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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Jessica Ann Salvini, Circuit Court Judge

Civil Action No. 2024-CP-10-04202

Appellate Case No. 2025-000355

Hulsey Law Group, LLC,

Respondent,

v.

Robin M. Schoepfel, Jessica Lynn Schoepfel, and Nicolas Mark Schoepfel,

Appellants.

APPELLANTS' INITIAL BRIEF (REDACTED)

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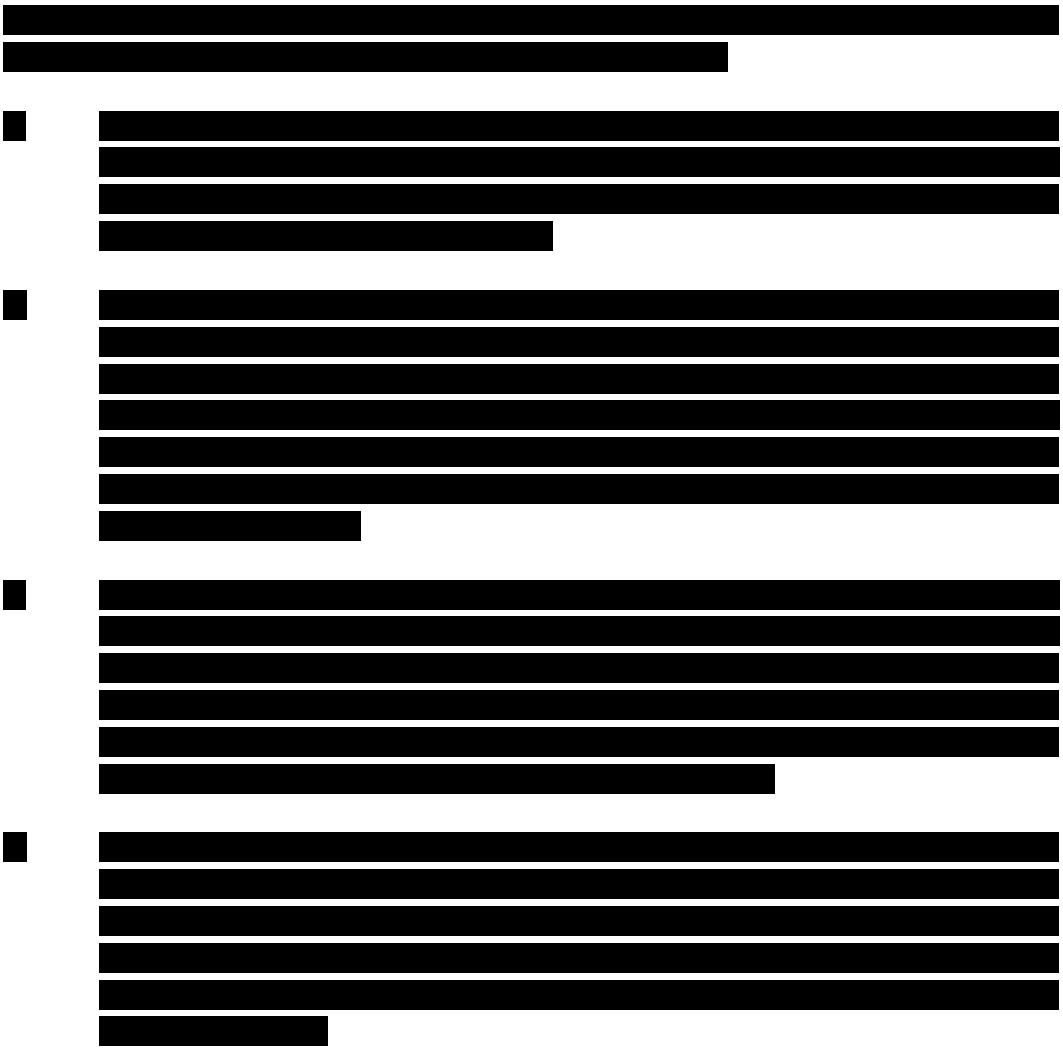
STATEMENT OF THE CASE AND FACTS[1]

On December 11, 2022, Jeffrey Schoepfel died under suspicious circumstances, allegedly committing suicide in the presence of Summer Hall ("Ms. Hall") the night after their wedding celebration at the Montage Palmetto Bluff Resort in Bluffton, South Carolina. Ms. Hall claims that months earlier, she had married Jeffrey Schoepfel pursuant to California's confidential marriage statute and thus was entitled to a portion of his estate as his surviving spouse. Not only do the Schoepfels dispute that Ms. Hall had legally married Jeffrey Schoepfel, but they also suspect, on information and belief, that Ms. Hall may be barred from any recovery under applicable South Carolina statutes.

The Schoepfels retained Paul Hulsey and Cherie Durand of HLG to represent them in their legal disputes with Ms. Hall. Pursuant to a Contract of Representation with HLG, the Schoepfels agreed to pay an hourly rate for HLG to [redacted] (Ex. A to MTD Memo.) The Contract stated: [redacted] (*Id.*) HLG and the Schoepfels executed an Amendment to Contract Representation on January 31, 2023. (Ex. B to MTD Memo.) The

[1] Appellants combine the statement of the case and statement of the facts to eliminate repetition due to considerable overlap between the procedural history and the facts in this case.

