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**Jun 27 2025**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM CHARLESTON COUNTY  
Jessica Ann Salvini, Circuit Court Judge

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Appellate Case No. 2025-000355

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Hulsey Law Group, LLC, .....Respondent,

v.

Robin M. Schoepfel, Jessica Lynn Schoepfel, and  
Nicholas Mark Schoepfel, ..... Appellants.

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**INITIAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court err in denying Appellants' motion to enjoin HLG from disclosing information related to the representation of its former clients' when such disclosure is permitted by Rule 1.6(b)(6), SCRPC?
- II. Did the Circuit Court abuse its discretion in denying Appellants' motion to dismiss HLG's claims?
- III. Did the Circuit Court abuse its discretion in denying Appellants' motion to stay the case where there is separate ongoing litigation?

## STATEMENT OF THE CASE & FACTUAL BACKGROUND

This is an appeal of three orders of the Circuit Court (1) denying Appellants' motion for temporary injunction, (2) denying Appellants' motion to dismiss pursuant to 12(b)(6), SCRPC, and (3) denying Appellants' motion to stay the underlying matter.

In December 2022, HLG received a call from Appellants informing them that Jeffrey Schoepfel (hereinafter "Decedent"), had died on December 11, 2022, under suspicious circumstances. (Complaint, filed Aug. 19, 2024). Decedent was the ex-husband of Appellant Robin M. Schoepfel and the father of Appellants Jessica Lynn and Nicholas Mark Schoepfel. At the time of his death, Decedent was the owner and principal manager of GSP Transportation Inc., a South Carolina corporation, and had considerable financial assets. *Id.* Decedent allegedly committed suicide during the early morning hours of December 11, 2022, following a gala the night before at the Montage Palmetto Bluff in Bluffton, South Carolina, celebrating his purported marriage to Summer Hall some six months prior in Montecito, California. *Id.* Appellants had little information about what had occurred and disputed that Hall had legally married the Decedent, so they retained HLG to investigate the incident, pursue any and all legal or equitable remedies against Hall, the alleged spouse, and protect Appellants and the Decedent's multi-million-dollar estate from claims asserted by Hall. *Id.*

HLG and Appellants entered into a fee agreement in which HLG agreed to represent Appellants based upon a blended hourly rate and contingency fee which was predicated on the outcome HLG achieved for Appellants. (Complaint, filed Aug. 19, 2024). The purpose of the contingency fee component of the blended fee was to properly compensate HLG for the amount for which HLG was successful in reducing Hall's financial recovery below the quantum she was demanding. *Id.* HLG represented the Appellants in several matters in State and Federal court

arising from Decedent's death and successfully prevented Hall's attempt to be appointed Personal Representative of Decedent's Estate and defeated an ERISA claim to the Decedent's retirement account in Case No. 2:23-cv-814-RMG filed in the U.S. District Court for the District of South Carolina. *Id.* Additionally, during HLG's representation of Appellants, Hall made no financial recovery from the Decedent's estate. *Id.*

Throughout HLG's representation, Appellants made timely payments to HLG pursuant to the fee agreement without delay or complaint. However, without any prior notice, on March 8, 2024, HLG received a letter from the law firm of Barnes & Thornburg indicating that they had been retained by Appellants to represent them going forward. (Complaint, filed Aug. 19, 2024). Despite being terminated, HLG helped facilitate the change in representation, however, Appellants owed HLG a total of \$289,718.11 for hourly work and expenses incurred up to that point. *Id.* Appellants' new counsel informed HLG that Appellants would not pay the outstanding bills, nor would they recognize HLG's contingency interest in the litigation as set forth in the fee agreement. *Id.*

HLG is informed and believes that due to its contingent interest in Decedent's estate, of which the primary asset is Decedent's corporation GSP Transportation, Inc., certain individuals associated with the Decedent's corporation, intentionally caused Appellants to terminate HLG's representation. In April 2024, prior to filing suit, HLG discussed with attorney John T. Lay the potential claims HLG had against Mr. Lay's clients Patrick Cross (counsel to Appellant Jessica Schoepfel and GSP Transportation, Inc.), Brad Meyer (CEO of GSP Transportation, Inc.), and David Sparkman (CFO of GSP Transportation, Inc.). (Affidavits of Paul Hulsey & Cherie Durand, filed Nov. 12, 2024). In furtherance of those discussions, HLG provided Mr. Lay with certain draft proposed documents for the purposes of negotiation. *Id.* Those documents were sent only to Mr.

