against Mr. von Herrmann and his law firm. Instead, the trial court simply determined that the attorney-client privilege and common-law doctrine of attorney immunity did not apply to absolutely shield Mr. von Herrmann from any potential liability to Respondents for violating the South Carolina Homeland Security Act in his prosecution of the Buchannon Action. **Appx. 27-28, 86-87.**

The trial court's Orders do not in any way address the merits of the action. **Appx. 27-28, 86-87.** The trial court did not find or even suggest that Mr. von Herrmann is, in fact, liable for violation of the South Carolina Homeland Security Act. **Appx. 27-28, 86-87.** Instead, the trial court simply precluded Mr. von Herrmann from relying on the attorney-client privilege and common-law doctrine of attorney immunity as end-runs around potential liability. **Appx. 27-28, 86-87.** Under established South Carolina law, Mr. von Herrmann and his law firm should not be granted an interlocutory appeal to revisit those issues. *See Wieters,* 381 S.C. at 332-33, 673 S.E.2d at 418; *Tucker*, 354 S.C. at 577, 582 S.E.2d at 407.

II. PETITIONERS' ATTEMPT TO DISTINGUISH OTHER IMMUNITY CASES IS UNAVAILING

In their Petition, Mr. von Herrmann and his law firm admit that in other immunity cases, South Carolina appellate courts have denied interlocutory appeals of orders denying motions to

dismiss. *See Brown v. Cty. of Berkeley*, 366 S.C. 354, 361, 622 S.E.2d 533, 537 (2005). Even so, Petitioners wrongly contend that the present case is distinguishable because the litigants in the other immunity cases were free to raise the immunity issue at a later point in the case, but Petitioners are not allowed to do so. This argument is fundamentally flawed.

As discussed in Argument Point I, above, the trial court's Orders denying Petitioners' motion to dismiss and denying reconsideration did not address the merits of Respondents' claim that Mr. von Herrmann and his law firm were civilly liable for violating the South Carolina Homeland Security Act in the course of their pursuit of the Buchannon Action. Instead, the trial court's Orders simply allowed the case to go forward. Mr. von Herrmann and his law firm remain free to mount a full defense against the merits of Respondents' statutory claim.

Further, the trial court's initial Order determining that the attorney-client privilege and work-product doctrine are not applicable in this case is an evidentiary ruling. *See Drayton*, 205 S.C. at 108, 31 S.E.2d at 152. As with other evidentiary rulings made by a trial court, Mr. von Herrmann and his law firm have the right to question the correctness of the trial court's ruling in any appeal from the final judgment rendered in the case.

As a practical matter, the only immediate effect of the trial court's Orders is to require Mr. von Herrmann to disclose in pretrial discovery the communications he had with Fulmer regarding the text messages Fulmer intercepted from Respondent Anna Coggeshall's iWatch. As detailed in Argument Part I, above, such discovery orders are not the proper subject of an interlocutory appeal even if it is alleged they intrude upon the attorney-client privilege. *See Wieters,* 381 S.C. at 332-33, 673 S.E.2d at 418; *Tucker*, 354 S.C. at 577, 582 S.E.2d at 407.

Next, Mr. von Herrmann contends that the Court of Appeals should have taken the time to opine on his claim of attorney immunity much like the court in *Brown* addressed qualified

immunity for governmental actors under the Tort Claims Act. Notably, Mr. von Herrmann does not provide any legal authority to support his argument that the lack of discussion on attorney immunity in the Court of Appeals' opinions qualifies as a legitimate basis for this Court's grant of the Petition for Writ of Certiorari.

As discussed in Argument Part I, above, a nonfinal order is immediately appealable only if it meets the qualifications set forth in S.C. Code Ann. § 14-4-330. Mr. von Herrmann fails to show that the Court of Appeals' lack of substantive discussion on common-law attorney immunity affected his substantial rights under § 14-4-330(2) by "discontinu[ing] an action, prevent[ing] an appeal, grant[ing] or refus[ing] a new trial, or strik[ing] out an action or defense." *Edwards*, 369 S.C. at 94, 631 S.E.2d at 530.

Notably, when the trial court denied Petitioners' Motion for Reconsideration of the Order denying their motion to dismiss Respondents' claim for violation of the South Carolina Homeland Security Act, that court issued a lengthy opinion on the merits of the attorney immunity claim. **Appx. 27-28.** Having been persuaded Respondents' reasoning in the matter, the trial court's Order stated:

> 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 if 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 [sic] § 17-30-65. The only exception for court proceedings is set forth in South Carolina code [sic] § 17-30-75, which allows for disclosure while giving testimony under oath in criminal and 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 [Petitioners'] Motion for Reconsideration is denied.

Appx. 27-28.

In dismissing Petitioners' appeal as interlocutory, the Court of Appeals let stand the trial court's reasons for denying Petitioners' motion to dismiss. **Appx. 33, 35.** It is reasonable to presume that the Court of Appeals, in declining to contradict or impugn the trial court's Order Denying the Motion to Reconsider in any respect, found no fault with the trial court's analysis and application of law.

