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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
Court of Common Pleas

Patrick C. Fant, III, Circuit Court Judge

Appellate Case No. 2025-000614
Civil Action No. 2024-CP-40-00827

Kellum W. Allen.....Respondent,

v.

Ann Marie Watson,.....Appellant

INITIAL BRIEF OF APPELLANT

Robert P. Wood, SC Bar No. 6206
ROGERS TOWNSEND, LLC
1221 Main Street, 14th Floor
PO Box 100200 (29202)
Columbia SC 29201
(803) 771-7900 – Telephone
(803) 343-7017 - Fax
robert.wood@rogerstownsend.com

Attorney for Appellant, Ann Marie Watson

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the Circuit Court err in dismissing the Fourth Cause of Action (for violation of the South Carolina Unfair Trade Practices Act) on the claimed basis that the land option entered into between a lawyer and his active, current client without her informed consent was a private transaction that does not affect the public interest?

II. Did the Circuit Court err in ruling there is no cause of action in South Carolina for breach of confidential information?

III. Did the Circuit Court err in ruling that the allegations of the Second Counterclaim merely repeated the allegations of the First Counterclaim such that the Second Counterclaim could be dismissed?

STATEMENT OF THE CASE

This matter is before the Court pursuant to a Notice of Appeal filed by Ann Marie Watson (“Ann Marie,” “Appellant,” or “Defendant”) on March, 31, 2025, seeking review of two orders – an order dismissing the second and fourth causes of action in her amended counterclaims and an order denying her motion to reconsider.

This suit was commenced by service of a summons and complaint filed in Richland County on February 7, 2024. In his complaint, Plaintiff/Respondent Kellum Allen (“Attorney Allen”) sought specific performance of an 18-month land option contract to purchase 17.51 acres from Ann Marie. Compl. ¶¶ 3 and 6.

Ann Marie answered and counterclaimed (No. 2) and then filed an Amended Answer and Counterclaim on June 12, 2025 (No. 5).

In her Amended Answer she alleged she had voided the land option. Am. Ans. ¶ 5. She went on to allege in ¶ 8 of her Amended Answer that while serving as her domestic lawyer, Plaintiff/Respondent Attorney Allen encouraged her to execute and deliver the land option. Specifically, she alleged in ¶ 8:

a) implied within the scope of any legal representation agreement, this one included, is the lawyer's promise to advise the client when to obtain independent legal counsel and independent business advice;

b) also implied within the scope of any legal representation agreement, this one included, is the lawyer's promise to treat his client fairly and reasonably and not to use her confidential information for his own benefit;

c) Attorney Allen knew or should have known that inserting into a land option of this sort a refundable deposit in any amount was not customary and was utterly unfair, unreasonable, and unconscionable to his client, Ann Marie;

d) Attorney Allen knew or should have known that a deposit of \$500 for a land option of this sort was not customary and was utterly unfair, unreasonable, and unconscionable to his client, Ann Marie;

e) Attorney Allen, while serving as Ann Marie's domestic lawyer, encouraged her to execute and deliver the land option yet never advised her to retain independent legal counsel or business advice to advise her on the fairness and reasonableness of the offer, and Respondent took full advantage of the fact that his client relied on him to know what was customary, fair, and reasonable for such a transaction when, in fact, Attorney Allen was using information Ann Marie had entrusted him with to Attorney Allen's personal advantage; and

f) Attorney Allen, while serving as Ann Marie's domestic lawyer, encouraged her to execute and deliver the land option yet never advised her to retain a real estate broker or appraiser or independent counsel to advise her on the reasonableness of the offer in terms of i) price; ii) the diminution of the per-acre value of Ann Marie's adjoining lands; iii) the duration of the land option; iv) the difficulties and expense of enforcing the restriction on the disruption of the pet cemetery; v) Ann Marie's continued access to the pet cemetery; vi) the advisability of a clause whereby the cost of the land option would increase as the exercise of the land option were delayed; vii) public interest in the lands in light of public comments made by officials of Richland School District Two regarding the possible construction of a \$140 million high school on lands adjoining those of Attorney Allen and his siblings; viii) the down payment was to be applied to the purchase price; and ix) the advisability of the land option being assignable. In addition, the Plaintiff took full advantage of the fact that Ann Marie relied on the Plaintiff to know what was customary, fair, and reasonable for such a transaction when, in fact, the Plaintiff was using information Ann Marie had entrusted him with to the Plaintiff's personal advantage; and