Lay and no one else. *Id.* Thereafter, Mr. Lay, for his own strategic reasons and without authorization, shared these documents with the Special Administrator of Decedent's estate, Patricia Scarborough. *Id.*

As a result of Appellant's failure to pay the outstanding invoices and refusal to recognize HLG's contingency interest, HLG filed the underlying action on August 19, 2024, asserting claims against Appellants for breach of contract, fraud/fraudulent inducement, civil conspiracy – constructive trust, prejudgment interest, and declaratory judgment.

Appellants subsequently filed an Answer and Counterclaim on September 23, 2024, asserting claims against HLG for breach of fiduciary duty, legal malpractice, and declaratory judgment. (Def. Answer & Counterclaim). In support of their legal malpractice claim against HLG, Appellants filed the expert affidavit of Michael Virzi on September 23, 2024. (Affidavit of Michael Virzi). On October 14, 2024, Appellants filed multiple motions before the trial court to include Motion for Protective Order, Motion for Temporary Injunction, Motion to Stay Proceedings, Motion to Seal certain documents, Motion to Strike Complaint, and Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP. Additionally, Appellants filed the second affidavit of Michael Virzi.

A hearing on Appellants' motions was held before Judge Jessica Salvini on October 31, 2024. Judge Salvini issued the following order on November 27, 2024: Order Denying Temporary Injunction, Order Denying Motion to Stay Proceedings, Order Denying Motion to Dismiss, Order Denying Motion to Strike Complaint, and Order Granting Motion to Seal Documents. On December 9, 2024, Appellants filed a Motion to Reconsider Judge Salvini's rulings on the aforementioned orders, which was denied by Order dated January 28, 2025. Appellants filed a Notice of Appeal on February 26, 2025, initiating the instant appeal.

## STANDARD OF REVIEW

“The granting of temporary injunctive relief is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion.” *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 520 (2000). “An abuse of discretion occurs when a trial court’s decision is unsupported by the evidence or controlled by an error of law.” *Id.* at 282, 531 S.E.2d at 521.

A trial judge may dismiss a claim when the defendant demonstrates the plaintiffs “failure to state facts sufficient to constitute a cause of action” in the pleadings filed with the court. Rule 12(b)(6), SCRCP. “A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case.” See *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999). “The trial court must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on the face of the complaint.” *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987). The motion cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case.” *Id.* A ruling on a motion to dismiss pursuant to Rule 12(b)(6) “must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true.” *Gressette v. S.C. Elec. & Gas Co.*, 370 S.C. 377, 378-79, 635 S.E.2d 538 (2006).

“The granting of a motion for a stay of proceedings rests entirely within the discretion of the trial judge.” *City of Spartanburg v. Belk’s Dep’t Store of Clinton*, 199 S.C. 458, 20 S.E.2d 157, 167 (1942).

## ARGUMENT

### **I. The Circuit Court did not abuse its discretion in denying Appellants' Motion for Temporary Injunction.**

On October 14, 2024, Appellants filed a Motion for Temporary Injunction seeking to prevent HLG from disclosing confidential information related to the representation of their former clients, the Appellants in this matter. (Def. Motion for Temporary Injunction). The Circuit Court properly denied Appellants' motion by order dated November 27, 2024, from which Appellants appeal.

“Generally, to obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and an inadequate remedy at law.” *Roach v. Combined Util. Comm’n*, 290 S.C. 437, 442, 351 S.E.2d 168, 170 (Ct.App.1986). “An injunction is a drastic remedy.” *AJC Holding, LLC v. Dunn*, 382 S.C. 43, 49, 674 S.E.2d 505, 507 (Ct.App.2009). A court may issue a temporary injunction “only if 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 likelihood of success on the merits, and that there is no adequate remedy at law.” *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

Appellants failed to demonstrate that they have suffered and will continue to suffer irreparable harm entitling them to a temporary injunction. Appellants assert that they have been harmed due to HLG allegedly disseminating confidential and privileged information from their representation of the Appellants. (Def. Motion for Temporary Injunction). Appellants specifically alleged that HLG disseminated a draft complaint to a third party revealing confidential information, and that HLG continued to disclose confidential information within the Complaint,

which was not authorized by Appellants. *Id.* However, there has been no violation of attorney-client privilege or breach of confidentiality on the part of HLG.

