IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Fourth Judicial Circuit Court Judge
Case No.: 2013-CP-16-0317

Appellate Case No. 2014-00626

Jonathan Teal and Stacie Teal,

Appellants,

v.

Mary Elizabeth Hickman-Tedder,
Allstate Property & Casualty Insurance Company,
Government Employees Insurance Company, and
Nationwide Mutual Insurance Company,

Respondents.

FINAL BRIEF OF RESPONDENT MARY ELIZABETH HICKMAN-TEDDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Rules

South Carolina Rules of Civil Procedure

Other Authorities

STATEMENT OF THE ISSUES ON APPEAL

The Respondent Mary Elizabeth Hickman-Tedder would restate the issues on appeal as:

Did the Trial Court properly dismiss the complaint against these Defendants for failure to state a cause of action for fraud on the court to set aside the dismissal of the prior negligence action against Defendant Hickman-Tedder based on allegations that the Plaintiffs' own attorney settled the action without their knowledge and consent, forged the settlement documents, misappropriated the settlement proceeds, and filed a stipulation of dismissal?

Or, as otherwise stated:

I. Can the Plaintiffs invoke the equity jurisdiction of the court to set aside the settlement and dismissal through a cause of action for fraud on the court where they have adequate remedies at law against their former attorney?

II. Can the Plaintiffs state a claim for fraud on the court based on allegations of fraud committed by the Plaintiffs' own attorney and in the absence of any allegations that the Plaintiffs' attorney presented any falsified documents to the court which formed the basis of any decision?

STATEMENT OF THE CASE

A more detailed count of the alleged facts will be set forth below, but briefly, for context of this procedural history, the alleged facts are that the initial, underlying action in this matter arises from an automobile accident involving the Plaintiffs Jonathan and Stacie Teal, and the Defendant Mary Elizabeth Hickman-Tedder on June 29, 2010. The Plaintiffs retained the legal services of an attorney, Williams J. Rivers, III, of Shurlknight and Rivers, who filed a negligence action against Hickman-Tedder on June 16, 2011. Thereafter, Attorney Rivers negotiated a settlement of the claim with Hickman-Tedder through her automobile insurance carrier, Allstate Property & Casualty Insurance Company, and with the Plaintiffs' underinsured motorist carriers – Government Employees Insurance Company (GEICO) and Nationwide Mutual Insurance Company. Settlement documents were executed, and Attorney Rivers submitted a stipulation of dismissal with prejudice pursuant to Rule 41(a)(1) to the court for filing. It is alleged that the Plaintiffs did not consent to the settlement, did not sign the settlement documents, and did not receive the settlement proceeds.

When the Plaintiffs learned of the settlement after their Attorney Rivers had been suspended by the Supreme Court,[1] they retained new counsel who brought this action with the filing of a summons and complaint on April 15, 2013. [ROA 12; Complaint.] They are seeking to void the dismissal of the prior action by asserting a cause of action for fraud on the court against the Defendant Hickman-Tedder and the insurance carriers that paid their policy limits as part of the settlement negotiated and consummated by Attorney Rivers. They also are asserting a separate cause of action solely against

[1] In re Rivers, III, 408 S.C. 137, 137, 758 S.E.2d 483 (2012). Attorney Rivers was disbarred in 2014. In re Rivers, 409 S.C. 80, 93, 761 S.E.2d 234, 241 (2014).

Hickman-Tedder reasserting their allegations of negligence in connection with the underlying automobile accident.

Each of the insurance carriers filed answers and/or motions to dismiss. Hickman-Tedder also filed an answer and a motion to dismiss. The Defendant Hickman-Tedder moved for dismissal on the ground of improper service pursuant to Rule 12(b)(4) and/or (5), SCRCP, because the Plaintiffs had never served the summons and complaint on her personally.[2] She also moved for dismissal on the grounds of lack of jurisdiction, and failure to state facts sufficient to constitute a cause of action, pursuant to Rule 12(b)(6), SCRCP. [ROA 59; Motion, dated May 10, 2013.] In her answer, she reasserted the same grounds as in her motion to dismiss, pled accord and satisfaction, and denied the allegations of negligence, as well as other defenses on the merits. [ROA 44; Answer, served May 10, 2013.]