g) Attorney Allen, while serving as Ann Marie's domestic lawyer, encouraged her to execute and deliver a writing that Attorney Allen had drafted yet he knew or should have known was not phrased in terms Ann Marie could reasonably understand;

h) Attorney Allen, while serving as Ann Marie's domestic lawyer, encouraged her to execute and deliver a writing in an unrelated matter without stating whether he represented her in that transaction;

i) Ann Marie had entrusted Attorney Allen with intimate, personal knowledge about her financial and emotional condition, her assets, her liabilities, her net worth, her liquidity, her

debts, her access to liquidity, her negotiating personality, skills and experience, her tolerance for conflict, her level of trust in Attorney Allen, her lack of knowledge of commercial real estate transactions, her access to family support, her children's current needs, the level of support from her family and the reasons for it, and her emotional state over the recent loss of her father; and Attorney Allen used that information to his personal advantage;

j) Ann Marie had entrusted Attorney Allen with knowledge of her fractured relationship with her siblings, and Attorney Allen used that information to his personal advantage by proposing to buy land from Ann Marie when Attorney Allen knew his siblings, or one or more of them, would be opposed to any such sale; and

k) Attorney Allen had vastly superior knowledge about prospective uses for the Subject Property than did Ann Marie, yet he failed to disclose those to her; and

l) Attorney Allen failed to advise Ann Marie (his client) that she would not be able to enforce any oral promises he had made to her (such as those about lot density, the pet cemetery, and equestrian amenities) that were not included in the written contract.

Am. Ans. ¶ 8.

She also alleged that Attorney Allen, as her lawyer, failed to advise her that the land option was void or voidable and that the Allen had misappropriated her information to his own personal benefit in violation of his duties of good faith, loyalty, and confidentiality. Am. Ans. ¶ 10. She went on to allege that she tendered the return of the \$500 deposit" and that Attorney Allen further violated his duties to Ann Marie by purporting to reject the tender. Am. Ans. ¶ 11. She denied Attorney Allen was entitled to specific performance of the land option. Am. Ans. ¶ 13.

Ann Marie also asserted the defenses that the land option was illegal and against public policy (and therefore unenforceable) and drafted in violation of Attorney Allen's common law duties of the utmost good faith, loyalty, and confidentiality and in violation of the South Carolina Rules of Professional Conduct. Am. Ans. ¶¶ 15 – 21. Specifically, she alleged Attorney Allen was her lawyer in a family court matter when he initiated discussions regarding and entered into the business transaction, that Attorney Allen drafted the land option, that Attorney Allen did not advise her in writing or otherwise of the desirability of seeking independent legal or business counsel in the transaction and did not give her a reasonable opportunity to seek such independent advice. She alleged the terms of the land option are not fair (for the reasons stated above), she alleged the Attorney Allen did not draft the land option in a manner such that the Defendant, the Attorney Allen's client, could reasonably understand it; and Attorney Allen did not explain to Ann Marie that he was not her lawyer with respect to the transaction. *Id.*

By way of a third defense Ann Marie alleged the land option was not supported by consideration since the \$500 deposit was to be held in her bank account and was fully refundable. Am. Ans. ¶ 23. She alleged that to the extent the land option is deemed to be supported by consideration, the consideration was wholly inadequate under the circumstances, making the land option voidable and unenforceable. *Id.*

In her Fourth, Fifth and Sixth Defenses, she alleged Attorney Allen had unclean hands and was not entitled to enforce the land option and that the transaction was unfair and unconscionable for the reasons stated above. Am. Ans. ¶¶ 24 – 34. Specifically, she alleged Attorney Allen is a sophisticated attorney and former judge who has drafted or reviewed professionally thousands of contracts and conducted hundreds of negotiations. Am. Ans. ¶ 30. She alleged she has no formal legal training or experience and has only rarely reviewed a

contract or negotiated the terms of one. Am. Ans. ¶ 31. She alleged she knows very little about substantive contract law, the terms normally found in an option contract or contract for the sale of undeveloped real property, or the bargaining process. *Id.* She alleged Attorney Allen's bargaining power is immensely greater than that of her own. Am. Ans. ¶ 32. She also alleged the land option Attorney Allen presented to her failed to contain terms she asked for with respect to Attorney Allen's use of the land. Am. Ans. ¶ 33.

As her Seventh Defense, she alleged Respondent should be estopped from asserting any rights he might otherwise have under the land option. ¶¶ 35 and 36.