Amendment purportedly provided for a contingency fee related to the Estate of Jeffrey Schoepfel, stating:



(*Id.*)

Until March 8, 2024, HLG represented the Schoepfels in various litigation against Ms. Hall, including in Case No. 2023-CP-10-02649, pending in the Court of Common Pleas, Ninth Judicial Circuit of Charleston County; Case No. 2023-ES-10-33, pending in the Probate Court of Charleston County; and Case No. 2:23-CV-814-RMG, pending in the U.S. District Court for the District of South Carolina (collectively, the "Litigation"). On March 8, 2024, the Schoepfels discharged HLG for cause and paid all of HLG's legal fees that were outstanding at that time.

Later, HLG submitted additional invoices to the Schoepfels for work allegedly done prior to the discharge. The Schoepfels have disputed these invoices.

After being discharged by the Schoepfels, HLG retaliated by sending multiple letters making numerous factually and legally baseless threats against third parties for supposedly playing a role in the Schoepfels' decision to terminate HLG for cause. These third parties included the company that Jeffrey Schoepfel founded, GSP Transportation, Inc., and those associated with it. HLG also made numerous unfounded threats against the Schoepfels' current counsel, seeking to interfere with their attorney-client relationship and impede the Litigation until their demands were satisfied.

These threats culminated in HLG disseminating a draft complaint that disclosed privileged and confidential information from the Litigation. (Third-Party Compl.; Virzi Aff.) The complaint styled the Husley Law Group as the prospective plaintiff and GSP Transportation, its management, and other unidentified entities as the prospective defendants. (Third-Party Compl.; Third-Party Defs Mtn. to Dismiss.) The Schoepfels did not authorize HLG to disclose any privileged and confidential information. The draft complaint, and the privileged and confidential information contained therein, was ultimately disclosed to counsel for Ms. Hall. (Third-Party Compl.; Virzi Aff.; Ex. to Memo.) The Schoepfels have incurred legal fees to remedy HLG's authorized actions and to respond to HLG's continued threats and extortion.

HLG initiated this action against the Schoepfels on August 19, 2024, raising causes of action for: (1) breach of contract; (2) fraud/fraudulent inducement; (3) civil conspiracy – constructive trust; and (4) prejudgment interest on liquidated damages. (Compl.) HLG also included a request for a declaratory judgment in its wherefore clause. HLG has continued to

disseminate the Schoepfels' confidential and privileged information by including such information within its publicly filed complaint in this action.

The Schoepfels filed an answer and counterclaims against HLG for: (1) breach of fiduciary duty; (2) legal malpractice; and (3) declaratory judgment. (Ans.) In support of their counterclaims, the Schoepfels filed the September 23, 2024 affidavit of Micheal J. Virzi, who testified that, in his professional opinion, HLG "failed to exercise the degree of care, skill, knowledge and judgment usually possessed and exercised by members of the legal profession and breached duties of competence, diligence, loyalty, deference, reasonable billing, and communication owed to" the Schoepfels. (*Id.*) On October 14, 2024, the Schoepfels filed various motions, including a motion to dismiss, motion for temporary injunction, motion to stay, motion to strike the complaint, and a motion to seal certain exhibits and confidential information contained in the filings.

In support of their motion for a temporary injunction, the Schoepfels submitted the October 14, 2024 affidavit of Michael J. Virzi. (Oct. Virzi Aff.) Mr. Virzi has taught professional responsibility at the University of South Carolina Joseph F. Rice School of Law for more than ten years and has focused his practice exclusively on legal ethics, malpractice, and lawyer discipline since 2003. (Sept. Virzi Aff.) Mr. Virzi reviewed numerous documents, including the filed pleadings, the draft complaint disseminated by HLG, and communications from HLG. (*Id.*) He testified HLG breached the duties of confidentiality, competence, diligence, and loyalty owed to the Schoepfels by disclosing confidential and privileged information about the Litigation in retaliation for HLG's termination. (*Id.*) As explained by Mr. Virzi, HLG continued to owe these duties to the Schoepfels despite the termination as there are "no exception[s] to either the duty of confidentiality or the attorney-client privilege" that "would allow Plaintiff or its lawyers to disclose confidential communications between Plaintiff" and the Schoepfels in this manner. (*Id.*)

HLG opposed the motions, and the circuit court held a hearing on October 31, 2024. (Hrg Tr.)