The motions came for hearing before the Honorable Paul M. Burch, on November 21, 2013, who issued an order granting the motions and dismissing the complaint. [ROA 3 ; Order, filed December 17, 2013.][3]

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[2] Plaintiffs failed to affect service despite the fact that Defendant's counsel specifically inquired about service before making the motion. [ROA 163. 176; Transcript, p. 15, Ex. 1 – Letter dated 5/7/13.]

[3] The Plaintiffs finally served the Defendant Hickman-Tedder on the night before the motion hearing. [ROA 164; Transcript p. 16, lines 24-25.] The Trial Court held that the service was too late because the statute of limitations expired on June 29, 2013. The record will show that Defendant Hickman-Tedder did not move for dismissal on statute of limitations grounds, rather, the Defendant's motion was grounded on the lack of service. [ROA 164; Transcript, p. 16.] To the extent that the Supreme Court has held that there is no statute of limitations for a claim of fraud on the court, Chewning v. Ford Motor Co., 354 S.C. 72, 80, 579 S.E.2d 605, 609-10 (2003), the dismissal could not be sustained on that ground alone. However, the dismissal was proper and should be affirmed for lack of jurisdiction and/or failure to state a cause of action, as fully discussed below.

The Plaintiffs served and filed a motion to reconsider on December 30, 2013, along with a separate motion for a hearing on the motion to reconsider. [ROA 135, 146; Motions.] The Trial Court denied both motions. [ROA 9, 11; Order, filed February 5, 2014, Order, filed March 10, 2014]. The Plaintiffs timely served and filed a notice of appeal.

STATEMENT OF THE FACTS

As alleged in the Complaint, the Plaintiffs retained Attorney William J. Rivers III of Schurlknight & Rivers to represent them in connection with claims against Hickman-Tedder. [ROA 22; Complaint ¶14.] On June 16, 2011, Attorney Rivers filed an action in the Court of Common Pleas in Darlington County, C/A No. 2011-CP-16-00416. [ROA 22; Complaint ¶ 17,18.]

On November 20, 2012, Attorney Rivers was suspended from the practice of law, and Attorney Nicholas W. Lewis was appointed to assume responsibility for his client files. [ROA 23; Complaint ¶¶ 23, 24; see footnote 1.] The Plaintiffs received a letter from Attorney Lewis advising that Schurlknight & Lewis would no longer be serving as their attorney and directed them to pick up their file. [ROA 23; Complaint ¶25, 26.] Upon retrieving the file and reviewing it, the Plaintiffs discovered that their Attorney had settled the Plaintiffs' claims without their knowledge, consent or authorization. [ROA 23; Complaint ¶ 27.]

In the file, they found a Release, Covenant Not to Execute and Settlement Agreement, dated March 30, 2011, evidencing a settlement of the liability claims against

Hickman-Tedder[4] and Allstate in exchange for payment of the $25,000.00 policy limits. [ROA 32; Complaint Ex. B.] They also found a Covenant Not to Execute, dated May 12, 2011, evidencing a settlement of the $25,000 underinsured motorist coverage under Mr. Teal's GEICO policy, [ROA 34; Complaint Ex. C], and a Release Underinsured Motorist Coverage, dated June 20, 2011, evidencing a settlement of the $50,000 UIM under Mrs. Teal's Nationwide policy. [ROA 40; Complaint Ex. D.] Attorney Rivers' file also contained a Stipulation of Dismissal, signed by Attorney Rivers and filed with the court on June 13, 2012, which stated:

> It is hereby stipulated by and between counsel for all the parties to this action that this action be and hereby is dismissed, discontinued, and forever ended with prejudice pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure." [ROA 43; Complaint Ex. E.]

The Plaintiffs allege that they had no knowledge of the settlements; they did not consent to the settlements, and they did not sign any of the settlement documents. [ROA 22, 24-25; Complaint ¶¶ 17, 31, 34, 37, 38.] They also allege that they never received the $25,000 paid by Hickman-Tedder's carrier, Allstate. [ROA 23; Complaint ¶¶ 28-29.]

[4] Liability was also released as to Mrs. Hickman-Tedder's husband. [ROA 33; Complaint, Ex. B.]

ARGUMENT

The Trial Court properly dismissed the Plaintiffs' action because a cause of action for fraud on the court cannot be sustained on allegations that their own attorney settled the action without their knowledge and consent, forged the settlement documents, misappropriated the settlement proceeds, and filed a stipulation of dismissal.