Ann Marie then asserted four counterclaims, incorporating into each the previous allegations by reference.

Her First Counterclaim (which the lower court did not dismiss) is a claim for breach of fiduciary duties of good faith, loyalty, and confidentiality. Am. Ans. and Counterclaim ¶¶ 37 *et seq.* She alleged that when Attorney Allen presented the land option to her, Allen did not advise her to seek independent counsel or independent business advice, did not explain that he was not acting as her lawyer in the business transaction, did not present the land option to her in an arm's-length transaction or in a way she could understand, did not share with her that he was intending to combine her property with that of others and offer the combined tracts to a real estate developer for a high density, non-equestrian residential development, did not reveal to her the financial benefit he was obtaining from the transaction, did not explain to her that promises he had made regarding his use for the land would only be binding on her to the extent they were expressed in the written document, did not explain to her that the \$500 deposit he was tendering to her was not remotely adequate or customary for such a land option, did not disclose to her all known information that was significant and material regarding the transaction, and did not

explain to her how difficult it might be for her to enforce the pet cemetery restriction shown on a plat she had sent him and on which she had conditioned all further transactions regarding the land. Am. Ans. and Counterclaim ¶ 43. She itemized the damages she suffered as a result. Am. Ans. and Counterclaim ¶ 44.

In her Second Counterclaim she incorporated the previous allegations and alleged that Attorney Allen had misappropriated her confidential information by presenting the ill-gotten land option to a third-party real estate developer along with other papers and obtained for himself some unknown benefit, and that, on information and belief, he remains in wrongful possession of that benefit today. Am. Ans. and Counterclaim ¶ 48. She sought the imposition of a constructive trust and an accounting and payment of such additional sums as are necessary to restore her to the position she occupied prior to executing the land option. Am. Ans. and Counterclaim ¶ 50. She also sought damages. *Id.* at ¶ 51.

The lower court would later dismiss this cause of action, saying, “The claim does not exist or is otherwise duplicative of Defendant’s First Counterclaim for Breach of Fiduciary Duties of good Faith, Loyalty, and Confidentiality.” Order of January 24, 2025, at pg. 2 of 2; Supplemental Order of January 27, 2025, at pg. 2 of 2.

Ann Marie’s Third Counterclaim is for Professional Negligence. She alleged that Attorney Allen is an attorney practicing law in South Carolina and that she retained him to serve as her attorney in a domestic matter. She alleged he served as her attorney in that matter from May 1, 2016 through October 2022. Am. Ans. and Counterclaim ¶¶ 53 and 54.

She alleged that by accepting her as his client, “the Plaintiff assumed duties to her to possess and exercise the same degree of skill, care, learning, communication, and disclosure as would be expected of a reasonable, competent, and trustworthy attorney under the same or

similar circumstances. Those duties included, among other things, the duty to inform, consult, and communicate with the client as to a need to retain other counsel if he could not represent her yet knew she needed a lawyer.” Am. Ans. and Counterclaim ¶ 55. She alleged that when the Plaintiff offered to enter into a business transaction with her, he knew she needed separate legal and business counsel, yet he failed to advise her of that. Am. Ans. and Counterclaim ¶ 56. She then alleged Attorney Allen acted negligently, carelessly, recklessly, and wantonly in the following particulars:

- a) Failing to render legal services in the form of advice to retain separate counsel with respect to the land option;
- b) Failing to disclose to Ann Marie that he had a conflict of interest and could not enter into the land option without her properly informed, written consent;
- c) Failing to disclose to Ann Marie that Attorney Allen was prohibited by South Carolina Rules of Professional Conduct from entering into this transaction unless he had obtained her properly informed, written consent;
- d) Failing to comply with the rules, regulations and statutes governing attorneys’ conduct in the State of South Carolina; and
- e) Taking advantage of the Defendant.

Am. Ans. and Counterclaim ¶ 57.

Ann Marie alleged as a result that she suffered actual damages and specified what those damages were. Am. Ans. and Counterclaim ¶ 58.

The lower court did not dismiss this counterclaim.

