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-16-00317

Appellate Case No.: 2014-000626

JONATHAN TEAL AND STACIE TEAL..... Appellants

-vs.-

MARY ELIZABETH HICKMAN-TEDDER, ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY AND NATIONWIDE MUTUAL INSURANCE COMPANY..... Respondents

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APPELLANTS' FINAL REPLY BRIEF

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III. The cases cited by Respondents do not establish that fraud on the court in South Carolina is limited solely to fraud committed by an opposing party or fraud that affects an opposing party.

IV. The conduct described in Appellants' Complaint rises to level of fraud on the court.

V. South Carolina's usual agency rules do not and should not apply to this case involving attorney fraud.

ARGUMENT

I. **Respondent Hickman-Tedder concedes that the trial court erred in dismissing Appellants' Complaint based on statute of limitations.**

In her Brief, Respondent Hickman-Tedder concedes that "[t]o the extent that the Supreme Court has held that there is no statute of limitations for a claim of fraud of the court, the dismissal could not be sustained on that ground alone." (Resp. Brief page 3, note 3) (internal citations omitted). The South Carolina Supreme Court has held: "There is no statute of limitations when a party seeks to set aside a judgment due to fraud upon the court . . . ." Chewning v. Ford Motor Co., 354 S.C. 72, 84, 579 S.E.2d 605, 610 (2003). Accordingly, the trial court's dismissal of Appellants' Complaint based on statute of limitations was in error.[1]

[1] Respondent Nationwide "adopts and fully incorporates Hickman-Tedder's arguments in response to the statute of limitations issues posed by Appellants." (Resp. Brief p. 4). Respondent Allstate notes that it "anticipate[s] this issue will be addressed in Hickman-Tedder's submission to the Court." (Resp. Brief p. 8, note 2).

II. **Factual issues must be resolved to determine whether or not Plaintiffs have an adequate remedy at law, and the trial court was required to resolve those factual issues in Plaintiffs' favor. Moreover, Plaintiffs do not have adequate remedies at law.**

"An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." ZAN, LLC, v. Ripley Cove, LLC, 406 S.C. 404, 414, 751 S.E.2d 664, 669 (Ct. App. 2013) *quoting* Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). "The basis for granting equitable relief is the impracticability of obtaining full and adequate compensation at law." Nutt Corp. v. Howell Road, LLC, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011). "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." Santee Cooper Resort, 298 S.C. at 185, 379 S.E.2d at 123. See also Miliken & Co. v. Morin, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009).

Respondents incorrectly argue that the mere fact that Appellants could possibly file other lawsuits or claims in an effort to right the wrongs at issue in this case is sufficient to establish an "adequate remedy at law." However, an adequate remedy at law must provide full and adequate compensation and be certain, practical, complete, and efficient to attain complete justice. To determine if any of the remedies at law suggested by Respondents provide full and adequate compensation and attain complete justice for Appellants, the trial court must resolve many factual issues in Respondents' favor, which is the opposite of what the trial court was required to do.

For example, Respondents argue that one adequate remedy Plaintiffs have is to file a claim against Schurlknight and Rivers law firm. To determine if this is an

"adequate" remedy that prevents equitable relief, the trial court would have to resolve the following factual issues:

- What are the injuries sustained by Appellants?
- What are Appellants' total damages?
- What constitutes full and adequate compensation for Appellants?
- Did Schurlknight and Rivers carry malpractice insurance, and if so, how much?
- What were the assets of Schurlknight and Rivers?
- How many other individuals have claims against Schurlknight and Rivers?
- What is the dollar amount of other claims made against Schurlknight and Rivers?

Of course, factual issues such as the ones listed above cannot be decided as part of a Motion to Dismiss. "A ruling on a motion to dismiss a claim must be based solely on the allegations set forth on the face of the claim. The motion cannot be sustained if the acts alleged and the inferences reasonably deductible therefrom would entitle the plaintiff to **any** relief on **any** theory of the case." Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009) (emphasis added and internal citations omitted). When considering a Rule 12(b) motion, "the trial court must base its ruling solely upon allegations set forth on the face of the complaint." Ashley River Properties I, LLC, v. Ashley River Properties II, LLC, 374 S.C. 271, 277, 648 S.E.2d 295, 299 (Ct. App. 2007).