As declared in the Introduction to their Complaint, the Plaintiffs are asserting an action for fraud on the court:

> This is an action for fraud upon the Court. Fraud upon the Court occurs where a party or an attorney, tampers with the fair administration of justice by deceiving the institutions set up to protect and safeguard the public or otherwise abuses or undermines the integrity of the judicial process. An attorney is an officer of the Court. An attorney's loyalty to the Court, as an officer thereof, demands integrity and honest dealing with the Court, and when the attorney departs from that standard in the conduct of a case, he perpetrates fraud on the Court. Attorney fraud calls into question the integrity of the entire judicial system and erodes public confidence in the fairness of our system of justice. Therefore, when it is clear that there has been fraud upon the Court, it is imperative that quick and decisive action be taken to stamp out the fraud, which is the only way to restore the public's confidence in our system of justice. [ROA 18-19; Complaint, p. 1-2.]

There is no doubt that attorney fraud negatively impacts the judicial system, and the Supreme Court promptly acted with decisive action to suspend Attorney Rivers from the practice of law and ultimately disbarred him. In this case, however, the Plaintiffs are asserting a personal/private cause of action for fraud on the court, seeking to set aside the dismissal of their prior action against Hickman-Tedder and to avoid the binding effect of the settlements negotiated and finalized by their Attorney. As fully discussed below, the Trial Court properly dismissed this action on jurisdictional grounds, but the dismissal can also be affirmed on additional grounds because the allegations do not state a cause of action for fraud on the court.

One of the foundations necessary for the efficient operation of our legal system is the principle of agency law that the acts of attorneys are binding on their clients, and this includes the rule that lawyers have authority to settle cases on behalf of their clients. See Crowley v. Harvey & Battey, P.A., 327 S.C. 68, 488 S.E.2d 334 (1997); Motley v. Williams, 374 S.C. 107, 647 S.E.2d 244 (S.C. Ct. App. 2007); Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998). Such settlements are binding absent fraud or mistake. Id.

An action for fraud on the court and the power to set aside a settlement and dismissal of a prior action lies in the equity jurisdiction of the court, and it is well settled that equity will not intervene where there is an adequate remedy as by an action at law for damages affords. Van Robinson Ins. Agency, Inc. v. Harleysville Mut. Ins. Co., 272 S.C. 127, 128-29, 249 S.E.2d 744, 745 (1978). On this threshold jurisdictional point, the Trial Court properly concluded that the Plaintiffs' claim for equitable relief based on fraud on the court fails because, as a matter of law, they have legal remedies to pursue against Attorney Rivers. Motley v. Williams, 647 S.E.2d at 247.

In the seminal South Carolina appellate decision addressing fraud on the court, the Supreme Court states: "Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs." Chewning v. Ford Motor Co., 354 S.C. 72, 83-84, 579 S.E.2d 605, 611 (2003).

In this case, however, the Plaintiffs' allegations do not justify avoiding the settlement and dismissal because a claim of fraud on the court cannot be stated on

allegations of fraud by the Plaintiffs' own attorney nor can such a claim be stated where there is no allegation that any fraudulent representations were presented to the court as a basis for any ruling. For each and all of these reasons, the Trial Court's dismissal should be affirmed.

I. The Plaintiffs cannot invoke the equity jurisdiction of the court to set aside the settlement through a cause of action for fraud on the court where they have adequate remedies at law against their former attorney.

"Equitable relief is generally available only where there is no adequate remedy at law." Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). See also Carolina Park Associates, LLC v. Marino, 400 S.C. 1, 8, 732 S.E.2d 876, 879 (2012) ("equitable relief is unnecessary when an adequate remedy for money damages is available at law"); Van Robinson Ins. Agency, Inc. v. Harleysville Mut. Ins. Co., 249 S.E.2d at 745 ("This action at law for damages affords appellant the full relief to which it is entitled. Since appellant possesses an adequate remedy at law, equity will not intervene.").

