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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Appellate Case No. 2024-000786

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

v.

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

RESPONDENTS' FINAL BRIEF

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STATEMENT OF THE ISSUE ON APPEAL

I. Did the Circuit Court err in declining to apply the common-law defense of attorney immunity to absolutely bar a claim that an attorney and law firm were civilly liable for violation of the South Carolina Homeland Security Act ("Homeland Security Act"), S.C. Code Ann §§ 17-30-10 to 17-30-145, if they used and disclosed third-party electronic communications in the pursuit of a lawsuit on the client's behalf, when they allegedly knew or should have known that the client intercepted the electronic communications in violation of the Act?

COUNTERSTATEMENT OF THE CASE AND FACTS

A. The Fulmer Action

Appellants William Bertram von Herrmann ("von Herrmann") and The Von Hermann Law Firm (the "Law Firm") acted as legal counsel for Justin Fulmer ("Mr. Fulmer") in a prior lawsuit that Mr. Fulmer brought against Respondents Anna Coggeshall ("Anna"), Katherine Coggeshall, and Bryan Coggeshall (collectively the "Coggeshalls") and others in the Horry County Court of Common Pleas (the "Fulmer Action"). The Fulmer Action was captioned *Justin Shayne Fulmer v. Melissa Emery Buchannon Esq.*, et al and bore Civil Action No. 2021-CP-26-06975.[1] (R. pp. 276-277.)

Mr. Fulmer's claims in the Fulmer Action were based solely on 962 text messages that he intercepted from Anna's iWatch. (R. pp. 91, 225, 280-302.) These intercepted electronic

[1] This Court may take judicial notice of the pleadings, jury verdict, and court orders issued in the Fulmer Action. *See* Rule 201(b) , SCRCP ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984) ("A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records"); *see also Lucht v. Youngblood*, 266 S.C. 127, 134, 221 S.E.2d 854, 858 (1976) ("Generally, the prior pleadings in an action may be received in evidence against the pleader").

communications were referenced in Mr. Fulmer's Amended Complaint, were attached to a disciplinary complaint that von Herrmann and his Law Firm filed against a sitting family court judge, were produced in discovery in the Fulmer Action, and were used by von Herrmann to formulate Mr. Fulmer's claims and to prepare and pursue the Fulmer Action. (R. pp. 91, 104-114, 225, 289.)

Consequently, Anna filed a Counterclaim against Mr. Fulmer for violation of the Homeland Security Act. This Counterclaim alleged that Mr. Fulmer unlawfully obtained the text messages on which his lawsuit was based through the surreptitious acquisition of Anna's iWatch. (R. p. 91.) Anna's counsel advised von Herrmann that they objected to von Herrman's dissemination and use of the intercepted electronic communications in von Herrmann's pursuit of the Fulmer Action because such communications were intercepted without Anna's knowledge or consent. (R. pp. 91, 102-103.)

During the course of the Fulmer Action, an appeal was filed with the South Carolina Court of Appeals that bore the caption *Justin Shayne Fulmer v. Melissa Emery Buchannon Esq., et al.*, Appellate Case No. 2022-000330. (R. p. 239.) In that appeal, the Court of Appeals found "the preponderance of the evidence indicates [Anna] Coggeshall was the rightful owner of the iWatch. Accordingly, [Mr.] Fulmer's repeated use of the device to view her text messages amounted to interceptions under the Homeland Security Act." (R. p. 243.) Noting that S.C. Code Ann. § 17-30-20 prohibits "the intentional interception of electronic communications", the Court of Appeals concluded that Mr. Fulmer violated the Homeland Security Act when he intercepted and accessed electronic communications from Anna's iWatch. (R. p. 243.) Even if Mr. Fulmer was the original owner of the iWatch, the court found there was "no evidence that [Anna] Coggeshall gave him permission to access her communications on the device." (R. p. 243.)

The Fulmer Action was tried before a jury on November 27-30, 2023. (R. pp. 323, 344.) The jury issued a verdict in favor of Anna on her Counterclaim against Mr. Fulmer for violation of the Homeland Security Act. (R. pp. 323, 344.)

Although Mr. Fulmer filed an appeal that is still pending before the South Carolina Court of Appeals, Appellants' Initial Brief mischaracterizes the nature of that appeal. Contrary to the suggestions in that Brief, Mr. Fulmer did **not** appeal the underlying jury verdict or the jury's damages award issued against him. Instead, Mr. Fulmer appealed only the amount of attorney's fees imposed against him.[2] Thus, the issue of Mr. Fulmer's liability to Anna for violating the Homeland Security Act has been definitively established. The only question that remains is whether von Herrmann and his Law Firm, as Mr. Fulmer's attorneys, may likewise be held civilly liable for violation of the Homeland Security Act.

B. The Underlying Lawsuit

In the underlying action, the Coggeshalls allege that von Herrmann and his Law Firm violated the Homeland Security Act by using and disclosing third-party electronic communications that they knew were unlawfully intercepted by their client, Mr. Fulmer, in the prosecution of the Fulmer Action. (R. pp. 30-33, 91, 102-103.) In other words, the Coggeshalls contend that von Herrmann and his Law Firm, while acting as Mr. Fulmer's legal counsel in the Fulmer Action, had knowledge that Mr. Fulmer unlawfully obtained the subject electronic communications from Anna's iWatch. (R. pp. 30-33, 91, 102-114.) Despite this knowledge, von Herrmann and his Law Firm knowingly printed, used and disclosed the unlawfully obtained electronic communications in their pursuit of the Fulmer Action against the Coggeshalls and others. (R. pp. 30-33, 91, 102-114.)

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[2] *See* n.1, *supra.*

Contrary to the allegations in Appellants' Initial Brief, the present action is based on von Herrmann's wrongful use and disclosure of the illegally obtained electronic communications in various court filings in the Fulmer Action. (R. pp. 30-33; p. 42. line 18 - p. 43, line 21; p. 55, lines 7-25; pp. 93, 102-114, 213-216, 222-233.) von Herrmann and his Law Firm moved to dismiss the claim that they violated the Homeland Security Act on the grounds that the common-law defense of attorney immunity applies to absolutely bar them from liability to the Coggeshalls. (R. pp. 5, 83-89.)

On November 1, 2023, the circuit court below issued an Order that determined the "attorney-immunity defense does not apply to the [Homeland Security Act]" because attorneys and their law firms are "persons" within the meaning of the Act. (R. p. 7.) Because the common-law attorney immunity defense did not function as an absolute bar to the prosecution of von Herrmann and his Law Firm for violation of the Homeland Security Act, the circuit court denied the motion to dismiss. (R. pp. 7-8.)

