

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS

Honorable Heath P. Taylor

Trial Case No. 2023-CP-18-01621

Appellate Case No. 2024-000564

EADIE’S CONSTRUCTION COMPANY, INC. and EADIE’S INDUSTRIAL, INC., Appellants,

vs.

EADIE’S DIVA D ENTERPRISES, LLC, Dawn Eadie, Jordan Jones,
Justine Lawson, Kevin Lawson, Hunter Basco, and Mackel Maleckar, Respondents,

vs.

Keith Eadie, Appellant.

APPELLANTS’ MOTION TO DISQUALIFY COUNSEL FOR RESPONDENTS

Notice

Appellants, EADIE’S CONSTRUCTION COMPANY, INC. and EADIE’S INDUSTRIAL, INC., (“the Companies”), hereby move for an Order disqualifying Steven L. Smith, Esq. (“Mr. Smith”) and all other lawyers in his law firm as counsel for the Respondents.

Motion

The Companies move according to Rule 240, SCACR, and Rules 1.6, 1.7, 1.9, and 3.7, RPC, Rule 407, SCACR, for an Order disqualifying Mr. Smith and all other lawyers in his law firm as counsel for the Respondents on the grounds Mr. Smith formerly represented the Companies, has confidential information related to his prior representation of the Companies that is material to the disputes in this lawsuit, and is or may be a witness in this lawsuit (“the Lawsuit”).

A. Background and Factual Basis for this Motion.

For many years, Mr. Smith represented the Companies and provided legal services for them, including legal advice on corporate contractual matters. *See* (Affidavit of Keith E. Eadie, filed with this Motion as **Exhibit 1**). Although Mr. Eadie is the sole owner of both of the Companies, other employees were handling the Companies’ financial matters, including the Companies’ QuickBooks files, as well as serving as the point of contact for the lawyers retained on the Companies’ matters, including serving as the point of contact with Mr. Smith. *See* (Affidavit of Keith E. Eadie, filed with this Motion as Exhibit 1). When the Companies negotiated contractual matters with other companies, Mr. Smith was routinely consulted to provide legal advice, review proposed contracts, and provide other related legal services. *See* (Affidavit of Keith E. Eadie, filed with this Motion as Exhibit 1).

As alleged in the Complaint filed in this matter, certain of the Companies’ employees are alleged to have removed, altered, or destroyed the Companies’ records, invoices, QuickBooks files, bank statements, credit card statements, etc. The Companies have spent many months attempting to obtain and/or restore those records, including records of the Companies’ payments of invoices from Mr. Smith and his law firm. As part of the Companies’ efforts to recover and

restore their corporate records, the Companies recently obtained a copy of a QuickBooks record showing an invoice dated May 10, 2021, from Mr. Smith’s law firm, SMITH CLOSSER WHEELER, P.A., a copy of which is filed with this Motion is **Exhibit 2**. This invoice was for legal services Mr. Smith provided to “[p]repare release with Michael Leino/ correspondence with client” on April 13, 2021. The Companies paid the invoice on June 1, 2021.

This lawsuit was commenced on September 25, 2023, a little over two years after the last invoice from SMITH CLOSSER WHEELER that the Companies were able to locate. Nevertheless, Mr. Smith remained the Companies’ lawyer on corporate contractual matters until he appeared in October 2023 as counsel for the Respondents in this lawsuit. Mr. Smith did not obtain or even attempt to obtain the Companies’ informed consent to waive the existing conflict of interest to allow him to represent the Respondents.

B. Arguments.

1. Legal Standard.

The South Carolina Court of Appeals explained the duty of loyalty owed to former clients by their lawyer in *Madison v. Graffix Fabrix, Inc.*, 304 S.C. 321, 404 S.E.2d 37 (Ct. App. 1991). In *Madison*, the law firm representing an employee in an action against a company arising out of the employee’s termination previously had represented the defendant company in an action against another former employee. In the prior representation, the company had alleged that the former employee in that case was trying to entice away its employees. The Court Of Appeals concluded that

an attorney is not prevented from representing a subsequent client against a former client, where the duties required of him do not conflict with those required in the first employment. The test of whether the attorney’s employment is inconsistent

with his duty to a former client is whether acceptance of the new retainer will require him, in forwarding the interest of the new client, to do anything that will injuriously affect a former client in any matter in which he formerly represented him, and also whether the attorney will be called on, in his new relation, to use against a former client any knowledge or information acquired in the former relationship.

