The Supreme Court of South Carolina

Enersys Delaware, Inc , Appellant,

v

Tammy Hopkins, Respondent

The Honorable George C James, Jr
Sumter County
Trial Court Case No 2011-CP-43-00179

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court

IT IS SO ORDERED

CJ

FOR THE COURT

Columbia, South Carolina

July 25, 2012

cc William H Floyd, III, Esquire
Angus Macaulay, Esquire
George A Harper, Esquire
The Honorable Jenny Kitchings

NEXSEN|PRUET

William H Floyd III
Member
Certified Employment & Labor Law Specialist
Admitted in SC

December 6, 2011

The Hon V Claire Allen
Deputy Clerk
S C Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re ***EnerSys Delaware Inc v Tammy Hopkins***
Case No 2011-CP-43-000179
Appeal No 2011193446

Dear Ms Allen

On behalf of Appellant EnerSys Delaware Inc , please find the following enclosed for filing, pursuant to S C A C R 210-211

(1) An original and fifteen (15) copies of the Final Brief of Appellant, one copy unbound,

(2) An original and fifteen (15) copies of the Final Reply Brief of Appellant, one copy unbound,

(3) An original and one (1) copy of the Proof of Service,

(4) An original and one (1) copy of the Certificate of Counsel, and

(5) An original and fifteen (15) copies of the Record on Appeal, one copy unbound

Please return one file-stamped copy of each item via our courier By copy of this letter, we are serving the same upon counsel for the Respondent

Please contact us if we can be of additional assistance

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia SC 29202
www nexsenpruet com

T 803 253 8201
F 803 727 1436
E WFloyd@nexsenpruet com
Nexsen Pruet LLC
Attorneys and Counselors at Law

Sincerely,

William H Floyd, III

WHF/jab
Enclosures
cc George Harper, Esquire
Angus H Macaulay, Esquire

The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 116 9
COLUMBIA SOUTH CAROLINA 29 11
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29?01
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www sccourts org

February 3, 2012

George A Harper, Esquire
1229 Lincoln St
Columbia, SC 29201

Re Enersys Delaware v Hopkins, Tammy
2011193446

Dear Mr Harper

The following Order has been endorsed on your Motion to Serve and File Out of Time in the above entitled case on appeal

"Granted

John Cannon Few C J
For the Court

By s/ V Claire Allen
Deputy Clerk

February 03, 2012 "

Please be advised that the Record on Appeal and all Final Briefs will be submitted for the Court's consideration

Very truly yours,

CLERK

TAG/laf
cc William H Floyd, III, Esquire
Angus Macaulay, Esquire

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SUMTER COUNTY
COURT OF COMMON PLEAS

The Honorable George C James, Jr Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware Inc , Appellant,

V

Tammy Hopkins, Respondent,

MOTION TO SERVE AND FILE OUT OF TIME

Comes now, Tammy Hopkins, by and through her counsel of record and files this, her motion to serve and file out of time her Final Brief in the above-captioned matter and would show the Court as follows

Counsel for the Respondent received from the Court a notice of a filing deficiency by the Appellant's in its preparation of the Record on Appeal Counsel erroneously assumed this notice changed the due date for Respondent's Final Brief By letter dated January 6, 2012, this Court corrected counsels error and this Motion is filed within the time requirements of that letter Accordingly, counsel respectfully moves to be allowed to serve and file her final brief out of time

Respectfully submitted,

January, 17, 2012

George A Harper

1229 Lincoln Street
Columbia, SC 29201
(803) 730-1570
sharperg@mac com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was served on counsel for the Appellant by hand delivery on this 17th day of January, 2012

GRANTED
JOHN CANNON FEW, C J
FOR THE COURT

By _____ (Clerk) (Deputy Clerk)

FILED
2-3-12 LAF

Law Office of,
George A Harper
1229 Lincoln Street
Columbia, SC 29201

Tel (803) 730-1570
Fax (803) 779-9628

sharperg@mac com

January 17, 2012

Via Hand Delivery

The Honorable Tanya A Gee, Clerk
The South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re *EnerSys Delaware, Inc v Tammy Hopkins*
Case No 2011193446

Dear Ms Gee

Enclosed for filing are Respondent's Motion to Serve and File Out of Time its Final Brief, Respondent's Final Brief, and Respondent's Certificate of Compliance with Rule 211(b) Copies of all these documents have been served on counsel for the appellant

Thank you for your attention to these matters,

Very truly yours,

Counsel for Respondent

GAH/pn

CC, William H Floyd, III

The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211

1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE (803) 734 1890
FAX (803) 734 1839
www sccourts org

January 6, 2012

George A Harper, Esquire
1229 Lincoln St
Columbia, SC 29201

Re Enersys Delaware v Hopkins, Tammy
2011193446

Dear Mr Harper

Our records indicate that the Respondent's Final Brief in the above matter should have been served and filed by December 6, 2011 You must file the brief and a Motion to Serve and File Out of Time within ten (10) days of this letter, or any brief subsequently filed may not be considered

Very truly yours,

CLERK

TAG/laf
cc William H Floyd, III, Esquire
Angus Macaulay, Esquire

The South Carolina Court of Appeals

TANYA A GLE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www sccourts org

December 12, 2011

William H Floyd, III, Esquire
Angus Macaulay, Esquire
Nexsen Pruet, LLC
P O Drawer 2426
Columbia, SC 29202

Re Enersys Delaware v Hopkins, Tammy
2011193446

Dear Counsel

We have received the Record on Appeal, Final Brief of Appellant and Final Reply Brief of Appellant in the above case However, according to Rule 267 of the South Carolina Appellate Court Rules, you must include all counsel of record on the cover of the Record on Appeal Additionally, you must provide a Certificate of Counsel for the Record on Appeal according to Rule 210(g) of the South Carolina Appellant Court Rules According to Rule 267(e) of the SCACR, the covers of the Record on Appeal shall be of a material not less than 50 pound weight and not glassine

Furthermore, the copies of the final brief and reply brief are stapled According to Rule 267(d), if staples are used to bind the volumes, the spines of the volumes shall be bound with heavy tape

Within ten days of the date of this letter, please arrange for a representative from your office to come to the Court of Appeals filing desk on the 1st floor of the Edgar A Brown Building to make the required corrections and provide the Certificate of Counsel for the Record on Appeal **We request that you notify this office when someone will be arriving to make the corrections so the documents will be available without delay**

Very truly yours,

CLERK

TAG/laf
cc George A Harper, Esquire

The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 9?11
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29?01
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www sccourts org

October 24, 2011

William H Floyd, III, Esquire
Angus Macaulay, Esquire
Nexsen Pruet, LLC
P O Drawer 2426
Columbia, SC 29202

George A Harper, Esquire
1229 Lincoln St
Columbia, SC 29201

Re Enersys Delaware v Hopkins, Tammy
2011193446

Dear Counsel

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1205 Pendleton Street, Columbia, S C 29201 Thank you for your attention to this

If you have any questions, please do not hesitate to contact this office

Very truly yours,

CLERK

TAG/laf

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C James, Jr , Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware, Inc — Appellant,

v

Tammy Hopkins — Respondent

PROOF OF SERVICE

I hereby certify that I have served the foregoing Reply Brief of Appellant on the Respondent by causing to be hand-delivered a copy of the same on October 17, 2011 at the office of Respondent's Counsel of Record, George Harper, Esq , 1229 Lincoln Street, Columbia, South Carolina 29201

October 17, 2011

William H Floyd, III S C Bar #10246
Angus Macaulay S C Bar #15044
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803 771 8900
WFloyd@nexsenpruet com
AMacaulay@nexsenpruet com

Attorneys for Appellant
EnerSys Delaware Inc

NEXSEN|PRUET

William H Floyd, III
Member
Certified Employment & Labor Law Specialist
Admitted in SC

October 17, 2011

The Hon V Claire Allen
Deputy Clerk
S C Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re ***EnerSys Delaware Inc v Tammy Hopkins***
Case No 2011-CP-43-000179
Appeal No 2011193446

Dear Ms Allen

Enclosed for filing please find the original and two copies of Appellant EnerSys Delaware Inc 's Reply Brief and Proof of Service Please return file-stamped copies via our courier Please note that a technical error has placed the text of Footnote 4 one page before the note appears in the brief text This error will be corrected when EnerSys submits its Final Brief

By copy of this letter, we are serving the same upon counsel for the Respondent

Please contact us if we can be of additional assistance

Sincerely,

William H Floyd, III

WHF/gpc
Enclosures
cc George Harper, Esquire
Angus H Macaulay, Esquire

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia SC 29202
www nexsenpruet com

T 803 253 8201
F 803 727 1436
E WFloyd@nexsenpruet com
Nexsen Pruet LLC
Attorneys and Counselors at Law

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C James, Jr , Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware Inc — Appellant,

v

Tammy Hopkins — Respondent

REPLY BRIEF OF APPELLANT

William H Floyd, III
Angus H Macaulay
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
(803) 771 8900
WFloyd@nexsenpruet com
AMacaulay@nexsenpruet com

Attorneys for Appellant
EnerSys Delaware Inc

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I ARGUMENT

THE LOWER COURT ABUSED ITS DISCRETION IN DENYING ENERSYS' MOTION TO DISQUALIFY HARPER, BECAUSE IT REQUIRED ENERSYS TO SHOW THAT HARPER ACTUALLY POSSESSES CONFIDENTIAL INFORMATION INSTEAD OF DEMONSTRATING RISK OF DISCLOSURE

A The Lower Court Failed to Properly Apply the "Substantial Relationship" Test

Rule 1 9's "substantial relationship" test requires disqualification when there "is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter" S C A C R 407, Rule 1 9 cmt 3 The moving party need not identify specific facts learned in the prior representation, because "[a] conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and the information that would in ordinary practice be learned by a lawyer providing such services" *Id*

The lower court applied the wrong legal standard, and thus abused its discretion, when it required EnerSys to identify specific confidential facts learned in Harper's prior representation of EnerSys in order to justify disqualification Contrary to the court's ruling, Harper's knowledge of EnerSys' confidential "personnel decisions, agreements, policies, procedures, and litigation strategies"[1] *does* warrant disqualification, because it is this kind of intimate familiarity with a former client's legal affairs that can be used to that client's disadvantage in a later case *See e g Stitz v Bethlehem Corp* , 650 F Supp 914, 917 (D Md 1987) (disqualifying attorney in age discrimination case because his prior representation of the defendant in "reductions in force and grievance proceedings made

---

See Order at 5

him familiar with Bethlehem's personnel policies and procedures, and that familiarity could be used to Bethlehem's disadvantage in Stitz' suit ")

In support of the lower court's application of the "substantial relationship" test, the Respondent argues that "the lower court concluded that there was nothing in Harper's former representation of EnerSys that show (sic) either that (1) Harper had confidential information which would be relevant to the Hopkins matter, or (2) that the nature of the services Harper had rendered for EnerSys led to the conclusion that Harper would possess such information " Respondent's Brief at 9 This statement does not accurately represent the analysis or conclusions of the lower court

In fact, the lower court's error is that it only addressed the first conclusion listed by the Respondent in concluding that no substantial relationship existed among Harper's prior representation of EnerSys and current representation of the Respondent While citing the correct standard, the lower court **never** engaged in the analysis required by Rule 1 9's "substantial relationship" test because it failed to consider the risk that Harper learned confidential information while representing EnerSys that could be relevant to the Respondent Instead, the court equated the "substantial relationship" test to a rule requiring EnerSys to prove that Harper actually learned material confidential factual information in order to justify disqualification Because the lower court failed to properly apply the "substantial relationship" test, the court's Order denying EnerSys' motion to disqualify Harper is controlled by an error of law amounting to an abuse of discretion [2]

[2] *See e g NCK Org Ltd v Bregman* 542 F 2d 128 134 (2d Cir 1976) ([T]he court need not inquire whether the lawyer did in fact receive confidential information It may be presumed that [the lawyer] possessed confidences of his client and the possibility that breach of these confidences was committed by [the lawyer] is sufficient to make disqualification a necessary and desirable remedy to enforce the lawyer s duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information) (internal quotations and citations omitted)

B The *Townsend* Decision Reflects the Error in the Lower Court's Application of the "Substantial Relationship" Test

The Respondent argues that the South Carolina Supreme Court's decision in *Townsend v Townsend* supports the lower court's insistence on the identification of specific facts learned in the prior representation that would be relevant to the subsequent representation in order to justify disqualification *See Townsend v Townsend*, 323 S C 309, 474 S E 2d 424 (1996) The Respondent's reliance on *Townsend* to support her position is misguided, because *Townsend* reaffirms that a commonality of relevant facts or legal issues is expressly not required to establish a substantial relationship

Townsend involved a lawyer who served as a guardian ad litem in a child custody proceeding and then, several years later, brought an action on behalf of the child's father for a reduction in his child support obligations *Id* at 315, 474 S E 2d at 428 The day of the merits hearing, the family court judge moved *sua sponte* to disqualify the lawyer after learning of his prior role as the child's guardian ad litem *Id* at 312, 474 S E 2d at 426

In affirming the disqualification, the Supreme Court emphasized the objective nature of the "substantial relationship" test, restating the standard as one justifying disqualification when the lawyer "would have or *reasonably could* have learned confidential information in the first representation that would be of significance to the second " *Id* at 317, 474 S E 2d at 429 (emphasis in original) The *Townsend* Court did not require identification of any specific factual similarities or common legal issues shared between the two matters, and in fact acknowledged that the lawyer, like Harper in this case, "claims none of the same information was actually used in the two matters " *Id* The Court cites no specific facts that even *might* have been learned in the prior representation that could be relevant to the second matter and acknowledged that there

may not be any such facts It was the "*risk* that information he gained during the [previous] matter *might* prove relevant" to the current matter that required disqualification *Id* at 317-18, 474 S E 2d at 429 (emphasis added)

Townsend reflects that the proper focus of the "substantial relationship" inquiry is on the *risk* of disclosure of confidential information as a means of erring on the side of promoting candid disclosure between attorneys and clients [3] *See also NCK*, 542 F 2d at 134 ("Where it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation, it is the court's duty to order the attorney disqualified ") (internal citation omitted) The lower court's citation to *Townsend* but insistence that EnerSys identify facts learned in Harper's representation of EnerSys to prove a "substantial relationship" was error