On November 22, 2024, HLG filed a third-party complaint against John T. Lay and Gallivan, White & Boyd, P.A.[2], requesting equitable indemnification from the third-party defendants.[3] (Third-Party Compl.) In the Thid-Party Complaint, HLG admitted to sharing a copy of the draft complaint containing "confidential information about [HLG's] legal strategy and the facts [HLG] had discovered" with counsel for GSP Transportation. (Th. Party Compl. ¶ 23) Specifically, HLG blames the third-party defendants for "publicizing the thought processes and legal strategy of [HLG and its] work product, *i.e.*, the proposed lawsuit against Cross, Meyer and Sparkman, as well as the facts which disclose Hall's sham marriage and responsibility of the death of the decedent." (Th. Party Compl. ¶ 27) HLG also admitted in the Third-Party Complaint that the disclosure of such information "caused substantial harm to . . . its former clients," the Schoepfels. (Th. Party Compl. ¶ 24)

On November 27, 2024, the circuit court ruled on the various pending motions by issuing Form 4 orders. The circuit court summarily denied the Schoepfels' motion to stay, without prejudice, and motion to dismiss. (Or. Denying Mtn. to Stay; Or. Denying Mtn. to Dismiss.) The circuit court granted the motion for temporary injunction in part and denied it in part, stating:

> Plaintiff does not object to Defendants' request for the return of their entire legal file maintained by Plaintiff. Thus, Plaintiff shall provide the same to the Defendants forthwith.[4] Defendants' request for an order restraining or enjoining Plaintiff from disseminating confidential and/or attorney-client privileged information is any way is denied. Defendants acknowledge that their motion is for an order directing the

[2] Mr. Lay represents GSP Transportation. He does not and has not represented Appellants.
[3] The Schoepfels filed a motion to strike the third-party complaint, and the third-party defendants filed a motion to dismiss it. (Mtn. Strike; Mtn. Dismiss.)
[4] HLG initially refused to provide the Schoepfels with their entire legal file despite numerous requests following HLG's termination. However, at the hearing, HLG agreed it would provide the file and did so on November 26, 2024.

> Plaintiff not to violate the South Carolina Rules of Professional Conduct. Plaintiff acknowledged they are duty bound to abide by the South Carolina Rules of Professional Conduct. Further, to the extent Defendants alleged the Plaintiff has violated these rules, the remedy would be to report the violator(s) to the South Carolina Office of Disciplinary Counsel.

(Or. on Mtn. Temp. Inj.) The circuit court granted the Schoepfels' motion to seal and denied the motion to strike, directing the confidential information in the Complaint be sealed instead of stricken. (Or. Denying Mtn. Strike; Or. Granting Mtn. Seal.)

On December 9, 2024, the Schoepfels filed a motion requesting the circuit court to reconsider its rulings on the motion for temporary injunction, motion to dismiss, and motion to stay. (Mtn. Reconsider.) In further support of the motion for temporary injunction, the Schoepfels submitted a communication from counsel for Summer Hall in the pending litigation, requesting an unredacted version of the draft complaint discussed in the motion for temporary injunction that Plaintiff disseminated to a third party and claiming the privilege had been waived. (Ex. A to Mtn to Reconsider.) The communication was received days after HLG filed the third-party complaint admitting that it shared the Schoepfels' purported confidential and privilege information with a third party. The Schoepfels argued the continued disclosure of purported confidential information in the third-party complaint illustrated why the temporary injunction was necessary and the resultant irreparable harm to the Schoepfels. The Schoepfels further requested the circuit court to reconsider its ruling on the motions to dismiss and stay, and to issue a detailed formal order ruling on the motions.

The circuit court issued an initial order indicating it would decide the motion to reconsider on written submissions and directing the parties to file any additional briefs within the schedule set by the court. (Initial Or.) The Schoepfels filed a Memorandum in Support of the Motion on

January 9, 2025. (Mtn Reconsider Memo.) HLG did not file any written submissions on the motion to reconsider.

The circuit court denied reconsideration on January 28, 2025. (Or. Denying Reconsideration.) Appellants timely filed a Notice of Appeal on February 26, 2025. (Notice of Appeal.)

STANDARD OF REVIEW

"The grant or denial of an injunction by the [circuit] court will not be reversed absent an abuse of discretion." *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 463, 626 S.E.2d 38, 41 (Ct. App. 2005), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010). "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." *Id.*

"An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action." *Cap. City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). "Under Rule 12(b)(6)[of the South Carolina Rules of Civil Procedure,] a defendant may make a motion to dismiss based on a failure to state facts sufficient to constitute a cause of action." *Baird v. Charleston Cty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). The Court should "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." *FOC Lawshe Ltd. P'ship v. Int'l Paper Co.*, 352 S.C. 408, 412, 574 S.E.2d 228, 230 (Ct. App. 2002) (quoting Rule 12(b)(6)). The Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Builder Mart of Am., Inc. v. First Union Corp.*, 349 S.C. 500, 512, 563 S.E.2d 352, 358 (Ct. App. 2002), *overruled on other grounds by Farmer v. Monsanto Corp.*, 353 S.C. 553, 579 S.E.2d 325 (2003) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *see also Carolina Winds*

Owners' Ass'n, Inc. v. Joe Holden Builder. Inc., 297 S.C. 74, 76, 374 S.E.2d 897, 899 (Ct. App. 1988) ("A motion under Rule 12(b)(6) or Rule 12(c) admits the well pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law.").