304 S.C. at 325, 404 S.E.2d at 40.

In *Madison*, there was no evidence that the second representation would injure the former client in connection with the prior representation or that counsel would be called upon to use any knowledge acquired in the former relationship.

As to the duty of confidentiality owed to former clients, in *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996), the Supreme Court addressed the meaning of the “substantial relationship” test. In *Townsend* a lawyer represented a father in an action against his former wife to reduce child support. The child was joined as a party in the action. The lawyer had served as guardian ad litem for the child in connection with the divorce a few years earlier. The trial court disqualified the lawyer and the supreme court affirmed. The court provided the following definition of a substantial relationship between two matters:

In determining whether the matter is “substantially related,” one should consider, among other things, whether the affected lawyer “would have or reasonably could have learned confidential information in the first representation that would be of significance in the second.” 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.9:104, at 293 (1996).

323 S.C. at 317, 474 S.E.2d at 429 (emphasis in original).

The court in *Townsend* went on to observe:

Here, although he claims none of the same information was actually used in the two matters, Lawyer should have recognized the risk that information he gained during the custody matter in which he was Daughter’s guardian ad litem might prove

relevant to the child support claim and particularly to the college support claim in the action in which he represented Father.

323 S.C. at 317-318, 474 S.E.2d at 429 (emphasis added).

Under *Townsend*, the test of whether matters are substantially related is ***whether a reasonable possibility exists that confidential information in the prior matter “might prove relevant” in the subsequent matter.*** The evidence and testimony submitted with this Motion satisfy the test under *Townsend* to have Mr. Smith disqualified as counsel for the Respondents/Defendants in this matter.

2. Confidentiality under Rule 1.6 and Concurrent Conflict under Rule 1.7, RPC.

Until the Companies learned of Mr. Smith’s appearance on behalf of the Respondent/Defendants in this lawsuit, they believed they were current clients of Mr. Smith and that he was still serving as their corporate lawyer. The Companies are gravely concerned Mr. Smith may have disclosed confidential information belonging to the Companies to the Respondents/Defendants. They are also gravely concerned. Mr. Smith’s continued representation of the Respondents/Defendants in this lawsuit and as part of this appeal will be detrimental to the Companies.

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. *See* Rule 1.6, Rule 407, SCACR. A lawyer shall not represent a client if he or she has a concurrent conflict of interest. Rule 1.7(a), Rule 407, SCACR (“... a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”). “A concurrent conflict of interest exists if “the representation of one client will be directly adverse to another client.” Rule 1.7(a)(1), Rule 407, SCACR. “In simultaneous representation cases the

paramount consideration is the duty of loyalty[.]” *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, LLP*, 69 Cal. App. 4th 223, 233 (1999). “Loyalty to a current client prohibits undertaking representation directly adverse to that client a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.” Rule 1.7, Rule 407, SCACR, cmt. 6. As a result, a counsel’s duty of loyalty prohibits the lawyer from being adverse to his or her client. This is precisely the circumstance presented in this matter as demonstrated by the testimony and evidence supporting this Motion.

A conflict of interest exists if “the representation of one client will be directly adverse to another client.” *Id.*; *see also Donaldson v. City of Walterboro Police Dep’t*, No. 2:06-cv-02492 PMD, 2008 WL 906707, (D.S.C. 2008) (disqualifying plaintiff’s counsel because of that counsel’s concurrent representation of a defendant in other. The comments to Rule 1.7 further provide that the two representations do not need to involve related matters: a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. See Rule 1.7, Rule 407, SCACR, cmt. 6. Further, the conflict rules apply regardless of whether the representations are for litigation or transactional matters. See Rule 1.7, Rule 407, SCACR, cmt. 7.

South Carolina Rules of Professional Conduct, Rule 1.7(a)(2) provides an alternative ground for disqualification if a lawyer’s representation of a client is “materially limited” by the lawyer’s representation of another client. Under Rule 1.7(a)(2), “[a] concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client . . . or by a personal interest of the lawyer.” Rule 1.7(a)(2), Rule 407 SCACR; *see, e.g., In re Allsep*, 343 S.C. 503, 50405, 541 S.E.2d 245,

246 (2001) (counsel's representation of client materially limited because lawyer was also represented opposing party in an ongoing, unrelated matter); *In re Hoffman*, 70 N.E.2d 1138 (Ind. 1998) (lawyer's continued representation of client materially limited by lawyer's own interest in avoiding malpractice action for filing client's claim in wrong state).