In any event, Petitioners have not established a viable basis for this Court to grant their Petition for Writ of Certiorari. As Rule 242(b), SCACR, emphasizes: "A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Petitioners have not shown the existence of any "special and important reasons" that would justify immediate review of the trial court's Orders denying their motion to dismiss Respondents' claim for violation of the South Carolina Homeland Security Act.

III. THE COURT'S INTEREST IN JUDICIAL ECONOMY WILL NOT BE SERVED BY GRANTING THE PETITION

Contrary to Petitioners' contentions, judicial economy will not be served by granting the Petition for Writ of Certiorari and allowing the interlocutory appeal to proceed. In arguing otherwise, Mr. von Herrmann mistakenly relies on *Ex parte Wilson*, 367 S.C. 7, 625 S.E.2d 205 (2005). Although the *Wilson* court did take the opportunity to clarify the procedure for discovery under Rule 69, SCRCP, it nevertheless "dismiss[ed] the appeal because the order quashing the

subpoena duces tecum [was] not immediately appealable." *Wilson*, 367 S.C. at 16, 625 S.E.2d at 209.

Here, there is no procedure for the Court to clarify. Instead, it is clear that the trial court's Orders, which are tantamount to orders directing discovery to proceed, are interlocutory and, therefore, they are not subject to immediate appeal. *See Wieters*, 381 S.C. at 332-33, 673 S.E.2d at 418. Consequently, the Court of Appeals correctly dismissed the interlocutory appeal, and Appellants' Petition for Writ of Certiorari should be denied.

Finally, Mr. von Herrmann advocates that this Court immediately address the substantive issue as to whether attorneys who act in the representation of a client may be held liable for violation of the South Carolina Homeland Security Act, S.C. Code Ann. §§ 17-30-10, et seq.. In making this argument, Mr. von Herrmann misrepresents the status of the appeal of the Buchannon Action[4].

Fulmer brought the Buchannon Action against Respondents herein and other Co-Defendants, including judge Melissa Buchannon. Accordingly, this Court may take judicial notice of the pleadings, jury verdict, and court orders issued in the Buchannon Action. *See* Rule 201(b), SCRE ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984) ("A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records"); *see also Lucht v. Youngblood*, 266 S.C. 127, 134, 221 S.E.2d 854, 858

[4] *See* n.2, *supra.*

(1976) ("Generally, the prior pleadings in an action may be received in evidence against the pleader").

Fulmer's appeal in the Buchannon Action, which is presently pending before the South Carolina Court of Appeals, does not in any way question the jury's verdict or damages award in favor of Respondent Anna Coggeshall on her Counterclaim against Fulmer for violation of the South Carolina Homeland Security Act. Rather, that appeal involves only the amount of attorney's fees imposed against Fulmer.

Thus, it has been definitively determined that Fulmer violated the South Carolina Homeland Security Act by unlawfully intercepting and using text messages from Respondent Anna's iWatch in the litigation. The only question that remains is whether Mr. von Herrmann and his law firm are equally liable under the Act for knowingly using the unlawfully intercepted text messages in the course of their legal representation of Fulmer.

Under the circumstances, Mr. von Herrmann's suggestion that the disclosure in pretrial discovery of any attorney-client privileged and work-product doctrine material generated in the Buchannon Action would somehow harm Fulmer's appeal is disingenuous at best. Instead, it is clear that Mr. von Herrmann seeks to avoid disclosure of this material in pretrial discovery because the material is likely adverse to his own interest. This is not a credible basis for the grant of a Petition for Writ of Certiorari to allow an interlocutory appeal of the matter.

In further contravention to Mr. von Herrmann's contentions, no conflict exists between the trial court's Orders and the Court of Appeals' decision. This argument is apparently based on the Court of Appeals' reference to *McLendon*. **Appx. 33.** In *McLendon*, this Court stated: "Like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the

law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings." *McLendon*, 313 S.C. at 526 n.2, 443 S.E.2d at 540.

McLendon recites is a general rule of procedure. It does not address the applicability of the common-law doctrine of attorney immunity or the evidentiary attorney-client privilege. Because the language of the various Orders issued by the trial court and the Court of Appeals is consistent, the Orders must be construed together and harmonized. *First Nat'l Bank v. Iredell Land Co.*, 60 S.C. 306, 308, 38 S.E. 613, 614 (1901).

Finally, it may be noted that Respondents are confident that the substantive issues at stake in this case will ultimately be resolved in their favor, to wit, that the courts will conclude that attorneys are persons who are subject to the dictates of the South Carolina Homeland Security Act and that Mr. von Herrmann and his law firm are civilly liable for violation of the Act. Respondents, however, are content to have these issues resolved in due time and in the proper procedural manner. It is respectfully submitted that, at this early juncture, the Court should allow the case to proceed before the trial court so that the evidentiary record can be fully developed through pretrial discovery.

Conclusion

For the foregoing reasons, Appellants' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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