In response, von Herrmann and his Law Firm moved for reconsideration. On April 17, 2024, the circuit court filed an Order Denying the Motion to Reconsider. The court stated that although this is a Novel Issue, it was persuaded that the South Carolina Legislature, in enacting the Homeland Security Act, did not intend to allow "broad common law immunity for disclosure by attorneys in civil and family court narratives." (R. p. 14.)

The Coggeshalls duly served pretrial discovery requests on von Herrmann, but von Herrmann refused to provide substantive responses. (R. pp. 150-171, 182-192, 206-212, 341-347.) Similarly, Mr. von Herrmann and his law firm did not file any Answer. Instead, von Herrmann and his Law Firm filed an interlocutory Notice of Appeal to the Court of Appeals. (R. pp. 356-362.) The Coggeshalls, in turn, filed a motion to dismiss the interlocutory appeal. In the meantime,

on March 20, 2024, the circuit court below filed a Form 4 Order granting Anna's Motion to Compel Discovery. (R. pp. 10-12.)

In an Order filed on August 14, 2024, the Court of Appeals granted the Coggeshalls' motion to dismiss the appeal as interlocutory. von Herrmann and his Law Firm then filed a Petition for Rehearing, which was denied.

On December 4, 2024, von Herrmann and his Law Firm filed a Petition for Writ of Certiorari with the South Carolina Supreme Court. In a Memorandum Opinion filed on February 19, 2025, the South Carolina Supreme Court granted the Petition, reversed the Court of Appeals' Order dismissing the appeal as interlocutory, and remanded the matter to the Court of Appeals for consideration of the merits of the appeal.

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). Thus, "where there is cause for doubt, or it is clear that the ends of justice may well be promoted by a trial on the merits, a demurrer should be denied where novel issues are present or are involved." *Id.*

"Determining the proper interpretation of a statute is a question of law, and . . . [the appellate] Court reviews questions of law de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT UNDER THE EXPRESS LANGUAGE OF THE HOMELAND SECURITY ACT, AN ATTORNEY AND HIS LAW FIRM MAY BE HELD CIVILLY LIABLE FOR VIOLATION OF THE ACT

A. The Circuit Court Correctly Interpreted and Applied the Provisions of the Homeland Security Act

South Carolina's Homeland Security Act begins with the following statement: "The interception of wire, electronic, or oral communications is hereby authorized **only in the manner permitted by this chapter.**" S.C. Code Ann. § 17-30-10 (emphasis added). The Homeland Security Act subsequently elucidates upon the circumstances in which the interception of electronic communications is legal:

> (A) It is lawful under this chapter for a person to:
>
> > (1) intercept or access an electronic communication made through an electronic communication system that is configured so that the electronic communication is readily accessible to the general public;
> >
> > (2) intercept any radio communication which is transmitted by:
> >
> > > (a) any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;
> > >
> > > (b) any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including any police or fire communications system, readily accessible to the general public;
> > >
> > > (c) a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(d) any marine or aeronautical communications system;

(3) engage in conduct which is:

(a) prohibited by Section 633 of the Communications Act of 1934; or

(b) excepted from the application of Section 705(a) of the Communications Act of 1934 and by Section 705(b) of that act;

(4) intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station of consumer electronic equipment to the extent necessary to identify the source of the interference;

(5) intercept, if the person is another user of the same frequency, any radio communication that is not scrambled or encrypted made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of the system;

(6) intercept a satellite transmission that is not scrambled or encrypted and that is transmitted:

(a) to a broadcasting station for purposes of retransmission to the general public; or

(b) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls, when the interception is not for the purposes of direct or indirect commercial advantage or private financial gain; or

(7) intercept and privately view a private satellite video communication that is not scrambled or encrypted or to intercept a radio communication that is transmitted on frequencies allocated under Subpart D of Part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted, if the interception is not for an unlawful purpose or for purposes of direct or indirect commercial advantage or private commercial gain.

(B) It is lawful under this chapter for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful, or abusive use of such service.

S.C. Code Ann. § 17-30-35.

S.C. Code Ann. § 17-30-30 provides some additional exceptions to the Homeland Security Act:

> (A) It is lawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of 47 U.S.C. Chapter 5, to intercept a wire, oral, or electronic communication transmitted by radio or to disclose or use the information thereby obtained.
>
> (B) It is lawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.
>
> (C) It is lawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception.

In addition, the Homeland Security Act expressly exempts Federal Communications Commission employees and employees of providers of communications services in certain scenarios. S.C. Code Ann. §§ 17-30-25, 17-30-30.

The text messages intercepted from Anna's iWatch and used and disseminated in the Fulmer Action do not fall into any of the above categories of permissible interceptions. Hence, under S.C. Code Ann. § 17-30-10, the interception of the subject text messages was unauthorized.

The Homeland Security Act makes it a felony if a person

> (1) intentionally intercepts, attempts to intercept, or procures any other person to intercept or attempt to intercept any wire, oral, or electronic communication;
>
> . . .
>
> (3) intentionally discloses or attempts to disclose to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

> (4) intentionally uses or attempts to use the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection[.]

S.C. Code Ann. § 17-30-20.

Pursuant to S.C. Code Ann. § 17-30-20(3) and (4), in addition to the person who actually intercepts third-party electronic communications without authorization, other persons may likewise be held liable for violating the Homeland Security Act. This occurs if the additional persons use or disclose the third-party electronic communications knowing or having a reason to know that such communications were intercepted without prior authorization. S.C. Code Ann. § 17-30-20(3) and (4). For purposes of the Homeland Security Act, a "person" includes "any individual, partnership, association, joint stock company, trust, or corporation." S.C. Code Ann. § 17-30-15(5).

Further, S.C. Code Ann. § 17-33-65 expressly prohibits the receipt into evidence of any wire, oral, or electronic communication that has been intercepted in violation of the Homeland Security Act. This prohibition applies to "any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the State, or a political subdivision thereof." S.C. Code Ann. § 17-33-65.

Although a violation of the Homeland Security Act is classified as a criminal felony (S.C. Code Ann. § 17-30-20), an aggrieved person may bring a civil action for relief. In this regard, S.C. Code Ann § 17-20-135(A) states: "Any person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of this chapter has a civil cause of action against any person or entity who intercepts, discloses, or uses, . . . the communications and is entitled to recover from the person or entity which engaged in that violation relief as may be appropriate[.]"