First, the Plaintiffs argue that the Trial Court violated the Rule 12(b)(6) standard by failing to accept their allegation that they do not have an adequate remedy at law. [ROA 26; Complaint ¶ 48.] As asserted by the Plaintiffs, the basic standard for consideration of a Rule 12(b)(6) motion to dismiss is that the court must limit its consideration to the facts as alleged in the complaint. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006) (In considering a Rule 12(b)(6) motion, the trial court must base its ruling solely on allegations set forth in the complaint.). However, the trial court is not bound to accept all allegations of the complaint. To the contrary, the rule is that the court must accept the facts *well-pleaded* in the complaint, and the court is not

bound to accept allegations of legal conclusions:

> A demurrer admits the facts well pleaded in the complaint but does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law.

Charleston Cnty. Sch. Dist. v. S. Carolina State Ports Auth., 283 S.C. 48, 50, 320 S.E.2d 727, 729 (Ct. App. 1984). Thus, the Trial Court was not bound to accept the Plaintiffs' allegation that they have no adequate remedy at law, because that is a legal conclusion.

As the Trial Court properly ruled, the Plaintiffs do have multiple remedies at law for the fraud committed by their attorney. Their remedy is through legal claims against their Attorney for legal malpractice:

> [I]f the attorney has apparent authority to confess, or consent to, judgment, it is ordinarily binding and conclusive on the client, notwithstanding an actual lack of authority unknown to the court or the opposing party, *the sole remedy in such a case being against the attorney.*

Motley v. Williams, 647 S.E.2d at 247 (citations omitted) (emphasis added).

> A lawyer who enters into a settlement without client authority may be liable to the client for negligent advice with regard to the settlement. *Crowley v. Harvey & Battey, P.A.*, 327 S.C. 68, 488 S.E.2d 334 (1997).

Nathan M. Crystal, "Let's Make A Deal"-Settlement Ethics, S.C. Law., November 2008, at 8, 17. See also Purcell Int'l Textile Grp., Inc. v. Algemene AFW N.V., 185 N.C. App. 135, 141, 647 S.E.2d 667, 672 (2007) ("defendants' proper remedy is to seek relief through a malpractice claim against [attorney]"). Based on their allegations, these Plaintiffs have adequate remedies through causes of action even beyond negligence such as for fraud, conversion, breach of fiduciary duty, and breach of contract. See Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000). Accordingly, the Trial Court properly dismissed the Plaintiffs' equitable claim for fraud on the court.

II. The Plaintiffs cannot state a claim for fraud on the court based on allegations that the Plaintiffs were defrauded by their own attorney and there are no allegations that their attorney presented any falsified documents to the court which formed the basis of any decision.

A. The Plaintiffs are bound by Attorney Rivers' settlement of their claims against Hickman-Tedder.

Although the primary ground for the dismissal was jurisdictional, the Trial Court also found that Attorney Rivers had apparent authority to enter settlements with the Defendants under South Carolina agency law. That holding is correct under the well-settled law set forth in a long line of appellate court opinions, including Ex parte Jones, 47 S.C. 393, 25 S.E. 285, 286 (1896); Crowley v. Harvey & Battey, P.A., *supra*; Motley v. Williams, *supra*; Arnold v. Yarborough, 281 S.C. 570, 572, 316 S.E.2d 416, 417 (Ct. App. 1984).

"In South Carolina, an attorney may settle litigation on behalf of his client, and absent fraud or mistake, such a settlement is binding on the client." Crowley v. Harvey & Battey, P.A., 488 S.E.2d at 334. "It is a long-standing and well-settled rule that an attorney may settle litigation on behalf of his client and that the client is bound by his attorney's settlement actions." Motley v. Williams, 647 S.E.2d at 246.

> '[E]mployment of an attorney in a particular suit implies his client's assent that he may do everything which the court may approve in the progress of the cause. Upon this distinction in a large measure rest the certainty, verity, and finality of every judgment of a court. Litigants must necessarily be held bound by the acts of their attorneys in the conduct of a cause in court, in the absence, of course, of fraud.'

Arnold v. Yarborough, 316 S.E.2d at 417 (quoting Ex parte Jones, 25 S.E. at 286).

> The acts of attorneys are binding on their clients through principles of agency law. *Collins v. Bisson Moving & Storage, Inc.*, 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998). Lawyers have authority to settle cases on behalf of their clients. Such settlements are binding absent fraud or

mistake. *Motley v. Williams*, 374 S.C. 107, 647 S.E.2d 244 (S.C. Ct. App. 2007).