In her Fourth Counterclaim she sought damages from Attorney Allen for his violation of the South Carolina Unfair Trade Practices Act. She alleged that Attorney Allen was an attorney

who was engaged in trade or commerce in South Carolina (¶ 60), that he enticed her to enter into this business transaction with him when he knew she was his client, that she looked up to him as her trusted attorney, that she did not have separate representation for the transaction, and that he had superior knowledge about some relevant facts. ¶ 61. She alleged his actions were capable of repetition because he is a practicing attorney who accepts cases from the general public and from family members. ¶ 63. She alleged that Attorney Allen had engaged in a similar transaction with a client before, even naming the client and citing the civil action number of the ensuing lawsuit (Lexington County Civil Action No. 2000-CP-32-0248). ¶ 64.

She alleged that Allen's actions are capable of repetition because he continues to practice law in South Carolina, he represents naïve, uninformed and trusting clients, he owns property with other relatives in Richland County, and he remains willing to conduct business with those relatives and clients. ¶ 65. She also alleged his actions affect the public interest because they have reduced the public's confidence in the South Carolina justice system and the South Carolina Bar. ¶ 66. She also alleged his actions affect the public interest because they constituted violations of the South Carolina Rules of Professional Conduct and were not merely violations of his common law fiduciary duties. ¶ 67. She then alleged specific ways that Attorney Allen's actions cost Ann Marie an ascertainable sum of money. ¶ 68.

In his Brief in Support of Motion to Dismiss, Attorney Allen acknowledged that Ann Marie in her Unfair Trade Practices Act counterclaim had "alleged an ongoing, active, attorney-client relationship." Pl. Brief in Support of Motion to Dismiss Counterclaims at pg. 4 (No. 11).

Despite the allegations of the Amended Answer and Counterclaims and Attorney Allen's recognition that Ann Marie had alleged they had an ongoing, active attorney-client relationship, the lower court, the Hon. Patrick C. Fant, III, Circuit Court Judge, dismissed this cause of action

“based on the fact this case concerns a private transaction that does not affect the public interest.” Order of January 27, 2025, pg. 2.

On February 23, 2025, Ann Marie filed a motion to reconsider, which the lower court denied by order entered March 25, 2025. Ann Marie served and filed her notice of appeal on March 31, 2025.

The pleadings do not state the amount involved on appeal, only that Ann Marie suffered an ascertainable loss of money or property from her inability to market the subject property, lost profits from her inability to manage the property for timber and other forest products, lost profits from her inability to enter into long-term contracts for the use of the property, lost profits from her inability to sell the property for an equestrian-residential development similar to that on Persimmon Fork Road, lost tax benefits from placing the property into a conservation easement, lost income from her inability to use the property as collateral for a loan, and otherwise. She also alleges she lost the unfettered right to develop or improve the property as she wished.

STANDARD OF REVIEW

This Court must view the allegations of the Amended Answer and Counterclaim in the light most favorable to the counterclaiming defendant. If the facts alleged and the inferences reasonably deducible from those facts would entitle the counterclaiming defendant to relief under any theory of the case, dismissal is improper. *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 732 S.E.2d 876 (2012).

HHHunt Corp. v. Town of Lexington, 389 S.C. 623, 699 S.E.2d 699 (Ct. App. 2010), teaches that in deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the pleader, state any valid claim for relief.

The trial court and the Court of Appeals must presume all well-pled facts to be true. Pleadings in a case should be construed liberally so that substantial justice is done between the parties.

Further, dismissal is a drastic procedure. The complaint should not be dismissed merely because the court doubts the pleader will prevail in the action.

This standard ensures that cases are not dismissed prematurely and that parties are given the opportunity to present their claims fully if their allegations could potentially entitle them to relief.

The Supreme Court has expressly rejected any rigid, bright line test that delineates in minute detail exactly what a plaintiff must show to satisfy the Unfair Trade Practice Act's element of potential for repetition/public impact. *Daisy Outdoor Advertising Co. v. Abbott*, 322 S.C. 489, 473 S.E.2d 47 (1996). In Unfair Trade Practices Act cases, generally, plaintiffs will prove potential for repetition/public impact (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts. But those are not the only means for showing potential for repetition/public impact. Rather, **each case must be evaluated on its own merits.** *Id.* (Emphasis added.)

“[S]ince the Rules of Professional Conduct do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.” SCACR 407, “Scope” [7].

STATEMENT OF THE FACTS

The allegations of the Amended Answer and Counterclaims are what matter here, but we will note the following.