"Generally, a ruling on a motion to dismiss under Rule 12(b)(6), SCRCP must be based solely on the allegations contained in the complaint." *Chewning v. Ford Motor Co*., 346 S.C. 28, 32, 550 S.E.2d 584, 586 (Ct. App. 2001). However, the Court may also consider documents referred to in the Complaint, even if not formally attached or incorporated, when the authenticity of the document is not disputed. *Greenberg v. Life Inc. Co*., 177 F.3d 507, 514 (6th Cir. 1999); *Farrino v. Fhp. Inc*., 146 F.3d 699 (9th Cir. 1998); *Cortec Industries, Inc. v. Sum Holding L.F*., 949 F.2d 42, 47 (2nd Cir. 1991). Considering such documents supports the policy of "[p]reventing plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting references to documents upon which their claims are based." *Farrino*, 146 F.3d at 706; *see also Cortec*, 949 F.2d at 47 ("[W]hen a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint, the defendant may produce the document when attacking the complaint for its failure to state a claim because plaintiff should not so easily be allowed to escape the consequences of its own failure.").

South Carolina has recognized this practice in considering whether to dismiss a case. *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) (overruled on other grounds) (considering the content of the entire contract when ruling on the enforceability of an arbitration agreement in the 12(b)(6) context); *Christensen v. Mikel*, 324 S.C. 70, 73, 476 S.E.2d 692, 694 (1996) (construing meaning and coverage of a title insurance policy at the 12(b)(6) stage and granting a motion to dismiss).

"The granting of a motion for a stay of proceedings rests entirely within the discretion of the trial [court]." *City of Spartanburg v. Belk's Dep't Store of Clinton*, 199 S.C. 458, 20 S.E.2d 157, 167 (1942). Such discretion, however, is not unlimited. A court, for example, should grant a stay when doing so would serve the interests of the parties or protect a party from an unjust result. *Talley v. John-Mansville Sales Corp.*, 285 S.C. 117, 118–20, 328 S.E.2d 621, 622–23 (1985) (determining that circuit court abused its discretion by not staying cases against various defendants, even though the cases were approaching trial and the stay could delay resolution of the cases for years). A stay is also appropriate when a controlling issue in the case is currently pending in another case. *Piedmont Press Ass'n v. Rec. Pub. Co.*, 156 S.C. 43, 152 S.E. 721, 728 (1930) (staying case because a forthcoming decision in another case would resolve a threshold issue in the instant case). Avoiding possible inconsistent judgments is yet another reason to stay a proceeding. *Merritt Bros. v. Marine Midland Realty Credit Corp.*, 307 S.C. 213, 216, 414 S.E.2d 167, 169 (1992).

ARGUMENT

I. The circuit court erred in refusing to enjoin HLG from continuing to disseminate its former clients' privileged and confidential information.

The circuit court erred in refusing to issue a temporary injunction to prevent HLG from continuing to disseminate confidential and privileged information it learned while representing the Schoepfels.

A court should grant a temporary injunction when "necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." *Poynter Invs., Inc.*, 387 S.C. at 586–87, 694 S.E.2d at 17. "The determination of whether to grant

an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing [justifying the injunction] has been made." *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2005). "The sole purpose of a temporary injunction is to avoid irreparable injury to a plaintiff pending final adjudication of a case." *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992). "Whether 'a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules.'" *Levine*, 367 S.C. at 464, 626 S.E.2d at 41 (quoting *Kirk v. Clark*, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939)). When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right; the plaintiff need only present "a fair question to raise as to the existence of such a right." *Id.* at 465, 626 S.E.2d at 42 (quoting *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912)).

The Schoepfels sufficiently demonstrated that they have suffered and will continue to suffer irreparable harm if the circuit court did not grant the temporary injunction. The Schoepfels have not authorized HLG to disclose their privileged and confidential information to anyone, and HLG's ongoing failures to abide by its fiduciary duties and the confidences afforded by the attorney-client privilege cause continued harm to the Schoepfels. HLG owes strict confidences to the Schoepfels arising out of the attorney-client relationship and must protect any information disclosed to it during the relationship. *See Wilson v. Preston*, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008) ("The attorney-client privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained.").

HLG has admitted to disseminating confidential and privileged client information to a third party—Mr. Lay, counsel for GSP Transportation—by circulating a draft complaint that included "confidential information about [HLG's] legal strategy and the facts [HLG] had discovered" prior to filing the instant action. (Thr. Party Compl. at ¶ 22.) HLG admitted in the Third-Party Complaint that the disclosure of such information "caused substantial harm to . . . its former clients," the Schoepfels. (Th. Party Compl. at ¶ 24.) HLG then continued to disseminate confidential and privileged information by including such information within its publicly filed Complaint in this action. Even after the Schoepfels requested this information be stricken or sealed, HLG continued to disseminate confidential information by filing the Third Party Complaint.

Notably, at the hearing, HLG objected to sealing any information in this case and argued that Rule 1.6(b) of the South Carolina Rules of Professional Conduct gave it an absolute right to disclose any and all confidential information because it brought an action against its former clients for payment of fees. (Hrg. Tr. at 14, 25.) HLG even went so far as to argue that the Schoepfels and their new counsel "should have thought about all that before they disengaged" HLG. (Hrg. Tr. at 25.) HLG's interpretation of Rule 1.6(b) has no merit. While Rule 1.6(b) states that a lawyer "may reveal information relating to the representation of a client . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client," he may only do so "to the extent the lawyer reasonably believes necessary." As explained by Mr. Virzi, HLG "gross[ly] misunderstand[s]" Rule 1.6, which is "limited to disclosing only so much information as reasonably necessary to defend against the claims asserted against the lawyer or establish the amount due in a fee collection action" and cannot be used to bring claims against third parties. (Oct. Virzi Aff.)

