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July 12, 2013

VIA HAND DELIVERY (July 12, 2013)

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *Ricky S. Mitchell, Respondent v. Marin Right of Way Service, LLC and Bernardo L. Hernandez, Appellants, v. Three-Gen, Inc., Third-Party Defendant*
Appellate Case No.: 2012-212460
Claim No.: 503923200
Our File No.: 700-050

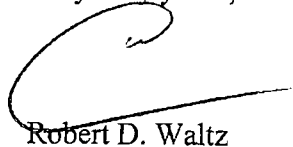
Dear Ms. Kitchings:

Enclosed for filing are the original and one copy of the *Petition for Writ of Certiorari, Appendix Volume I & II*, and the *Proof of Service* in the above-referenced matter.

By copy to counsel via email, I am notifying them of this filing as they have already been served under a separate cover letter with the referenced documents via United States Postal Service. If you have any questions, please do not hesitate to contact me.

With kindest regards, I am

Very truly yours,



Robert D. Waltz

RDW/kl

Enclosures

cc: Bert G. Utsey, III, Esquire (via email w/o encl.)
J. Paul Detrick, Esquire (via email w/o encl.)
Britton Hawk Mason, Esquire (via email w/o encl.)
Lindsay Smith-Yancey, Esquire (via email w/o encl.)

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SC Court of Appeals

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**STATE OF SOUTH CAROLINA
In The Supreme Court**

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
The Honorable Perry M. Buckner, Circuit Judge
Civil Action No. 2011-CP-15-20

Ricky S. Mitchell,..... Respondent,

v.

Marin Right of Way Service, LLC, and
Bernardo L. Hernandez,.....Petitioners,

v.

Bernardo L. Hernandez,.....Third-Party Plaintiff,

v.

Three-Gen, Inc.,.....Third-Party Defendant.

PROOF OF SERVICE

I certify that on July 11, 2013 I served a true and correct copy of the Petitioner for a Writ of Certiorari and Appendix on opposing counsel by mailing the same via U.S. First Class Mail, postage prepaid, addressed to counsel of record.

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I, Matthew S. Byzet, also hereby certify that on 12 July 2013, I served one copy of the Petition for Writ of Certiorari and Proof of Service submitted by Petitioner on the Office of the Clerk of Court for the South Carolina Court of Appeals via hand delivery as follows:

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1205 Pendleton Street
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Charleston, South Carolina
July 12, 2013

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In The Supreme Court

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
The Honorable Perry M. Buckner, Circuit Judge
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PETITION FOR A WRIT OF CERTIORARI

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SC Court of Appeals

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I. CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 13, 2013.

II. QUESTIONS PRESENTED

1. Did the Court of Appeals err in dismissing Petitioners' appeal on the basis that the trial court's order was interlocutory?

III. STATEMENT OF THE CASE

On January 6, 2011, the Respondent, Ricky S. Mitchell (“Mr. Mitchell”), sued the Petitioners, Marin Right of Way Service, LLC (“Marin Right of Way”) and Bernardo L. Hernandez (“Mr. Hernandez”), for negligence arising out of a motor vehicle accident. Mitchell sought unspecified actual and punitive damages, as well as litigation costs. (App.pp. 32-33, paras. 10-14). On July 26, 2011, Petitioners filed a Motion to Disqualify Respondent’s counsel based on Rules 1.9, 1.10, 1.18 and 3.7, RPC, Rule 407, SCACR. (App.pp. 34-35).

The matter was heard before the Honorable Perry M. Buckner, III, Circuit Court Judge, on December 19, 2011. During the hearing, Petitioners presented witness testimony from Mr. Marin and expert testimony from Michael J. Virzi, Esquire. On January 30, 2012, the trial court filed an order denying Petitioners’ motion. (App.pp. 42-45). Petitioners received the trial court’s order via e-mail on February 21, 2012 and subsequently filed a Motion for Reconsideration on the basis that the trial court’s order neither addressed Petitioners’ claims made pursuant to Rule 1.18, RCP, Rule 407, SCACR, nor the motion’s applicability to Hernandez, as well as Marin. On May 7, 2012, the trial court denied Petitioners’ Motion for Reconsideration. (App.pp. 46-47).