In his Complaint, Attorney Allen did not disclose that when he and Ann Marie entered into the land option contract he was her lawyer in matters related to her domestic case, and he did not allege that at the time of the transaction Ann Marie had adequate information about the terms of the transaction and the risks presented by his involvement in it. He did not allege that the terms of the transaction were fair and reasonable to Ann Marie. He did not allege that Ann Marie had consented to his role in the transaction, and he did not allege Ann Marie had been encouraged and given a reasonable opportunity to seek independent legal advice (or any other advice) about the transaction. *See* Compl., generally. In his Summons, he stated that if Ann Marie failed to answer the complaint within the stated time, judgment by default would be rendered against her for the relief sought in the complaint (specific performance of the land option contract). Summons, pg. 1.

Also, since dismissal is improper if the facts alleged **and the inferences reasonably deducible from those facts** would entitle the counterclaiming defendant to relief under any theory of the case, and because the potential for repetition/public impact prong of the UTPA test **must be evaluated on its own merits**, we invite the court to review the affidavit Ann Marie (No. 9) filed in support of her motion for partial summary judgment (as to Attorney Allen's claim for specific performance). There, she fleshes out the details of Attorney Allen's conduct and even avers the specific legal advice and assistance he was providing her while at the same time negotiating the land option with her. Paragraphs 7, 8, and 53 of the Affidavit of Desa Ballard (No. 7) also provide meaningful insight into the public impact of Attorney Allen's actions.

ARGUMENT

Question I: Did the Circuit Court err in dismissing the Fourth Cause of Action (for violation of the South Carolina Unfair Trade Practices Act) on the claimed basis that the land option entered into between a lawyer and his active, current client without her informed consent was a private transaction that does not affect the public interest?

Introduction and General Concepts

We learn from a pre-UTPA case known as *Craven v. Williams*, 302 F. Supp. 885 (D.S.C. 1969, Russell, J.), that for several years in the 1960s a man named Samuel C. Craven went around the Lincolnton, SC area of Charleston County actively seeking to purchase land and “intending generally to resell it advantageously on the advancing market.” *Id.* at 886. Judge Russell found (in 1969) that purchases were normally made for Mr. Craven’s own account, though other members of his family were similarly engaged in seeking to acquire land in this general area. *Id.* Judge Russell found examples of where Mr. Craven purchased from an absent owner a year or two before he began negotiations with Mrs. Williams (the lady he would later sue for specific performance of a contract), a tract in the same neighborhood for \$25 per acre, which less than a year later he would sell for \$150 per acre. *Id.* Judge Russell also found that Mr. Craven had made other offers for land in the neighborhood at prices ranging from \$100 per acre to \$450 per acre. *Id.* Mr. Craven later took the position that Mrs. Williams had agreed to sell him her land for \$150/acre, and he sued her for specific performance when she refused.

Mrs. Williams defended on several bases, but she did not assert the South Carolina Unfair Trade Practices Act as a defense because, after all, the General Assembly wouldn’t until 1971 enact it, two years after Judge Russell entered his order.

Judge Russell denied Mr. Williams specific performance, noting:

The plaintiff was a lawyer of ability, with great knowledge of real estate values in the Lincolnton area based on extensive experience in that field, and in the full possession of his faculties. The defendant, on the other hand, was advanced

in years, living remote from the property involved, with access to no reliable information on value in the Lincolnvile neighborhood, without any knowledgeable adviser so far as the record shows, and but shortly released from a mental institution, after some six or eight years of confinement.

Id. at 893.

Mrs. Williams was not one of Mr. Craven's clients (neither current nor former), but it was important to Judge Russell to note that Mr. Craven was an attorney. *Id.*

Why would that have been important? Why does it matter when assessing the fairness of a contract that one party is an attorney?

Is it because lawyers possess such specialized knowledge and ability beyond that of an average person that the Supreme Court regulates lawyers to protect the public from the potentially severe emotional and economic consequences of their actions? *See Brown v. Coe*, 365 S.C. 137, 616 S.E.2d 705 (2005), and *In re S.C. NAACP Hous. Advoc. Program*, 442 S.C. 189, 897 S.E.2d 691 (2024), to that effect.

Is it because a dual trust is imposed on attorneys: They must act with all good fidelity to the Courts *and* to their clients? They are bound by canons of ethics that have been the growth of long experience and which are enforced by the Courts. *See State ex rel. Daniel v. Wells*, 191 S.C. 468, 481 S.E.2d 181, 186 (1939).

Is it because lawyers have special skills with respect to preparing, negotiating, and interpreting contracts? *Ex parte Westbrook*, 429 S.C. 618, 840 S.E.2d 926 (2020).