Rule 1.16(d) of the South Carolina Rules of Professional Conduct confirms that the duty of confidentiality continues after termination, stating: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests[.]" Here, HLG has taken no steps to protect the Schoepfels' information, and instead has actively prevented its protection by objecting to sealing it. As explained by Mr. Virzi, there are "no exception[s] to either the duty of confidentiality or the attorney-client privilege" that "would allow Plaintiff or its lawyers to disclose confidential communications between Plaintiff" and the Schoepfels in this manner. (Oct. Virzi Aff.)

The Litigation is still ongoing. As a result of HLG's actions, highly-sensitive privileged and confidential information was disclosed to counsel for an adverse party in the Litigation. If HLG continues to disseminate privileged and confidential information to third parties and in public filings, it will further interfere with and impede the Litigation.

Instead of properly analyzing whether the Schoepfels met the requisite factors for a temporary injunction, the circuit court improperly relied on HLG's counsel's assertion that the court did not need to impose a temporary injunction because "as long as Plaintiff is represented by its current counsel, there will be no violation of attorney-client privilege or breach of confidentiality." (HLG Memo at pp. 5–6.) Specifically, in the order, the circuit court stated: "Plaintiff acknowledged they are duty bound to abide by the South Carolina Rules of Professional Conduct." (Or.) However, HLG's unsubstantiated and qualified representation that it would not disclose confidential information in no way alleviated the need for an injunction, especially in light of the HLG's past disclosures of privileged information, the current disclosures occurring in the Complaint in this case, and HLG's objections to the Schoepfels filing documents involving confidential information under seal in the case. Other than conclusory assertions, HLG did not

address the elements of a temporary injunction or make any arguments as to why the Schoepfels were not entitled to one.

The Schoepfels identified specific instances where HLG's disclosure of protected information harmed them, including an instance where a complaint HLG drafted was disseminated to Summer Hall's counsel. HLG admitted it shared the draft complaint with third parties. (HLG Memo at p. 6; Third-Party Complaint.) However, HLG claimed it was not responsible because it did not directly send the complaint to Hall's counsel. This in no way absolves HLG from disclosing confidential information to a third party in the first place. The Schoepfels' privileged and information should never have been shared with anyone and, if HLG did not improperly disclose it, it would not have been shared with Hall's counsel. The Rules of Professional Conduct prohibit an attorney from sharing confidential client information with anyone, not just the opposing party. HLG owed a duty to the Schoepfels to not divulge confidential information learned in the course of their representation. They have now admitted that they utilized confidential information in drafting a complaint and shared that draft complaint with a third party. This is a breach of their duties to the Schoepfels. The fact that the information was subsequently shared with opposing counsel only illustrates the gravity of the situation and the threat of irreparable harm the Schoepfels face without an injunction.

As further evidence of the irreparable harm caused by HLG's continued disclosures of confidential information, the Schoepfels submitted a communication from counsel for Summer Hall in the Litigation, requesting an unredacted version of the draft complaint discussed in the motion for temporary injunction that HLG disseminated to a third party and claiming the privilege has been waived. (Ex. A to Mtn to Reconsider.) The communication was received days after HLG filed the third-party complaint admitting that it shared the Schoepfels' purported confidential and

privilege information with a third party. The continued disclosure of confidential information in the third-party complaint illustrates why the temporary injunction is necessary and the irreparable harm the Schoepfels will suffer if one is not issued.

Contrary to the circuit court's ruling, there is no other adequate remedy at law. The circuit court denied the injunction, finding "the remedy" for an attorney's violation of the Rules of Professional Conduct "would be to report the violator(s) to the South Carolina Office of Disciplinary Counsel." (Or.) This is a unique case where the litigation HLG represented the Schoepfels in is still ongoing, and the confidential information that HLG has disclosed (and is likely to continue to disclose) will have a detrimental impact on the pending litigation and cause irreparable harm to the Schoepfels. Reporting HLG to the Office of Disciplinary Counsel ("ODC") will not prevent or remedy the irreparable harm to the Schoepfels and, therefore, is not an adequate remedy at law to justify denying the injunction.

A report to ODC for a violation of the South Carolina Rules of Professional Conduct does not prevent it from continuing to occur. Once the violation occurs, irreparable harm occurs, and HLG has demonstrated that it will continue to violate its duties to the Schoepfels. There is no remedy other than the circuit court ordering HLG to stop. Without the temporary injunction, the Schoepfels will suffer irreparable harm in the Litigation long before any ODC complaint is resolved.[5] *See Levine*, 367 S.C. at 467, 626 S.E.2d at 43 (granting a temporary injunction to prevent a doctor from losing her privileges at a hospital because if she did, "her professional practice and, by extension, her career may very well be lost long before her claims against the

[5] ODC receives thousands of complaints about lawyer misconduct each year. For example, from July 1, 2023 to June 30, 2024, there were 3,948 complaints pending and received by ODC. *See, e.g.*, 2023-2024 Annual Report of Lawyer Discipline in South Carolina, South Carolina Judicial Branch Office of Disciplinary Counsel, *available at* https://www.sccourts.org/media/gsqlt2ke/clc2024.pdf.

