

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

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S.C. SUPREME COURT

Appellate Case No. 2024-000786
Order Dismissing Appeal, Dated August 14, 2024

Anna Coggeshall; Bryan Coggeshall; and Katherine CoggeshallRespondents

v.

William Bertram von Herrmann and The Von Herrmann Law Firm.Petitioners.

**PETITIONERS' REPLY TO
RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI**

Mr. von Herrmann and his law firm petitioned this Court for writ of certiorari to the Court of Appeals to review a final order dismissing the appeal as interlocutory, filed August 14, 2024. Respondents filed a return to the petition. Pursuant to Rule 242(g), Petitioners submit this Reply.

Argument

Respondents' arguments in their Return attempt to confuse the issues and are internally inconsistent which warrants, at the very least, a close inspection of the petition for appealability. First, Respondents appear to be intentionally misconstruing the trial court's decision as one based on a discovery privilege over one that purports to finally rule on a defense. Second, Respondents assert the appeal is interlocutory by too narrowly construing section 14-3-330 and comparing it to

the present facts. This Court should grant the Petition to rule on appealability, and take up the underlying legal issue that is ripe for review even at this early stage.

I. Respondents’ argument that the appeal is interlocutory confuses a material difference between an evidentiary privilege and a defense to liability, and Respondents arguments establish the trial court ruled on the merits of a defense that make the order appealable under 14-3-330.

Respondents’ arguments to convince this Court that the appeal is interlocutory rest on a flawed basis—a flawed basis repeated from their return to the petition for rehearing before the Court of Appeals that Petitioners attempted to correct in their reply, which suggests the representation is intentional.

Respondents recite the basic law for appealability and section 14-3-330, and state the appealed order did not affect a substantial right. **Return at 6.** But then Respondents misconstrue Petitioners’ arguments and repeatedly refer to the trial court’s order as one relating to *attorney-client privilege*. **Return at 6-7** (“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.”); **Return at 7** (arguing the trial court barred Petitioners “from raising the attorney-client privilege going forward,” that it is an evidentiary ruling, and “[i]t is not tantamount to the striking of a defense that affects a substantial right”). The flawed arguments continue throughout the Return.

Petitioners are not arguing they are barred from asserting a privilege. Petitioners clearly argue that the trial court’s order affected a substantial right under 14-3-330 because the ruling Petitioners “cannot assert the defense going forward” has the effect of striking the attorney immunity defense. Contrary to Respondents’ arguments, the trial court did not rule on anything

related to Mr. von Herrmann's privilege with his client, Justin Fulmer, and did not find Mr. von Herrmann must produce documents.

Respondents otherwise argue the trial court's order did "not in any way address the merits of the action." **Return at 10.** However, this argument is based on a misunderstanding of section 14-3-330 and is belied by Respondents' own statements.

In support of their argument, Respondents assert the trial court did not rule on Petitioners' liability under the Homeland Security Act. **Return at 10.** Likewise, Respondents assert that the trial court's order "did not address the merits of Respondents' claim that [Petitioners] were civilly liable for violating the . . . Homeland Security Act in the course of their pursuit of the Buchannon Action." **Return at 11.** Respondents focus too narrowly on the merits of their claim, to the exclusion of rulings on the merits of defenses. Section 14-3-330(2) explicitly applies to orders that strike any part of any pleading in any action, and case law interpreting section 14-3-330(1) hold orders involve the merits when they finally determine a substantial matter forming even part of a claim or defense. *See Stone v. Thompson*, 426 S.C. 291, 294, 826 S.E.2d 868, 869-70 (2019). Appealability law sanctions interlocutory appeals finally ruling on defenses. Thus, the fact that the trial court did not rule on *Respondents' claim* is of no consequence to appealability when the trial court purported to finally rule on *Petitioners' defense* of attorney immunity.

In addition, Respondents' position that the trial court did not rule on the merits is contrary to their own arguments: noting the trial court "issued a lengthy opinion on the merits of the attorney immunity claim." **Return at 12.** Respondents' arguments are in direct conflict because both cannot be true—that the trial court "did not in any way address the merits of the action" and yet the trial court "issued a lengthy opinion on the merits of the attorney immunity claim."