Nathan M. Crystal, "Let's Make A Deal"-Settlement Ethics, S.C. Law., November 2008, at 8, 17.

The Plaintiffs argue that the Trial Court ignored the fraud exception to the agency rule. In the absence of any South Carolina opinion applying the fraud exception to set aside a settlement or dismissal as in this case, the Plaintiffs have cited a string of decisions from various jurisdictions with similar facts upon which those courts found that the attorney fraud alleged and/or proven was not binding on the clients. However, most of those rulings were not predicated on fraud on the court. Rather, they are founded on the substantive law of agency in those states that does not allow attorneys to settle without consent of their clients.

For example, the Plaintiffs cite to the case of Blakney v. Leathers, 56 A.D.3d 404, 867 N.Y.S.2d 145 (2008), where the facts of the attorney misconduct are indistinguishable. The plaintiff's attorney settled a case without authority or consent from the client, forged settlement documents and absconded with the settlement funds. The court vacated the general release and stipulation of discontinuance, and restored the action to the active trial calendar because under New York law, " [a]n attorney must be specifically authorized to settle and compromise a claim, as an attorney has no implied power by virtue of his general retainer to compromise and settle his client's claim." Id. at 146. This case offers no support for the Plaintiffs' argument in this case because under South Carolina law, Attorney Rivers had the authority to bind his clients, as a matter of law.

See also Henderson v. Great Atl. & Pac. Tea Co., 374 Mich. 142, 144, 132 N.W.2d 75, 78 (1965)(court rejected a defense of accord and satisfaction because "an attorney at law has no power, by virtue of his general retainer, to compromise his client's cause of action; but that precedent special authority or subsequent ratification is necessary to make such a compromise valid and binding on the client"); Coates v. Drake, 131 Mich. App. 687, 346 N.W.2d 858 (1984) (dismissal set aside where attorney settled clients' personal injury action against defendants without clients' express or implied authorization and stipulated to dismissal of their action); Nehleber v. Anzalone, 345 So. 2d 822, 822 (Fla. Dist. Ct. App. 1977)(the court rejected an affirmative defense of release because the attorney did not have authority to settle); Perkins v. Philbrick, 443 A.2d 73, 74 (Me. 1982)("an attorney clothed with no other authority than that arising from his employment in that capacity has no power to compromise and settle or release and discharge his client's claim"); Miotk v. Rudy, 4 Kan. App. 2d 296, 299, 605 P.2d 587, 590 (1980)(setting aside a judgment of dismissal on the stated basis that "An attorney has no authority to compromise or settle his client's claim without his client's approval."); Walker v. Stephens, 3 Ark. App. 205, 211, 626 S.W.2d 200, 203 (1981) ("the mere fact that counsel is retained does not, in and of itself, carry an implication of authority to compromise his client's claim"); Humphreys v. Chrysler Motors Corp., 184 W. Va. 30, 32, 399 S.E.2d 60, 62 (1990) (refusing to enforce settlement, stating "The relationship of attorney and client does not imply that a power has been given to the attorney to compromise and settle a claim."). Also cited Liquori v. Giordano, 42 Conn. Supp. 122, 125, 603 A.2d 782, 784 (Super. Ct. 1991) (summary judgment should not be granted where a dispute of material fact regarding the extent to which the plaintiff knew of the

settlement, signed the release or endorsed the check); and Ball v. Teissonniere, 2000 WL 1868243 (Conn. Super. Ct. Dec. 1, 2000) (refusing to enforce settlement after weighing equities and concluding that "the balance is more fairly struck by maintaining the plaintiffs' right of access to the courts in order to pursue their underlying claim.").

Upon study of these opinions, none support the Plaintiffs' claim in this case because, here in South Carolina, the law on the key point is that retaining an attorney to file a court action gives that attorney the authority to settle the litigation on behalf of his client. See Crowley v. Harvey & Battey, P.A., and others discussed above. In addition, as discussed below, the case law does not support the Plaintiffs' argument that their allegations state a cause of action for fraud on the court as an exception to this rule.