In the Fulmer Action, it was definitively determined that Mr. Fulmer violated the Homeland Security Act by intercepting text messages from Anna's iWatch without authorization and using those text messages as the basis for his lawsuit against the Coggeshalls and others.[3] (*See* R. pp. 239-244, 323, 344.) The sole question that remains is whether von Herrmann and his Law Firm may likewise be held civilly liable to the Coggeshalls for violating the Homeland Security Act through their use and disclosure of the subject text messages in the prosecution of the Fulmer Action. (R. p. 5.)

The Homeland Security Act defines a "person" subject to the Act to include an "individual, partnership, association, joint stock company, trust or corporation." S.C. Code Ann. § 17-30-15(5). The circuit court below correctly concluded that von Herrmann and his Law Firm meet the broad definition of "persons" who are subject to the Homeland Security Act. (R. p. 7.) Nothing in the statutory definition of "persons" excludes or limits attorneys or law firms from the requirements of the Homeland Security Act. Similarly, no other provision of the Homeland Security Act exempts attorneys or law firms from the application of the Act.

In an attempt to avoid this conclusion, von Herrmann argues in part that the Homeland Security Act is a criminal statute that provides for a civil action and damages for its violation, and that such a statute must be interpreted strictly. Appellants' Initial Brief, however, cites no legal authority holding that a hybrid statutory scheme that contains both criminal and civil elements must be interpreted strictly within the context of a civil action.[4]

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[3] *See* n.1, *supra.*

[4] The sole case cited in Appellants' Initial Brief, *Town of Sullivan's Island v. Murray*, 435 S.C. 22, 28, 864 S.E.2d 909, 912 (Ct. App. 2021), *cert. granted*, 2023 S.C. LEXIS 94 (Apr. 26, 2023), concerned only a penal statute. It did not address a situation in which a penal statute also authorized a civil action and damages for its violation.

It does not appear that any South Carolina cases have addressed the standard of review applicable to such hybrid criminal/civil statutes. Other courts, however, have determined that, where possible, the criminal and statutory provisions should be read and interpreted separately. "Where a penal statute is such that it is a hybrid of civil and criminal remedies capable of definite severance, that part of it which relates to and grants a civil remedy must be read separate and distinct from the part of it which is penal in character and viewed as a separate and independent enactment and construed and interpreted accordingly." *Bounkhoun v. Barnes*, No. 15-CV-631-A, 2018 U.S. Dist. LEXIS 64580, at *9 (W.D.N.Y. Apr. 17, 2018). *Accord Wiggin v. Gordon*, 115 Misc. 2d 1071, 1076, 455 N.Y.S.2d 205, 209 (Civ. Ct. 1982)

The specific provision of the Homeland Security Act that authorizes an aggrieved party to file a civil action and obtain damages from those who violate the Act (S.C. Code Ann. § 17-20-135) is definitely capable of severance from the penal provision (S.C. Code Ann. § 17-30-20). Hence, the principle of strict construction applicable to criminal statutes should not be applied in favor of von Herrmann and his Law Firm here. *See Bounkhoun*, 2018 U.S. Dist. LEXIS 64580, at *9; *Wiggin*, 115 Misc. 2d at 1076, 455 N.Y.S.2d at 209.

Even if the Homeland Security Act is construed strictly, it still should be concluded that attorneys and law firms, including von Herrmann and his Law Firm, may be held civilly liable for violating the Act. Nothing in the Homeland Security Act exempts attorneys and law firms from its requirements.

Notably, in contending that the circuit court below misinterpreted the Homeland Security Act, von Herrmann conveniently overlooks the important point that South Carolina's Homeland Security Act "is patterned after Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-22 (2002)." *State v. Guerrero-Flores*, 402 S.C. 530, 534, 741 S.E.2d

577, 580 (Ct. App. 2013); *see also State v. Whitner*, 399 S.C. 547, 553, 732 S.E.2d 861, 864 (2012). This federal act is commonly referred to as a wiretap statute and is referenced herein as the "Federal Wiretap Act." *See, e.g., Nix v. O'Malley*, 160 F.3d 343, 345-46 (6th Cir. 1998). Indeed, in *Whitner*, the South Carolina Supreme Court referred to the Homeland Security Act as "[o]ur Wiretap Act" and stated that said Act "parallels the Federal Act passed by Congress in 1968[.]" *Whitner*, 399 S.C. at 553, 732 S.E.2d at 864.

Accordingly, "federal cases analyzing comparable provisions of the Federal [Wiretap] Act are persuasive in interpreting the provisions of the Homeland Security Act applicable to this case." *Guerrero-Flores*, 402 S.C. at 534, 741 S.E.2d at 580. South Carolina courts will "look to the federal courts' interpretations" of the Federal Wiretap Act when interpreting comparable provisions of the state Homeland Security Act. *Whitner*, 399 S.C. at 553, 732 S.E.2d at 864. *See Orr v. Clyburn*, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982) ("Under general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation").

The fact that Appellants' Initial Brief fails to even mention the Federal Wiretap Act is indicative of the weakness of von Herrmann's legal position. The Federal Wiretap Act and the federal cases interpreting the Act establish that attorneys and law firms are not insulated from the requirements of the Act and may be held civilly liable for litigation conduct that constitutes a violation of the Act.

The Federal Wiretap Act "prohibit[s] more than the placing of wiretaps, because [it] forbids both the interception of certain communications -- even if the interceptor does not use or disclose the contents of the communication -- and the use or disclosure of the contents of the communication -- even if the user or discloser did not intercept the communication." *Nix*, 160

F.3d at 345-46. Specifically, 18 U.S.C. § 2511 – like S.C. Code Ann § 17-30-20 -- provides in relevant part:

> (1) Except as otherwise specifically provided in this chapter [18 USC §§ 2510-2523] any person who—
>
> > (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
> >
> > . . .
> >
> > (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
> >
> > (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . .
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

This statute prohibits "the unauthorized interception of 'any wire, oral, or electronic communication.'" *United States v. Frink*, 328 F. App'x 183, 189 (4th Cir. 2009) (quoting 18 U.S.C. § 2511(1)(a)), *cert. denied*, 558 U.S. 925, 130 S. Ct. 334, *and cert. denied*, 558 U.S. 922, 130 S. Ct. 324 (2009). Thus, the § 2511(a)(1) of the Federal Wiretap Act "quite clearly expresses a blanket prohibition on all electronic surveillance not specifically authorized by the Act." *Fultz v. Gilliam*, 942 F.2d 396, 400 (6th Cir. 1991). Unless the Federal Wiretap Act "specifically provides otherwise", it "protects an individual from all forms of wiretapping[.]" *Abraham v. County of Greenville*, 237 F.3d 386, 389 (4th Cir. 2001); *see also United States v. Hammond*, 148 F. Supp.