In the present matter, it is undeniable that Mr. Smith has undertaken representation of EADIE'S DIVA D ENTERPRISES, LLC, Dawn Eadie, Jordan Jones, Justine Lawson, Kevin Lawson, Hunter Basco, and Mackel Malecka in their defenses and counterclaim against the Companies, that are directly adverse to the interests of the Companies. In the present situation, the claims, defenses, and counterclaims are directly related to Mr. Smith's previous representation of the Companies, on corporate and financial matters, which are at issue in this lawsuit. Because Mr. Smith gained confidential information in his prior representation, he can, should, and candidly must use it to further the Respondent/Defendants' defenses to the claims and their counterclaims in order for Mr. Smith to represent his "new clients" adequately.

Pursuant to Rules 1.6 and 1.7, Rule 407, SCACR, Mr. Smith should be disqualified as counsel for Respondents in this matter.

3. Conflicts of interest with former clients under Rule 1.9, RPC.

To the extent Mr. Smith claims the Companies are former clients, he still should not be permitted to represent the Respondents in this lawsuit, because corporate matters are directly involved in and "substantially related" to the disputes at issue in this lawsuit. A lawyer should be disqualified as counsel when the subject matter of a case is "substantially related" to a matter in which counsel previously advised or represented the presently adverse party. *See* Rule 1.9, RPC, Rule 407, SCACR.

The test of whether the attorney's employment is inconsistent with his duty to a former client is whether acceptance of the new retainer will require him, in forwarding the interest of the new client, to do anything that will injuriously affect a former client in any matter in which he formerly represented him, and also whether the attorney will be called on, in his new relation, to use against a former client any knowledge or information acquired in the former relationship.

Madison v. Graffix Fabrix, Inc., 304 S.C. 321, 325-26, 404 S.E.2d 37, 40 (Ct. App. 1991).

Mr. Smith provided legal advice to the Companies on corporate contractual matters. If Mr. Smith were to argue the Companies are not current clients, but are former clients, he is still precluded from any involvement in the present case. There is no doubt that the Companies' claims in the Complaint filed in this matter against the Respondents are directly and "substantially" related to corporate contractual matters where Mr. Smith was counsel for the Companies. Mr. Smith will certainly be called upon to use knowledge and information learned in his representation of the Companies as those issues are "substantially related" to the disputes in this lawsuit. Even if these conflicts could be waived, which the Companies believes that they cannot be, such waiver would have to have been executed by Mr. Eadie, because Mr. Eadie is the managing member of the Companies and pursuant to Rule 1.13, Rule 407, SCACR ("...If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders"). Pursuant to Rule 1.9, Rule 407, SCACR, Mr. Smith should be disqualified as counsel in this matter.

4. The "Necessary Witness" Rule, Rule 3.7

Generally speaking, unless an exception applies, "a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness...." Rule 3.7, RPC, Rule 407, SCACR; *In re Westmoreland*, 353 S.C. 44, 577 S.E.2d 209 (2003) (lawyer formed real estate partnership

and represented partnership and partners in various matters; improper for lawyer (1) to represent one of the partners and that partner's estate in litigation and arbitration against other partners without disclosure and consent by them and (2) to refuse to withdraw when it became apparent lawyer would be a witness); *In re Dobson*, 310 S.C. 422, 427 S.E.2d 166 (1993) (lawyer failed to notify the client that lawyer could be witness in subject matter of representation). *See also In re Hawkins*, 320 S.C. 57, 463 S.E.2d 92 (1995) (under Code of Professional Responsibility, lawyer failed to withdraw as counsel even though the lawyer should have known he might be called as a significant and probably adverse fact witness).

The Complaint implicates corporate contractual matters that relate directly to Mr. Smith's representation as counsel for the Companies on corporate contractual matters. The Companies may need to depose Mr. Smith in support of their claims and in defense of the counterclaims claims made in the Complaint. Pursuant to Rule 3.7, Rule 407, SCACR, Mr. Smith should be disqualified as counsel in this matter.

2. Conclusion

For the reasons set forth above, Mr. Smith should be disqualified as counsel in this matter pursuant to Rules 1.6, 1.7, 1.9, and 3.7, Rule 407, SCACR, and the Companies hereby request the same.

Respectfully submitted,

/s/ Thomas A. Pendarvis

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May 10, 2024

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