This appeal followed. Respondent filed a Motion to Dismiss Petitioners’ appeal to the Court of Appeals on the basis that the appellate court did not have jurisdiction. (App.p. 23). The Court of Appeals issued its decision on January 3, 2013, granting Respondent’s Motion to Dismiss finding that the trial court’s order was not immediately appealable. (App.pp. 90-91). Petitioners subsequently filed a Petition for Rehearing on January 18, 2013. (App.p. 92).

The Court of Appeals denied the petition for rehearing on June 13, 2013. (App.pp. 585-586). Petitioners seek a writ of certiorari to review that decision.

IV. STATEMENT OF THE FACTS

A. The Accident

On a foggy morning, at around 7:00 a.m. (App.p. 548, line 25 – App.p. 549, line 2) on January 27, 2010, Mr. Hernandez was driving a 15-passenger van owned by his employer, Marin Right of Way, carrying seven (7) additional employees to a job in Allendale. (App.p. 547, line 2 - App.p. 548, line 1). Mr. Hernandez was traveling west on S.C. Highway 641 in Colleton County and stopped for a stop sign at the intersection of S.C. Highway 641 and U.S. Highway 601. Believing it was safe to proceed, Mr. Hernandez entered the intersection. Mr. Mitchell, traveling south on U.S. Highway 601, struck the passenger side of the van resulting in the immediate death of several Marin Right of Way employees and causing grievous injury to Mr. Mitchell and others.

The owner of Marin Right of Way is Carlos Marin (“Mr. Marin”), a Mexican immigrant who speaks English as a secondary language. (App.p. 552, lines 3-6). Within a few minutes after the accident, Mr. Hernandez called Mr. Marin and told him the company vehicle had been involved in a bad accident with multiple injuries, including one fatality. (App.p 549, line 22 - App.p 550, line 2). Mr. Marin immediately went to the accident scene and was shocked at what he observed. (App.p. 550, line 6 - App.p. 551, line 5). His company had never been in this situation and he did not know what to do. His first thought was that he needed legal advice on this horrific situation. (App.p. 551, lines 6-9).

B. The Meeting with Dorcas Tuten, Esquire

Unable to drive himself because he was so distraught, Mr. Marin asked his sister-in-law to drive him to seek legal advice from the attorney who handled various matters for Marin Right of Way, Dorcas Tuten ("Ms. Tuten"). (App.p. 551, lines 11-18). Once he arrived at Ms. Tuten's office, Mr. Marin explained to her what happened - that his company's vehicle had been in a serious accident - and asked if she could help because he did not know what to do. (App.p., 551, lines 20-23) Ms. Tuten is a real estate attorney. She told Mr. Marin that she could not help him but she knew an attorney who could help him. She referred Mr. Marin to Bert "Skip" G. Utsey, III ("Mr. Utsey"). (App.p. 551, lines 23-25). Mr. Marin understood that Ms. Tuten would not be able to help him as his lawyer. (App.p. 552, lines 7-15). So, Mr. Marin left Ms. Tuten's office and went straight to see Mr. Utsey. (App.p. 552, lines 16-18).

C. Initial Meeting with Mr. Utsey

Mr. Marin arrived at Mr. Utsey's office sometime between 9:00 and 9:30 a.m. (App.p. 554, line 25 - App.p. 555, line 2), just a couple of hours after the accident occurred. Mr. Marin immediately went to the front desk and told the receptionist that he needed to see Mr. Utsey. (App.p. 552, lines 19-23). Mr. Marin, seeking legal advice for the accident (App.p. 553, lines 3-7), said he did not have an appointment but explained the situation to the receptionist. (App.p. 552, line 23 - App.p. 553, line 25).