Moreover, Appellants do not have any other adequate remedies, at law or otherwise. First, the Schurlknight and Rivers law firm had no insurance and is otherwise

insolvent. Second, Mr. Schurlknight committed suicide, and Mr. Rivers is now in jail. Both attorneys are no longer in possession of the money stolen from Appellants. Third, the claims brought against the Schurlknight family only resulted in $323,324.56 (after fees and costs) being paid into a common fund for all eligible former clients of Schurlknight and Rivers. Fourth, the lawsuit brought against First Reliance Bank will result in $1,467,417.31 (after fees and costs) being paid into a common fund from which Appellants and all other eligible former clients of Schurlknight and Rivers will receive a *pro rata* share. Fifth, the Lawyers' Fund for Client Relief has limited the maximum amount that any one claimant could possibly receive to $40,000.00 and had limited the maximum amount paid per lawyer to $200,000.00. In other words, Appellants can prove that while they may have some other remedies, they are not "adequate" remedies. Accordingly, the trial court erred in finding that Appellants' have an adequate remedy at law.

III. Fraud on the court in South Carolina is not limited solely to fraud committed by an opposing party or fraud that affects an opposing party.

Respondents argue, based on Chewning, 354 S.C. at 72, 579 S.E.2d at 605, and Ray v. Ray, 374 S.C. 79, 647 S.E.2d 237 (2007), that fraud on the court in South Carolina is limited only to situations in which the fraud is committed by an opposing party. However, neither Chewning nor Ray supports Respondents' argument.

In Chewning, the South Carolina Supreme Court quotes several definitions of fraud on the court such 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[,]" "[f]raud upon the court is a serious allegation

. . . involving corruption of the judicial process itself[,]" and "fraud on the court, whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court." Id. at 78, 579 S.E.2d at 608. These definitions do not limit fraud on the court solely to fraud committed by an opposing party.

In addition, Respondents argue that Chewning limits fraud on the court to fraud to conduct that affects the opposing party. However, just as the definitions of fraud on the court in Chewning are not limited to conduct by an opposing party, the definitions are not limited to conduct that affects an opposing party. In fact, the definitions in Chewning focus on the integrity of the Court, a corruption of the judicial system, and whether the judicial machinery can perform "its impartial task of adjudging cases." Id. at 78, 579 S.E.2d at 608. These cases view the effect fraud has on our system of justice, and not a mere litigant.

The South Carolina Supreme Court also defined extrinsic fraud in Chewning as "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." Id. at 81, 579 S.E.2d at 610. Again, nothing in these definitions limits extrinsic fraud to actions of an opposing attorney only.

Further, the South Carolina Supreme Court has rejected an earlier attempt to limit the broad definitions of Chewning. In Ray v. Ray, 374 S.C. 79, 647 S.E.2d 237 (2007), the Supreme Court rejected the argument that Chewning limits that fraud on the court only to fraud committed by an attorney or officer of the court:

> However, **our holding in *Chewning* does not limit the finding of extrinsic fraud to misconduct of an attorney or an officer of the court.** As we noted in *Evans*, 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." *Evans v. Gunter,* 294 S.C. 525, 529, 366 S.E.2d 44, 46 (1988) (quoting H. Lightsey, J. Flanagan, *South Carolina Civil Procedure,* 408 (2nd ed. 1985)) (emphasis added).

Id. At 85, 647 S.E.2d at 240 (Emphasis added).

A review of these definitions establishes nothing that limits fraud on the court only to acts committed by an opposing attorney or opposing party. Schurlknight & Rivers' fraudulent actions subverted the integrity of the Court itself and prevented the judicial machinery from performing its tasks of adjudging cases presented for adjudication. Therefore, Schurlknight & Rivers' actions qualify as fraud on the court.

Respondents also cite Purcell Intern. Textile Group, Inc., v. Algemene AFW NV, 647 S.E.2d 667 (N.C. App. 2003), to support the contention that fraud on the court is limited to acts committed by an opposing party or opposing attorney. The North Carolina Court of Appeals based its ruling in Purcell Intern. Textile on Henderson v. Wachovia Bank of N.C., N.A., 551 S.E.2d 464, 468 (N.C. App. 2001). The North Carolina Court of Appeals in Henderson held that:

> Defendant's attorneys did not bribe or improperly influence the court, nor did their conduct constitute a fraud upon the court or upon defendant. At most the affidavits show that defendant's attorneys did not fully apprise defendant of court orders to appear for depositions. **Without so holding today, there may be situations so egregious that would entitle a party to be relieved of fraud on it by its own attorney, but this is not one of those situations**.

Id. at 469 (emphasis added). North Carolina courts clearly contemplate situations where a party would be entitled to be relieved of fraud on by its own attorney. While the facts of Henderson may not have supported such a finding, the facts of the instant case do, or at a minimum, Appellants' allegations of fraud on the court should not have been thrown out of court on a motion to dismiss.

IV. The conduct described in Appellants' Complaint rises to level of fraud on the court.

Respondents argue that the conduct described in Appellants' Complaint does not rise to the level of fraud on the court and does not corrupt the judicial process. This contention is incorrect.