2d 589, 590 (D. Md. 2001), *aff'd*, 286 F.3d 189 (4th Cir.), *cert. denied*, 537 U.S. 900, 123 S. Ct. 215 (2002).

In addition, "[t]he syntax of sections 2511(1)(c) and (d) parallels that in section 2511(1)(a) and carries the same semantic import." *Fultz*, 942 F.2d at 400. "Sections 2511(1)(c) and (d) plainly forbid all intentional disclosures and uses of the contents of intercepted communications where the individual knows or should know that the source of the material is an unauthorized interception." *Fultz*, 942 F.2d at 401. "By prohibiting all intentional uses and disclosures of unauthorized interceptions by an individual with knowledge of the violation, subsections (1)(c) and (d) strengthen subsection (1)(a) by denying the wrongdoer the fruits of his conduct." *Id.* Subsections (1)(c) and (d) also "insure protection for the wiretap victim from third parties, unrelated to the wrongdoer, who, having access to the material and a reasonable basis to know its source, might desire to disclose the information for their own purposes." *Id.*

Pursuant to 18 U.S.C. § 2511(1)(c) and (d), a civil action may be brought against any person who "intentionally discloses, or endeavors to disclose, to any other person" or "intentionally uses, or endeavors to use" "the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." *Babb v. Eagleton*, 614 F. Supp. 2d 1232, 1243-44 (N.D. Okla. 2008); *see also Abraham*, 237 F.3d at 389. For a defendant to be held liable for violation of 18 U.S.C. § 2511(c) or (d), the plaintiff must demonstrate that the defendant knew "1) the information used or disclosed came from an intercepted communication, and 2) sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of Title III [the Federal Wiretap Act]." *Thompson v. Dulaney*, 970 F.2d 744, 749 (10th Cir. 1992).

If these criteria are satisfied, an attorney and/or his law firm may be held liable for violation of § 2511(c) or (d). *See Pyankovska v. Abid*, 65 F.4th 1067, 1078 (9th Cir. 2023), *cert. denied, Jones v. Pyankovska*, 144 S. Ct. 354 (2023); *Nix*, 160 F.3d at 352; *United States v. Wuliger*, 981 F.2d 1497, 1505 (6th Cir. 1992), *cert. denied*, 510 U.S. 1191, 114 S. Ct. 1293 (1994); *Marsh v. Curran*, 362 F. Supp. 3d 320, 328 (E.D. Va. 2019); *Babb*, 614 F. Supp. 2d at 1243. "There is nothing in the [Federal Wiretap] Act which affords attorneys special treatment."[5] *Wuliger*, 981 F.2d at 1505. Indeed, courts have concluded that applying the common-law attorney immunity doctrine "contravenes the plain language of federal and state wiretap statutes." *Nix*, 160 F.3d at 352.

Federal case law is in accord that the Federal "Wiretap Act prohibits in no uncertain terms the interception, disclosure, or use in court of oral communications obtained in violation of the Act. *See* 18 U.S.C. § 2511(1)(c)-(d)." *Pyankovska*, 65 F.4th at 1078. Under the plain language of the Federal Wiretap Act, an attorney may be held personally liable when his client "intercepted

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[5] The *Wuliger* court went on to conclude that although the fact that the defendant used taped conversations in his role as attorney did not shield him from the application of the Federal Wiretap Act, a factual issue remained as to whether the defendant attorney knew or had reason to know that "recorded information, given by the client, was illegally obtained." *Wuliger*, 981 F.2d at 1505. In effect, "knowledge or reason to know of the illegality is an element of the offense." *Williams v. Poulos*, 11 F.3d 271, 284 (1st Cir. 1993).

Here, the Amended Complaint alleges that von Herrmann used and disclosed the text messages that Mr. Fulmer provided him in the pursuit of the Fulmer Action, while knowing that Mr. Fulmer intercepted such text messages through unlawful means. (R. pp. 30-32.) Interpreting the allegations of the Amended Complaint in the light most favorable to the Coggeshalls, as the law requires, it must be presumed for purposes of the present Motion to Dismiss that von Herrmann did use and disclose the subject text messages knowingly. *See Rydde*, 381 S.C. at 646, 675 S.E.2d at 433. However, von Herrmann's knowledge or state of mind ultimately presents a question of fact that lies beyond the scope of the issues at stake in this appeal. *See Wulinger*, 981 F.2d at 1505. For purposes of this appeal, the salient point is that the common-law doctrine of attorney immunity does not render von Herrmann and his law firm absolutely immune from civil liability for violating the Homeland Security Act.

communications without consent in violation of the Wiretap Act, and [the attorney] used and disclosed those illegally obtained . . . communications" in a motion or other filing with the court. *Id.*

This is exactly what transpired here. Mr. Fulmer intercepted third-party text messages from Anna's iWatch without consent in violation of the provisions of both the Federal Wiretap Act and South Carolina's Homeland Security Act. His attorneys, von Herrmann and his Law Firm, used and disclosed these illegally obtained communications in filings made with the circuit court in the Fulmer Action as well as in discovery.

The foregoing principles are further illustrated in *Marsh.* In that case, Marsh claimed that his wife's lawyers violated the Federal Wiretap Act by using recordings in divorce proceedings which the lawyers knew the wife had obtained illegally. The lawyers claimed they were immune from liability. In rejecting this theory, the Virginia district court found that the "plain language of both the federal and the Virginia wiretapping statutes precludes attorneys from using or disclosing illegal recordings, and information derived from such recordings, even in a manner intimately associated with ongoing judicial proceedings." *Id.* at 327. This is because "[b]oth statutes expressly "prohibit '***any*** person' - which includes attorneys - from intentionally using or disclosing 'the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication" in violation of the statutes. 18 U.S.C. § 2511(1) (emphasis added); Va. Code. Ann. § 19.2-62(A) (emphasis added)." *Marsh*, 362 F. Supp. 3d at 327. Although "both statutes provide for limited exceptions, none of the provided exceptions include use by an attorney in a manner intimately associated with ongoing judicial proceedings." *Id.*

In reaching this decision, the *Marsh* court cited the Fourth Circuit's opinion in *United States v. Crabtree*, 565 F.3d 887 (4th Cir. 2009). In *Crabtree*, the Fourth Circuit held that the Federal Wiretapping Statute "clearly and unambiguously" prohibited a government attorney from introducing evidence derived from an illegal wiretap in a supervised release revocation proceeding. *Id.* at 888-89. In reaching this decision, the Fourth Circuit explicitly considered and rejected the argument that the court was required to recognize a common-law exception that would have allowed the government attorneys to use the illegal recordings as evidence. *Id.* at 891-92.