Mr. Utsey met with Mr. Marin. Mr. Utsey instructed his assistant cancel his scheduled appointments to meet with Mr. Marin. He started asking Mr. Marin questions about the accident and his company. (App.p. 554, lines 6-17). Mr. Marin believed Mr. Utsey was trying to help him and his company. (App.p. 555, lines 5-7). Mr. Marin told

Mr. Utsey what happened and answered various questions regarding how many people were injured, how many were killed and the driver of the vehicle, among others. (App.p. 555, line 8 – App.p. 556, line 6). During the hour long meeting (App.p. 559, lines 16-18), he answered all of Mr. Utsey's questions honestly, freely and fully. (App.p. 556, lines 7-12). Mr. Utsey took several pages of notes. (App.pp. 561-575). Mr. Marin left the meeting with the belief that Mr. Utsey had provided legal advice and that he did not need to seek further advice from another lawyer. (App.p 558, line 21 – App.p. 559, line 8).

D. Meeting on January 29, 2010

That following Friday, two days after their first meeting, Mr. Utsey met with Mr. Marin, again. (App.p. 292, lines 1-16). Also in attendance was Mrs. Tuten, Mr. John E. Parker, one of Mr. Utsey's law partners. (App.p. 292, lines 17-21). Mr. Utsey and Mr. Parker asked Mr. Marin questions about the legal status of his employees. (App.p. 293, lines 1-6). As an immigrant whose primary language is Spanish (App.p. 273, lines 8-12), Mr. Marin did not know why he was being asked these questions, but he trusted them because he believed there was no reason to think those lawyers were not working for him. (App.p. 293, line 13 – App.p. 294, line 3). That was the last time Mr. Marin spoke to Mr. Utsey. (App.p. 294, lines 4-10).

E. Ricky S. Mitchell

Less than five (5) weeks later, on March 3, 2010, Mr. Mitchell retained Mr. Utsey to represent him as a result of the accident involving Marin Right of Way's vehicle on January 27, 2010. (App.p. 344, lines 17-18). Mr. Marin never received a letter from Mr. Utsey saying he or his firm would not represent Mr. Marin or his company. (App.p. 294,

lines 15-18). Mr. Marin did not hear from Mr. Utsey after the January 29, 2010 meeting. (App.p. 294, lines 4-10). On January 13, 2011, Mr. Marin was served with a Summons & Complaint which Mr. Utsey filed against Mr. Marin's company. (App.p. 294, line 23 – App.p. 296, line 6). In that suit, Mr. Mitchell seeks compensation for injuries he sustained in the accident with Mr. Marin's van on January 27, 2010. (App.pp. 31-33). This is the same accident about which Mr. Marin sought legal advice from Mr. Utsey within hours after the accident.

V. ARGUMENT AND CITATION OF AUTHORITY

A. The Court of Appeals' Incorrectly Applied EnerSys To Dismiss Petitioners' Appeal

The Court of Appeals' denial of Petitioners' appeal based on this Court's decision in EnerSys Delaware, Inc. v. Tammy Hopkins, Op. No. 27225 (S.C. Sup. Ct. filed February 27, 2013) (App.pp. 585-586) ignores the fundamental differences between the rights of former and prospective clients. There is simply no comparison between the impact of what knowledge or information an attorney may have acquired from a former client in a previous representation and the real time information acquired from a prospective client. Rule 1.18, RPC, Rule 407, SCACR, recognizes the difference and imposes upon the attorney, who is approached by a potential client, considerable limitations regarding the scope of inquiry. The blanket application of EnerSys to all denied motions for disqualification, including those involving prospective clients, eviscerates the rights of prospective clients and makes Rule 1.18 meaningless. This is especially well illustrated in the case at bar, where a visibly distraught man goes to see a lawyer about a horrific situation, the lawyer meets with him to discuss the case and does not accept the representation, but later agrees to represent the opposing party in the very

same legal matter the man went to the lawyer to discuss. This situation is exactly why Rule 1.18 exists.