The judicial process is corrupted when fraud prevents the court system from impartially adjudicating cases and parties are deprived of their day in court and of their opportunity to be heard. That is exactly what happened in this case. Schurlknight and Rivers, serving only their own personal financial interests, fraudulently settled Plaintiffs' case, forged settlement documents, lied to the trial court, prepared a fraudulent stipulation of dismissal that the Clerk of Court accepted and filed, and absconded with the settlement proceeds. Plaintiffs have never had their day in court, and they should not be prevented from having their day in court due to the dishonesty and fraud of Schurlknight & Rivers. If the trial court's Order stands, the entire judicial process will have been subverted at the hands of an attorney willing to commit fraud.

As the United States Supreme Court discussed in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), "tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public,

institutions in which fraud cannot complacently be tolerated consistently with the good order of society." Id. at 246.

Moreover, the South Carolina Supreme Court has also recognized that lawyer fraud can qualify as fraud upon the court and corrupts the judicial process. "Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice." Chewning, 354 S.C. at 83-84, 579 S.E.2d at 611. Accordingly, the conduct alleged in Appellants' case constitutes fraud on the court for purposes of a motion to dismiss.

V. South Carolina's usual agency rules do not and should not apply to this case involving attorney fraud.

Respondents argue that South Carolina's usual agency rules, and specifically the agency rule that clients/principals are bound by the settlement acts of their attorneys/agents, apply to this situation. However, almost every South Carolina case that cites this general rule notes that there are two exceptions to the general rule for (1) fraud and (2) mistake. See, e.g., Crowley v. Harvey & Battey, P.A., 327 S.C. 68, 70, 488 S.E.2d 334 (1997) ("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.") (emphasis added); Shelton v. Bressant, 312 S.C. 183, 208, 439 S.E.2d 833, 834 (1993) ("We uphold and reaffirm the long standing rule that a client is bound by his attorney's actions in the settlement of a case. Acts of an attorney are directly attributable to and binding upon the client. **Absent fraud** or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement.") (emphasis added); Motley v. Williams, 374 S.C. 107, 111, 647 S.E.2d 244, 246 (Ct. App. 2007) (after specifically finding that Williams made no allegations of fraud, holding that attorney had

authority to settle case on behalf of client); Arnold v. Yarborough, 281 S.C. 570, 572, 316 S.E.2d 416, 417 (Ct.App.1984) ("**Absent fraud** or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement. . . 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.**") (emphasis added). Thus, in South Carolina, when fraud is alleged and exists (as it does in this case), litigants (like Appellants) are not bound by the acts of their attorney in the conduct and settlement of a case.

Respondents also argue that the general rule that a principal should bear the risk of an agent's infidelity should also apply in this case. However, no South Carolina Court has directly addressed this rule in the lawyer/client/third-party/fraud on the court context. Thus, to the extent Appellants' Complaint contains novel issues, these novel issues should not be decided on a Motion to Dismiss. This is especially true since the Complaint raises important issues relating to the relationship between lawyers and their clients. See, e.g., Evans v. State, 344 S.C. 60, 543 S.E.2d 547 (2001); Keiger v. Citgo, Coastal Petroleum, Inc., 326 S.C. 369, 482 S.E.2d 792 (Ct. App. 1997). However, as cited in Appellants' Brief, other jurisdictions, when faced with similar factual situations, have found that a client is not bound by a settlement obtained through fraud, misrepresentations, and forgeries. E.g. NC-DSH, Inc., v. Garner, 218 P.3d 853 (Nev. 2009) (noting that while generally the sins of an agents are visited on the principal, courts do not treat the attorney-client relationship as they do other agent-principal relationships).

Accordingly, the trial court erred in applying general agency rules to this case and in dismissing Appellants' Complaint.

CONCLUSION

For the reasons contained herein, in Appellants' Brief, and as may be raised in any Supplemental Briefs and at oral arguments, the Order of the trial court should be reversed and judgment entered on behalf of the Appellants.

Respectfully submitted,

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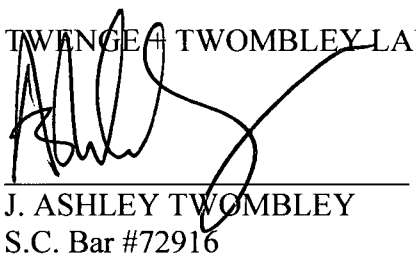
BY: 

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CERTIFICATE OF COUNSEL

The undersigned, J. Ashley Twombley, certifies that the herein Final Reply Brief of Appellants complies with Rule 211(b) the South Carolina Appellate Court Rules.

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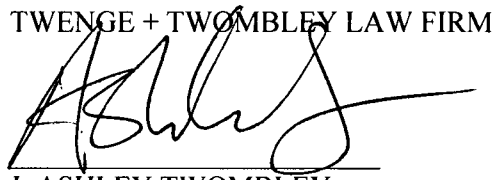
BY: 

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December 10, 2014