In *Marsh*, the court reasoned that "[b]ecause the [Wiretap] statutes explicitly apply to 'any person,' not just government officials, it clearly follows from *Crabtree* that non-government attorneys also cannot use improperly intercepted communications in court. *Crabtree* therefore suggests that the Fourth Circuit would not recognize a litigation privilege exception to the wiretapping statutes' prohibitions." *Marsh*, 362 F. Supp. 3d at 327.

Marsh is directly analogous to the present case. As *Marsh* demonstrates, under the express language of the Federal Wiretap Act and the corresponding state statute, attorneys may be held civilly liable for using in court the electronic communications that their client improperly intercepted.

Like the *Marsh* court, the circuit court below concluded that the plain and unambiguous language of both the Federal Wiretap Act and South Carolina's Homeland Security Act prohibit "any person" – including attorneys – from intentionally using or disclosing electronic communications he/she knew or had reason to know were obtained in violation of the statute. (R. pp. 7, 14.) von Herrmann's arguments to the contrary are unavailing.

Other federal cases are in accord with *Marsh*. Such cases establish that common-law defenses of attorney immunity and litigation privilege do not apply to attorneys accused of

violating State or Federal Wiretap statutes. In *Lewton v. Divingnzzo*, 772 F. Supp. 2d 1046, 1060 (D. Neb. 2011), for example, the court concluded that an attorney was liable under the Federal Wiretap Act for "intentionally using and disclosing the plaintiffs' oral communications [ ] for the purpose of advancing [his client's] . . . position in the state court Custody Case."

Similarly, in *Nix*, the Sixth Circuit expressly "decline[d]" the "invitation to immunize attorneys for certain violations of [federal] and Ohio wiretap law." *Nix*, 160 F.3d at 352. This was so even though the attorneys "disclosed the contents of the intercepted communications in relation to a judicial proceeding." *Id.*

Here, the Coggeshalls allege that von Herrmann and his Law Firm, acting as legal counsel for Mr. Fulmer, violated the Homeland Security Act when they deliberately accepted, used, and disseminated the Coggeshalls' electronic communications that von Herrmann knew were wrongfully intercepted by Mr. Fulmer from Anna's iWatch for the purpose of advancing Mr. Fulmer's position in the Fulmer Action. This constitutes a violation of the Federal Wiretap Act and, by analogy, of South Carolina's Homeland Security Act. *See Guerrero-Flores*, 402 S.C. at 534, 741 S.E.2d at 580; *see also Pyankovska*, 65 F.4th at 1078; *Nix*, 160 F.3d at 352; *Nix*, 160 F.3d at 352; *Wuliger*, 981 F.2d at 1505; *Marsh*, 362 F. Supp. 3d at 327-28; *Lewton*, 772 F. Supp. 2d at 1060; *Babb*, 614 F. Supp. 2d at 1243; *Sound Video Unlimited, Inc. v. Video Shack, Inc.*, 661 F. Supp. 1482, 1489 (N.D. Ill. 1987). Accordingly, this Court should affirm the circuit court's prior ruling that von Herrmann and his Law Firm may be held civilly liable to the Coggeshalls for violation of the Homeland Security Act.[6]

[6] *See* n.5, *supra*.

B. The Common Law Defense of Attorney Immunity Does Not Displace the Express Provisions of the Homeland Security Act

Appellants' Initial Brief makes the misplaced argument that the common-law attorney-immunity defense applies to absolutely bar the Coggeshalls' claim that von Herrmann and his Law Firm are civilly liable in damages for violating South Carolina's Homeland Security Act. This theory must be rejected because it directly contradicts the express language of the Homeland Security Act.

As noted above, the Homeland Security Act provides that the interception of electronic communications "is . . . authorized **only in the manner permitted by this chapter**." S.C. Code Ann. § 17-30-10 (emphasis added). Although the Homeland Security Act explicitly authorizes the interception and use of third-party electronic communications in certain listed circumstances, none of these exceptions applies to attorneys or law firms. *See* S.C. Code Ann. §§ 17-30-10 to 17-30-145; *see also Pyankovska*, 65 F.4th at 1078; *Nix*, 160 F.3d at 352; *Wuliger*, 981 F.2d at 1505; *Marsh*, 362 F. Supp. 3d at 328; *Lewton*, 772 F. Supp. 2d at 1060; *Babb*, 614 F. Supp. 2d at 1243.

If the South Carolina Legislature had intended that attorneys or law firms be exempted in any degree from potential civil liability for violation of the Homeland Security Act, the Legislature would have done so through express statutory language to this effect. *See Giannini v. S.C. DOT*, 378 S.C. 573, 587, 664 S.E.2d 450, 457 (2008) ("if Legislature had intended certain result in a statute it would have said so"); *Hainer v. Am. Med. Int'l*, 328 S.C. 128, 134, 492 S.E.2d 103, 106 (1997) (same).

For example, the South Carolina statutes regulating private investigators define the types of evidence-gathering activities for which one must be licensed and set forth the penalties for collecting the regulated types of information without a properly issued license. However, the statute lists persons who are exempted from the regulations and thus who can collect and use the

prohibited types of information without penalty. Attorneys are specifically exempted from the private investigator regulations. S.C. Code Ann. § 40-18-40(3) (stating that this chapter does not apply to "an attorney-at-law while in the performance of his duties").

No corollary exemption language concerning attorneys exists within the Homeland Security Act. The absence of any such limiting language necessarily means that, pursuant to S.C. Code Ann. §§ 17-30-10 and 17-30-15(5). attorneys and their law firms are "persons" subject to the provisions of the Homeland Security Act. *See Giannini*, 378 S.C. at 587, 664 S.E.2d at 457; *Hainer*, 328 S.C. at 134, 492 S.E.2d at 106.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Whitner*, 399 S.C. at 552, 732 S.E.2d at 863-64 (2012). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). "Absent an ambiguity, the court will look to the plain meaning of the words used to determine their effect." *Whitner*, 399 S.C. at 552, 732 S.E.2d at 864.