The Court of Appeals, in its first application of the holding, took EnerSys, which deals with the prior representation of a former client in previous matters, and applied it to this case, which involves a prospective client who sought representation in the very same manner. However, where the aggrieved party is a present or prospective client in the very same matter, as in this case, the interests are not at all the same, a fact recognized by the much greater detail and complexity of Rule 1.18.

In EnerSys, the Respondent's attorney, Mr. Harper, represented EnerSys in a handful of employment lawsuits during the period of 2002 to 2004. The case involving Mr. Harper's representation of Ms. Hopkins was seven years later for an entirely separate matter from Mr. Harper's previous representation of EnerSys. Unlike the appellants in EnerSys, Petitioners are not seeking to disqualify counsel based on previous representation in other matters. Rather, Petitioners are requesting this Court address the question of appealing the denial of a motion to disqualify counsel based on representation in the very same matter.

It is of the utmost importance that a person be able to enter a lawyer's office to discuss his or her legal rights and trust that the lawyer will not subsequently use the content of that same discussion against the person in an adverse litigation.

Recently, the United States District Court for the District of West Virginia wrote:

It is imperative, however, in all conflicts of interest related to the attorney-client relationship to avoid the appearance of impropriety, because it is the glory of the legal profession that its fidelity to its clients can be depended upon; that a man may safely go to a lawyer and converse with him upon his rights in litigation with absolute

assurance that the lawyer's tongue is tied from ever discussing it. Anything less than the strictest safeguarding by the lawyer of a client's confidences would irreparably erode the sanctity of the lawyer-client relationship. Thus to preserve the value and sanctity of the attorney-client relationship, courts resolving conflicts of interest must resolve all doubts in favor of disqualification in order to prevent the appearance of impropriety.

Burgess-Lester v. Ford Motor Co., 643 F.Supp.2d 811, 813 (N.D.W.Va. 2008) (citations omitted).

Mr. Marin was, at minimum, a prospective client based on his consultation with Mr. Utsey and, therefore, subject to the provisions of Rule 1.18. If left uncorrected, the Court of Appeals' decision will give attorneys *carte blanche* to obtain information from communications with a prospective client and subsequently use that information adversely to that prospective client. The Court of Appeals' overly broad application of EnerSys deprives the public of the ability to "safely go to a lawyer and converse with him upon his rights in litigation." Burgess-Lester, 643 F.Supp.2d at 813.

When Mr. Marin was looking for legal advice immediately after the accident, he had the substantial right to his attorney of choice. Mr. Marin believed he was exercising that right when he sought legal advice from Mr. Utsey. (App.p. 281, lines 3-9; App.p. 287, line 21 – App.p. 288, line 2). Regardless of whether an attorney-client relationship was established, Mr. Marin also has the right to confidentiality involving his communication with Mr. Utsey as a prospective client. See Rule 1.18; Rule 1.6, RPC, Rule 407, SCACR. Mr. Marin's right to confidentiality continues to exist. Rule 1.6. As such, Mr. Marin has a substantial right to a mode of trial where his confidential communications with Mr. Utsey regarding the accident will not be used against Mr. Marin at trial for the very same matter. (App.p. 281, lines 3-17).

B. Court of Appeals Incorrectly Concluded That The Trial Court's Order Does Not Affect a Substantial Right

Petitioners respectfully submit the Court of Appeals' dismissal of Petitioners' appeal on the basis that the trial court's Order was not immediately appealable was improper, and that this Court must conclude that the trial court's Order is immediately appealable as it affects a substantial right under S.C. Code Ann. § 14-3-330(2)(a), which states:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal (2) [a]n order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action. . .