Is it because lawyers have special skills with respect to negotiating and advising others about proposed settlements? *Ex parte Wilson*, 428 S.C. 221, 833 S.E.2d 840 (2019); *State v. Despain*, 319 S.C. 317, 460 S.E.2d 576 (1995); *Brown v. Coe*, 365 S.C. 137 (2005).

Is it because lawyers have special skills with respect to matters of law in general?

Franklin v. Chavis, 371 S.C. 527, 640 S.E.2d 873 (2007); *John Doe v. Condon*, 341 S.C. 22, 532 S.E.2d 879 (2000).

Is it because lawyers have special skills with respect to the rights and privileges provided under complex contracts such as insurance policies? See *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002).

Is it because lawyers have special skills with respect to land transactions? See *H&H of Johnson, LLC v. Old Republic Nat. Title Ins. Co.*, 405 S.C. 469, 748 S.E. 2d 72 (Ct. App. 2013); and *In re Paschal*, 412 S.C. 325, 772 S.E.2d 271 (2015).

Is it because they have special skills for helping to resolve legal disputes? *Id.*

Or is it also because lawyers are public citizens who are officers of the legal system and have a special responsibility for the quality of justice? See Preamble[1], RPC, Rule 407, SCACR.

These special skills, together with the “special responsibility for the quality of justice, combined with the trust lawyers have accepted from the courts, their clients, and the public, are why it is so incredibly important that a lawyer obtain his client’s informed consent before entering into a business transaction with him or her.

The utility and value of legal services are difficult for ordinary consumers to assess on their own. Where there is a marked information asymmetry between a service provider and client, it is all too easy for the client to be taken advantage of by one with a built-in conflict of interest.

An attorney simply does not leave his professional skills at his desk when he goes home for the night, this, despite the admonition to a room full of lawyers made by a lecturer on negotiation skills not to “attempt this in your own home.”

When an attorney goes home at night, he simply does not forget what clauses benefit buyers in land contracts.

He does not go home and forget the technique of having the other party to the negotiation make the first offer.

He does not lose the feeling for when it's time to be the Golden Retriever puppy and when it's time to be the Pit Bull. He does not forget the parol evidence rule. He does not forget the list of clauses typically found in a basic option contract.

We ask the Court to acknowledge, monitor, and regulate the disproportionate bargaining power between lawyers and their uninformed clients by recognizing that when a lawyer does business with a client without her informed consent, the public interest is affected.

And we ask the Court not to forget the immense trust the public has placed in lawyers and in the legal system.

Judge Russell did not forget in the *Craven* case (where the lawyer had gone around Lincolnton looking to buy land cheaply from unsophisticated people).

Section 126 of the Restatement (3d) of the Law Governing Lawyers provides:

§ 126. Business Transactions Between a Lawyer and a Client

A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which the lawyer does not render legal services, unless:

- (1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement in it;
- (2) the terms and circumstances of the transaction are fair and reasonable to the client; and
- (3) the client consents to the lawyer's role in the transaction under the limitations and conditions provided in § 122 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.

The Restatement provides the following comments:

a. Scope and cross-references. ***

In all jurisdictions, a lawyer who enters into a business transaction—other than a standard commercial transaction in which the lawyer does not render legal services—with a client of an affiliated lawyer without complying with this Section does so at the risk that the transaction is voidable by the client and subject to other appropriate remedies....

In any civil proceeding between a lawyer and a client, or their successors, the lawyer has the burden of persuading the tribunal that requirements stated in this Section have been satisfied.

b. Rationale. A lawyer's legal skill and training, together with the relationship of trust that arises between client and lawyer, create the possibility of overreaching when a lawyer enters into a business transaction with a client. Furthermore, a lawyer who engages in a business transaction with a client is in a position to arrange the form of the transaction or give legal advice to protect the lawyer's interests rather than advancing the client's interests. Proving fraud or actual overreaching might be difficult. Hence, the law does not require such a showing on the part of a client.

f. Consent only after encouragement and opportunity to obtain independent legal advice. The client must be encouraged and have a reasonable opportunity to obtain independent legal advice before entering into the transaction. There is no requirement that the client actually consult another lawyer. A client might determine to consult another trusted adviser, such as an accountant, a tax adviser, or a business person, or to consult no one at all.

An opportunity to obtain competent independent advice tends to assure that the client has time to consider the transaction and that the lawyer is not applying undue pressure on the client. By the same token, evidence that a lawyer has not allowed the client opportunity to obtain independent counsel is evidence of overreaching. An independent adviser also can bring an objective eye to the proposed arrangement.