As detailed in the Affidavits of Paul Hulseley and Cherie Durand, the alleged breach of confidentiality that Appellants complained of was not a breach by HLG. (Affidavits of Paul Hulseley & Cherie Durand, filed Nov. 12, 2024). In fact, HLG shared a draft proposed document with John T. Lay, counsel for Patrick Cross, Brad Meyer and David Sparkman in the context of negotiations. *Id.* Mr. Cross is counsel to Jessica Schoepfel and the corporation, GSP Transportation, Inc., Brad Meyer is acting CEO of the corporation, GSP Transportation, Inc., and David Sparkman is the CFO. *Id.* Nothing in the draft document HLG provided to Mr. Lay shared information which was unknown to those individuals or constituted a violation of confidentiality. Mr. Lay, apparently after consultation with his clients, all of whom represent the company's interests, determined that in the best interests of his clients he would forward the document to Patricia Scarborough, the Special Administrator of the Decedent's estate, who then forwarded it to counsel for Hall, Robert Brunson. Therefore, any breach of confidentiality was accomplished by Mr. Lay on behalf of his clients for his own strategic purpose. *Id.*

To the extent that Appellants assert that HLG disclosed confidential and privileged information within the Complaint initiating this matter and the Third-Party Complaint, such disclosure is permitted by the South Carolina Rules of Professional Conduct. Rule 1.6(b)(6), SCRPC, permits a lawyer to reveal information relating to the representation of a client "to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in controversy between the lawyer and the client, to establish a defense to...a civil claim against the lawyer based upon conducted in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." Here, HLG has

brought the underlying action against Appellants, their former clients, for failing to pay HLG pursuant to their fee agreement, breaching that agreement, and fraudulently inducing HLG to undertake the representation with a contingency interest that Appellants had no intention of honoring. HLG then filed the Third-Party Complaint for equitable indemnification against Mr. Lay for his unauthorized dissemination of confidential and privileged information. Upon review of the Complaint and the Third-Party Complaint, it is clear that HLG included only such information as reasonably necessary to establish its claims and defenses in this controversy between HLG and its former clients. Such disclosure is expressly permitted by the Rules of Professional Conduct and does not constitute a violation of confidentiality or attorney-client privilege.

Appellants claim that since litigation is still ongoing as it concerns the Decedent's estate, that HLG's alleged disclosure of confidential information will cause Appellants irreparable harm in that litigation, necessitating a temporary injunction. However, Appellants fail to explain how these disclosures in a breach of contract claim have had or will have any adverse effect upon Appellants' position in the estate litigation. The only evidence Appellants offer is a communication from Ms. Hall's attorney in the estate litigation requesting a copy of the draft complaint that HLG provided to Mr. Lay in the context of settlement negotiations. (Def. Motion to Reconsider, Exhibit A). As discussed previously, to the extent that any improper disclosure of confidential information was made, it was done so by Mr. Lay. Appellants and their counsel are uniquely aware of this fact yet knowingly fail to admit or advise the court of these facts in making their various motions.<sup>1</sup>

Appellants assert that in denying their request for injunctive relief, the Court erred in finding that there are other adequate remedies at law to redress violations of confidentiality or

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<sup>1</sup> Stating that through HLG's actions the document "made its way to other counsel." That is significantly different than HLG violating confidentiality. Mr. Lay shared the document, not HLG.