1. Right to Attorney of Choice

In Hagood v. Sommerville, 362 S.C. 191, 197-98, 607 S.E.2d 707, 710 (2005), this Court found that an order granting a motion to disqualify counsel in a civil trial is immediately appealable because such an order affected the substantial right of the party to have an attorney of his own choosing. Mr. Marin was exercising his substantial right to the attorney of one's choice when he walked into Mr. Utsey's office in search of legal advice just hours after the accident.

This is a logical extension of American Jurisprudence's insistence on the right to legal counsel as a core principle. That is not to say that Mr. Utsey was duty-bound to take the case. Assuredly, he was not. However, as an officer of the court, Mr. Utsey did have a duty to facilitate rather than impede Mr. Marin's attempts to secure representation.

Had Mr. Utsey stayed within the boundaries established by Rule 1.18, he would have been free to decline the representation and, perhaps, represent an opposing party

should the opportunity arise and Mr. Marin would have left Mr. Utsey's office with his substantial right to representation intact. Because Mr. Utsey did not do so, he had a duty of confidentiality, had no liberty to represent an opposing party and Mr. Marin was set adrift because, while he was uncertain as to what had just happened, the one thing he did not know was that he would need to find another attorney.

Without question, Mr. Utsey had the right to decline the representation and the Rules of Professional Conduct serve to protect the lawyer who stays within the well-defined boundaries therein. However, they also serve to protect people who are in need of legal services, such as Mr. Marin on the day he walked in Mr. Utsey's office desperately seeking legal guidance just hours after an automobile accident involving his company that resulted in the deaths of several employees. That failure of Mr. Utsey to stay within the safe harbor of a limited interrogation as provided in Rule 1.18, gave rise to the reasonable expectation of confidentiality in the mind of Mr. Marin.

2. Right to Confidentiality

Petitioners were, at a minimum, "prospective clients" as defined in Rule 1.18, as a result of Mr. Marin's consultation with Mr. Utsey just hours after the accident. Subsection (a) of Rule 1.18 states: "A person with whom a lawyer discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship." In other words, if Mr. Marin's subjective expectation of an attorney-client relationship was objectively reasonable then he was a prospective client. The expectation is evaluated before the representation is declined. The record is replete with evidence that at the beginning of the conversation with Mr. Utsey, Mr. Marin had a

“reasonable expectation that the lawyer [was] willing to discuss the possibility of forming a client-lawyer relationship.” See Rule 1.18, Comment 2.

A lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation and “shall not represent a client with interests materially adverse to those of a prospective client in the same matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter”.¹ Rule 1.18(b),(c). Petitioners have a right to confidentiality. Because Mr. Marin was a prospective client, subsection (c) prohibits Mr. Utsey and his firm from representing anyone with interests materially adverse to Petitioners in the same or substantially related matter. Rule 1.18(c). By seeking legal advice from Mr. Utsey on the very same matter in which he now represents Mr. Mitchell, regardless of whether an attorney-client relationship was formed, Petitioners have a right to confidentiality of the shared confidences as a prospective client under Rule 1.18.

Neither disclosure to third parties nor discoverability has any impact on confidentiality. Confidentiality is far broader than the attorney-client privilege and not subject to the same exceptions. All information obtained by a lawyer from a client or prospective client is confidential. See Rule 1.6(a), (“information relating to the representation”); Comment 3 (“The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the

¹ Petitioners’ still maintain the position originally asserted in their Motion to Disqualify Counsel, that Petitioners’ are former clients, but in the alternative, they were potential clients based on Mr. Marin’s consultation with Mr. Utsey. Further, Mr. Marin did not give informed consent in writing. See Rule 1.18(d), SCACR 407.

lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”); Comment 4 (“Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.”). While disclosure to a third party may waive the attorney-client privilege, such disclosure does not waive confidentiality. Confidentiality may be waived only by informed consent. Rule 1.6(a).