B. The fraud exception to the *Crowley* rule does not apply to the facts as alleged by these Plaintiffs.

Apart from the threshold jurisdiction ruling, the dismissal of this action should be affirmed on the additional sustaining ground that the Plaintiffs' allegations do not state a cause of action for fraud upon the court. As a basic proposition, the court has equitable jurisdiction to set aside a judgment on the ground of fraud – IF, as discussed above, there is no adequate legal remedy available.[5] However, the relevant court holdings in various

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[5]A party might seek such relief under Rule 60(b), SCRCP, or through an independent action:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud, misrepresentation, or other misconduct of an adverse party;

actions have narrowly defined the nature of the type of fraud that will justify setting aside a settlement and dismissal. For example, in Bryan v. Bryan, 220 S.C. 164, 66 S.E.2d 609, 611 (1951), the Court held that, as a general rule, an independent action in equity will not lie to set aside a judgment for fraud on the basis that there was perjured testimony at the trial. In Davis v. Davis, 236 S.C. 277, 281, 113 S.E.2d 819, 821 (1960), the Court mentioned, in dicta, that an attorney's misrepresentation to the court that a party was in default might be fraud on the court. The Court of Appeals also discussed fraud on the court in Evans v. Gunter, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1988):

> Fraud upon the court has been defined as 'that species of fraud which does, or attempts to, subvert the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.' H. Lightsey, J. Flanagan, *South Carolina Civil Procedure,* 408 (2nd Ed. 1985).

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(4) the judgment is void;
(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.

However, in Evans, an action to set aside a divorce decree, the allegations actually stated a cause of action for fraud perpetrated not by an attorney, but by the defendant wife on the plaintiff husband.[6]

The Supreme Court first defined "fraud upon the court" in the context of fraud committed by an attorney in the case of Chewning v. Ford Motor Co.:

> The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud. Contrary to perjury by a witness or a party's failure to disclose requested materials, conduct which constitutes intrinsic fraud, where an attorney-an officer of the court-suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court.

579 S.E.2d at 610-11 (footnotes omitted). The Court found that the plaintiff's allegations that the defendant's attorneys knowingly withheld critical documents during discovery and hired an expert to testify falsely in numerous product liability trials sufficiently stated a cause of action for fraud on the court. Id. at 612.

The Court also has held, in disciplinary proceedings, that an attorney's submission of forged documents to a court constitutes a fraud upon the court. Matter of Celsor, 330 S.C. 497, 502, 499 S.E.2d 809, 811 (1998) (attorney publicly reprimanded for committing a fraud upon the court by improperly signing and notarizing documents submitted to the probate court); Matter of McGuinn, 272 S.C. 366, 366, 252 S.E.2d 122, 122 (1979) (attorney publicly reprimanded for fraud on the court in signing his secretary's signature as notary public on affidavits submitted to court in support of a motion); Matter of Jennings, 321 S.C. 440, 446, 468 S.E.2d 869, 873 (1996) (attorney disbarred for

[6] The Court of Appeals held that Evans/husband had sufficiently stated an independent action to set aside a divorce decree based on allegations of fraud and deceit by Gunter/wife in obtaining a divorce decree, which included allegations that she induced him to sign an affidavit of acceptance waiving his right to answer while he was intoxicated

misconduct that included forging client's name to a satisfaction of judgment which constituted a fraud upon the court). See also State v. Jolly, 405 S.C. 622, 630, 749 S.E.2d 114, 118 (Ct. App. 2013)(preparation, execution, and improper notarization of quitclaim deeds constitute fraud upon the court to sustain a criminal contempt conviction and a separate criminal prosecution for obtaining property under false pretenses).

The Plaintiffs cite to NC-DSH, Inc. v. Garner, 125 Nev. 647, 653, 218 P.3d 853, 858 (2009), where the court did set aside a settlement for fraud on the court, but it is factually different because the finding of "fraud upon the court" was based on the fact that the plaintiff's attorney signed and submitted a stipulated judgment for dismissal with prejudice to the court, which the court then signed and entered. The common denominator in these cases was the fact that the attorney committed fraud ***on the court*** by presenting fraudulent documents or making ***misrepresentations to the court***. As the Court stated in Chewning, "'fraud on the court,' whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court.'" 579 S.E.2d at 608 (quoting United States v. Buck, 281 F.3d 1336, 1342 (10th Cir. 2002)).