[3] Instead of requiring a commonality of law and fact the *Townsend* Court based its disqualification decision on the confidentiality rationale underlying Rule 1 9 finding that the guardian ad litem s hybrid role of both ascertaining the child s best interests through fact investigation and advocating those interests to the court demands candor so as to ensure the guardian can be an informed representative of the parties *Townsend* 323 S C at 316 17 474 S E 2d at 428 29 This rationale supported disqualification even though the guardian ad litem did not have a lawyer client relationship with the client nor any absolute duty of confidentiality because [s]uch a construction of the phrase substantially related furthers the policy rationale of encouraging candid disclosure to the lawyer guardian *Id* at 317 474 S E 2d at 429

C The Respondent's Reliance on *Kaselaan* Is Misplaced

1 *Kaselaan* focused on a commonality of issues, not a commonality of facts and law

The Respondent attempts to distinguish *Kaselaan* by suggesting that a higher degree of factual and legal commonality existed in *Kaselaan* than exists in this case But the *Kaselaan* court did not order disqualification due to a commonality of facts and legal claims In fact, like the *Townsend* court, the *Kaselaan* court expressly rejected the argument that a mechanical comparison of fact and law is required to establish a "substantial relationship" warranting disqualification *See Kaselaan & D Angelo Assocs Inc v D Angelo*, 144 F R D 235, 243 (D N J 1992) ("Thus, an examination of the factual bases underlying the successive representations does not appear particularly 'crucial' to resolving the 'substantially related' issue ")

Rather, the court was concerned with an identity of "common issues regarding [the employer's] employment policies and procedures, hiring and termination criteria, and normal course of action in prosecuting and defending employment claims " *Id* at 245 This commonality of issues—not facts or legal claims—created a "climate of disclosure" of relevant confidential information *Id* at 244 ("Knowledge of [the employer's] tactical approach to dealing with departing employees confers a distinct advantage arising from his retention by [the employer] in such employment matters in the recent past ") Finding that the issues between those matters were "practically the

same," the court concluded that a substantial relationship was established and disqualification was warranted *Id* at 244-45

Applying the *Kaselaan* standard to Harper's former representation of EnerSys and current representation of the Respondent reflects that disqualification is equally warranted in this case Like the disqualified lawyer in *Kaselaan*, Harper represented EnerSys over a period of four years and handled a broad scope of employment litigation Like the disqualified lawyer in *Kaselaan*, not all of the matters previously handled by Harper share factual circumstances and legal claims with this case But disqualification is required here, as in *Kaselaan*, because **all** of Harper's EnerSys matters shared material employment-related issues with this case involving EnerSys confidences, including EnerSys' litigation strategy and approach on employment matters and the strengths and weaknesses of its internal policies and employee agreements

2 *Kaselaan*'s focus on the similarity of the contracts as reflective of the similarity of the issues is equally compelling in this case

The *Kaselaan* court noted that the commonality of "issues" between the lawyer's prior and current representations was especially evident when focusing on one particular matter which, like the case at issue, also included unfair competition allegations and a similar underlying confidentiality agreement *See Kaselaan*, 144 F R D at 244 The Respondent mistakenly equates this portion of the court's discussion with a requirement

[4] The Respondent argues that the lawyer in *Kaselaan* actually drafted the exact employment agreement at issue in the subsequent litigation while representing the employer and thus "switched sides with respect to that agreement This is incorrect the lawyer merely assisted in drafting an employment termination agreement containing restrictive covenants similar to those found in defendant s contract Id at 244 The court found that the similarity in the contracts—not the lawyer s role in drafting one or the other—reflected the similarity of the issues at the heart of the litigation thus supporting disqualification Id at 244 45

of heightened factual and legal similarity and argues that the *Phillips* matter and this case are too dissimilar to create a "substantial relationship"

The Respondent claims that, unlike *Kaselaan*, "the only commonality between *Phillips* and [this case] is the fact that EnerSys claims its confidentiality policy is implicated in both cases" Respondent's Brief at 12 The Respondent's argument also misses the point of the *Kaselaan* court's discussion of the similarity of the contracts at issue in those two matters The court did not closely examine the contracts to determine whether their similarity was indicative of a substantial relationship[4] In fact, the only similarity identified by the court, aside from the purpose of the employee agreements, was that "both agreements contain in part identical definitions of the term 'confidential information'" *Kaselaan*, 144 F R D at 244 n 15 Rather, the court found that because the contracts contained similar language and were imposed on employees for a similar purpose, the issues underlying those agreements were substantially related, warranting disqualification *Id* at 244-45

Harper's prior representation of EnerSys included enforcement of a confidentiality agreement that was functionally identical to the agreement signed by the Respondent *Compare* Exhibit H (Phillips' Confidentiality Agreement) *to* Exhibit I (Hopkins' Confidentiality Agreement) It is the fact that the construction and enforcement of a similar confidentiality agreement is at issue in both *Phillips* and this case, not the presence or absence of factual similarities regarding the violation of those agreements, that supports disqualification Those similarities create a substantial risk that the *issues* underlying Harper's enforcement of the confidentiality agreement on behalf of EnerSys in *Phillips* involved the disclosure of confidential information that would be

relevant to the Respondent *See also Jessen v Hartford Cas Ins Co*, 3 Cal Rptr 3d 877, 887-88 (Cal Ct App 2003) (holding that a commonality in the "subjects" between the former and current matters, including information related to the evaluation, prosecution, and settlement of similar claims, would be material to the current client and sufficient to establish substantial relationship despite legal and factual dissimilarities)

3 The fact that Harper did not represent EnerSys when the Respondent signed the confidentiality agreement at issue is irrelevant

The Respondent's focus on the "temporal overlap" in *Kaselaan* as a distinguishing factor between these two cases is similarly unavailing The Respondent emphasizes that the lawyer in *Kaselaan* still represented the employer when his later client signed the employment agreement at issue there, while Harper had not represented EnerSys for a year by the time the Respondent signed her confidentiality agreement Respondent's Brief at 11-12 This fact made no difference in *Kaselaan*, and it should make no difference here

In *Kaselaan*, it was clear that the employer's former lawyer had not participated in the drafting of the employee agreement at issue in the subsequent case 144 F R D at 244 As such, the fact that the lawyer still represented the employer at the time that the agreement was signed by the defendant was not a basis upon which the court found a "substantial relationship" warranting disqualification Instead, the court naturally focused on the employee agreement and underlying litigation that the lawyer **did** work on while representing the employer, and its similarity to the employment agreement and litigation at issue in the instant case *Id* at 244-45 The similarity in the agreements, not their dates of execution, provided the basis for the court's holding that the commonality of issues necessarily involved in unfair competition litigation against a former employee

created a "climate for disclosure" of confidential information that warranted disqualification *Id*

The fact that Harper no longer represented EnerSys when the Respondent signed her confidentiality agreement is similarly irrelevant to the "substantial relationship" analysis EnerSys does not claim that there is a risk of disclosure of confidential information related to the specific confidentiality agreement signed by the Respondent at the outset of her employment in 2005, just as the movant in *Kaselaan* did not allege that the lawyer had confidential information about the specific contract signed by the employee in that case If that were the case, then the "substantial relationship" analysis would be unnecessary because Harper would be representing the Respondent in the **same** matter in which he previously represented EnerSys and would quite literally be switching sides

Instead, it is the fact that Harper represented EnerSys in a number of employment-related matters, including enforcement of a functionally identical confidentiality agreement in *Phillips*, that demonstrates the risk that Harper gained confidential information in the years he represented EnerSys that would be material to the Respondent's position The absence of a temporal overlap between Harper's representation of EnerSys and the Respondent's execution of her confidentiality agreement is immaterial to the substantial relationship analysis

D The Factual Distinctions Between *Phillips* and This Case Do Not Affect Their Substantial Relationship

The Respondent suggests that *Phillips* matter is too factually dissimilar to this case to establish a substantial relationship Again, Respondent misses the point *Phillips* is important not because of any factual similarities between it and this litigation, but

because of the nature of the services necessarily provided by Harper and the near certainty that Harper acquired relevant confidential information while litigating *Phillips* specifically and in his representation of EnerSys more generally

Phillips and this matter are not merely two "breach of contract" cases with no factual or legal relationship beyond the allegation that some contractual obligation was breached Out of the universe of matters that could fall within the scope of "breach of contract" cases, both cases involve EnerSys suing a former Sumter County employee—the only two such cases brought by EnerSys against Sumter-operations employees in the past decade The same contractual causes of action are alleged against both employees Both lawsuits allege the breach of a confidentiality agreement Both confidentiality agreements imposed the same obligations on the former employee defendants [5]

Despite these similarities, the Respondent argues that the cases cannot be substantially related because "there is no commonality in the way the corporate policies or contracts were violated " Respondent's Brief at 12 But this distinction implies that there is only a risk that Harper learned relevant confidential information if the cases were

[5] The Respondent also argues that the confidentiality agreement 'can hardly be deemed confidential when EnerSys routinely requires its employees to execute it and EnerSys has used the agreement as exhibits in other litigation " Respondent s Brief at 13 This argument misses the importance of the similarity of the confidentiality agreements to the substantial relationship test It is not the terms of the confidentiality agreements that require disqualification it is the information likely acquired by Harper in the course of enforcing the agreements The agreement was the obligation at the heart of both ' breach of contract actions Accordingly it is neither the existence nor the content of the agreement that bolsters the substantial relationship between *Phillips* and this case it is the fact that the critical importance of the agreement to both cases indicates a substantial risk that Harper learned confidential information related to that agreement which will materially benefit the Respondent s position in this case

essentially identical, a premise consistently rejected by courts applying Rule 1 9(a) *See e g Westinghouse Elec Corp v Gulf Oil Corp*, 588 F 2d 221, 224 (7th Cir 1978), *Kaselaan*, 144 F R D at 243, *Crawford W Long Memorial Hosp of Emory Univ v Yerby*, 373 S E 2d 749, 750-51 (Ga 1988), *NCK*, 542 F 2d at 134 Surely Harper would be expected to learn significant confidences related to employee confidentiality matters as he guided EnerSys through the *Phillips* litigation, even though the precise manner in which the agreement was breached is not the same For the Respondent to suggest otherwise amounts to an argument that client confidences worthy of protection by Rule 1 9's "substantial relationship" standard are limited to those learned by a lawyer in the earlier of two cases which are so similar as to be indistinguishable, save the substitution of the lawyer's new client in the later case

The Respondent's argument that Rule 1 9(a) should be read so narrowly as to preclude representation only when two cases are factually and legally identical is wholly inconsistent with "the policy rationale of encouraging candid disclosure" that underlies Rule 1 9(a) *Townsend*, 323 S C at 317, 424 S E 2d at 429 Because the lower court based its denial of EnerSys' motion to disqualify Harper on its finding that "[t]here is no similarity between this case and the five cases referenced by the plaintiff, except that they involve disputes with an employee," *see* Order at 5, the lower court also failed to properly apply the "substantial relationship" test and thus abused its discretion

Similarly, it makes no difference that seven years have elapsed since Harper last represented EnerSys in *Phillips* While "[i]nformation acquired in a prior representation may have been rendered obsolete by the passage of time," S C A C R 407, Rule 1 9 cmt 3, the mere passage of time cannot negate the existence of a "substantial relationship" if

the disclosure of confidential information risked by the representation could still be material to the lawyer's current client *See Smith & Nephew Inc v Ethicon Inc*, 98 F Supp 2d 106, 109 (D Mass 2000) (rejecting premise that fifteen year lapse of time between representations necessarily erodes risk of disclosure of former client's confidences when lawyer acknowledged familiarity with the contracts at issue)

The passage of time affects the substantial relationship of two matters **only** when the confidential information has become "obsolete" or otherwise superseded by newer, more relevant information *See State ex rel Ogden Newspapers Inc v Wilkes*, 566 S E 2d 560, 564-65 (W Va 2002) ("[O]ld information may continue to be secret and thus subject to a broad duty on the part of the lawyer not to reveal or use it adversely But if the old information is not realistically relevant to the later representation, its presumed possession should not lead to a finding of substantial relationship ") (internal citation omitted) If the confidential information learned in the prior representation is still relevant to the former client, its disclosure could materially advance the later client's position, regardless of the passage of time

In this case, the materiality of the confidential information at risk of disclosure by Harper's current representation of the Respondent is unaffected by the lapse of years since Harper last represented EnerSys EnerSys' policies, procedures, employee agreements, litigation strategy and evaluation process, key decision-making personnel, and operating structure have remained consistent and confidential since Harper last represented EnerSys Because the passage of time has not rendered Harper's confidential knowledge of EnerSys "obsolete," the Respondent's argument that the information learned by Harper is no longer material to the Respondent must fail

II CONCLUSION

For the reasons stated herein, Plaintiff/Appellant EnerSys Delaware Inc respectfully requests that the Court reverse Judge James' May 3 order denying EnerSys' Motion to Disqualify Defendant's Counsel George A Harper, Esquire and that Harper be disqualified from further representing the Respondent in this case

Respectfully submitted,

William H Floyd, III S C Bar #10246
Angus H Macaulay S C Bar #15044
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803 771 8900
WFloyd@nexsenpruet com
AMacaulay@nexsenpruet com

Attorneys for Plaintiff/Appellant
EnerSys Delaware Inc

October 17, 2011

The South Carolina Court of Appeals

Enersys Delaware, Inc , Appellant,

v

Tammy Hopkins, Respondent

The Honorable George C James, Jr
Sumter County
Trial Court Case No 2011-CP-43-00179

ORDER

For good cause having been shown, the time for Appellant's Initial Reply Brief to be served and filed in the above entitled matter is hereby extended until October 27, 2011

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
cc William H Floyd, III, Esquire
Angus Macaulay, Esquire
George A Harper, Esquire

FILED
10/7/11

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C James, Jr , Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware, Inc — Appellant,

v

Tammy Hopkins — Respondent

MOTION FOR EXTENSION OF TIME

Pursuant to S C A C R 263(b), Plaintiff/Appellant EnerSys Delaware, Inc ("EnerSys") respectfully requests an extension of time in which to file its Reply Brief in this matter EnerSys' Reply Brief is currently due October 6, 2011 EnerSys requests a ten (10) day extension so that the deadline for filing the Reply Brief will be October 17, 2011