Mr. Marin conveyed four (4) pieces of information that could be significantly harmful in this case: 1) Mr. Marin’s immediate impressions of the accident; 2) the immigration and driver’s license status of Mr. Hernandez and the other passengers; 3) Marin Right of Way’s policies and procedures regarding hiring immigrants; and 4) Marin Right of Way’s available automobile and general liability insurance. Respondent previously argued that Rule 1.18(c) requires that the information shared “is significantly harmful.” The information need not be proven to be significantly harmful, as long as it has the potential to be significantly harmful. See Rule 1.18(c).

The present lawsuit against Petitioners alleges, in part, negligence, gross negligence, recklessness and willfulness; actual and punitive damages have been requested. (App.pp. 31-33). Mr. Marin conveyed to Mr. Utsey, the driver’s (Mr. Hernandez’s) account of the accident, Mr. Marin’s present thoughts and feelings, Mr. Marin’s account of what he observed at the collision site immediately after he left the scene, and his thoughts about how to manage the situation. (App.p. 284, line 8 – App.p.

286, line 1). Without more, this information alone is harmful to Petitioners in this case. But, Mr. Marin conveyed additional harmful information.

Information about Petitioners' available insurance coverage can significantly enhance Respondent's bargaining position. Marin Right of Way's immigrant-employment policies and procedures could easily and obviously become an issue on liability issue and serve as a basis for punitive damages; and information about Marin's knowledge of Mr. Hernandez's driver's license status not only could be a liability issue for Petitioners, but also has specifically been made an issue in Respondent's pleadings and discovery requests. Mr. Hernandez's immigration status is the type of information that could be significantly influential with a jury in a manner adverse to Petitioners, particularly in the present highly charged political climate on the subject of immigration and the inability to control the border between the United States and Mexico, the economy, and current rate of unemployment.

As prospective clients, Petitioners have the right to a trial where their confidential communications to an attorney in search of legal advice are not later used against them by the adverse party who is represented by the same lawyer whom Petitioners – through Mr. Marin – originally consulted on the very same matter. Therefore, Petitioners' right, as in Hagood, is closely related to the right to a particular mode of trial, a well-established substantial right. *See Id.*, at 197-98, 607 S.E.2d at 710.

The revelation and/or use of confidential communications would affect the trial proceedings and, as discussed immediately above, an appeal from any final verdict would be insufficient to rectify the injustice. There is no case with precedential value on point. However, two cases do serve to inform.

In Wilson, Mr. Wilson was charged with murdering his ex-wife. He moved to disqualify the assistant solicitor assigned to his case based on the fact that the assistant solicitor's husband represented Wilson in a divorce proceeding against his ex-wife sixteen (16) months earlier. Surprisingly, the trial court granted the motion and the State appealed. The Supreme Court found against the State and upheld the trial court's order of disqualification. It refused to extend the holding of Hagood (discussed further in Section C.) for two reasons. First, the Court found that the policy considerations which existed in Hagood -- "the right of a party to retain counsel of his or her choosing and the development of an attorney/client relationship"-- simply do not exist in the context of disqualifying an assistant solicitor. Id., at 603, 693 S.E.2d at 926. Second, the Court noted that the State's "ability to appeal has historically been limited in criminal matters." Id.

In footnote 3, the Court gratuitously noted that the "denial" of a motion to disqualify is not immediately appealable because the ruling does not affect a party's substantial rights. Id. Of course, that was not the issue before the court in Wilson. More importantly, the cases cited by that Court did not involve a motion filed by a former client or a former prospective client against an attorney. Id. (citing Townsend v. Townsend, 325 S.C. 309, 474 S.E.2d 424 (1996); Rogers v. Wilkins, 275 S.C. 28, 267 S.E.2d 86 (1980)).

None of the four (4) reasons identified in Hagood were present in the judicial disqualification cases cited in Wilson. Thus, the reasoning Wilson is inapplicable to the issue of a former or prospective client's substantial rights.