attorney-client privilege. Significantly, in its order, the Circuit Court specifically stated that “Defendants acknowledge that their motion is for an order directing the Plaintiff not to violate the South Carolina Rules of Professional Conduct.”<sup>2</sup> (Order Denying TRO, filed Nov. 27, 2024). Upon assurance by the undersigned that they are duty bound to comply with the South Carolina Rules of Professional Conduct, the court ruled that “to the extent Defendants allege that the Plaintiff has violated those rules, the remedy would be to report the violator(s) to the South Carolina Office of Disciplinary Counsel.”<sup>3</sup> *Id.* Appellants cannot now complain that the Circuit Court provided an inadequate remedy when the Court only articulated the applicable remedy in response to Appellants’ acknowledgement of the type of relief they were seeking. Moreover, while the Circuit Court did not acknowledge it in its order denying the temporary injunction, it did in fact provide Appellants with another adequate remedy at law by granting Appellants’ Motion to Seal. (Order Granting Motion to Seal, filed Nov. 27, 2024). The Circuit Court granted both of Appellants’ motions to seal specific documents and exhibits containing confidential and/or privileged information. *Id.* Additionally, in a separate order denying Appellants’ Motion to Strike portions of the Complaint, the Circuit Court denied the motion and provided that “To the extent the Complaint contains confidential information, that information shall be subject to the Court’s order granting the Defendants’ requests to seal.” (Order Denying Motion to Strike, filed Nov. 27, 2024). Therefore, Appellants were afforded multiple remedies to redress any alleged improper disclosure of confidential and/or privileged information, and the Circuit Court did not err in finding that there are other adequate remedies at law still available to Appellants.

Lastly, Appellants failed to establish that there is a likelihood of success on the merits of

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<sup>2</sup> Nowhere in Appellants’ Initial Brief or their Motion to Reconsider do they deny or dispute this acknowledgment of the type of relief sought by their Motion for Temporary Injunction.

<sup>3</sup> Notably, there was no finding by the Circuit Court that HLG had in fact violated the Rules of Professional Conduct.

their claims against HLG for breach of fiduciary duty, legal malpractice, and declaratory judgment. In support of their request for injunctive relief, Appellants supplied both a sealed and unsealed affidavit of expert Michael Virzi, who attests that, in his opinion, HLG or one or more of its agents have violated the duty of confidentiality as to Appellants. HLG asserts that the affidavit of Mr. Virzi is not admissible in these proceedings, as his affidavit is testimony as to what the law is, and that is the sole province of the Court. *State v. Morris*, 376 S.C. 189, 656 S.E.2d 359 (2008) (excluding expert testimony that would confuse the fact finder). The Court did not address, nor did it need to address, the admissibility of Mr. Virzi's testimony at this stage, in that Mr. Virzi's affidavit is based, at least in part, on a document identified in Paragraph 2(O) of his affidavit as a draft complaint not filed in any court, and draft discovery.<sup>4</sup> (Paragraph 4, Virzi affidavit). This document has not been identified or authenticated to date in this proceeding, and Mr. Virzi's apparent belief that Plaintiff improperly disclosed these unfiled pleadings is the basis of his opinion. In the absence of a foundation that ties this unsigned pleading and unsigned discovery to HLG, the court may not consider Mr. Virzi's affidavit or his opinion which is based upon unauthenticated documents.

Accordingly, the Circuit Court did not err or abuse its discretion in denying Appellants' motion to issue a temporary injunction against HLG.

**II. The Circuit Court properly denied Appellants' Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP.<sup>5</sup>**

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<sup>4</sup> Mr. Virzi also stated he has reviewed a significant number of documents, but his opinion is based on the allegations of the complaint. *Id.*

<sup>5</sup> Appellants' appeal prior to final judgment is permissible pursuant to S. C. Code § 14-3-330(4) because the order denying temporary injunction is immediately appealable, and the other interlocutory orders (that would not otherwise be appealable) are joined in the appeal of the order denying temporary injunction.

HLG's complaint alleges sufficient facts to maintain causes of action against Appellants for breach of contract, fraud/fraudulent inducement, civil conspiracy – constructive trust, and declaratory judgment, and to survive a Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC. Accordingly, the Circuit Court did not err in denying Appellants' motion to dismiss.