10/3/11
10/17/11
1st

September 29, 2011

William H Floyd, III S C Bar #10246
Angus Macaulay S C Bar #15044
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803 771 8900
WFloyd@nexsenpruet com
AMacaulay@nexsenpruet com

Attorneys for Plaintiff/Appellant EnerSys Delaware Inc

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C James, Jr , Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware, Inc — Appellant,

v

Tammy Hopkins — Respondent

PROOF OF SERVICE

I hereby certify that I have served the foregoing Motion for Extension of Time on the Respondent by causing to be hand-delivered a copy of the same on September 29, 2011, at the office of Respondent's Counsel of Record, George Harper, Esq , 1229 Lincoln Street, Columbia, South Carolina 29201

September 29, 2011

William H Floyd, III S C Bar #10246
Angus Macaulay S C Bar #15044
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803 771 8900
WFloyd@nexsenpruet com
AMacaulay@nexsenpruet com

Attorneys for Plaintiff/Appellant EnerSys Delaware Inc

NEXSEN|PRUET

James A Byars
Associate

October 3, 2011

The Hon Jeanette Barber, Clerk
S C Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re ***EnerSys Delaware Inc v Tammy Hopkins***
Case No 2011-CP-43-000179

Dear Ms Barber

Enclosed is a check for $25 00 to cover the motion fee we inadvertently forgot to send last week with our Motion for Extension of Time

Sincerely,

James A Byars/gpc

James A Byars

Enclosure
JAB/gpc

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia SC 29202
www nexsenpruet com

T 803 540 2051
F 803 727 1422
E JByars@nexsenpruet com
Nexsen Pruet LLC
Attorneys and Counselors at Law

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C James, Jr , Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware Inc — Appellant,

v

Tammy Hopkins — Respondent

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Respondent proposes the following to be included in the Record on Appeal

1 Defendant's Answer and Counterclaim
2 Exhibit "A" to Defendant's Response to Plaintiff's Motion to Have Defendant's Counsel Disqualified

I certify that this designation contains no matter which is irrelevant to this appeal

George A Harper
1229 Lincoln Street
Columbia, South Carolina 29201
(803) 730-1570
sharperg@mac com

Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C James, Jr , Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware Inc — Appellant,

v

Tammy Hopkins — Respondent

PROOF OF SERVICE

I hereby certify that the foregoing Designation of Matter to Be Included in the Record of Appeal was served on Counsel for the Appellant on September 23, 2011

George A Harper
1229 Lincoln Street
Columbia, South Carolina 29201
(803) 730-1570
sharperg@mac com

Attorney for Respondent

Law Office of,
George A Harper
1229 Lincoln Street
Columbia, SC 29201

Tel (803) 730-1570
Fax (803) 779-9628

sharperg@mac com

September 23, 2011

Hon Tanya Gee
Clerk S C Court of Appeals
P O Box 11629
Columbia, SC 29211

Re Enersys Delaware, Inc v Tammy Hopkins
Case No 2011-CP-46-000179

Dear Ms Gee

Enclosed please find Respondent's Initial Brief as well as her Designation of Matter to Be Included in the Record on Appeal Copies of these documents have been served on Counsel for the Appellant

Thanking you, I remain,

Yours very truly,

George A Harper

GAH/pn

cc William H Floyd, III, Esq

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C James, Jr , Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware Inc — Appellant,

v

Tammy Hopkins — Respondent

INITIAL BRIEF OF RESPONDENT

George A Harper
1229 Lincoln Street
Columbia, South Carolina 29201
(803) 730-1570
sharperg@mac com

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I STATEMENT OF THE ISSUE ON APPEAL

Whether the lower court was correct in denying Appellant's Motion to Disqualify Defendant's Counsel when the Appellant failed to establish any "significant relationship" between counsel's prior representation of Appellant and counsel's representation of Defendant and Appellant failed to show the existence of any confidential information counsel could have learned in his prior representation which would be relevant to his representation of Defendant

II STATEMENT OF THE CASE

Plaintiff/Appellant EnerSys Delaware Inc ("EnerSys" or "the Company") filed this case against Defendant/Respondent Tammy Hopkins ("Hopkins") after it terminated her employment on January 31, 2011 EnerSys obtained *ex parte* a temporary restraining order and scheduled a hearing for a temporary injunction for February 10, 2011 (Order p 1) Hopkins hired George A Harper ("Harper") to represent her Harper had previously represented EnerSys but had not done any work for them since 2004 (Order p 3)

EnerSys objected to Harper's representation claiming it was violative of South Carolina Rule of Professional Conduct 1 9 ("Rule 1 9") In due course, EnerSys filed a motion to have Harper disqualified Following a hearing, on May 3, 2011 Judge James issued an Order denying EnerSys' motion (Order p 6) On June 2, 2011 EnerSys served its notice of appeal

III STATEMENT OF FACTS

A Course of proceedings and disposition in the court below

This case was commenced by EnerSys filing a complaint against a former employee, Tammy Hopkins, which alleged she downloaded confidential EnerSys payroll information onto her personal computer (Amended Complaint p 12) EnerSys alleged she violated its policy related to confidential information and obtained, ex parte, a temporary restraining order against Hopkins (Amended Complaint p 17-47) Hopkins hired Harper to represent her Harper had represented EnerSys over eight years before but EnerSys objected to his representation claiming it violated Rule 1 9 On April 2011 EnerSys filed a motion to disqualify Harper and following receipt of briefs and a hearing the lower court entered an order denying EnerSys' motion to disqualify Harper (Order p 6)

The lower court first noted that EnerSys claimed that during his representation of the Company from 2000 until 2004, Harper was given confidential knowledge of its personnel practices, policies and procedures as well as its litigation strategy all of which it claimed was protected by the attorney-client privilege (Order p 3) The lower court also noted EnerSys emphasized Harper's involvement in *EnerSys, Inc v Choice Phillips* a case which EnerSys claimed was particularly significant because, according to EnerSys it involved an employee's improper use of confidential information in violation of the same personnel policy at issue in the instant case (Order p 3-4)

Thus the background of the Phillips litigation warrants a close examination Phillips had been the Company's personnel manager at a battery manufacturing plant in Sumter South Carolina (Exhibit "A" p 1) That plant was the subject of a series of disputed between the Company and a labor union representing the hourly employees at the battery plant (Id) In one matter, Phillips made public statements and testified that the Company was improperly making payments to employees involved in an "anti-union committee" who were seeking to have the Union decertified The Company claimed Phillips' statements were false and defamatory because they alleged the Company engaged in illegal activity (Exhibit "A" p 2)

The Company obtained a default judgment against Phillips Subsequently, in other litigation it developed that EnerSys had in fact made the illegal payments to the anti-union committee that Phillips alleged they had made (Exhibit "A" p 2) Thus EnerSys was forced to admit that it had violated the National Labor Relations Act and it settled those cases by paying $7,750,000 (Id) Then Phillips moved to have the default judgment entered against him set aside based on the fact EnerSys had committed fraud on the court in obtaining the default judgment (Exhibit "A" p 3)

The lower court noted that Rule 1 9 prohibits a lawyer who has formerly represented a client from thereafter representing another person "in the same or a substantially related matter" in which that person's interests are materially adverse to the interests of the former client, absent written consent In particular, the lower court emphasized that the prohibition was put in place to prevent the lawyer from using or relating confidential information connected to the former representation to the disadvantage to the client in the subsequent litigation Order p 4-5

The lower court found as a factual matter that these was no similarity between the instant case and the cases referred to by EnerSys except that they all involved disputes with former employees The lower court went on to observe that the fact that EnerSys "had developed a certain method of handling these disputes that has survived over seven years does not warrant disqualification " Order pp 5-6

B Defendant's Employment History with EnerSys

Hopkins was employed in a clerical function at Sumter Metals another EnerSys facility in Sumter County (Answer/Counterclaim p 11) EnerSys contends that Hopkins accessed and downloaded confidential payroll reports that she was not authorized to have access to EnerSys further alleges that Hopkins then transmitted this confidential information via e-mail to her personal e-mail address EnerSys contends it discharged Hopkins for these acts (Amended Complaint p 12)

Hopkins admitted that confidential payroll information was downloaded on to her work computer but denies that she did it (Answer/Counterclaim p 14) Hopkins alleges that numerous EnerSys management officials had access to her work computer and had the opportunity to download this information (Answer/Counterclaim p 23) Hopkins alleges that she could not had gain access to the confidential information because it was protected by passwords that she never had access to (Answer/Counterclaim p 25) Hopkins contends that she was "set-up" by EnerSys because of her complaints of sexual harassment (Answer/Counterclaim p 26)

IV STANDARD OF REVIEW

The lower court's order denying the motion to disqualify counsel is reviewed under the abuse of discretion standard *State v Gregory,* 364 S C 150, 152, 612 S E 2d 449, 450 (2005) An abuse of discretion only occurs when the lower court applies the wrong legal standard or its factual findings are without evidentiary support *Gainey v Gainey*, 382 S C 414, 423, 675 S E 2d 792, 797 (Ct App 2009)

V ARGUMENT

THE LOWER COURT CORRECTLY FOUND THAT HARPER WAS NOT DISQUALIFIED BECAUSE HIS CURRENT REPRESENTATION OF HOPKINS WAS NOT SUBSTANTIALLY RELATED TO HIS FORMER REPRESENTATION OF ENERSYS

A Application of Rule 1 9(a) does not disqualify Harper

It is axiomatic that Rule 1 9 of the South Carolina Rules of Professional Conduct requires a lawyer to be disqualified from representing a former client in a current matter without the former clients written consent if the matters are "substantially related " Under Rule 1 9(a) of the South Carolina Rules of Professional Conduct, "a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing "

There is no dispute that Harper formerly represented EnerSys nor is there any dispute that EnerSys has not given its consent to Harper's representation of Hopkins EnerSys does not contend that the facts or legal theories in the current case are the *same* as those in any case that Harper had handled for them Instead, EnerSys claims that Harper's prior representation of EnerSys in employment cases, and specifically his representation in the *Choice Phillips* matter so "substantially related" to the current case that his disqualification is warranted

Comment [2] of Rule 1 9 notes in part, "The scope of a "matter" for purposes of the Rule may depend on the facts of a particular situation or transaction " Comment [3] adds that "Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter "

Comment [3] goes on to note that information which had been disclosed to the public would ordinarily not be disqualifying nor "***would information that may have been rendered obsolete by the passage of time "*** Rule 1 9 Comment [3] (emphasis added) The Comment goes on to note that in the case of an organizational client, "general knowledge of the client's policies and practices ordinarily will not preclude representation, on the other hand, knowledge of specific facts gained in a prior that are relevant to the subject matter in question ordinarily will preclude such representation

A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential to sue in the subsequent matter ***A conclusion about the possession of such information***

may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services Id (Emphasis added)

EnerSys contends the lower court erred when it sought a showing of specific facts that Harper could have learned in the prior representation which were confidential and which would have some relevance to the present action What the lower court sought was "something that [he] could sink my teeth in, allude to it or produce it *in camera* or whatever it might be " (Order p 3) The lower court concluded that there was nothing in Harper's former representation of EnerSys that show either that (1) Harper had confidential information which would be relevant to the Hopkins matter, or (2) that the nature of the services Harper had rendered for EnerSys led to the conclusion that Harper would possess such information

In so doing, the lower court correctly applied the test enunciated in Townsend v Townsend, 323 S C 309, 317, 474 S E 2d 424,429 (1996) "whether the lawyer would have or reasonably could have learned confidential information in the first representation that would be of significance to the second " The facts in *Townsend* are instructive in the instant case A lawyer's disqualification was sought because he first represented a minor as a guardian ad litem, and then sought to represent one of the child's parents in an action involving payment of child support 474 S E 2d at 426 The Supreme Court found the matters were "substantially related" because confidential matters he could have learned when he acted as the child's gardian ad litem would be relevant in the subsequent matter 474 S E 2d at 429

In the instant case, the lower court found nothing confidential that Harper could have learned in his prior representation of EnerSys would be relevant in the Hopkins matter On appeal, EnerSys stresses the lower court erred in requiring it to specify the confidential information Harper could have leaned in his prior representation that would be relevant in the Hopkins matter Yet this is exactly what the "substantial relationship" test requires It is what the Court in Townsend required It is what every appellate court which has looked at this issue has required

There are several ways the "substantial relationship" test can be satisfied First, if the subject matter of the prior and present representations are closely related or intertwined, then a presumption of shared confidences exists and the movant is not required to point to any specific confidences For example, in *Healy v Axelrod Construction Company*, 155 F R D 615 (N D Ill 1994), the lawyer whose disqualification was sought had provided legal advice in setting up an ERISA plan and then was engaged by a different party in a suit over the plan benefits The court found a "substantial relationship" between the matters because the lawyer "could have obtained confidential information in the first representation that would be relevant in the second representation !55 F R D at 619

A similar case, and one relied on by EnerSys, is *Kaselaan & D'Angelo Associates, v D'Angelo,* 144 F R D 235 (D N J 1992)(hereinafter "K & D") In 1988, Hill International Inc purchased K & D As part of the acquisition, one of the former owners, William D'Angelo entered into a six year written employment contract commencing on January 1, 1989 which contained required him to refrain from soliciting or interfering with

employees of K & D and from misappropriating or disclosing confidential business information of K & D 144 F R D at 236-37

From 1986 through at least March 29,1990, K & D John J Rosenburg represented K & D in a variety of lawsuits involving various employment matters "in connection with claims against former employees alleging misappropriation of trade secrets, tortious interference with customer relations, breach of duty of loyalty of an employee and unfair competition " 144 F R D at 239 Then , in 1992, Mr Rosenburg entered his appearance to represent William D'Angelo in a suit it which the corporation was alleging D'Angelo breached his restrictive covenants 144 F R D at 236