Restatement (3d) of the Law Governing Lawyers § 126.

Consistent with the Restatement is Rule 1.8 of the South Carolina Rules of Professional Conduct. It reads in relevant part:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.¹

Rule 1.8(a), RPC, Rule 407, SCACR.

The Comments to Rule 1.8(a) explain the public policy reasons for the Rule:

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of insurance or the provision of investment or fiduciary services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

¹ Rule 1.8 goes on to provide in subsection (b) that a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

[2] *** When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(g) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

Rule 1.8, RPC, Rule 407, SCACR.

We urge the Court to recognize that just about any time a lawyer engages in a transaction with his current client without obtaining her informed consent, the transaction affects the public interest. This is not simply a fallback position to the fact that Ann Marie alleged Attorney Allen had done the same thing before – to Mr. Rawl – and that he owns more land in the area and has other clients and therefore his acts are capable of repetition. It is stronger and far more important to South Carolina jurisprudence. Ann Marie should be entitled to her day in court to prove that she, like Martha Williams of Judge Russell's case, was treated unfairly. And thanks to the foresight of the General Assembly when it enacted the Unfair Trade Practices Act, she should be afforded the opportunity to prove just how behavior like this affects the public interest.

Unfair Trade Practices Act

The Unfair Trade Practices Act reads in relevant part:

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

S.C. Code Ann. § 39-5-20 (1971).

The Act goes on:

(a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages. If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of § 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs.

(d) For the purposes of this section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of § 39-5-20.

S.C. Code Ann. § 39-5-140(d) (1971).

To state a claim under the South Carolina Unfair Trade Practices Act, a plaintiff must allege (and later prove):

(1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)."

RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 337, 732 S.E.2d 166 (2012).

Here, the Circuit Court dismissed the Fourth Cause of Action because it concluded Ann Marie had not alleged the second element: the unfair or deceptive act affected public interest. Order of January 27, 2025. (No. 21.)

We urge the Court to find otherwise.

In *Daisy Outdoor Advertising Co. v. Abbott*, 322 S.C. 489, 473 S.E.2d 47 (1996), the Supreme Court noted, “Plaintiffs in prior cases generally have shown potential for repetition in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts.” *Daisy Outdoor Advertising Co. v. Abbott*, 322 S.C. at 496.

The Supreme Court further noted, “Generally, plaintiffs will prove potential for repetition by the two means described above. We decline to hold, however, that those are the only means for showing potential for repetition/public impact. Rather, each case must be evaluated on its own merits. We expressly reject any rigid, bright line test that delineates in minute detail exactly what a plaintiff must show to satisfy the potential for repetition/public impact prong of the UTPA test.” *Id.* at 497.

In this case, Ann Marie alleged that Attorney Allen had once before engaged in the similar conduct of entering into a business transaction with a client without the client’s informed consent (the Rawl matter) (Am. Ans. and Counterclaim ¶ 64), and she alleged he had the capacity to do so again (since he was still a lawyer with clients and land in the area) (Am. Ans.

and Counterclaim ¶¶ 63 and 64). Every lawyer in this state should be scared to death of doing business with a current client, but this one apparently is not.²

Because Ann Marie has alleged that (and how) Attorney Allen's actions have the potential for repetition, she has in fact met what the Supreme Court calls the "potential for repetition/public impact prong of the UTPA test."

And we again note the Supreme Court's rejection of any "rigid, bright line test that delineates in minute detail exactly what a plaintiff must show to satisfy the potential for repetition/public impact prong of the UTPA test," and we urge the Court to rule that anytime a lawyer transacts business with a current client without her informed consent, the public impact prong of the UTPA test has been met.

Question II: Does South Carolina recognize a cause of action for a lawyer's misappropriation of his current client's confidential information such that a constructive trust could be imposed on the allegedly ill-gotten gains, the lawyer be required to make an accounting, and the current client awarded judgment for such additional sums as are necessary to restore her to the position she occupied before her confidential information was misappropriated?

Plaintiff claims Ann Marie is not entitled to an accounting of the profits he, her lawyer, made by using her confidential information for his personal gain.