A. Breach of Contract

To recover for breach of contract, a plaintiff must establish the existence of a binding contract between the parties, breach of that contract, and damages suffered by the plaintiff as a result of the breach. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). HLG's Complaint contains allegations establishing the existence of a valid and binding fee agreement between HLG and the Appellants. (Complaint, ¶¶ 6, 18). Appellants do not dispute that they entered into a valid and binding contract with HLG for legal services. (Def. Answer & Counterclaim, ¶¶ 5-6). The fee agreement provided for payment to HLG for work performed on an hourly basis and a contingency fee interest predicated on the outcome achieved in the estate litigation against the Decedent's purported spouse, Ms. Hall, and anticipated future litigation. (*Id.* at ¶¶ 6, 8, 15-16). HLG alleges that Appellants breached the fee agreement after they terminated HLG and refused to pay the outstanding invoices for hourly billing and expenses, totaling \$289,718.11, and refused to acknowledge HLG's contingency fee interest. (*Id.* at ¶ 18). As set forth in the Complaint, HLG has sustained damages as a result of Appellants' breach of the fee agreement in that HLG is still owed \$289,718.11 for legal services rendered to Appellants, and HLG is also entitled to its contingency fee from Appellants' future recovery in the estate litigation. *Id.*

While the Complaint articulates two theories establishing the breach of the fee agreement, Appellants focus their argument on the contingency fee agreement, however HLG maintains that

it has sufficiently pled a breach of both the hourly and contingency fee agreement. The specific provision within the amended fee agreement concerning HLG's contingency fee states:

In the event this litigation is compromised, settled, resolved or otherwise terminated, then [HLG] will be entitled to the following:

- a. In the event the matter is resolved by the putative wife accepting an amount less than Fifty Percent (50%) of the Estate, but more than one-third (her elective share), then [HLG] will receive only that portion of its hourly billing invoiced and unpaid to date.
- b. In the event the matter is resolved by the putative wife accepting less than her elective share within the first ninety (90) days of our original contract of representation, then [HLG] will receive one-fourth (25%) of the difference between her elective share and the amount of money, property or other consideration accepted by her to settle the litigation. In this event, the amount of hourly fees already earned by [HLG] will be deducted from one-fourth payment.
- c. In the event the matter is resolved by the putative wife after ninety (90) days of our original contract of representation, [HLG] will receive one-third (33%) of the difference between her elective share and the amount of money, property or other consideration accepted by her to settle the litigation. In this event, the amount of hourly fees already earned by [HLG] will be deducted from the one-third payment.
- d. In the event that by some artifice or deception, the putative wife produces a "new Will" purporting to divest the children from any interest in the Estate, thereby bequeathing the entire corpus of the estate to her then [HLG] will receive Fifteen Percent (15%) of the difference between what she receives and the total value of the Estate, minus the amount of hourly fees already earned by [HLG].

(Def. Motion to Dismiss Memo, Exhibit B).

Appellants argue that the fee agreement(s)<sup>6</sup> between HLG and Appellants are invalid under Rule 1.5, SCRPC, in that they failed to separately state whether costs would be deducted from that portion of the fee that was contingency. HLG maintains that the foregoing provisions set forth a valid contingency fee, however, that issue was not ripe for decision by the trial court at the 12(b)(6) stage of the proceedings. If it were, it is clear that the Rules of Professional Conduct do not, alone,

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<sup>6</sup> HLG and Appellants executed an original fee agreement and an amended fee agreement setting forth the contingency fee agreement.

set forth the standards for whether a fee agreement is or is not enforceable. *Williamson v. Middleton*, 374 S.C. 419, 649 S.E.2d 57 (Ct.App. 2007), *rev'd* on other grounds 383 S.C. 490, 681 S.E.2d 867 (2009). Rather, the appropriate question to consider upon a motion to dismiss pursuant to Rule 12(b)(6) is “whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). Viewed in the light most favorable to HLG, it is clear that the Complaint states a valid claim against Appellants for breach of contract and contains factual allegations establishing each element of a breach of contract claim. It is certainly not necessary or appropriate to examine the enforceability of any fee agreements at this stage of the litigation. As such, the Circuit Court properly denied Appellants’ Motion to Dismiss.

#### B. Fraud/Fraudulent Inducement

A party asserting a claim for fraud in the inducement to enter into a contract must establish "(1) a representation, (2) its falsity, (3) its materiality, (4) knowledge of its falsity or 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." *Brown v. Stewart*, 557 S.E.2d 676, 348 S.C. 33 (S.C. App. 2001) (quoting *Parker v. Shecut*, 340 S.C. 460, 482, 531 S.E.2d 546, 558 (Ct.App.2000)).