The court noted that Rosenburg had assisted K & D "in drafting an employment termination agreement containing restrictive covenants similar to those found in defendant's contract " 144 F R D at 239 According to the court, this "created the strong likelihood that Mr Rosenburg was exposed to both information and issues which are critical to the resolution of the present matter " Thus at the same time the corporation entered into the employment contract with William D'Angelo, Mr Rosenburg was representing it in drafting and enforcing these agreements Id

A matter of months after representing the corporation drafting and defending restrictive covenants, Mr Rosenburg attempted to "switch sides" and represent a former owner of the corporation who allegedly had breach the agreements Rosenburg had been working on It bears emphasis that when William D'Angelo signed the agreement that was subject to the suit, Rosenburg represented the corporation Moreover the exact issues that Rosenburg handled for the corporation were the issues raised in the

subsequent litigation On these facts, the district court found that plaintiffs had met their burden of proof and granted the motion to disqualify 144 F R D at 246

EnerSys argues that the decision in K & D supports it motion for disqualification by attempting to compare Harper's role in the *Choice Phillips and Hopkins* matters with the instant case with Rosenburg's role in K & D One common factor between Phillips and the instant case is they both involved an alleged violation of EnerSys' policy on the use of confidential information In Phillips, the company was contending it was defamed when Phillips said it was providing illegal support to an anti-union committee All of these actions occurred prior to the plant being shut down in 2001 Hopkins, on the other hand involves an alleged misuse of confidential payroll information over ten years later

Thus the Phillips and Hopkins matters involve fundamentally different issues separated by a significant amount of time In the K & D case, the issues were virtually the same and they overlapped with the lawyer's representation of the client Rosenburg was representing the corporation at the same time D'Angelo entered into the employment contract which later became the subject of the suit Moreover, both Rosenburg's representation of the corporation and the subsequent D'Angelo litigation involved a myriad of the same issues breaches of employment agreements, improper use of the same trade secrets, solicitation of the same customers and employees etc

By way of contrast, the only commonality between Phillips and Hopkins is the fact that EnerSys claims its confidentiality policy is implicated in both cases However, unlike the K & D case, there is no commonality in the way the corporate policies or contracts were violated nor is there any temporal overlap Moreover, EnerSys can

hardly claim that the confidentiality policy itself is confidential, or what would constitute a breach of that policy is confidential

EnerSys claims that both suits contain the same causes of action But that simple fact, without more, does not make the cases "substantially similar " This is so because "a court must look behind mere facial similarities between prior and pending cases and focus on the precise nature of the subject matters presented in the two representations " *Duncan v Merrill, Lynch, Pierce, Fenner, & Smith, Inc* 646 F 2d 1020, 1031 (5th Cir Unit B) cert denied 454 U S 895 (1981) There is nothing similar between the actual subject matters of the *Phillips case,* or any other matter Harper handled for EnerSys over seven years ago, and the Hopkins case

EnerSys also contends that the Phillips case and the instant matter have the *"same potential fact witnesses and key exhibits "* (Appellants Brief p 18) The only witness identified in the Phillips case was the former human resource manager of the closed battery plant, Daryl Davids Davids testified about the damages EnerSys suffered as a result of Phillips allegedly defamatory statements (Exhibit "A" p 3) The individuals who EnerSys claims may be involved in the instant case, Ted Fries and Callie Guillotte had no involvement in the Phillips case The "key exhibit" EnerSys points to is its standard Confidentiality Agreement That agreement can hardly be deemed "confidential" when EnerSys routinely requires its employees to execute it and EnerSys has used the agreement as exhibits in other litigation Thus, other than its very public confidentiality policy, there are no witnesses or exhibits in common between the Phillip case and Hopkins

Finally EnerSys contends that the fact Harper had given them general employment advice and was familiar with their "litigation strategy and approach" warranted his disqualification notwithstanding the fact that over seven years had lapsed between his representation of them and the filing of the instant case Any lawyer is going to gain insight on how a client approaches a particular case If that was sufficient to disqualify him from ever taking a case against that client then the "substantial relationship" test would be unnecessary and a "any relationship" test could be substituted in its place

B Application of Rule 1 9(c) does not disqualify Harper

EnerSys also argues that Harper's ethical duties to his former client cannot be reconciled with Rule 1 9(c) if he represents Hopkins EnerSys suggests that Harper had "familiarity with EnerSys such thaat he cannot simply avoid the use or disclosure of EnerSys confidences in the process of representing the Respondent, the information he learned is simply too critical to an understanding of EnerSys' business, its personnel, its employment practices, and its litigation strategy" Brief p 24

EnerSys' contention runs head-on into the Comments to Rule 1 9, one of which states ***"In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude such representation"*** Rule 1 9 Comment [3] (emphasis added) Assuming as late as 2004 Harper had a general knowledge of EnerSys' litigation policies and practices, that alone could not serve to disqualify him in 2011 Instead EnerSys is now required to demonstrate the existence of confidential information Harper could have learned in his prior representation which

would be relevant in the Hopkins matter That is what the lower court required and it is what the Rule requires Since there is no significant relationship between Harper's prior representation of EnerSys and the Hopkins matter, Rule 1 9(c) does not require disqualification

CONCLUSION

For the reasons stated herein, Defendant/Respondent respectfully requests that the Court affirm Judge James' May 3, 2011 order and remand the case for further proceedings

Respectfully submitted,

George A Harper

Attorney for Defendant/Respondent

September 23, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C James, Jr , Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware Inc — Appellant,

v

Tammy Hopkins — Respondent

PROOF OF SERVICE

I hereby certify that I have served a copy of the foregoing initial brief on the Appellant by mailing a copy of the same to him on September 23, 2011

George A Harper
1229 Lincoln Street
Columbia, South Carolina 29201
(803) 730-1570
sharperg@mac com

Attorney for Respondent

The South Carolina Court of Appeals

Enersys Delaware, Inc , Appellant,

v

Tammy Hopkins, Respondent

The Honorable George C James, Jr
Sumter County
Trial Court Case No 2011-CP-43-00179

ORDER

For good cause having been shown, the time for the Respondent's Initial Brief and Designation of Matter in the above entitled matter to be served and filed is hereby extended until September 23, 2011

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
cc William H Floyd, III, Esquire
Angus Macaulay, Esquire
George A Harper, Esquire

FILED
Martin 9/7/11

LAW OFFICE OF
GEORGE A HARPER

1229 LINCOLN STREET
COLUMBIA SOUTH CAROLINA 29201

TEL (803) 730 1570
FAX 799 9628

SHARPERG@MAC COM

August 18, 2011

Hon Tanya Gee
Clerk, S C Court of Appeals
P O Box 11629
Columbia, SC 29211

Re EnerSys Delaware Inc v Tammy Hopkins
Tracking No 2011193446

Dear Ms Gee

This office represents the defendant/appellee, Tammy Hopkins in the above-referenced matter EnerSys Delaware Inc 's Initial Brief and Designation of Matter to be included in the Record on Appeal was served on July 25, 2011 As Counsel for Ms Hopkins, I would respectfully request a 30 day extension of time to file and serve Ms Hopkins responsive brief

Your consideration of this request is, as always, appreciated

Thanking you, I remain

Yours very truly,

George A Harper

cc William H Floyd, III Esq

8-24-11 1st motion

9-23-11

Filing fee Tracking No 2011193446

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUL 2 5 2011
SC Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C James, Jr , Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware Inc — Appellant,

v

Tammy Hopkins — Respondent

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal

1 Order of The Honorable George C James, Jr , Circuit Court Judge, dated May 3, 2011,
2 Amended Complaint,
3 Affidavit of Theodore R Fries dated March 28, 2011,
5 Transcript of Proceedings held April 20, 2011, pp 53-73, and
6 Plaintiff/Appellant's Exhibits A-I

I certify that this designation contains no matter which is irrelevant to this appeal

William H Floyd, III
Angus Macaulay
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
(803) 771 8900

RECEIVED
JUL 2 5 2011
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C James, Jr , Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware, Inc — Appellant,

v

Tammy Hopkins — Respondent

PROOF OF SERVICE

I hereby certify that I have served the foregoing Designation of Matter to Be Included in the Record on Appeal on the Respondent by causing to be hand-delivered a copy of the same on July 25, 2011 at the office of Respondent's Counsel of Record, George Harper, Esq , 1229 Lincoln Street, Columbia, South Carolina 29201

July 25, 2011

William H Floyd, III S C Bar #10246
Angus Macaulay S C Bar #15044
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803 771 8900
WFloyd@nexsenpruet com
AMacaulay@nexsenpruet com

Attorneys for Appellant
EnerSys Delaware Inc

July 25, 2011

William H Floyd, III S C Bar #10246
Angus Macaulay S C Bar #15044
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803 771 8900
WFloyd@nexsenpruet com
AMacaulay@nexsenpruet com

Attorneys for Appellant
EnerSys Delaware Inc

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C James, Jr , Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware Inc — Appellant,

v

Tammy Hopkins — Respondent

INITIAL BRIEF OF APPELLANT

William H Floyd, III
Angus H Macaulay
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
(803) 771 8900
WFloyd@nexsenpruet com
AMacaulay@nexsenpruet com

Attorneys for Appellant
EnerSys Delaware Inc

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

I STATEMENT OF THE ISSUE ON APPEAL

Whether the lower court erred in denying Appellant's Motion to Disqualify Defendant's Counsel George Harper, Esquire, under Rule 1 9 of the South Carolina Rules of Professional Conduct, when the court failed to consider the risk that information Harper reasonably could have learned through representing EnerSys in litigation and general employment advice could be relevant or material to his representation of the Respondent in this case

II STATEMENT OF THE CASE

Plaintiff/Appellant EnerSys Delaware Inc ("EnerSys") filed this action against Defendant/Respondent Tammy Hopkins ("Respondent"), a former EnerSys employee, in the Sumter County Court of Common Pleas on January 31, 2011

On February 2, 2011, EnerSys learned that the Respondent retained its former employment lawyer, George A Harper, Esquire ("Harper"), to represent her in this matter EnerSys immediately and repeatedly objected to Harper's involvement On March 21, 2011, Harper answered the Complaint on behalf of the Respondent, denying EnerSys' allegations and asserting a collective action under the Fair Labor Standards Act ("FLSA") for unpaid overtime wages

On March 29, 2011, EnerSys filed a Motion to Disqualify Harper pursuant to South Carolina Rule of Professional Conduct 1 9 A hearing on EnerSys' motion was held before Judge James on April 20, 2011 On May 3, 2011, Judge James issued an Order denying EnerSys' Motion to Disqualify Harper On June 2, 2011, EnerSys served the Notice of Appeal on the Respondent

III STATEMENT OF FACTS

A EnerSys Retains Harper and Jackson Lewis

EnerSys operates a plant in Sumter County, South Carolina, where employees make metal trays that house industrial batteries Amended Complaint ¶ 4 In the mid-1990s, EnerSys retained the Greenville, South Carolina office of Jackson Lewis, LLP ("Jackson Lewis") law firm to represent it in matters arising from its Sumter County operations [1] Fries Aff ¶ 4 [2]

By 2000, George A Harper was a partner with Jackson Lewis and working in its Greenville, South Carolina office Fries Aff ¶ 4 For four years, from approximately 2000-2004, Harper actively represented and advised EnerSys on numerous employment and labor law matters and lawsuits involving its Sumter County operations Fries Aff ¶ 4

In the course of representing EnerSys in these employment and labor law matters, Harper worked closely with EnerSys' Director of Administration Ted Fries and advised Fries in his role as EnerSys' primary Human Resources ("HR") contact Fries Aff ¶ 5 Throughout their professional relationship, Fries communicated numerous client confidences to Harper related to EnerSys' employment policies and practices, in addition to other confidential communications related to Harper's representation of EnerSys Fries Aff ¶ 5

B Harper Represents EnerSys in Employment Cases

In addition to the general employment advice that Harper provided EnerSys, Harper was also EnerSys' counsel of record in five litigated cases involving labor and

---

[1] For many years EnerSys operated two plants in Sumter County including the current metal products plant and also a battery plant which closed in approximately 2003 Although the plant operations were distinct the plants were physically near each other and shared the same managerial leadership employment policies and procedures

[2] Citations to the Affidavit of Theodore R Fries filed with the lower court contemporaneously with EnerSys Motion to Disqualify Harper on March 28 2011 are referenced as Fries Aff ¶ X

employment policies, practices, and personnel from its Sumter County operations, including (*see also* Fries Aff ¶ 6)

1 *Singletary v YUSA Inc*, 3 00-cv-00527-MJP, filed February 14, 2000, completed September 30, 2003 Harper represented YUSA, EnerSys' former entity in Sumter, in this case involving a former Sumter County employee who alleged violations of the Americans with Disability Act ("ADA") among other violations of state and federal law *See* ECF Case Summary, Exhibit A

2 *Barwick v EnerSys Inc*, 3 01-cv-00929-DWS-BM, filed March 28, 2001, terminated August 27, 2002 Harper represented EnerSys in this case, in which a former Sumter plant employee alleged Title VII sex discrimination among other violations of state and federal law *See* ECF Case Summary, Exhibit B

3 *EnerSys Inc v Phillips*, 3 01-cv-02582-MJP, filed June 12, 2001, terminated November 16, 2004 Harper brought this suit on behalf of EnerSys against Choice Phillips, EnerSys' former HR Manager at the Sumter County plant, alleging breach of a contract based on a Confidentiality Agreement, breach of contract accompanied by a fraudulent act, and breach of the duty of good faith and fair dealing—three of the causes of action brought against the Respondent in this case—in addition to defamation *See* ECF Case Summary, Exhibit C Harper signed the Amended Complaint on behalf of EnerSys *See* Amended Complaint, Exhibit D

4 *International Union v EnerSys Inc*, 3 01-cv-04766-MJP, filed December 14, 2001, terminated August 12, 2004 Harper represented EnerSys in this matter brought by the Sumter County battery plant union against EnerSys for violations of the Worker Adjustment and Retraining Notification ("WARN") Act, among other things

See Motion for Summary Judgment, signed by Harper on behalf of EnerSys, Exhibit E

5 *DuBose v YUSA Inc*, 3 01-cv-04812-CMC, filed December 19, 2001, terminated March 31, 2004 Harper represented YUSA in this ADA case involving a former Sumter County employee, which also involved alleged violation of state law *See* ECF Case Summary, Exhibit F