Here, S.C. Code Ann. § 17-30-10 plainly states that unless the interception of electronic communications is accomplished in a manner authorized by the Homeland Security Act, then the interception is unauthorized. *See Whitner*, 399 S.C. at 553, 732 S.E.2d at 864 (holding that the Homeland Security Act "is violated when a person intercepts oral communications that are not otherwise exempt from or subject to an exception contained in section 17-30-30"). Because attorneys are not exempted from the Homeland Security Act, their knowing use and disclosure of unauthorized interceptions of third-party electronic communications is prohibited and is civilly actionable. S.C. Code Ann. §§ 17-30-20, 17-30-135; *see also Pyankovska*, 65 F.4th at 1078; *Nix*,

160 F.3d at 352; *Wuliger*, 981 F.2d at 1505; *Marsh*, 362 F. Supp. 3d at 328; *Lewton*, 772 F. Supp. 2d at 1060; *Babb*, 614 F. Supp. 2d at 1243.

In arguing otherwise, Appellants' Initial Brief misstates the relationship between a statute and the common law. Contrary to von Herrmann's representations, the presumption that the South Carolina Legislature did not intend to alter the common law by the enactment of a statute applies only in situations where the enacted statute concerns "the same subject" as the common law principle in question. *Nuckolls v. Great Atl. & Pac. Tea Co.*, 192 S.C. 156, 161, 5 S.E.2d 862, 864 (1939). Specifically, the South Carolina Supreme Court has established that "it is not presumed that the Legislature intended to abrogate or modify a rule of the common law **by the enactment of a statute upon the same subject**; that it is rather to be presumed that no change in the common law was intended unless the language employed clearly indicates such an intention[.]" *Id.* (emphasis added).

In incorrectly suggesting that this principle broadly applies to the Homeland Security Act, von Herrmann misleadingly lifts a single sentence from *State v. Prince*, 316 S.C. 57, 66, 447 S.E.2d 177, 182 (1993). The entirety of the paragraph from which this sentence was taken, however, demonstrates that the application of this principle is limited to statutes that address conduct similar to the conduct covered by the common law:

> Common law offenses are not abrogated simply because there is a statutory offense proscribing similar conduct." McAninch and Fairey, *The Criminal Law of South Carolina*, 39 (2d Ed. 1989). Rather, it is presumed that no change in common law is intended unless the Legislature explicitly indicates such an intention by language in the statute. *Nuckolls v. Great Atlantic & Pacific Tea Co.*, 192 S.C. 156, 5 S.E.2d 862 (1939).

Prince, 316 S.C. at 66, 447 S.E.2d at 182 (1993).

As explained in Argument, Part I(A), above, the Homeland Security Act parallels the Federal Wiretap Act and proscribes the unauthorized interception, use, and disclosure of third-

party electronic communications. *See Guerrero-Flores*, 402 S.C. at 534, 741 S.E.2d at 580; *Whitner*, 399 S.C. at 553, 732 S.E.2d at 864. Clearly, the Homeland Security Act does not address the "same subject" as the common-law doctrine of attorney immunity. *Nuckolls*, 192 S.C. at 161, 5 S.E.2d at 864. Hence, no presumption arises that the South Carolina Legislature intended for the Homeland Security Act not to displace the common-law principle of attorney immunity, as von Herrmann incorrectly asserts.

For all the foregoing reasons, von Herrmann's claim the common law defense of attorney immunity necessarily applies to shield von Herrmann and his Law Firm from civil liability to the Coggeshalls for violation of South Carolina's Homeland Security Act should be rejected as unmeritorious. Outright dismissal of the Coggeshalls' action is not warranted.

C. The Texas Case of *Taylor v. Tolbert* Is Inapplicable

As explained in Argument Part I(A), above, South Carolina courts will "look to the federal courts' interpretations" of the Federal Wiretap Act – after which the Homeland Security Act was patterned -- when interpreting comparable provisions of the state Homeland Security Act. *Whitner*, 399 S.C. at 553, 732 S.E.2d at 864. Such federal cases "analyzing comparable provisions of the Federal [Wiretap] Act are persuasive in interpreting the provisions of the Homeland Security Act applicable to this case." *Guerrero-Flores*, 402 S.C. at 534, 741 S.E.2d at 580.

Instead of looking to any federal cases interpreting the Federal Wiretap Act, Appellants' Initial Brief relies on the Texas state case of *Taylor v. Tolbert*, 644 S.W.3d 637 (Tex. 2022), as support for its position that the common-law defense of attorney immunity should apply to the Homeland Security Act. This Court, of course, is in no way bound by the Texas court's decision and may simply decline to find the Texas opinion to be persuasive. *See Guerrero-Flores*, 402 S.C. at 534, 741 S.E.2d at 580; *Whitner*, 399 S.C. at 553, 732 S.E.2d at 864.

This conclusion is reinforced by an examination of *Taylor* on its merits. In that case, the Texas court determined that the attorney-immunity defense was applicable to the Texas wiretap statute because the Texas Legislature did not explicitly abrogate the defense and the defense did not inherently conflict with the statute. *Taylor*, 644 S.W.3d at 650-52. In reaching this decision, the Texas court employed a line of reasoning that is far different from the analysis employed by both the South Carolina courts and the various federal courts that have considered the wiretapping issue, including the Fourth Circuit. (This line of analysis is detailed in Argument, Part I(A), above.)

The anomalous result obtained in *Taylor* also may be explained by the fact that the Texas wiretap statute differs markedly from both the Federal Wiretap Act and the South Carolina Homeland Security Act (which is modeled on the Federal Wiretap Act). Texas law takes a rather unique approach to the application of common-law defenses to statutory offenses. Whereas federal law and most states interpret statutes to exclude common-law defenses not expressly included in the text of the statute, Texas law adopts an "opt-out" approach that includes all common-law defenses to statutes unless the legislature expressly precludes them. For this reason, the Texas Supreme Court held that the attorney-immunity defense was available to the causes of action for violations of the Texas state wiretap statute but was not available to causes of action for the same violations of the federal wiretap statutes. *Taylor*, 644 S.W.3d at 652-53.

Unlike both the Federal Wiretap Act and South Carolina's Homeland Security Act, the Texas wiretap statute does not include any exclusivity phrase, such as "[e]xcept as otherwise specifically provided". *Id.* at 653. Lacking such language, the Texas court ruled that the phrase "any person" broadly included attorneys but lacked the specificity necessary to exclude the common-law attorney immunity defense. *Id.* at 651.