“[E]ntering into an agreement, with no intention of keeping such agreement, constitutes fraudulent misrepresentation; however, mere breach of contract does not constitute fraud.” *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). A future promise is not fraudulent unless such promise was part of a general design or plan, existing at the time, to induce a party to enter into a contract or act as he or she otherwise would not have acted, to his or her

injury. *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 527, 455 S.E.2d 183, 187 (Ct.App.1995) (quoting *Coleman v. Stevens*, 124 S.C. 8, 16, 117 S.E. 305, 307 (1923)).

Appellants incorrectly assert that HLG has not pled each element required to maintain a cause of action for fraud in the inducement. In its Complaint, HLG alleges that Appellants made several false misrepresentations to HLG in order to induce HLG to undertake the representation of Appellants and provide them legal services. Specifically, Appellants promised HLG a contingency fee premised on the outcome of the estate litigation, the reduction in recovery by Decedent's purported spouse, and recovery in anticipated future litigation against the purported spouse. (Complaint, ¶¶ 20-22). In the context of those promises, Appellants made further fraudulent misrepresentations by misrepresenting the amount of Decedent's estate subject to the contingency fee, and misrepresenting Appellants' desire to pursue additional causes of action against the purported spouse which would necessarily trigger additional contingency fees. (*Id.*) Despite agreeing to pay HLG a contingency fee and signing a fee agreement confirming their commitment, HLG alleges Appellants had no intention of honoring their agreement at the time that they entered into the agreement. (*Id.*) Due to the nature and complexity of the representation, HLG would not have undertaken the representation of Appellants without the contingency fee component of the fee agreement, and Appellants were aware of the same, thus making it a material component of the agreement. (Complaint, ¶¶ 8, 20). When Appellants later terminated HLG without any prior notice and retained new counsel, Appellants' new counsel informed HLG that it refused to recognize HLG's contingency interest or lien as provided in the fee agreement. (*Id.* at ¶ 11). As a direct and proximate result of Appellants' fraudulent misrepresentations, HLG has sustained significant financial damages. (*Id.* at ¶ 23). The factual allegations set forth in the Complaint establish each of the required elements for fraud in the inducement. Appellants assert that the Complaint does not

identify specific alleged misrepresentations, however the Complaint specifically identifies three fraudulent misrepresentations with particularity. (Complaint, ¶¶ 20-22).

Appellants further argue that the misrepresentations cannot constitute fraud because they concern future acts. Ordinarily, to be actionable, a statement must relate to a present or preexisting fact, and cannot be predicated on unfulfilled promises or statements as to future events. *Davis v. Upton*, 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967). “However, where one promises to do a certain thing, having at the time no intention of keeping his agreement, it is a fraudulent misrepresentation of a fact, and actionable as such.” *Id.* Additionally, “[a]n action in fraud...can be based on an unfulfilled promise to perform in the future made with a present undisclosed intention not to perform and for the purpose of inducing one to sign a paper or do some other act.” *Jones v. Cooper*, 234 S.C. 477, 109 S.E.2d 5 (1959). This is precisely what HLG has pleaded in the Complaint as it relates to Appellants’ fraudulent misrepresentations concerning the contingency fee agreement, thus Appellant’s misrepresentation of fact is actionable, and the Circuit Court did not err in denying Appellants’ motion to dismiss.

### C. Civil Conspiracy – Constructive Trust

HLG’s Complaint sufficiently pleads factual allegations supporting (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). The Complaint alleges that Appellants, comprising of three individuals, conspired together and with third parties to retain HLG and use their services to their benefit, only thereafter to create a situation in which Appellants unlawfully avoided or breached their obligations under the fee agreement with HLG. (Complaint, ¶ 25).

HLG maintains that the Complaint contains factual allegations establishing each element of its civil conspiracy claim, and the Circuit Court did not err in denying Appellants' motion to dismiss. Even assuming, arguendo, that the Circuit Court did err in denying Appellants' motion to dismiss as to the civil conspiracy claim, South Carolina law provides that where a complaint is found to be deficient under Rule 12(b)(6), the court should provide the plaintiff an opportunity to amend the complaint before entering a final order of dismissal. *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 826 S.E.2d 585 (S.C. 2019). There's no indication in the record that the Circuit Court would have denied HLG's request to amend the Complaint if it had in fact found the Complaint to be deficient. Furthermore, the order from which Appellants appeal is still remains an interlocutory order,<sup>7</sup> which issues no final judgment on the matter, nor does it prevent Appellants from raising this issue again prior to trial.