C EnerSys Brings Suit Against the Respondent

From May 5, 2005 until approximately January 31, 2011, the Respondent was a Junior Accountant at EnerSys' Sumter County plant Amended Complaint ¶ 5 In January 2011, following reports that she had divulged confidential payroll-related information outside of her authority to other EnerSys employees, EnerSys conducted an investigation into the Respondent's computer activity Amended Complaint ¶ 12 The investigation revealed that the Respondent had accessed and downloaded confidential EnerSys computer payroll reports, including personnel and salary information for all EnerSys' North America employees, and transmitted this report, via e-mail, to her personal e-mail address Respondent's actions were in violation of EnerSys policy, her confidentiality agreement, and state and federal law Amended Complaint ¶ 13

As a result of this investigation, EnerSys brought suit against the Respondent in the Sumter County Court of Common Pleas on January 31, 2011, alleging six causes of action, including breach of contract based on the Respondent's breach of a confidentiality agreement and various computer use policies and agreements, breach of contract accompanied by a fraudulent act, and breach of the duty of good faith and fair dealing Amended Complaint ¶¶ 17-47

D The Respondent Retains Harper

On February 2, 2011, EnerSys learned that the Respondent had retained Harper to defend her in EnerSys' suit Fries Aff ¶ 8 EnerSys immediately recognized Harper as its former lawyer and repeatedly objected to his representation of the Respondent as an adverse party in this litigation [3] Fries Aff ¶ 8

IV STANDARD OF REVIEW

The standard of review on appeal of the denial of a motion to disqualify counsel is abuse of discretion *State v Gregory*, 364 S C 150, 152, 612 S E 2d 449, 450 (2005) An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support *Gainey v Gainey*, 382 S C 414, 423, 675 S E 2d 792, 797 (Ct App 2009)

V ARGUMENT

THE LOWER COURT ERRED IN DENYING ENERSYS' MOTION TO DISQUALIFY HARPER BECAUSE HIS PRIOR REPRESENTATION OF ENERSYS IS SUBSTANTIALLY RELATED TO HIS CURRENT REPRESENTATION OF THE DEFENDANT

The lower court erred in denying EnerSys' Motion to Disqualify Harper, based on its finding that Harper's prior representation of EnerSys was not "substantially related" to his current representation of the Respondent, as required for disqualification under Rule 1 9(a) of the South Carolina Rules of Professional Conduct Under Rule 1 9, matters are "substantially related" not only when the underlying facts are similar, but also when a "substantial risk" exists that the type of confidential information typically learned by a lawyer in the prior representation may benefit the lawyer's current client Because the

[3] The reason for EnerSys objection to Harper s representation of the Respondent was confirmed when in an initial telephone conversation with EnerSys counsel Harper stated that he know[s] more about EnerSys than you [opposing counsel] do Exhibit G

lower court's Order limited the scope of the Rule 1 9 "substantial relationship" inquiry to an analysis of the factual overlap between Harper's prior and current representations, it was controlled by an error of law amounting to an abuse of discretion

A Rule 1 9 Requires Disqualification If Matters Are "Substantially Related "

A lawyer's continuing duties to safeguard the confidences of former clients are governed by Rule 1 9 of the South Carolina Rules of Professional Conduct, titled "Duties to Former Clients " Rule 1 9(a) provides

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing

S C A C R 407, Rule 1 9(a) Even if the current representation does not involve the same or a "substantially related" matter, a lawyer is prohibited from using any information—whether confidential or otherwise—learned in the previous representation of a former client to the disadvantage of that former client *Id* , Rule 1 9(c)

B Harper's Current Representation of the Respondent Is Substantially Related to His Former Representation of EnerSys

The lower court erred as a matter of law by reading Rule 1 9 as requiring disqualification only when the moving party can point to specific, subjective factual information learned in the prior representation that would be material to the current representation

1 A "substantial relationship" may be determined objectively or subjectively

The "substantial relationship" test includes both an objective and subjective component Objectively, matters are substantially related if there is a "*substantial risk*

that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter" *Id*, Rule 1 9 cmt 3 (emphasis added), *see also* Restatement (Third) of The Law Governing Lawyers § 132 Because the rule focuses on the mere *risk* of disclosure, EnerSys need not identify any specific confidential information gained in the prior representation "A conclusion about the possession of such [confidential] information may be based on the *nature* of the services provided the former client and information that would *in ordinary practice* be learned by a lawyer providing such services" *Id* (emphasis added)

Of course, specific, subjective knowledge of a former client's material factual confidences *also* creates a sufficiently substantial relationship to warrant disqualification, as "knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such representation" *Id* But the lower court read Rule 1 9 as *requiring* a showing of specific facts learned in the prior representation that would be material to the current representation "What I was looking for quite frankly, was something that I could sink my teeth in, allude to it or produce it *in camera* or whatever it might be, something other than a strong possibility" Hearing Transcript, p 64, ln 11-15 Accordingly, the court ruled that disqualification was unwarranted, based on its finding that the prior litigation matters Harper handled for EnerSys did not share specific underlying factual issues with this case "What [the Respondent] did had nothing to do with what Mr [Phillips] supposedly did And that's what I'm struggling with " Hearing Transcript, p 71, ln 4-11, *see also* Order, p 5 ("In my view, the fact that Mr Harper assisted in the development of personnel decisions, agreements, policies,

procedures, and litigation strategies does not warrant disqualification in this case There is no similarity between this case and the five cases referenced by plaintiff, except that they involve disputes with an employee ")

By requiring a showing of shared facts to warrant disqualification, the lower court overlooked the critical objective component of the substantial relationship test altogether Identification of specific facts learned and a showing that the lawyer obtained such knowledge is expressly *not* required to warrant disqualification under Rule 1 9 *See* S C A C R 407, Rule 1 9 cmt 3, *see also* Restatement (Third) of The Law Governing Lawyers § 132 cmt (d)(iii) ("The substantial relationship test avoids requiring the disclosure of confidential information by focusing upon the general features of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation") [4]

The lower court's failure to consider the *risk* that Harper obtained material confidential information in his prior representation of EnerSys was an error of law amounting to an abuse of discretion The South Carolina Supreme Court has emphasized the importance of the objective component of the "substantial relationship" test, casting the objective inquiry as a consideration of whether the lawyer "would have or *reasonably could* have learned confidential information in the first representation that would be of significance to the second " *Townsend v Townsend*, 323 S C 309, 317, 474 S E 2d 424,

[4] *See also Westinghouse Elec Corp v Gulf Oil Corp* 588 F 2d 221 224 (7th Cir 1978) (The determination of whether there is a substantial relationship turns on the possibility or appearance thereof that confidential information might have been given to the attorney in relation to the subsequent matter in which disqualification is sought The rule thus does not necessarily involve any inquiry into the imponderables involved in the degree of relationship between the two matters but instead involves a realistic appraisal of the possibility that confidences had been disclosed in the one matter which will be harmful to the client in the other It is not appropriate for the court to inquire into whether actual confidences were disclosed)

429 (1996) (emphasis in original) (internal citation omitted), *see also* Restatement (Third) of The Law Governing Lawyers § 132 cmt (d)(iii) ("Substantial risk exists where it is reasonable to conclude that it would materially advance the client's position in the subsequent matter to use confidential information obtained in the prior representation")

This rule reflects that this disqualification inquiry should focus on whether a lawyer who represented a client on the type and scope of matters that Harper handled for EnerSys could *reasonably* have learned confidential information that could be *relevant* to his representation of the Respondent in this case Applying this objective component of Rule 1 9 here reflects that Harper's prior representation of EnerSys is substantially related to his current representation of the Respondent, because a substantial risk exists that his unique knowledge of EnerSys' personnel, policies, litigation strategy, and other confidential information would materially advantage the Respondent in this case

2 Harper's representation of EnerSys in litigation matters and general employment advice create a substantial risk that he learned confidences that would be material to the Respondent

Harper represented and advised EnerSys on a broad range of sensitive employment and labor law matters involving its Sumter operations, including representation in at least five litigated cases in addition to day-to-day employment and labor law advice Fries Aff ¶ 4-6 Both the litigation matters and the general employment advice are relevant to the issue of substantial relationship *See* Restatement (Third) of The Law Governing Lawyers § 132 cmt (d)(iii) (" the term "matter" includes not only representation in a litigated case, but also any representation involving a contract, claim, charge, or other subject of legal advice")

Courts are generally guided by a three-part inquiry in analyzing matters relevant to the substantial relationship test (1) the court must identify the scope of the prior representation, (2) the court must determine if it is reasonable to presume that the lawyer obtained confidential information in the course of that representation, and (3) the court must decide if the confidential information obtained in the prior representation is relevant to the issues in the current representation *See e g Hurley v Hurley*, 923 A 2d 908, 910-11 (Me 2007), *Christpens v Coastal Refining & Marketing Inc* , 257 Kan 745, 752, 897 P 2d 104, 111 (Kan 1995) (*citing Westinghouse Elec Corp v Gulf Oil Corp* , 588 F 2d 221, 225 (7th Cir 1978)), *Morrison Knudsen Corp v Hancock Rothert & Bunshoft*, 81 Cal Rptr 2d 425, 432 (Cal Ct App 1999), *Thermodyne Food Serv Prods Inc v McDonald s Corp* , 960 F Supp 138, 140 (N D Ill 1997)

(a) ***Litigation matters***

Harper represented EnerSys in five litigated employment cases, with issues including breach of a confidentiality agreement, violations of the WARN Act, Title VII, and the ADA, and other South Carolina employment causes of action Fries Aff ¶ 4-6 It is reasonable to presume that Harper's role in representing EnerSys in these matters involved extensive sharing of and access to confidential EnerSys information related to the issues arising in those cases *See* Restatement (Third) of The Law Governing Lawyers § 132 cmt (d)(iii) ("When the prior matter involved litigation, it will be *conclusively presumed* that the lawyer obtained confidential information about the issues involved in the litigation") (emphasis added)

(i) **Litigation strategy and approach**

There is a substantial risk that some of the strategic information Harper learned by representing EnerSys in these litigation matters would be relevant to his representation of

the Respondent For example, Harper could reasonably be expected to know how EnerSys internally evaluates employment-related disputes, specifically including its evaluation process in the event of employee confidentiality breaches in breach of employment agreements Harper reasonably should know the identity and litigation philosophy of key EnerSys personnel regarding employment-related matters Harper reasonably should know EnerSys' threshold for litigation and the factual and legal issues it considers in weighing possible resolutions All of this information would be material and relevant to the Respondent's position in this case

Harper's knowledge of EnerSys' litigation strategy and practices is material to his representation of the Respondent, even to the extent that this knowledge applies to causes of action and legal issues that are not at issue in this case *See e g Jessen v Hartford Cas Ins Co* , 3 Cal Rptr 3d 877, 887-88 (Cal Ct App 2003),[5] *see also Morrison Knudsen Corp* , 81 Cal Rptr 2d at 432-35 (finding that material confidential information can include information relevant to the current client in proceeding with lawsuit, including the identity of decision-makers, litigation philosophy, organizational structure, financial impact of pending claims, and insurance coverage), *Gray v Commercial Union Ins Co* , 468 A 2d 721 (N J Super Ct App Div 1983) (holding that a lawyer's prior representation of the defendant in personal injury litigation was substantially related to his representation of the plaintiff in an employment contract dispute because his knowledge of the former client's litigation philosophy, methods and

[5] *Jessen* 3 Cal Rptr 3d at 887 88 (We consider the subject of a representation as including information material to the evaluation prosecution settlement or accomplishment of the litigation or transaction given its specific legal and factual issues Thus successive representations will be substantially related when the evidence before the trial court supports a rational conclusion that information material to the evaluation prosecution settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation prosecution settlement or accomplishment of the current representation given its factual and legal issues)

procedures for defending claims and litigation, and business operations could all be used to the disadvantage of the former client) Harper's unique knowledge of EnerSys' litigation strategy, key personnel, operating structure, and other confidential information ordinarily learned in the course of representing a client in employment-related litigation matters creates a substantial relationship between those matters and this case, because that information would be material to his representation of the Respondent regardless of the underlying subject matter of the litigation in which it was learned [6]

(ii) **Common legal and factual issues**

A commonality of factual and legal issues and circumstances surrounding the litigation can also create a substantial relationship based on the risk of learning material client confidences The substantial overlap in the factual and legal issues between *EnerSys v Phillips* and this case creates a "climate of disclosure" that substantially increases the risk that Harper possesses confidential information that would be relevant to the Respondent *See e g Kaselaan & D Angelo Assocs , Inc v D Angelo*, 144 F R D 235, 243-45 (D N J 1992)

In *Kaselaan*, the plaintiff brought suit against a former employee for misappropriation of trade secrets and confidential information, in breach of restrictive covenants in his employment agreement, breach of the duty of loyalty, and other unfair competition causes of action *Id* at 236 The defendant retained the plaintiff's former employment lawyer to represent him in the suit, and the plaintiff moved to disqualify the

[6] The passage of time between the prior and current representation is also a consideration in the substantial relationship test but only to the extent that it affects the materiality or relevance of the information to the current client *See* Rule 1 9 cmt 3 (Information acquired in a prior representation may have been rendered obsolete by the passage of time a circumstance that may be relevant in determining whether two representations are substantially related) The passage of time since Harper s prior representation of EnerSys has not rendered the information he learned obsolete because the consistency and confidentiality of EnerSys policies procedures litigation strategy and evaluation process key decision making personnel fact witnesses and strategic approach between the time of Harper s representation and this case confirm that his knowledge remains material and relevant to the Respondent s position in this case

former lawyer under Rule 1 9 *Id* at 237-38 The court first considered the broad range of employment matters the lawyer previously handled for the plaintiff, finding that "[s]urely, the present and former matters share common issues regarding [the employer's] employment policies and procedures, hiring and termination criteria, and normal course of action in prosecuting and defending employment claims," all of which give a "distinct advantage" to the lawyer's current client from a tactical perspective *Id* at 244