Hospital and Foothills were finally adjudicated"). The purpose of ODC is to investigate and sanction attorney misconduct so that the misconduct does not happen to other citizens. It is not a proper remedy for clients that have suffered harm due to attorney misconduct or to immediately prevent the harm from occurring to maintain the status quo in litigation.

Finally, the Schoepfels sufficiently demonstrated they were likely to succeed on the merits on their counterclaims against HLG for (1) breach of fiduciary duty, (2) legal malpractice, and (3) declaratory judgment. The Schoepfels submitted two affidavits of Michael J. Virzi to the circuit court—one in support of their legal malpractice claim and another in support of their motion for temporary injunction. In his affidavits, Mr. Virzi outlines HLG's specific instances of breach of their duties to the Schoepfels, and opines that HLG "failed to exercise the degree of care, skill, knowledge and judgment usually possessed and exercised by members of the legal profession and breached duties of competence, diligence, loyalty, deference, reasonable billing, and communication owed to" the Schoepfels. (Sept. Virzi Aff.) Additionally, HLG admitted that it used the Schoepfels' confidential information in the draft complaint and shared that information with a third party.

Accordingly, the circuit court erred in refusing to issue a temporary injunction against HLG to prevent it from continuing to disclose the Schoepfels' privileged and confidential information.

II. The circuit court erred by summarily denying the motion to dismiss HLG's claims based upon an unenforceable contract.

The circuit court abused its discretion by summarily denying the motion to dismiss. The circuit court's Form 4 Order did not substantively address whether HLG's complaint stated sufficient facts to support its causes of action. Instead, the Form 4 Order included a summary dismissal with no analysis of the issues or the circuit court's reasoning for denying the motion.

a. Breach of Contract

The circuit court erred in refusing to dismiss HLG's claim against the Schoepfels for breach of contract. "The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491–92, 732 S.E.2d 205, 209 (Ct. App. 2012). In the breach of contract claim, HLG contends:

> HLG entered into a valid and enforceable contract with [the Schoepfels] in December 2022. As a result of said contract and legal work and expenses incurred based upon such contract, [the Schoepfels] currently owe HLG $289,718.11 in hourly billing and expenses, as well as a contingency fee interest in the outcome of their significant work on the matter which is yet to be determined and will be subject to proof at trial.

(Compl. at ¶ 18.) It is unclear whether HLG's breach of contract claim relates to the purported contingency fee agreement because the January 2023 Amendment is not specifically referenced in the breach of contract claim. Instead, HLG vaguely claims it is entitled to a contingency fee interest. To the extent HLG alleges the Schoepfels breached any purported contingency fee agreement, this claim should be dismissed.

First, the purported contingency fee agreement is not a valid and enforceable contract. The purported contingency fee agreement makes no mention of who bears the responsibility for expenses. "Rule 1.5(c) [of the Rules of Professional Conduct] establishes requirements for contingent fee agreements and disbursement of money received in contingent fee cases. *Matter of Jordan*, 421 S.C. 594, 609, 809 S.E.2d 409, 417 (2017). A contingent fee contract "shall be in writing signed by the client." Rule 1.5(c). In addition, Rule 1.5(c) requires that a contingent fee agreement:

> state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses the client will be expected to pay.

The Amendment states the percentages HLG purportedly would be entitled to once the probate litigation is resolved, but it does not mention expenses at all. It is silent on whether expenses will be deducted from the recovery and, if so, whether the expenses would be deducted before or after the contingent fee is calculated. This is a violation of Rule 1.5(c). *See, e.g.*, *Matter of Brooker*, 433 S.C. 232, 234, 857 S.E.2d 553, 554 (2021) (finding violation of Rule 1.5(c) where contingent fee agreement "failed to state . . . whether the fee was to be calculated before or after the deduction of expenses as required"); *Matter of Schiller*, 421 S.C. 404, 406, 808 S.E.2d 378, 379 (2017) ("[F]ailure to document in writing whether litigation and other expenses are to be deducted before or after a contingent fee is calculated is a violation of Rule 1.5(c)[.]"). Contrary to Rule 1.5(c), the Amendment does not "clearly notify" the Schoepfels of any expenses they would be required to pay. *See* Rule 1.5(c). Accordingly, HLG's purported contingent fee agreement fails to comply with Rule 1.5 and, therefore, is unenforceable.

Further, the allegation that HLG "agreed to represent [the Schoepfels] upon a blended hourly and contingency fee" is not enforceable because contingency fee contracts must be in writing and signed by the client. (Compl. ¶ 6.) There can be no oral contingency fee agreement. The original contract of representation stated that HLG would [redacted] (Ex. to Memo in Support of Mtn. Dismiss.) While the original contract of representation stated HLG would [redacted]. (*Id.*) The original contract of representation is clearly not a written agreement for a blended hourly and contingent fee. It clearly states the opposite. It was solely for an hourly fee. As discussed above, the purported contingency fee agreement executed later fails to satisfy the elements of a proper

written contingency fee agreement in South Carolina. Therefore, HLG's breach of contract claim fails because there is no valid contract for a contingency fee.