As explained in Argument Part I(A), above, South Carolina's Homeland Security Act does contain an exclusivity clause, which provides that "[t]he interception of wire, electronic, or oral communications is . . . authorized only in the manner permitted by this chapter." S.C. Code Ann. § 17-30-10. This alone is sufficient to distinguish the present case from *Taylor*. Unlike the Texas wiretap statute at issue in *Taylor*, the South Carolina Homeland Security Act prohibits all nonconsensual interceptions of third-party electronic communications unless specifically authorized by the Act. S.C. Code Ann. § 17-30-10. Because Texas law works in the exact opposite direction, *Taylor* is wholly inapplicable to the present case.

Further, it is interesting to note that *Taylor* has not been cited by any state or federal court outside of Texas. This lack of citation by any non-Texas court indicates that *Taylor* is confined to the State of Texas and should not be considered persuasive authority for this Court to follow.

D. Appellants' Initial Brief Misapprehends the Circuit Court's Reasoning

Appellants' Initial Brief incorrectly contends that the circuit court below misunderstood the common-law attorney-immunity defense as applied to the Homeland Security Act. This contention misapprehends the requirements for a determination that a person – including an attorney or law firm – is civilly liable for violation of the Act.

To hold an attorney or law firm civilly liable to a plaintiff for damages under the Homeland Security Act based on the use and disclosure to third parties of electronic communications that a client unlawfully intercepted, the evidence must show that the attorney/law firm knew or had reason to know that the client intercepted such electronic communications without prior authorization. S.C. Code Ann. § 17-30-20(3) and (4). Although von Herrmann and his Law Firm used and disclosed the text messages that Mr. Fulmer intercepted from Anna's iWatch in the prosecution of the Fulmer Action, von Herrmann and his Law Firm are liable for violating the

Homeland Security Act only if they knew or had reason to know that the intercepted electronic information, "given by the client, was illegally obtained." *Wuliger*, 981 F.2d at 1505; *see also Williams*, 11 F.3d at 284.

The Amended Complaint alleges that von Herrmann possessed such knowledge and yet willfully used and disclosed the subject text messages in his pursuit of the Fulmer Action. (R. pp. 30-32.) Interpreting the allegations of the Amended Complaint in the light most favorable to the Coggeshalls, as the law requires, it must be presumed for purposes of the present Motion to Dismiss that von Herrmann did use and disclose the subject text messages knowingly. *See Rydde*, 381 S.C. at 646, 675 S.E.2d at 433. Hence, the Coggeshalls have stated an actionable claim, and this claim is not subject to outright dismissal under Rule 12(b)(6), SCRCP. *See also Gentry*, 337 S.C. at 5, 522 S.E.2d at 139 ("where there is cause for doubt, or it is clear that the ends of justice may well be promoted by a trial on the merits, a demurrer should be denied where novel issues are present or are involved").

Ultimately, von Herrmann's knowledge or state of mind when using and disclosing the subject text messages in his pursuit of the Fulmer Action presents a question of fact that lies beyond the scope of the issues at stake in this appeal. *See Wulinger*, 981 F.2d at 1505. This is because, in considering the Motion to Dismiss, the circuit court addressed only the legal question as to whether the Amended Complaint stated a claim on which relief could be granted. *See Rydde*, 381 S.C. at 646, 675 S.E.2d at 433. To determine whether the Amended Complaint stated a viable cause of action, the circuit court had to decide whether the common-law defense of attorney immunity acted as an absolute bar to the Coggeshalls' claim against von Herrmann and his Law Firm for violation of the Homeland Security Act. (R. pp. 3-8, 13-14.)

No court has yet considered the factual issue as to whether von Herrmann and his Law Firm actually knew (or should have known) that the text messages that Mr. Fulmer provided to them were unlawfully obtained. Again, for purposes of this appeal, the salient point is that von Herrmann and his Law Firm are not absolutely immune from civil liability. von Herrmann's suggestions to the contrary should be disregarded.

E. The Policy Arguments Advanced in Appellants' Initial Brief Are Unpersuasive

Appellants' Initial Brief advances a host of policy arguments, many of which are confusing, in an effort to show that the circuit court's interpretation of the Homeland Security Act will lead to negative consequences. However, all these arguments overlook the basic, axiomatic point that "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (internal citations omitted).

As discussed in Argument Part I(A), above, the language of the Homeland Security Act is plain and unambiguous. *See Pyankovska*, 65 F.4th at 1078; *Marsh*, 362 F. Supp. 3d at 327. It is the Court's duty to give effect to this plain language as written. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. If the enforcement of this plain language leads to adverse public consequences, it is the role of the South Carolina Legislature – and not the Court -- to modify the statutory scheme.

Moreover, an attorney's obligation to zealously represent clients must be balanced by the ethical obligations not to counsel, engage, or assist a client "in conduct that the lawyer knows is criminal or fraudulent[.]" Rule 1.2, RPC, Rule 407, SCACR. It is professional misconduct for a

lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" (Rule 8.4(d), RPC, Rule 407, SCACR) or to "engage in conduct that is prejudicial to the administration of justice" (Rule 8.4(e), RPC, Rule 407, SCACR). An attorney crosses the line into the territory of criminal/fraudulent conduct when he knowingly uses information obtained from communications unlawfully intercepted by his client to prepare and prosecute a lawsuit. *Marsh*, 362 F. Supp. 3d at 329. Such attorney conduct is not – and should not – be unimpugnable.

Further, it should be recognized that the common law on which von Herrmann relies does not shield an attorney or law firm from sanction for knowingly assisting a client in the commission of a crime. Mr. Fulmer's unauthorized interception, use, and disclosure of the text messages from Anna's iWatch is a felony under the Homeland Security Act. S.C. Code Ann. § 17-30-20. If, as the Coggeshalls allege, von Herrmann and his Law Firm knowingly utilized communications that they knew Mr. Fulmer obtained illegally, then no common law defense of immunity applies to shield them from liability.

"It would be inappropriate to place lawyers above the law or to treat them differently from all other citizens. The attorney-client relationship impels caution, but does not immunize lawyers where criminal activity on their part is suspected." *Klitzman, Klitzman & Gallagher v. Krut*, 591 F. Supp. 258, 268 (D.N.J.), *aff'd*, 744 F.2d 955 (3d Cir. 1984). "Any lawyer providing advice concerning ongoing unlawful activity is circumscribed in the legal advice that can permissibly be provided, lest he become a participant in the unlawful activity." *United States v. Farrell*, 921 F.3d 116, 138 (4th Cir.), *cert. denied*, 140 S. Ct. 269 (2019). An attorney who crosses the line and becomes a participant in a client's unlawful activity is subject to criminal prosecution, civil sanction, and disciplinary punishment. *Id.* & n.25.