The court went on to focus on one particular employment matter, in which the lawyer drafted a settlement agreement on behalf of the employer in a dispute with an employee raising many of the same unfair competition issues *Id* The court noted that, in the course of his representation on that matter, the lawyer learned information about the misuse of company computers, the misappropriation of confidential information, and other acts of unfair competition, which are "practically the same" as the issues raised in the current litigation *Id* at 244-45 The court concluded that the lawyer's knowledge of the client's litigation strategy, combined with his specific familiarity with the facts and legal issued involved in an employee unfair competition action, created a "climate for the disclosure of relevant confidential information" *Id* Therefore, the court ruled that a substantial relationship existed between that prior matter and the current case and disqualified the defendant's lawyer *Id*

As in *Kaselaan*, the substantial relationship between Harper's prior representation of EnerSys in litigation matters and his current representation of the Respondent is highlighted by his representation of EnerSys in the *Phillips* case Harper's insight into EnerSys' litigation strategy and practices alone is disqualifying, but the similarities in the underlying legal issues, facts, and circumstances involved in litigating the legal issues in

Phillips and this case create a "climate for disclosure" of EnerSys confidences that punctuates the substantial relationship between Harper's representation of EnerSys and the Respondent

(A) *Same purpose for lawsuit*

In both cases, the harm that EnerSys sought counsel to prevent is identical—the disclosure of its confidential information by a former employee to an indeterminable class of third parties, in breach of an applicable confidentiality agreement In *Phillips*, with the advice of Harper, EnerSys alleged that its former Human Resources Manager breached his obligations under an employee confidentiality agreement by disclosing confidential information learned within the scope of his employment to third parties following the termination of his employment *See* Exhibit D Similarly, in this case, EnerSys factual and legal claims involve its claim that the Respondent transmitted and disclosed confidential information related to her employment to third parties, in breach of her obligations under a substantially similar employee confidentiality agreement *See* Amended Complaint

There is a substantial risk that Harper's participation in the early stages of the *Phillips* lawsuit would give him access to valuable confidential information For example, Harper would have interacted with the key local and national management responsible for confidentiality issues and learned EnerSys' internal procedure for identifying and investigating such a disclosure Harper would have learned EnerSys' analysis and approach in weighing the potential cost of the disclosure against the cost of litigation, its goals in pursuing the litigation decision, and the personnel and policies that would potentially have an impact on the litigation As Harper's access to information of this nature is capable of creating a substantial relationship regardless of the underlying

subject matter, his insight into these issues as they relate to employee confidentiality cases of the type involving the Respondent is particularly material to her position in this case

(B) *Same causes of action*

In both cases, EnerSys sought to prevent the potential harm of disclosure of confidential information by a former employee by asserting multiple, contract-based causes of action against the former employee, based on various confidentiality agreements the defendants signed while EnerSys employees Three of those causes of action—for breach of contract, breach of contract accompanied by fraud, and breach of the duty of good faith and fair dealing—asserted by EnerSys in the Amended Complaint in *Phillips* and signed by Harper, *see* Exhibit D, ¶¶ 32-41, are also raised against the Respondent in this case, *see* Amended Complaint, ¶¶ 17-28

As lead counsel for EnerSys in *Phillips*, Harper would have taken the lead role in developing the factual and legal position necessary to enforce the agreement and prove the defendant's conscious disregard for the obligations underlying that agreement In doing so, Harper can reasonably be expected to have learned EnerSys' perception of the advantages and challenges involved in enforcing the employee confidentiality agreement, the nature of the consideration given to employees as a result of that agreement, the timing involved in EnerSys' requirement that employees executed the agreement, the level of disclosure that EnerSys considers to be a breach of that agreement, and other specific factual confidences involving the confidentiality agreement itself An identity of all three contract-based causes of action between *Phillips* and this case reflects the materiality of this information to the Respondent

(C) *Same potential fact witnesses and key exhibits*

The confidentiality agreement supporting the three contract-based causes of action in *Phillips* is substantially similar to the confidentiality agreement supporting the same three contract-based causes of action at issue in this case *Compare* Exhibit H (Phillips' Confidentiality Agreement) *to* Exhibit I (Hopkins' Confidentiality Agreement) All of the client confidences related to the content of that agreement that Harper learned in representing EnerSys in *Phillips* would be relevant to his defense of the Respondent in this case, as the agreements themselves and EnerSys practices surrounding those agreements are consistent among both cases

There is also a substantial risk that the fact witnesses who helped Harper shape EnerSys' litigation position in *Phillips* are also critical fact witnesses in this case, particularly including Ted Fries and Callie Guillotte In *Phillips*, Harper can be expected to have worked closely with Director of Administration Ted Fries as EnerSys' representative in developing EnerSys' factual position on the employee confidentiality portion of the case Harper also reasonably can be expected to have relied on Callie Guillotte, the Accounting Director for EnerSys' Sumter operations, for factual information, as Mr Guillotte worked in EnerSys' front office alongside Phillips and would have been aware of the confidentiality obligations surrounding Phillips' employment

Similarly, in this case, Mr Fries and Mr Guillotte will play major roles as EnerSys fact witnesses Mr Guillotte was the Respondent's direct supervisor and was specifically named in the Respondent's FLSA counterclaim, while Mr Fries has been an affiant throughout this case and directly involved in the development of EnerSys'

litigation strategy, the same role he had while working with Harper on the *Phillips* case Harper's familiarity with these EnerSys employees creates a substantial risk of materially benefitting the Respondent, because, aside from the confidential information they shared with Harper, he also learned the strengths and weaknesses of those individuals as witnesses As strategic determinations such as witness effectiveness and credibility play an important role in case evaluation, the Respondent is likely to benefit from Harper's insight into the testimony value of EnerSys personnel

Harper's representation of EnerSys in five employment litigation matters creates a substantial risk that he learned confidential EnerSys information relevant to the Respondent's case, through his knowledge of EnerSys litigation strategy, approach, personnel, policies, and other underlying issues that ordinarily arise in the course of a litigation matter That risk is strongest in considering Harper's representation of EnerSys in the *Phillips* case, in which the similarity in the underlying factual and legal issues increases the likelihood that Harper learned specific confidences that would be relevant to his representation of the Respondent *Compare Madison v Graffix Fabrics Inc* , 304 S C 321, 325-26, 404 S E 2d 37, 40 (Ct App 1991) (finding no substantial relationship when plaintiff's counsel previously represented defendant in a single, legally and factually distinct litigation matter, because there was "no evidence [the lawyer] would be called upon to use any knowledge acquired out of the former relationship against [the employer] in the present matter") *with Crawford W Long Memorial Hosp of Emory Univ v Yerby*, 373 S E 2d 749, 750-51 (Ga 1988) (affirming plaintiff's lawyer's disqualification in medical malpractice action when his prior representation of the defendant in factually unrelated medical malpractice actions involved knowledge of the

"same general subject matter" as the current litigation and knowledge of the defendant's "practices, policies, procedures, reporting requirements, and of ongoing or recurring problems") As such, Harper's representation of EnerSys in litigation matters is substantially related to his representation of the Respondent, and disqualification is warranted

(b) ***General employment advice***

EnerSys Director of Administration Ted Fries confirmed Harper's role in a broad scope of general employment and labor law advice, involving the regular communication of information that EnerSys considered to be confidential Fries Aff ¶ 5-6, *see also* Restatement (Third) of The Law Governing Lawyers § 132 cmt (d)(iii) ("When the prior matter did not involve litigation, its scope is assessed by reference to the work that the lawyer undertook and the array of information that a lawyer ordinarily would have obtained to carry out that work") In ordinary practice, a lawyer advising a large commercial client on complex employment and labor law matters such as those handled by Harper would work closely with EnerSys in-house counsel and human resources personnel to manage everyday legal matters arising from EnerSys' Sumter operations Harper can reasonably be expected to not only have had access to, but to have advised and assisted EnerSys in the development of its confidential personnel decisions, agreements, policies, and procedures

Much of the information Harper could be expected to learn in advising EnerSys would be relevant to his representation of the Respondent Harper would be called upon to offer candid advice and analysis of the strengths and weaknesses of the client's policies, personnel decisions, disciplinary matters, trade secrets, employee agreements, and decision-making practices in an effort to minimize potential exposure to litigation

Accordingly, it may be presumed that Harper obtained information material to the Respondent's position in this case, such as knowledge of the restrictive covenants and confidentiality agreements that EnerSys puts in place with its employees, the challenges EnerSys faces in their enforcement, the confidential information EnerSys considers to be trade secrets and what EnerSys may do or not do to protect those trade secrets, and other employment-related client confidences

Harper's familiarity with EnerSys' internal personnel policies and procedures and methods of handling disputes with employees learned through his representation on advising matters is sufficient to create a substantial relationship with this employment case *See e g Stitz v Bethlehem Steel Corp* , 650 F Supp 914 (D Md 1987) In *Stitz*, the defendant moved to disqualify counsel for the plaintiff, a former employee, based on the lawyer's former representation of the defendant as its in-house labor and employment attorney 650 F Supp at 915 The court granted the motion, finding that the lawyer's prior work on a broad range of labor and employment matters for the employer was substantially related to the current matter *Id* at 917 The substantial relationship was based on the court's conclusion that it was "obvious that his work made him familiar with [the employer's] personnel policies and procedures, and that familiarity could be used to [the employer's] disadvantage" in the later, employment-related case *Id*

Furthermore, even if Harper's knowledge of EnerSys' policies, procedures, and internal governance structure did not arise from attorney-client communications or other confidential sources, his familiarity with EnerSys can still create a substantial risk of material value to his representation of the Respondent *See e g NCK Org Ltd v Bregman*, 542 F 2d 128 (2d Cir 1976) In *Bregman*, like in *Stitz*, the plaintiff moved to

disqualify its former in-house counsel, who was retained by the defendant, a former employee of the plaintiff, to defend him in a contractual stock option dispute *Id* at 130 In opposing disqualification, the defendant argued that the lawyer's primary role as in-house counsel had been the management of outside counsel, so that much of his confidential knowledge with respect to specific legal matters was "only peripheral and required no legal advice " *Id* at 132 The court rejected this argument, finding that the substantial relationship test does not distinguish "between legal work and non-legal work, or between a requisite minimum of legal advice and mere peripheral legal participation " *Id* at 133 [7] The court then affirmed the lower court's disqualification order, finding that "some evidence exists that disclosures were made in the past of which [the lawyer] cannot dispossess [himself]," and "the possibility that breach of these confidences was committed by [the lawyer] is sufficient to make disqualification a necessary and desirable remedy " *Id* at 134

As in *Stitz* and *Bregman*, Harper's unique knowledge of EnerSys' policies, procedures, personnel, and method of handling employee disputes learned over years of representation on litigation and advising employment matters justifies disqualification, because a substantial risk exists that this information would be relevant to the Respondent's position in this case

[7] The *Bregman* court also noted that disqualification is still a viable remedy even if the confidences are not secret or are not wholly unknown to the lawyer s new client Even if all confidential information to which he as house counsel had access was independently known to [the defendant] from his own employment or from another source [the former client s] privilege in this information as disclosed to its attorney is not thereby nullified *Bregman* 542 F 2d at 133 The court based its position on the premise that the attorney client privilege is an ethical obligation that exists without regard to the nature or source of information or the fact that others share the knowledge *Id* Similarly in this case the fact that the Respondent may be familiar with some of EnerSys confidences by virtue of her employment is irrelevant to the substantial relationship inquiry

C Harper's Ethical Duties to EnerSys Require Disqualification

1 Harper's representation of the Respondent cannot be reconciled with Rule 1 9(c)

Harper's ethical duties to EnerSys cannot be satisfied merely by the prohibition that he not "use" information learned throughout his representation to EnerSys' detriment, regardless of the similarity between his previous representation of EnerSys and current representation of the Respondent Rule 1 9(c) provides a duty independent of the "substantial relationship" test, which precludes a lawyer from using *any* information of a former client to its disadvantage in a later representation, even if that information is not considered "confidential" *Id*, Rule 1 9(c), *see also Kaselaan*, 144 F R D at 245 (finding that the rule is not limited to confidential information and precludes a lawyer from using any former client information to its disadvantage, regardless of substantial relationship or the duration of the representation)

This provision reflects the "confidentiality rationale" underlying Rule 1 9 and provides the lens through which the disqualification inquiry should be guided *See Madison*, 304 S C at 325-26, 404 S E 2d at 40 ("The test of whether the attorney's employment is inconsistent with his duty to a former client is whether the attorney will be called on, in his new relation, to use against a former client any knowledge or information required in the former relationship") When the nature of the representation is such that it inherently involves the *risk* of use or disclosure of information learned in a prior representation, Rules 1 9(a)-(b) demand disqualification, it is only when there is little risk of such a disclosure due to a lack of common relevant information that a lawyer is permitted to represent a new client against a former client, save the prohibition against use or disclosure of Rule 1 9(c)

But the nature of Harper's familiarity with EnerSys is such that he cannot simply avoid the use or disclosure of EnerSys confidences in the process of representing the Respondent, the information he learned is simply too critical to an understanding of EnerSys' business, its personnel, its employment practices, and its litigation strategy To suggest that Harper has the capacity to limit his representation of the Respondent to information learned only through the current litigation undermines the underlying purpose behind the objective inquiry of the "substantial relationship" test *See Bregman*, 542 F 2d at 135 ("Requiring attorneys to abstain from representation involving potential disclosure of former clients' confidences also frees lawyers from the difficult task of erecting Chinese walls in their own minds between what is confidential and what is not ") Harper's representation of the Respondent is necessarily permeated by his knowledge of EnerSys confidences, many of which would be relevant and material to his representation of the Respondent Thus Harper's duty to EnerSys under Rule 1 9(c) cannot be honored while moving forward with his representation of the Respondent

2 Disqualifying Harper best serves the policy rationales underlying the "substantial relationship" test

The importance of Rule 1 9's "substantial relationship" test and the objective inquiry that it requires is reflected in the four different policy rationales for the adoption of the rule *See* Restatement (Third) of The Law Governing Lawyers § 132 cmt (b) Harper's continued representation of the Respondent implicates the confidentiality and client loyalty concerns that the rule was intended to serve

(a) ***Duty to former client***

The first policy rationale for Rule 1 9's substantial relationship test and related disqualification rules is that, "absent the rule, a lawyer's incentive to serve a present

client might cause the lawyer to compromise the lawyer's continuing duties to the former client." *Id.* This reflects that the primary purpose of the rule is to preserve the interests of the former client and minimize the risk that confidential information shared within the scope of the attorney-client relationship is used against the client at some later point in time.[8] *See Kaselaan*, 144 F.R.D. at 245 ("The harm to be prevented in such circumstances is the facilitating of the defeat of the former client through counsel's use of information that he or she acquired while being paid by the former client.") Both Harper and the Respondent would benefit from using EnerSys information learned in Harper's former representation to the Respondent's advantage in this case, but Rule 1.9's substantial relationship test is designed to minimize the *risk* of such an incentive by barring the later representation when the information learned would be material. Should Harper continue to represent the Respondent, then this policy justification for Rule 1.9 will not be served.