HLG argued that the contingency fee agreement could still be enforced by the circuit court despite its violation of the Rules of Professional Conduct. This is not true. Rule 1.5(c), SCRPC, sets forth the requirements for creating a valid and enforceable contingent fee agreement in South Carolina. The purported contingent fee agreement here does not follow those requirements. A contract that violates the law is not enforceable. *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004) ("The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions.").

Second, the breach of contract claim fails because there has not been any breach or resulting damages because the probate litigation giving rise to the purported contingency fee is ongoing. The percentage contingency fee is calculated based on the ultimate result of the probate litigation. (Ex. B to Memo in Support of Mtn Dismiss and Stay.) As the purported contingency fee is not yet due, HLG's claim for breach of contract related to the contingency fee fails. Accordingly, the Court should reverse and dismiss the breach of contract claim to the extent that it relates to a purported contingency fee.

b. Fraud/Fraudulent Inducement

HLG's claim against the Schoepfels for fraud or fraudulent inducement fails as a matter of law.

> In order to establish a claim for fraud in the inducement to enter a contract, a party must establish the following by clear and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon;

> (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). "Failure to allege all elements is fatal to a claim of fraud." *Hansen v. DHL Lab'ys, Inc.*, 316 S.C. 505, 511, 450 S.E.2d 624, 628 (Ct. App. 1994). "In addition, our rules of civil procedure require that 'in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.'" *Id.* (quoting Rule 9(b), SCRCP).

HLG's fraud/fraudulent inducement claim fails because it is based entirely on HLG's arguments that it should be entitled to a contingency fee in this case. Specifically, HLG alleges the Schoepfels made fraudulent misrepresentations related to: (1) a promised contingency fee in exchange for legal services; (2) the amount of the estate subject to the contingency fee; and (3) their desire to file additional causes of action which would trigger additional contingency fees. However, as discussed above, the contingent fee agreement between HLG and the Schoepfels is unenforceable because it does not meet the requirements of Rule 1.5(c). Further, any alleged oral discussions about a contingency fee for the probate litigation or future contingency fees are unenforceable because Rule 1.5(c) requires contingent fee agreements to be made in writing and signed by a client. HLG knew that the contingent fee agreement did not satisfy the requirements of Rule 1.5(c) and that any contingent fee agreement must be in writing. Therefore, it cannot show any misrepresentation or that it relied on any purported misrepresentation.

In addition to HLG not being able to rely on an unenforceable agreement, HLG did not rely on any purported contingency fee to enter into the representation. HLG claims it would not have "undertaken the representation without the contingent fee component of the fee agreement" because "the value of their legal services is not properly represented by a simple hourly-fee agreement." (Compl. at ¶¶ 20, 22.) However, a review of the Contract of Representation shows

otherwise. In the Contract of Representation, HLG agreed to [redacted] for an hourly rate. (Ex. A to Memo in Support of Mtn Dismiss and Stay.) The Contract does not reflect any contingent fee agreement as of December 2022. While the Contract states HLG would evaluate any [redacted] the Schoepfels and [redacted] the Contract is clear that the vague reference to [redacted] was not a term of the legal representation. (*Id.*) Instead, the Contract stated HLG would [redacted] (*Id.*) As such, HLG's fraud/fraudulent inducement claim fails to set forth the required elements.

Further, HLG's fraud/fraudulent inducement claim fails as a matter of law because it failed to plead this claim with the particularity required by South Carolina law. HLG discusses vague "promise[s]" of a contingency fee by "Defendants" generally without identifying specific alleged misrepresentations or identifying which individual defendant allegedly made the purported misrepresentations. HLG has also failed to specifically allege all nine elements of fraud. *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993) ("Where the complaint omits allegations on any element of fraud, the trial court should grant the defendant's motion to dismiss the claim."). While it attempts to allege three misrepresentations, it does not allege falsity, intent, reliance, materiality, or the right to rely on the alleged misrepresentations. Further, the purported misrepresentations concern future acts which cannot constitute fraud. *See Jones v. Cooper*, 234 S.C. 477, 487–88, 109 S.E.2d 5, 10 (1959) ("Deceit or fraudulent representation, in order to be actionable, must relate to existing or past facts, and the fact that a promise made in the course of negotiations is never performed does not in and of itself constitute nor evidence fraud. A mere breach of a contract does not constitute fraud.").

Accordingly, HLG's claim for fraud/fraudulent inducement should be dismissed.

c. Civil Conspiracy – Constructive Trust

The Court should reverse and dismiss HLG's claim for civil conspiracy and a constructive trust over the proceeds of the Litigation. "[A] plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021). HLG alleges the Schoepfels "conspired [with] one another and with third parties to utilize the services of HLG for their benefit and then trigger a scenario wherein they would get out of paying hourly and other fees and avoid ever paying any contingency fee." (Compl. at ¶ 25.) HLG has failed to allege any of the elements of civil conspiracy. It does not identify any overt acts taken by the Schoepfels. And while it alleges generally that the Schoepfels conspired with third parties, HLG does not identify who or how. Further, the Schoepfels could not conspire to avoid paying a contingency fee to which HLG is not entitled due to there being no enforceable contingent fee agreement. As no contingent fee is due, there are no damages.