Within the civil conspiracy cause of action, HLG requests the imposition of a constructive trust upon the proceeds or recovery obtained by Appellants to ensure that HLG receives its due compensation for legal services. (Complaint, ¶26). "A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." *Wolfe v. Wolfe*, 215 S.C. 530, 56 S.E.2d 343 (1949). In the instant matter, Appellants refuse to recognize HLG's contingency interest in the estate litigation as set forth in the fee agreement and stand to receive funds which do not equitably belong to Appellants.

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<sup>7</sup> *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526, 443 S.E.2d 539, 540 (1994) ("The denial of . . . a motion [to dismiss] is not immediately appealable under [§ 14-3-330 of the South Carolina Code (2017)]."); *id.* at 526 n.2, 443 S.E.2d at 540 n.2 (noting "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").

Additionally, HLG has asserted a claim of fraud/fraudulent inducement to support the imposition of a constructive trust.

As such, the Circuit Court did not err or abuse its discretion in denying Appellants' motion to dismiss HLG's actions for civil conspiracy – constructive trust.

D. Declaratory Judgment

The Circuit Court properly denied Appellants' motion to dismiss HLG's claim for declaratory judgment. To initiate a declaratory judgment action, the plaintiff must demonstrate the existence of a justiciable controversy, meaning there must be a concrete issue with a definite assertion of legal rights and a positive legal duty that is denied by the adverse party. *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634, 637 (Ct. App. 2002). *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 459 S.E.2d 844, 845. (1995). The sole purpose of the South Carolina Declaratory Judgment Act is to allow persons whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise to seek a court's determination of any question of construction or validity arising under the instrument and to obtain a declaration of rights, status, or other legal relations thereunder. S.C. Code Ann. § 15-53-10. In the Complaint, HLG requests a declaratory judgment as to the validity and enforceability of HLG's contingency fee with Appellants. (Complaint, pg. 7). HLG's request for declaratory judgment is valid in that it seeks clarification of HLG's rights under contract, which is expressly provided for under the South Carolina Declaratory Judgment Act. Accordingly, the Circuit did not err or abuse its discretion in denying Appellants' motion to dismiss HLG's claim for declaratory judgment.

**III. The Circuit Court did not abuse its discretion in denying Appellants' Motion to Stay Proceedings.**

Defendants assert these proceedings should be stayed while the “underlying matters” involving Summer Hall are litigated.<sup>8</sup> Whatever relief may ultimately be the result of the Summer Hall litigation has no bearing on whether or not Plaintiffs are entitled to recover attorney’s fees from Defendants. As set forth in the Complaint, a portion of the unpaid attorney’s fees are hourly billings, and a portion is contingent on the outcome of some unidentified litigation. While the amount of HLG’s lien/contingency interest may not be able to be determined in the underlying action, HLG expects to be able to prove the quantum of damages to the extent it involves a percentage of the ultimate sale of GSP Transportation, Inc. The fact of HLG’s damage, *i.e.*, whether a lien exists at all and the nature of the lien, is certainly ripe for determination in the underlying action and can certainly be decided without reference to any other litigation. *Capital City Insurance Co v. BP Staff Inc.*, 382 S.C. 92, 674 S.E.2d 39 (Ct.App. 2009) (discussing possible relevance of an administrative action also pending and noting it did not deprive the circuit court of subject matter jurisdiction over the instant matter).

Accordingly, the Circuit Court did not err in denying Appellants’ Motion to Stay Proceedings.

## CONCLUSION

For the reasons set forth herein, Respondent Hulsey Law Group, LLC respectfully requests an Order affirming the ruling of the Circuit Court.

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<sup>8</sup> Appellants also asserted that the “underlying matters” were not specifically identified in this proceeding, which remains true. Counsel for Appellants made reference to proceedings in District Court, state court and probate court but no identifying information was supplied to the court as to what the “underlying matters” were.

Respectfully submitted,

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