Respondents' latter arguments are an acknowledgment that the court ruled on the merits of a defense, and that it purported to finally rule on it by preventing Petitioners from raising it further.

Respondents further argue it is "reasonable to presume" the Court of Appeals "found no fault with the trial court's analysis and application of law." **Return at 13**. Respondents also assert that the trial court and Court of Appeals orders are consistent and should be read together. **Return at 16**. Respondents' arguments imply the Court of Appeals agreed with the trial court's decision that attorney immunity does not apply under the Act, which is not consistent with the Court of Appeals' ruling that "the issue raised by the motion can be raised again at a later stage of the proceedings." **Appx. at 33**. If the orders are consistent and should be construed together as Respondents argue, then the trial court's ruling preventing Petitioners from raising the defense in continued litigation would be a final ruling on the merits of the defense, effectively striking it from the case and bringing this appeal decidedly within the purview of section 14-3-330.

Last, Respondents contend judicial economy would not be served by deciding the attorney immunity issue now, and advocate this Court should allow for full litigation and discovery. However, the posture of the case and legal issue, and the requirements for immunity and Respondents' allegations support reviewing the issue now for the sake of judicial efficiency.

First, the issue of whether the common-law attorney immunity defense is abrogated by the South Carolina Homeland Security Act is a purely legal question, the answer for which depends on statutory interpretation and legislative intent. No facts about the case are relevant for this Court to resolve that issue and, therefore, any factual discovery and a trial are unnecessary. Thus, if this Court finds the issue not immediately appealable, it would force the parties and the court to incur unnecessary costs in litigation that are unnecessary to the issue at hand. That is uneconomical and inefficient. If, on the other hand, the Court finds the issue immediately appealable or otherwise

addresses the immunity issue now, it would either (1) decide immunity applies, saving the parties and courts costs and time, or (2) decide immunity does not apply, which would settle the legal issue now and make it necessary for the parties to continue litigation. Judicial economy thus favors finding the issue immediately appealable or otherwise addressing attorney immunity now.

Second, the requirements for attorney immunity and Respondents' allegations further support that discovery is unnecessary and the issue is ripe for review for the sake of judicial economy. Attorney immunity under *Gaar* is qualified, not absolute, and shields only liability to third parties for attorney actions that take place in the course and scope of representing a client. *See Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995) (finding attorneys immune under *Gaar* from liability to third persons unless the attorney breaches an independent duty to that third person or acts in his or her own interest, outside the scope of representing the client.).

Here, Respondents allege Petitioners should be liable for actions they took in representing a client, and do not otherwise allege that Petitioners owed an independent duty to Respondents or that Petitioners acted outside the scope of their representation of Mr. Fulmer. Thus, even if the factual allegations of the case are considered, the issue of attorney immunity is squarely raised because Respondents allege Petitioners should be liable for actions in scope of representing a client: "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." **Return at 15**. Therefore, there is no need to further develop other facts to decide whether Petitioners are entitled to immunity separate from the legal question of whether the Act abrogates attorney immunity. Refusing to address the issue now will only require the parties and courts to be burdened with costs and years of time that would be unnecessary if attorney immunity is addressed now.

Indeed, despite trying unnecessarily to drag out litigation, Respondents are confident that this Court will decide the attorney immunity issue in their favor. **Return at 16** (“Respondents are confident . . . that the courts will conclude attorneys are persons who are subject to the dictates of the South Carolina Homeland Security Act and that [Petitioners] are civilly liable for violation of the Act.”). Respondents misstate the issue—there is no dispute that the Act applies to attorneys as a class of people, but the question is whether they are immune in limited circumstances under the common law—but Petitioners are likewise confident that this Court will decide the Act did not abrogate attorney immunity and that Petitioners are immune from Respondents’ claims, whether this Court decides the appeal now or decides it after unnecessary and costly litigation.

COPELAND, STAIR, VALZ & LOVELL, LLP

January 10, 2025.

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