Here, there is no allegation that the forged settlement documents were presented to the court for approval, and the Stipulation of Dismissal signed by Attorney Rivers, was submitted for filing and it was self-executing. In submitting the Stipulation, Attorney Rivers did not make any presentation to the Court about the settlement and it did not require any affirmative decision or action by the Court. In noting these points, the Trial Court commented "it is doubtful that the conduct of Plaintiff's counsel would even constitute a 'fraud on the court.'" [ROA 7; 12/17/13 Order, p. 5.] While the Plaintiffs argue that the Trial Court violated the Rule12(b)(6) standard by considering whether they

might prevail, the Trial Court's "doubt" was appropriate -- and correct -- as it relates the sufficiency of the allegations even if accepted as true under the proper standard.

Consistent with the above discussed propositions, the Trial Court also correctly stated that an action for fraud on the court is limited to fraud committed by an opposing party. As succinctly stated by the court in Purcell Int'l Textile Grp., Inc. v. Algemene AFW N.V., 647 S.E.2d at 672: "Relief from attorney fraud on the court 'is to be granted only where the judgment was obtained by the improper conduct of the party in whose favor it was rendered.'" (Citations omitted).

In this case, neither the Plaintiffs nor the Defendants had any knowledge or reason to suspect the fraud perpetrated on all of them by Attorney Rivers. The Trial Court discussed the well-established equitable principle that "where one of two innocent persons must suffer, the law should fall upon him who put it in the power of a third person to cause such a loss.'" [ROA 5; 12/17/13 Order, p. 3 (quoting Bolton v. Wharton, 163 S.C. 242, 161 S.E. 454 (1931), and also citing Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006)). As the Trial Court noted, this rule "promotes the public policy of encouraging settlements so that parties who are forced to deal with another party's agent have confidence in the finality of the transaction." [ROA 5; 12/17/13 Order, p. 3.]

While fully sustainable on South Carolina precedent, the Trial Court's conclusion that the Plaintiffs -- rather than the Defendants -- must bear the loss is supported by decisions from other jurisdictions under virtually indistinguishable facts. For example, the Trial Court cited to precedent in North Carolina, Purcell Int'l Textile Grp., Inc. v. Algemene AFW N.V., 647 S.E.2d at 671: "'where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence or by his

negligent conduct made it possible for the loss to occur, must bear the loss.'" (Citation omitted). Similarly, in Nash v. Y & T Distributors, 207 A.D.2d 779, 616 N.Y.S.2d 402 (1994), the facts were strikingly similar – the plaintiff's attorney forged the client's signature to a release and check and submitted a dismissal to the court. The settlement was set aside, however, because under New York law an attorney must be "specifically authorized to settle and compromise a claim." Id. at 403. However, the plaintiff there had also asserted a claim for fraud on the court which the court rejected, stating: "[T]he forgery which forms the basis for the plaintiff's claim is not the type of fraud which would invalidate the settlement, since it is fraud between a party to the settlement and her agent, and not between the parties to the contract." Id. As the court explained, the plaintiff's attorney "duped" both parties, and thus "the well-settled rule of agency law dictates that as between two innocent parties, 'the risk of loss from the unauthorized acts of a dishonest agent falls on the principal that selected the agent.'" Id. (citation omitted).

Similar supporting authority in found in Pennsylvania and Rhode Island. Cohen v. Goldman, 85 R.I. 434, 132 A.2d 414 (1957); Rothman v. Fillette, 503 Pa. 259, 469 A.2d 543 (1983). In both those cases, the plaintiffs' attorneys settled without authority, forged documents, and stole the proceeds. In Cohen, the court ruled that even though the plaintiff's attorney lacked authority to settle the case, since the situation involved two innocent parties whose rights were violated by the client's attorney, the party that hired the attorney must bear the loss: "[I]n a case such as this where two innocent parties are involved, justice requires that of the two the least culpable should not be made to suffer." 132 A.2d at 417. The Supreme Court of Pennsylvania reached the same result on similar facts in Rothman v. Fillette, stating: "The fact that the agent has wronged his principal

through the agent's unlawful act does not provide a predicate for insulating the principal against the harm caused by the agent at the expense of the innocent third party who had no responsibility for the conduct of the agent. We believe that this view is consistent with fundamentally sound principals of agency and equity and that there were no other additional factors here present to justify ignoring its applicability." 469 A.2d at 545–46 (citations omitted).