Further, the holding in Wilson did not modify or overturn Hagood. While both the Wilson and Hagood cases involved the same statute, the court in Wilson based its holding on prior decisions limiting the ability of the State to appeal lower court rulings in criminal cases. Wilson, 387 S.C. at 603, 693 S.E.2d at 926. Unlike in Wilson, the policy implications which were present in Hagood are also present in the case at hand.

C. Court of Appeals Incorrectly Concluded That The Trial Court's Order Did Not In Effect Determine the Action And Prevent a Judgment From Which Appeal Might Be Taken

“The right to be represented by an attorney of one’s choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case.” Hagood, at 197-98, 607 S.E.2d at 710. Moreover, the right to be represented by one’s preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right. Id., at 198. It further held that such an order must be immediately appealed or any later objection in a subsequent appeal will be waived. Id.

If an order deprives a party of a mode of trial to which that party is entitled as a matter of right, the order is immediately appealable, and failure to do so forever bars appellate review. Cobb v. South Carolina Dept. of Transp., 365 S.C. 360, 618 S.E.2d 299 (2005). The trial court’s order denying Petitioners’ motion to disqualify counsel deprives Petitioners of a mode of trial to which they are entitled to as a matter of right, i.e., the rights enumerated in Rule 1.18. Moreover, if Petitioners cannot appeal the trial court’s orders at this time, then appellate review is forever barred. The trial court’s order must be immediately appealable because it would deny Petitioners their substantial right to a

mode of trial which could determine the action and prevent a judgment from which an appeal might be taken. S.C. Code Ann. § 14-3-330(2)(a) (1976 & Supp.).

The same policy considerations that led the Court to reach its decision in Hagood apply to the case at hand. Those considerations included: 1) the importance of the party's right to counsel of his choice in an adversarial system; 2) the importance of the attorney-client relationship, which demands a confidential, trusting relationship that often develops over time; 3) the unfairness in requiring a party to pay another attorney to become familiar with a case and repeat preparatory actions already completed by the preferred attorney; and 4) an appeal after final judgment would not adequately protect a party's interests because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney. Id. at 197, 607 S.E.2d at 710 (citing Goldson v. Am. Motors Corp., 326 N.C. 723, 392 S.E.2d 735, 737-38 (1990)); Russell v. Mercy Hosp., 15 Ohio St.3d 37, 472 N.E.2d 695, 697-98 (1984); Richardson v. Griffiths, 251 Neb. 825, 560 N.W.2d 430, 434-35 (1997)²; Casco Northern Bank v. JBI Associates, Ltd., 667 A.2d 856, 859 n. 3 (Me. 1995); Parker v. Volkswagenwerk, 245 Kan. 580, 781 P.2d 1099, 1104-05 (1989); In re Estate of French, 166 Ill.2d 95, 209 Ill.Dec. 677, 651 N.E.2d 1125, 1130-31 (1995) (Heiple and Freeman, J.J., dissenting)).

² While Richardson involved the appeal of an order granting a motion to disqualify counsel rather than an order denying a motion to disqualify, of note is that the trial court granted the motion to disqualify on very similar facts as exist in this case. In affirming the trial court's granting of the motion to disqualify, the appellate court stated, "An attorney-client relationship is created when a person seeks advice or assistance from an attorney, the advice or representation sought pertains to matters within the attorney's professional competence and the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance."

First, is the importance of the attorney-client relationship. One court recently noted that “[t]he ‘paramount’ concern in determining whether counsel should be disqualified is ‘the preservation of public trust in the scrupulous administration of justice and the integrity of the bar.’” Roush v. Seagate Technology, LLC, 150 Cal. App.4th 210, 220, 58 Cal. Rptr.3d 275, 282 (2007) (internal citations omitted). The court went on to note that:

The classic disqualification case involves the attorney switching sides ‘so that an attorney who once represented A now seeks to represent B in a matter materially related to the original representation.’ Disqualification in such a case is necessary to safeguard the attorney-client relationship. A client should not fear that confidences conveyed to his attorney in one action will return to haunt him in a later one.