HLG is not entitled to a constructive trust over the proceeds of the Litigation. HLG requests the circuit court "impose a constructive trust upon the proceeds to [e]nsure that HLG is fairly compensated for the legal services it rendered to" the Schoepfels. (Compl. at ¶ 26.)

> A constructive trust is distinguished from an express trust in that the former arises entirely by operation of law without reference to any actual or supposed intention of creating a trust. It is resorted to by equity to vindicate right and justice or frustrate fraud. . . . Generally, fraud is an essential element, but it need not be actual fraud.

Whitmire v. Adams, 273 S.C. 453, 457, 257 S.E.2d 160, 163 (1979). "In order to establish a constructive trust, the evidence must be clear, definite, and unequivocal." *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987). As discussed above, there is no valid or enforceable

contingency fee agreement because the agreement fails to comply with the requirements of Rule 1.5(c). Further, the litigation HLG alleges gives rise to a contingency fee is still ongoing; therefore, even if the contingent fee agreement were valid, there is no contingent fee owed at this time. Finally, there has been no fraud to support establishing a constructive trust.

Accordingly, the Court should reverse the circuit court's order and dismiss HLG's cause of action for civil conspiracy – constructive trust.

d. Declaratory Judgment

The Court should reverse the circuit court's order and dismiss HLG's request for a declaratory judgment against the Schoepfels. To "state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970). The Declaratory Judgment Act "does not require the [C]ourt to give a purely advisory opinion as to the issues sought to be raised." *Id.* A court should only issue a declaratory judgment if it would settle legal rights of the parties. *Pee Dee Elec. Co-op., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). Therefore, "[t]he court may refuse to render a declaratory judgment when the judgment would not terminate the uncertainty or controversy giving rise to the proceeding." *Id.* The purpose of the Declaratory Judgment Act is to "afford[] a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationships." *Sunset Cay*, 357 S.C. at 423–24, 593 S.E.2d at 466.

HLG does not bring a proper cause of action for a declaratory judgment. Instead, HLG includes the following one sentence request in its wherefore clause: "HLG prays for the following . . . b. Declaratory judgment that HLG's contingency fee is contractually valid and enforceable." (Compl. at p. 7.) As discussed above, there is no valid and enforceable contingent fee contract here because the agreement violates Rule 1.5(c). There also is no justiciable controversy because the underlying litigation is still ongoing. Accordingly, the Court should reverse and dismiss HLG's request for a declaratory judgment.

III. The circuit court erred in refusing to grant a stay.

Alternatively, the circuit court erred in refusing to grant a stay of the case until the close of the Litigation because HLG's claims are dependent on the outcome of the Litigation.

"The granting of a motion for a stay of proceedings rests entirely within the discretion of the trial [court]." *City of Spartanburg*, 199 S.C. 458, 20 S.E.2d at 167. Such discretion, however, is not unlimited. A court, for example, should grant a stay when doing so would serve the interests of the parties or protect a party from an unjust result. *Talley*, 285 S.C. at 118–20, 328 S.E.2d at 622–23 (determining that circuit court abused its discretion by not staying cases against various defendants, even though the cases were approaching trial and the stay could delay resolution of the cases for years). A stay is also appropriate when a controlling issue in the case is currently pending in another case. *Piedmont Press Ass'n*, 156 S.C. 43, 152 S.E. at 728 (staying case because a forthcoming decision in another case would resolve a threshold issue in the instant case). Avoiding possible inconsistent judgments is yet another reason to stay a proceeding. *Merritt Bros.*, 307 S.C. at 216, 414 S.E.2d at 169.

Here, a stay is required to prevent HLG from continuing to undermine the pending Litigation by further disclosing the Schoepfels' case strategy and other privileged and confidential information. This lawsuit is HLG's latest attempt to harass the Schoepfels. Additionally, HLG's

contingent fee claims are not ripe for adjudication because the alleged contingent fee would not be owed until the close of the Litigation. No claims related to the purported contingent fee agreement will be ripe for adjudication until the close of the Litigation. Accordingly, staying this case until that time best serves the interests of judicial economy and avoids piecemeal litigation over whether HLG is entitled to a contingency fee that may or may not materialize and what amount the contingency fee is. Whether HLG is entitled to a contingency and, if so, what that amount will be, is entirely based on the outcome of the Litigation. It is a waste of the parties' and the Court's resources to litigate HLG's contingent fee claims now. The circuit court erred in refusing to stay this action until these matters become ripe for adjudication.

CONCLUSION

For the reasons discussed herein, Appellants respectfully request the Court reverse the circuit court's November 27, 2024 orders and either direct the circuit court to dismiss the case, or, in the alternative, direct the circuit court to issue the temporary injunction and stay the case upon remand.

RESPECTFULLY SUBMITTED,

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