(b) ***Duty to current client***

The second justification for the rule mirrors the first, in that the rule is designed to minimize the risk that "the lawyer's obligations to the former client might constrain the lawyer in representing the present client effectively." *See* Restatement (Third) of The Law Governing Lawyers § 132 cmt. (b). In other words, regardless of the substantial relationship test, Harper's duties to EnerSys include the obligation not to "use" or "disclose" any information learned throughout his representation to EnerSys'

[8] Before the Rules of Professional Conduct were adopted, many states, including South Carolina, applied the appearance of impropriety standard, which was similarly designed to minimize even the risk that such a disclosure of confidential information could occur. In determining whether to disqualify counsel for conflict of interest, the trial court is not to weigh the circumstances with hair splitting nicety, but in the proper exercise of its supervisory power over the members of the bar and with a view of preventing the appearance of impropriety, it is to resolve all doubts in favor of disqualification. *United States v. Clarkson*, 567 F.2d 270, 273 n.3 (4th Cir. 1977); *see also* S.C. Adv. Op. #10-03 (May 21, 2010).

disadvantage But the scope of the information that Harper learned about EnerSys throughout his litigation matters and general employment advice is so broad as to create an inherent risk that that the information could be used against EnerSys, even if Harper intended to dutifully honor his ethical obligations If Harper were to limit his representation of the Respondent so as to honor his obligations to EnerSys, he would necessarily breach his responsibility of zealous advocacy and undivided loyalty to the Respondent, a result that is equally threatening to the integrity of the judicial process This is among the dilemmas the rule was intended to avoid

(c) ***Encourage candor with legal counsel***

Third, the rule is designed to prevent the lawyer from having an "incentive to lay the basis for subsequent representation against the client," that is, by taking some action in the prior representation that lays the groundwork for a claim against that client at a later date *Id* In this respect, the rule is intended to eliminate the incentive to strategically advise a current client with an eye towards later representation, a result that would sacrifice the loyalty of a current client to advantage a future, prospective one When interacting with its legal counsel, neither EnerSys nor any other client of legal services should not have to consider the possibility that the confidences and attorney-client privileged information it provides to its attorneys could potentially be strategically used against it at some later date *See Bregman*, 542 F 2d at 135 (" an important purpose of the preservation of client confidence is 'to encourage clients fully and freely to make known to their attorneys all facts pertinent to their cause '") Disqualifying Harper preserves this interest by ensuring that the "substantial relationship" test is broad enough to preclude representation in these risky circumstances

(d) ***Encourage acceptance of small matters***

Finally, the fourth policy rationale behind the "substantial relationship" test is to preclude representation only where there is an actual risk of disclosure of former client information, so as to avoid making lawyers "reluctant to take new, relatively modest matters" on the assumption that they would prohibit later unrelated representations of new clients *See* Restatement (Third) of The Law Governing Lawyers § 132 cmt (b) Disqualifying Harper will not turn every engagement into the "lifetime commitment" that the rule intends to avoid, because it is not the mere fact that Harper represented EnerSys that creates a substantial relationship worthy of disqualification It is Harper's unique familiarity with EnerSys' labor and employment policies, procedures, personnel, litigation strategy and approach, agreements, and other confidential information that creates a substantial relationship Certainly, a representation so broad in scope, time, and purpose is the exception rather than the rule and is not the type of "relatively modest matter" that the rule is intended to exclude from its scope Instead, the rule was designed to provide the basis for disqualification when, as here, the *risk* of disclosure of confidential information is significant

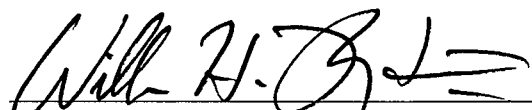
Taken together, these four policy justifications for Rule 1 9 illustrate why the lower court's limitation of the "substantial relationship" to a showing that the lawyer learned specific, material facts in the prior representation is an error of law amounting to an abuse of discretion Rule 1 9 is intended to be a prophylactic rule, prohibiting representation in certain limited circumstances to avoid precisely this kind of dilemma—one in which a lawyer's representation of a current client *may* force the lawyer to choose among competing loyalties and ethical duties to a former client By limiting the disqualifying effect of Rule 1 9 only to those situations in which the subject matter of the

current representation involves the *same* underlying facts or confidences as the former matter, the lower court improperly narrowed the scope of the rule to its subjective inquiry only Applying the objective inquiry at the heart of the rule reflects that Harper's representation of EnerSys is substantially related to his representation of the Respondent and his disqualification is warranted

VI CONCLUSION

For the reasons stated herein, Plaintiff/Appellant EnerSys Delaware Inc respectfully requests that the Court reverse Judge James' May 3 order denying EnerSys' Motion to Disqualify Defendant's Counsel George A Harper, Esquire and that Harper be disqualified from further representing the Respondent in this case

Respectfully submitted,



William H Floyd, III S C Bar #10246
Angus H Macaulay S C Bar #15044
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803 771 8900
WFloyd@nexsenpruet com
AMacaulay@nexsenpruet com

Attorneys for Plaintiff/Appellant
EnerSys Delaware Inc

July 25, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C James, Jr , Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware, Inc — Appellant,

v

Tammy Hopkins — Respondent

PROOF OF SERVICE

I hereby certify that I have served the foregoing Initial Brief of Appellant on the Respondent by causing to be hand-delivered a copy of the same on July 25, 2011 at the office of Respondent's Counsel of Record, George Harper, Esq , 1229 Lincoln Street, Columbia, South Carolina 29201

NEXSEN|PRUET

William H Floyd, III
Member
Certified Employment & Labor Law Specialist
Admitted in SC

July 25, 2011

The Hon V Claire Allen
Deputy Clerk
S C Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re ***EnerSys Delaware Inc v Tammy Hopkins***
Case No 2011-CP-43-000179
Appeal No 2011193446

Dear Ms Allen

Enclosed for filing please find the original and one copy of Appellant, EnerSys Delaware Inc 's Initial Brief, Designation of Matter to be included in the Record on Appeal, and Proof of Service Please return a file-stamped copy via our courier

By copy of this letter, we are serving the same upon counsel for the Respondent

Please contact us if we can be of additional assistance

Sincerely,

William H Floyd, III

WHF/gpc
Enclosures
cc George Harper, Esquire
Angus H Macaulay, Esquire

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia SC 29202
www nexsenpruet com

T 803 253 8201
F 803 727 1436
E WFloyd@nexsenpruet com
Nexsen Pruet LLC
Attorneys and Counselors at Law

NEXSEN|PRUET

William H Floyd, III
Member
Certified Employment & Labor Law Specialist
Admitted in SC

June 28, 2011

V Claire Allen
Deputy Clerk
S C Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re ***EnerSys Delaware Inc v Tammy Hopkins***
Case No 2011-CP-43-000179
Appeal No 2011193446

Dear Ms Allen

Please be advised that on June 24 this office received a copy of the transcript of the April 10, 2011 motion hearing from the court reporter Attached to the transcript was the court reporter's invoice We are processing this invoice for payment directly to the court reporter within the next seven days

Please contact us if we can be of additional assistance

Sincerely,

William H Floyd, III

WHF/gpc
cc George Harper, Esquire
Angus H Macaulay, Esquire

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia SC 29202
www nexsenpruet com

T 803 253 8201
F 803 727 1436
E WFloyd@nexsenpruet com
Nexsen Pruet LLC
Attorneys and Counselors at Law

The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 116 9
COLUMBIA SOUTH CAROLINA 79 11

1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 9201

TELEPHONE (803) 734 1890
FAX (803) 734 1839
www sccourts org

June 21, 2011

William H Floyd, III, Esquire
Angus Macaulay, Esquire
James A Byars, Esquire
Nexsen Pruet, LLC
P O Drawer 2426
Columbia, SC 29202

Re Enersys Delaware v Hopkins, Tammy
2011193446

Dear Counsel

We have received copy of your request for the transcript in the above matter However, this request did not include an agreement regarding payment for the transcript as required in Rule 207 of the South Carolina Appellate Court Rules Please provide proof that the payment arrangements have been made within ten (10) days of the date of this letter

Very truly yours,

V Claire Allen, Deputy
CLERK

TAG/laf
cc George A Harper, Esquire

NEXSEN|PRUET

William H Floyd, III
Member
Certified Employment & Labor Law Specialist
Admitted in SC

May 27, 2011

Ms Margaret Sullivan
Court Reporter
504 Henderson Street
Sumter, SC 29150-3167

Re ***EnerSys Delaware Inc v Tammy Hopkins***
Case No 2011-CP-43-000179

Dear Ms Sullivan

We appeared on April 20 before Judge James in this case regarding two pending motions Please transcribe that hearing for the plaintiff as well

Thank you for your assistance Please contact us with any related questions

Sincerely,

William H. Floyd III

William H Floyd, III

WHF/gpc

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia SC 29202
www nexsenpruet com

T 803 253 8201
F 803 727 1436
E WFloyd@nexsenpruet com
Nexsen Pruet LLC
Attorneys and Counselors at Law

NEXSEN|PRUET

William H Floyd III
Member
Certified Employment & Labor Law Specialist
Admitted in SC

June 17, 2011

The Hon Tanya A Gee
Clerk of Court
The South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

Re ***EnerSys Delaware, Inc v Tammy Hopkins***
2011193446
2011-CP-43-000179

Dear Ms Gee

Thank you for your letter of June 16 Pursuant to SCACR 207(a)(1), please find enclosed a copy of the May 27, 2011 correspondence from Plaintiff/Appellant EnerSys Delaware, Inc to the court reporter requesting the hearing transcript for the matter being appealed

Should you have any questions, please contact me at any time

Sincerely,

William H Floyd, III

WHF/gpc
Enclosure
cc George Harper, Esquire
1229 Lincoln Street
Columbia, SC 29201

Office of Court Administration
1015 Sumter Street, #200
Columbia, SC 29201-3747

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia SC 29202
www nexsenpruet com

T 803 253 8201
F 803 727 1436
E WFloyd@nexsenpruet com
Nexsen Pruet LLC
Attorneys and Counselors at Law

The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211

1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE (803) 734 1890
FAX (80) 734 1839
www sccourts org

June 16, 2011

William H Floyd, III, Esquire
Angus Macaulay, Esquire
James A Byars, Esquire
Nexsen Pruet, LLC
P O Drawer 2426
Columbia, SC 29202

Re Enersys Delaware v Hopkins, Tammy
2011193446
2011-CP-43-00179

Dear Counsel

We have received your Notice of Appeal in the case noted above This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1015 Sumter Street, Columbia, S C 29201 Thank you for your attention to this Failure to file in the proper court may result in the dismissal of your appeal

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript

NOTE If you beli this case has been improperly filed he Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases

1) any final judgment from the circuit court which includes a sentence of death,

2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,

3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,

4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,

5) any final judgment from the circuit court pertaining to elections and election procedure,

6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,

7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33

Very truly yours,

V. Claire Allen, Deputy
Tanya A Gee
CLERK

TAG/laf
cc George A Harper, Esquire
The Honorable James C Campbell

The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 116 9
COLUMBIA SOUTH CAROLINA 29 11
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (80) 734 18 9
www sccourts org

June 16, 2011

William H Floyd, III, Esquire
Angus Macaulay, Esquire
James A Byars, Esquire
Nexsen Pruet, LLC
P O Drawer 2426
Columbia, SC 29202

Re Enersys Delaware v Hopkins, Tammy
2011193446
2011-CP-43-00179

Dear Counsel

This office has received your Notice of Appeal in the above matter It has been assigned the Case Tracking Number that appears above Please use this number on all future correspondence relating to this matter

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties This office will not review filings for redaction or to determine if materials should be sealed

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf
cc George A Harper, Esquire

The Supreme Court of South Carolina

RE Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings

ORDER

Under the Federal Constitution our State Constitution, and our common law, court records are presumptively open to the public and these records may only be sealed by a court based on specific findings that the need for secrecy outweighs the presumption of openness Ex parte Capital U-Drive-It, Inc , 369 S C 1 630 S E 2d 464 (2006), Davis v Jennings, 304 S C 502, 405 S E 2d 601 (1991) Therefore, with some few exceptions,1 documents filed with this Court or the South Carolina Court of Appeals (appellate court) are available to the public unless sealed by order of the appellate court in which the matter is pending

Several commercial vendors have recently requested copies of briefs filed with the appellate courts, and it is anticipated that these and other appellate filings will be available electronically from both private and public sources in the future The ready availability of these documents raises significant privacy concerns While this problem is currently under review by the Chief Justice's Task Force on Public Access to Court Records, we adopt the following interim guidance regarding personal data identifiers and other sensitive information in documents filed in the appellate courts

Parties shall not include, or will partially redact where inclusion is necessary, the following personal data identifiers from documents filed with an appellate court 2

1 Social Security Numbers If a social security number must be included, only the last four digits of that number should be used

2 Names of Minor Children If a minor is the victim of a sexual assault or is involved in an abuse or neglect case, the minor's name will be completely redacted and a term such as "victim" or "child" should be used In all other cases only the minor's first name and first initial of the last name (i e , John S) should be used

3 Financial Account Numbers If financial account numbers are relevant, only the last four digits of these numbers should be used