Ann Marie alleged that she and Attorney Allen had a confidential relationship. She alleges in ¶ 8 of her Amended Answer and Counterclaims:

i) the Defendant had entrusted the Plaintiff with intimate, personal knowledge about her financial and emotional condition, her assets, her liabilities, her net worth, her liquidity, her debts, her access to liquidity, her negotiating personality, skills and experience, her tolerance for conflict, her level of trust in the Plaintiff, her lack of knowledge of commercial real estate transactions, her access to family support, her children's current needs, the level of support from her family and the reasons for it, and her emotional state over the recent loss of her father; and the Plaintiff used that information to his personal advantage; [and]

² This case does not involve a psychiatrist leasing space from a patient, a minister buying a used car from a parishioner, or a real estate agent buying land from his own client. But all are examples of severe public impact through *potential* for repetition.

j) the Defendant had entrusted the Plaintiff with knowledge of her fractured relationship with her siblings, and the Plaintiff used that information to his personal advantage by proposing to buy land from the Defendant when the Plaintiff knew the siblings, or one or more of them, would be opposed to any such sale.

Ann Marie alleges in ¶ 50 that as a direct result of Attorney Allen's use of that confidential information for his own, personal benefit, the court should impose a constructive trust upon the benefit he derived from the land option, requiring the him to account for and to turn over to Ann Marie the benefit he has received from the land option, and ordering Attorney Allen to pay Ann Marie such additional sums as are necessary to restore Ann Marie to the position she occupied prior to executing the land option. (She also alleges, in ¶ 51, that she suffered damages in numerous respects.)

A confidential or fiduciary relationship exists when one reposes special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence. *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987).

A constructive trust arises whenever a party has obtained money that 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). A constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust. *Whitmire v. Adams*, 273 S.C. 453, 257 S.E.2d 160 (1979).

It is also said that a constructive trust operates against one who by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of

unconscionable conduct, artifice, concealment, or questionable means and against good conscience, either has obtained, or holds the right to property which he ought not in equity and good conscience hold and enjoy. *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 126 F. Supp. 3d 611 (D.S.C. 2015), dismissed *sub nom. PCS Nitrogen Inc. v. Ross Dev. Corp. Rivers*, No. 16-1540 (L), 2018 WL 2111081 (4th Cir. 2018).

An accounting is a judicial remedy designed to prevent unjust enrichment by disclosing and requiring the relinquishment of profits received as the result of a breach of a confidential or fiduciary duty. *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 382 S.E.2d 915 (1989).

Yes, certainly Ann Marie has stated a cause of action for an accounting based on her attorney's misappropriation of her confidential information.

Question III: Did the Circuit Court erred in concluding the Second Counterclaim duplicated the First and therefore should be stricken?

The First Counterclaim is for breach of fiduciary duties of good faith, loyalty, and confidentiality. ¶¶ 37 *et seq.* It seeks damages. Am. Ans. and Counterclaim ¶ 44.

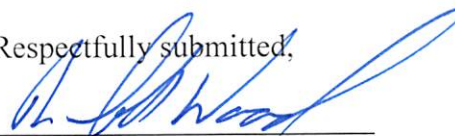
The Second Counterclaim alleges Attorney Allen misappropriated her confidential information by presenting the ill-gotten land option to a third-party real estate developer along with other papers and obtained for himself some unknown benefit. Am. Ans. and Counterclaim ¶ 48. She sought the imposition of a constructive trust and an accounting and payment of such additional sums as are necessary to restore her to the position she occupied prior to executing the land option. Am. Ans. and Counterclaim ¶ 50. She also sought damages. *Id.* at ¶ 51.

These claims do not duplicate each other. She does not seek an accounting in the First Cause of Action or the imposition of a constructive trust.

CONCLUSION

The orders of the trial court should be reversed and the Fourth (UTPA) and Second (Misappropriation of Confidential Information) Counterclaims be reinstated.

Respectfully submitted,



Robert P. Wood, SC Bar No. 6206
ROGERS TOWNSEND, LLC
1221 Main Street, 14th Floor
PO Box 100200 (29202)
Columbia SC 29201
(803) 771-7900 – Telephone
(803) 343-7017 - Fax
robert.wood@rogerstownsend.com

Attorney for Appellant, Ann Marie Watson

July 25, 2025.

Other Counsel of Record:

James Randall Davis, Esq. (S.C. Bar No. 1580)
Davis Frawley, LLC
140 East Main Street (29072)
Post Office Box 489
Lexington, South Carolina 29071
(803) 359-2512
Randy@OldCourthouse.com

Attorneys for Respondent, Kellum W. Allen