As a corollary matter, courts have recognized that "[a] client's disclosure of information she obtained in violation of wiretapping laws to her attorneys for a purpose other than defending herself against wiretapping charges violates the wiretapping laws." *Marsh*, 362 F. Supp. 3d at 329; *see* 18 U.S.C. § 2511(1); *Nix*, 160 F.3d at 351 (although a client may disclose the contents of intercepted communications to her attorneys when the facing wiretap charges, the disclosure or use "for purposes other than to prepare a defense against [ ] wiretap charges, exceeds the bounds of the privilege"). Thus, a client's communications with his attorneys "about using information from the intercepted conversations to prepare and prosecute [a] lawsuit fall within the crime/fraud exception to the attorney-client privilege." *Sound Video Unlimited*, 661 F. Supp. at 1486. An attorney uses such intercepted communications to prepare and prosecute a client's lawsuit at his own peril. *See Farrell*, 921 F.3d at 138 & n.25; *Nix*, 160 F.3d at 351; *Marsh*, 362 F. Supp. 3d at 329; *Sound Video Unlimited*, 661 F. Supp. at 1486.

Clearly, any communications von Herrmann and with Mr. Fulmer about using information from the text messages that Mr. Fulmer intercepted from Anna's iWatch to prepare and prosecute the Fulmer Action fall within the crime/fraud exception to the attorney-client privilege. In effect, if von Herrmann knowingly assisted Mr. Fulmer to violate the Homeland Security Act, then von Herrmann may be held liable as a participant in the criminal course of conduct. *See Farrell*, 921 F.3d at 138 & n.25; *Nix*, 160 F.3d at 351; *Marsh*, 362 F. Supp. 3d at 329; *Sound Video Unlimited*, 661 F. Supp. at 1486.

Rule 1.6(b)(1) of the South Carolina Rules of Professional Conduct provides that "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act[.]" Rule 1.6(b)(1), RPC, Rule 407, SCACR. Rule 4.1(b) further provides that a lawyer shall not knowingly

"fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client[.]" Rule 4.1(b), RPC, Rule 407, SCACR.

The South Carolina Supreme Court explained the interplay of the various Rules of Professional Conduct cited above as follows:

> [4] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so unless the disclosure is prohibited by Rule 1.6.

In re Amendments to Rules of Prof'l Conduct, Rule 407, SCACR, 2005 S.C. LEXIS 199, at *223-24 (June 20, 2005).

In In re Poff, 394 S.C. 37, 714 S.E.2d 313 (2011), the Office of Disciplinary Conduct alleged that an attorney violated Rule 1.2(d) by aiding a client to commit Medicaid fraud. The court found that the attorney helped the client misrepresent her income to the governmental authorities and, therefore, the attorney was in violation of Rule 1.2(d), RPC, Rule 407, SCACR and was subject to suspension. *Poff*, 394 S.C. at 52, 714 S.E.2d at 321.

A similar result was obtained in *In re Feeley*, 354 S.C. 427, 581 S.E.2d 487 (2003). In that case, an attorney assisted a client in creating fraudulent computer checks and also commingled funds. The attorney's wrongful conduct resulted in disbarment. *Id.* at 431, 581 S.E.2d at 488.

Here, von Herrmann and his Law Firm were prohibited by Rule 1.2(d) of the South Carolina Rules of Professional Conduct from knowingly assisting Mr. Fulmer to violate the Homeland Security Act. This means that von Herrmann and his Law Firm were legally barred

from using the text messages that Mr. Fulmer provided to them in the pursuit of the Fulmer Action if von Herrmann knew that Mr. Fulmer obtained such text messages through unlawful measures. If von Herrmann and his Law Firm knowingly assisted Mr. Fulmer to engage in criminal conduct, then they are personally subject to civil liability for violation of the Homeland Security Act, and no common law defense or public policy applies to bar such a result.

CONCLUSION

For the foregoing reasons, this Court should affirm circuit court's Order ruling that the common-law defense of attorney immunity does not apply to absolutely bar von Herrmann and his Law Firm from being held civilly liable for violation of the Homeland Security Act based on their use and disclosure in a civil lawsuit of third-party electronic communications if they knew or should have known that their client, Mr. Fulmer, obtained such communications through unlawful means. In the alternative, the Coggeshalls request that this Court affirm the circuit court's Order for any ground appearing on the record, as provided by Rule 220(c), SCACR.

Respectfully submitted,

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July 2, 2025
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Appellate Case No. 2024-000786

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

v.

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

PROOF OF SERVICE

I certify that I have served ***Respondents' Final Brief*** upon the parties below by electronic mail, addressed as follows:

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Subject:	Appellate Case No. 2024-000786; Coggeshall v. von Herrmann
Attachments:	7-2-25 CT App Final Brief.pdf
Importance:	High
Sensitivity:	Confidential

All:

On behalf of the Respondents, Anna Coggeshall, Bryan Coggeshall and Katherine Coggeshall we are providing you with a copy of the Respondents' Final Brief which will be filed with Court of Appeals.

Sincerely,

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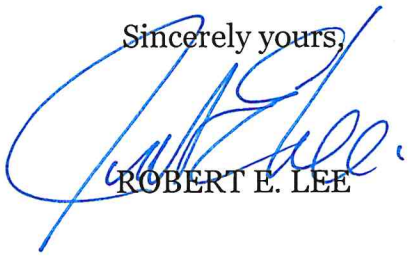
Re: Anna Coggeshall, Bryan Coggeshall; and Katherine Coggeshall (Respondents) v. William Bertram von Herrmann and The Von Hermann Law Firm (Appellants)
Appellate Case No.: 2024-00786
Common Pleas Case No.: 2022-CP-26-06296

Dear Ms. Kitchings:

Enclosed is the bound *Respondents' Final Brief* together with the *Proof of Service* indicating the *Respondents' Final Brief* has been served by electronic mail upon the Appellants' counsel of record. Also enclosed are copies of the e-mail providing Appellants' counsel with the *Respondents' Final Brief* and by copy of this letter advising the Appellants' counsel of this communication with the Court.

Sincerely yours,



ROBERT E. LEE

REL:mlb

W/Enclosures

cc: Douglas W. MacKelcan, Esq.
Sklyer C. Wilson, Esq.
Counsel for the Appellants
W/Enclosures
(*Via E-Mail Only*)

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