4 Home Addresses If a home address must be included only the city and state should be used

Parties wishing to file documents containing the personal data identifiers listed above may file unredacted documents under seal, together with redacted versions for the public file The sealed unredacted documents shall be filed in a separate Appendix and the bottom of each page of the Appendix shall be marked "Sealed " No order of the appellate court will be required to file this sealed Appendix The number of copies of the Appendix to be served and filed shall be the same as that required for the brief, record on appeal, motion or other filing that includes the redacted documents

If the caption of the case conta ɜny of the personal data identifier ed above, the parties should file a motion to amend the caption to redact the identifier This should be done contemporaneously with the filing of the notice of appeal or the commencement of the case with the appellate court Without a motion to the appellate court the caption of a juvenile delinquency matter from the family court shall be redacted to only use the juvenile's first name and first letter of the juvenile's last name (i e In the Interest of John S a Juvenile)

A party seeking to seal material beyond those personal identifiers listed above must file a motion to seal with the appellate court in which the matter is pending This is true even if the lower court or administrative tribunal may have issued an order sealing the record Until the motion is ruled on the clerk of the appellate court shall treat the material as if it is sealed Parties and counsel are reminded that the standard established in Ex parte Capital U-Drive-It, Inc and Davis v Jennings, supra, must be met before any request to seal all or a portion of a record will be granted Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information information regarding an individual's cooperation with the government information regarding the victim of any criminal activity or national security information

Attorneys are expected to discuss this matter with their clients so that an informed decision can be made about the inclusion of sensitive information The appellate courts and their staff will not review filings for redaction or to determine if materials should be sealed, the responsibility for insuring that information is redacted or sealed rests with counsel and the parties

IT IS SO ORDERED

s/Jean H Toal C J

s/James E Moore J

s/John H Waller, Jr J

s/E C Burnett, III J

s/Costa M Pleicones J

Columbia South Carolina

August 13, 2007

---

1 See e g , Rule 12 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, Rule 12 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502 SCACR, Rule 402(n) SCACR and Rule 403(l) SCACR

2 This restriction shall not apply when this information is required or requested by the appellate court For example, the application for admission to practice law under Rule 402 SCACR requires many of these personal identifiers to be disclosed

PM Handdelivered
POS 6-2-11

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C James, Jr , Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware, Inc — Appellant,

v

Tammy Hopkins — Respondent

NOTICE OF APPEAL

Plaintiff/Appellant EnerSys Delaware, Inc hereby appeals the Order of The Honorable George C James, III dated May 3, 2011, in which Judge James denied the Motion to Disqualify Defendant's Counsel George Harper, Esq (who had previously represented Plaintiff/Appellant) Plaintiff/Appellant received written notice of entry of this order on May 5, 2011

June 2, 2011

William H Floyd, III S C Bar #10246
Angus Macaulay S C Bar #15044
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803 771 8900
WFloyd@nexsenpruet com
AMacaulay@nexsenpruet com

Attorneys for Plaintiff/Appellant EnerSys Delaware Inc

Other Counsel of Record

George Harper, Esq
1229 Lincoln St
Columbia, SC 29201

Attorney for Defendant/Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable George C James, Jr , Circuit Court Judge

Case No 2011-CP-46-000179

EnerSys Delaware, Inc — Appellant,

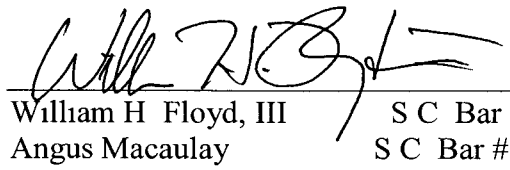
v

Tammy Hopkins — Respondent

PROOF OF SERVICE

I hereby certify that I have served the foregoing Notice of Appeal on the Respondent by depositing a copy of the same in the United States Mail, postage prepaid, on June 2, 2011, addressed to Respondent's Counsel of Record, George Harper, Esq , 1229 Lincoln Street, Columbia, South Carolina 29201

June 2, 2011



William H Floyd, III S C Bar #10246
Angus Macaulay S C Bar #15044
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
803 771 8900
WFloyd@nexsenpruet com
AMacaulay@nexsenpruet com

Attorneys for Appellant EnerSys Delaware Inc

NEXSEN|PRUET

William H Floyd, III
Member
Certified Employment & Labor Law Specialist
Admitted in SC

June 2, 2011

VH
359838
$100.00

The Hon Jeanette Barber, Clerk
S C Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re ***EnerSys Delaware Inc v Tammy Hopkins***
Case No 2011-CP-43-000179

Dear Ms Barber

Please find enclosed an original and one copy of a Notice of Appeal of Judge James' Order dated May 3, 2011, in which the Court denied EnerSys' Motion to Disqualify Defendant's Counsel, George Harper, Esq , a copy of said Order, a filing fee check for $100 00, and a Certificate of Service

Please return a clocked-in copy of the Notice of Appeal in the self-addressed, stamped envelope Thank you

Sincerely,

William H Floyd, III

Enclosures
WHF/gpc
cc George Harper, Esquire (w/ Enclosures)

RECEIVED
JUN 0 2 2011
SC Court of Appeals

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

1230 Main Street
Suite 700 (29201)
PO Drawer 2426
Columbia SC 29202
www nexsenpruet com

T 803 253 8201
F 803 727 1436
E WFloyd@nexsenpruet com
Nexsen Pruet LLC
Attorneys and Counselors at Law

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS

RECORDED
2011 MAY -3 PM 3 21
CLERK OF COURT
SUMTER, S.C.

JUDGMENT IN A CIVIL CASE

CASE NO 2011CP4300179

Enersys Delaware Inc *vs* **Tammy Hopkins**

CHECK ONE

☐ **JURY VERDICT** This action came before the court for a trial by jury The issues have been tried and a verdict rendered

☐ **DECISION BY THE COURT** This action came to trial or hearing before the court The issues have been tried or heard and a decision rendered

☐ **ACTION DISMISSED** (*CHECK REASON*) ☐ Rule 12(b) SCRCP ☐ Rule 41(a) SCRCP (Vol Nonsuit) ☐ Rule 43(k) SCRCP (Settled) ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*) ☐ Rule 40(j) SCRCP ☐ Bankruptcy ☐ Binding arbitration subject to right to restore to confirm vacate or modify arbitration award ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
☐ Affirmed ☐ Reversed ☐ Remanded ☐ Other _____

NOTE ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

IT IS ORDERED AND ADJUDGED ☐ See attached order ☐ Statement of Judgment by the Court

see attached Order

Dated at Sumter South Carolina this 3rd day of May 2011

Court Reporter

PRESIDING JUDGE George C James, Jr

This judgment was entered on the 2nd day of May 2011 and a copy mailed first class this 3rd day of May 2011 to attorneys of record or to parties (when appearing pro se) as follows

William H Floyd III Nexsen Pruet LLC P O Drawer 2426 Columbia SC 29202 2426

George A Harper Jackson Lewis LLP 55 Beattie Place Ste 800 Greenville SC 29601

CFORM4M
SCCA SCRCP Form 4 Revised 06 2008

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

James C. Campbell

James C Campbell Clerk of Court

RECORDED
2011 MAY -3 AM 10:37
JAMES G. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

STATE OF SOUTH CAROLINA COUNTY OF SUMTER	)	IN THE COURT OF COMMON PLEAS THIRD JUDICIAL CIRCUIT C/A NO.: 2011-CP-43-179
Enersys Delaware, Inc., Plaintiff, vs. Tammy Hopkins, Defendant.	)	**ORDER**

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Gloria L. Duff
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

This matter was before the court on April 20, 2011, for hearing of the plaintiff's motions for contempt and to disqualify counsel. William H. Floyd, III, Esq., Angus H. Macaulay, Esq., and James A. Byars, Esq., appeared for the plaintiff, and George A. Harper, Esq., appeared on behalf of the defendant.

CONTEMPT OF COURT

The contempt motion is held in abeyance. The defendant and the plaintiff advised the court that both want the data from Yahoo that would supposedly shed light on the whereabouts of emails both claim were improperly deleted. (Defendant admits she deleted, with "approval" of her attorney, "spam" emails she claims had no relation to Enersys.). This was done after the February 10, 2011 hearing on the motion for preliminary injunction. The plaintiff believes she deleted Enersys-related emails and contends that even if she deleted only spam emails, that is a violation of the February 10, 2011 order, as she was ordered to delete no emails whatsoever. Enersys claims that but for the red flag of eighteen (18) days of no emails in any email box,

Enersys would not be forced to go to the time and expense of obtaining email account information from Yahoo On the other hand defendant claims the Enersys computer expert deleted seventy (70) emails after she turned over her home computer to Enersys

Enersys maintains the defendant is also in contempt of court for her action and inaction relative to her Blackberry devices Enersys contends that when the defendant s Blackberry was delivered to its computer expert it was stripped , i e minus its battery and memory card Defendant testified that when she bought this Blackberry on E Bay it had no memory card, and she never obtained one She claims she bought a new Blackberry on E-Bay this one also without a memory card She claims the battery for the first Blackberry was recycled after she bought the second Blackberry

The defendant has heretofore resisted turning over her second Blackberry for inspection She testified as to three reasons for this resistance First she testified she has no landline and that she needed her phone constantly and that giving up her phone for even one day would cause substantial hardship Second, she testified she would have to drive to Columbia to turn the phone over, and gasoline would be expensive Third she testified she does not want to leave her son unsupervised for an entire day while she waited in Columbia Upon questioning by the court the defendant revealed that her son though unemployed, is twenty years old and of sound mind and body However the defendant seems to think he cannot fend for himself for one day That notion is preposterous and her rationale borders on contempt The court will rule further on this point pending the results of the Yahoo data recovery discussed herein

At the hearing the court ordered the defendant to deliver her second Blackberry in its complete state to the Enersys computer expert on Tuesday April 26 2011 at 9 00 a m at the

plaintiff's expert s office in Columbia Enersys will pay the defendant thirty dollars ($30 00) for gasoline The court notes that if the defendant failed to cooperate with this inspection, she has done so at her own peril

Issues concerning any contemptuous conduct on the part of the defendant for deleting other emails will be addressed at a hearing after the Yahoo data is obtained and reviewed The parties both having expressed a desire to obtain the Yahoo data are ordered to cooperate with one another in their efforts to obtain the data and to give all reasonable consents to Yahoo and courts of other states that might be necessary

DISQUALIFICATION OF COUNSEL

Plaintiff contends defendant s attorney George A Harper Esq should be disqualified from representing the defendant Mr Harper and his former firm Jackson Lewis LLP represented plaintiff from approximately 2000 until 2004 in employment and labor law matters specifically in litigation concerning its Sumter operations Plaintiff claims that Mr Harper obtained confidential knowledge of and in fact helped develop, personnel policies procedures and litigation strategies (all of which plaintiff claims are protected by the attorney-client privilege) regarding employment and labor law disputes Plaintiff claims that throughout the attorney client relationship, plaintiff's agents including Theodore Fries (plaintiff's Director of Administration) communicated numerous client confidences to Mr Harper related to plaintiff's employment policies and practices in addition to other confidential communications related to Mr Harper s representation of plaintiff

Plaintiff cites five particular lawsuits in which Mr Harper represented plaintiff but emphasizes his services in one particular case Enersys, Inc v Choice Phillips 3 01-CV 02582 MJP which was filed in 2001 and ended in 2004 Plaintiff alleged in the Phillips case that Phillips plaintiff s Human Resources Manager at the Sumter plant, had defamed the plaintiff and violated the confidentiality agreement that existed between him and plaintiff

Some background on the Phillips case is perhaps relevant to the issue of disqualification The cause of action for defamation was based on the allegation that Phillips had published false information that plaintiff had provided illegal assistance to an anti union committee and that Phillips had breached the terms of his confidentiality agreement with the plaintiff

Phillips did not answer the complaint and a default judgment of five hundred dollars ($500 00) was entered against him Subsequently, the judgment was overturned on the ground of fraud, specifically because an Enersys employee gave perjured testimony to the Federal Court that no illegal anti union assistance had been provided while in truth Enersys had provided the illegal assistance Enersys blamed its counsel the Jackson Lewis law firm for providing the illegal assistance Litigation ensued between Enersys and Jackson Lewis the results of which are unknown to this court

The court is well aware of the sanctity of the attorney client privilege The court has carefully considered the arguments of the plaintiff and the defendant and is compelled to conclude that disqualification is not warranted under Rule 1 9(a) of the Rules of Professional Conduct Rule 1 9(a) prohibits a lawyer who has formerly represented a client absent written consent from thereafter representing another person 'in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former

4

client (emphasis added) Rule 1 9(b) prohibits such representation by a lawyer when his former firm represented the former client Rule 1 9(c) prohibits a lawyer in such a situation from using or relating information connected to the former representation to the disadvantage of the former client

In Townsend v Townsend 323 SC 309, 474 SE2d 424 (1996), our Supreme Court held that a trial court does have the authority to disqualify counsel if the prohibitions of Rule 1 9 warrant disqualification The Court quoted 1 Hazard & Hodes The Law of Lawyering A Handbook on the Model Rules of Professional Conduct §1 9 10 at 293 (1996) for the proposition that in determining whether a matter was substantially related under 1 9 the Court should consider whether the lawyer "would have or reasonably could have learned confidential information in the first representation that would be of significance in the second ' Townsend 474 SE2d at 429 (emphasis added)

The issue in this case is whether Mr Harper reasonably could have learned confidential information while he represented Enersys Enersys focuses its argument on the assertion that he assisted Enersys in the development of its confidential personnel decisions agreements, policies and procedures and that he was responsible for developing litigation strategy involving those policies and agreements many of which remain largely unchanged (see plaintiff s memorandum p 7) [1]

In my view, the fact that Mr Harper assisted in the development of personnel decisions, agreements policies, procedures, and litigation strategies does not warrant disqualification in this case There is no similarity between this case and the five cases referenced by the plaintiff except that they involve disputes with an employee The fact that the plaintiff developed a certain

[1] This quoted assertion is from counsel for Enersys but does not appear in the affidavit of Mr Fries

method of handling these disputes that has survived over seven years does not warrant disqualification

Based upon the foregoing, it is

ORDERED that the plaintiff's motion for contempt is held in abeyance it is further

ORDERD that the motion to disqualify Mr Harper is denied

George C James Jr Circuit Court Judge
Third Judicial Circuit

Date May 2, 2011
Sumter SC