In litigation practice in this state, the authority of attorneys to make settlement agreements simply is accepted as an unquestionable matter of law. As discussed above, this proposition forms the basis for "the certainty, verity, and finality of every judgment of a court." Arnold v. Yarborough, 316 S.E.2d at 417. As another court has stated, this authority "is essential to the orderly and convenient dispatch of business, and necessary for the protection of the rights of the parties." Manchester Hous. Auth. v. Zyla, 118 N.H. 268, 269, 385 A.2d 225, 226-27 (1978). The public policy implications of allowing the Plaintiffs to set aside these settlements are very serious and very real, and the specter of a ruling that would allow the Plaintiffs to set aside the settlement and void the dismissal in this case is unfathomable. Conceivably, litigation would slow to a snail's pace if insurance carriers and defense attorneys feel compelled to demand face-to-face meetings with claimants/plaintiffs and insist on proof of identity in the execution of settlement documents in order to protect their interests and be assured the settlements will withstand such claims as presented here.

Such a rule would also raise the problematic concern of how to resolve the fact that the Carriers have all paid their policy limits. This is not simply a situation where the defendant/carrier is seeking to enforce a settlement negotiated by an attorney which the

party/client is denouncing. Rather, this is a completed settlement in which the carriers have all paid their limits. The carriers cannot be compelled to pay a second time, and the Defendant Hickman-Tedder is fully entitled rely on her affirmative defense of accord and satisfaction.[7] See Brownstein v. Aluminum Reserve Corp., 245 F.2d 82, 84 (2d Cir.1957) ("payment to an attorney of a claim which he is employed to recover or collect operates as payment to the client himself, absent specific contrary arrangements"); Hutzler v. Hertz Corp., 39 N.Y.2d 209, 213-14, 347 N.E.2d 627, 630 (1976) ("If the attorney absconds with the cash without paying it over to his client, the client may not thereafter compel the debtor or tort-feasor to pay a second time. He must instead look to the defalcating attorney.") (citations omitted).

Conclusion

Our Appellate Courts have consistently followed a longstanding policy favoring the finality of settlements and dismissals negotiated by retained counsel. The Plaintiffs cannot avoid the settlement and dismissal of the original action under a fraud on the court theory notwithstanding the facts, as alleged, that Attorney Rivers negotiated a settlement without their knowledge and consent, forged documents, and misappropriated the funds tendered by the Carriers in full satisfaction of the claims against Defendant Hickman-Tedder.

The Trial Court properly concluded that no action can lie in equity because the Plaintiffs have adequate remedies at law against their attorney for his illegal and

[7] Under the Nevada case of NC-DSH, Inc. v. Garner, *supra*, upon which the Plaintiffs rely, a credit or set-off would be allowed for the amounts paid by the carriers, but Defendant Hickman-Tedder would be left personally exposed for any judgment above those amounts.

unethical, fraudulent conduct, and accordingly the dismissal should be affirmed for lack of equity jurisdiction. In addition, the dismissal can be affirmed because no relief is available through a cause of action for fraud on the court where the Plaintiffs' own attorney committed the fraud, and he did not submit any fraudulent documents and/or make any misrepresentations to the court for a ruling.

WHEREFORE, the Respondent Hickman-Tedder respectfully submits that the dismissal should be AFFIRMED.

Respectfully submitted,

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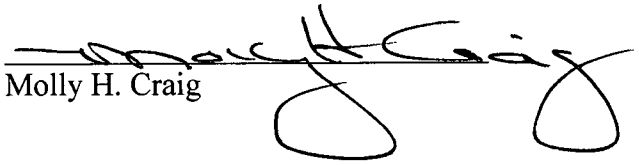
December 8, 2014

Certification of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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December 8, 2014

Certificate of Service

I certify that on this 8th day of December 2014, a copy of the foregoing Final Brief was served on the Appellant and all other Counsel of Record by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed to them as listed below:

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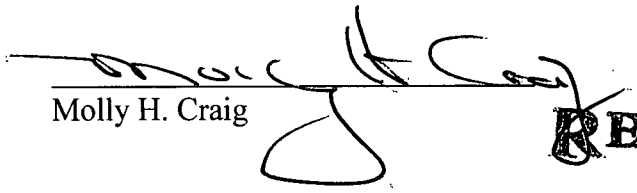

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