Id. (internal citations omitted). The matter before this Court is even starker. Petitioners do not seek to disqualify counsel for fear that confidences Mr. Marin conveyed to his attorney (or prospective attorney) in a ‘matter materially related’ will return to haunt him; rather, he fears that confidences conveyed to his attorney or prospective attorney in the very same matter about which he sought counsel will return to haunt him and impair his defense.

Second, an appeal after a trial on the merits of the case, final verdict and a new trial, if granted, would not adequately protect Petitioners’ interests because it would be absolutely impossible to rectify any prejudice that results. Not only would his confidences no longer be confidential, but public trust in the “scrupulous administration of justice and the integrity of the bar” would be completely undermined. See Roush, 150 Cal.App.4th at 220, 58 Cal.Rptr.3d at 282. The damage would already be done. A new trial could not possibly rectify either.

Third, there is no rationale that would support an argument that Respondent's right to counsel of his choice in an adversarial system is any greater than that of Petitioners' right to have the protections of Rule 1.18 respected. Mr. Marin sought legal advice from Mr. Utsey regarding the accident hours after it happened. (App.p. 283, line 25 – App.p. 284, line 7). But, in effect, he was denied the right to retain Mr. Utsey because, unbeknownst to Mr. Marin, Mr. Utsey elected to represent Mr. Mitchell less than five (5) weeks after Mr. Marin's last meeting with Mr. Utsey regarding the accident. (App.p. 344, lines 17-18).

Finally, were this Court to find that the trial court erred in failing to disqualify opposing counsel from representing Respondent, any possible "unfairness" in requiring Respondent to retain a new attorney would not be overly prejudicial in this case because, to date, the parties have only engaged in written discovery and the taking of four (4) depositions. Repeat preparatory actions would not be necessary and it is unlikely that a new attorney would be paid in any manner other than on a contingency basis. Thus, in all likelihood, Respondent would not have to pay another attorney to become familiar with the case because an hourly rate or flat fee would not be employed.

1. The Only Remedy is Prevention

If a hearing on the substance of Petitioners' appeal is delayed until the conclusion of a trial, it will be impossible to discern how the confidences shared with Mr. Utsey, et al, impacted the trial of the case. It is apparent that at least one significant decision was informed in the prospective client phase, the decision to act when the opportunity to represent Mr. Mitchell arose. The best measure this or any other court has of the depth of

the communications between Mr. Utsey's firm and Mr. Marin is their duration and that was substantial. Other information is bound to have been conveyed as well.

As an example, the Motion to Disqualify originally came about because Mr. Marin objected to answering the questions of a lawyer whom he had consulted for legal advice in the same matter. Each time an attorney takes a deposition he or she learns things that cause additional activity such as the issuance of subpoenas, hiring of experts, etc. It is one of the reason the deposition is taken. During the deposition the attorney does his or her best to react to new information on the spot and craft questions ad hoc to develop the new information, but that is not always easy. Often we could do a much better job of that the second time around but we do not have that opportunity. Mr. Utsey knows all the right questions to ask Mr. Marin just as if he had already deposed him. That is an advantage whose benefit cannot be overstated. It is inconceivable that this could be effectively redressed on appeal post-judgment. How would the reviewing court even begin to know what information was conveyed that led to the presentation of certain deposition questions.

Even more importantly, it is difficult to comprehend a situation that demands an immediate and full airing through the appeals process more than the allegation of a breach of confidentiality by an attorney that could affect litigation strategy. Whether or not a single damaging fact was made known to Mr. Utsey and his firm, the damage to the legal profession caused by allowing this appearance of impropriety to continue through a judgment only to be later declared improper defies reason. Swift action to redress this injustice is the best message to the bar that the rules governing contact with prospective clients must be respected.

CONCLUSION

Based upon the foregoing arguments and citation of authority, Petitioners respectfully request this Supreme Court to grant the petition for a writ of certiorari.

Respectfully submitted:

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