

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case No. 2013-CP-23-1833

D& C Builders, Inc. Appellant,

v.

Richard M. Buckley and Wells Fargo National Association, Defendants,
And Richard M. Buckley, Third-Party Plaintiff,

v.
Scott Dodenhoff, Third-Party Defendant

Of whom Richard M. Buckley is the Respondent.

MEMORANDUM OF RESPONDENT IN SUPPORT OF ITS
MOTION TO DISMISS

M. Stokely Holder, Esquire
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
(864) 242-4899
Attorney for Respondent

Other Counsel of Record:

Brian A. Martin, Esquire
Brian A. Martin, LLC
212 Trade Street
Greer, SC 29651
(864) 879-7779
Attorney for Appellant

RECEIVED

DEC 02 2013

SC Court of Appeals

H. Stewart James, Esq.
Babb & Brown, P.C.
505 West Butler Road
Greenville, SC 29607
Co-Counsel for Appellant

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
PO Box 71727
North Charleston, SC 29415
Attorney for Defendant Wells Fargo, N.A.

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COMES NOW, Respondent, Richard M. Buckley (“Buckley”), by and through his undersigned attorney, and files this Memorandum in Support of its Motion to Dismiss Appellant’s Appeal.

I. FACTS

At the outset of the underlying lawsuit, the Appellant filed a Motion to Disqualify Respondent’s counsel (a copy of said Motion without attachments is attached herein and incorporated by reference as “**Exhibit A**”). The lower court issued an Order holding the Appellant’s Motion to Disqualify in abeyance (a copy of said Order is attached herein and incorporated by reference as “**Exhibit B**”). In the same Order, the lower court ordered Appellant to produce a privilege log by a stated date under a protective order. Prior to the deadline delineated in the lower court’s Order for Appellant’s production of the privilege log, the Appellant filed a Motion to Reconsider wherein, for the first time, the Appellant included any reference to an injunction or ‘request’ for same- notably, without meeting the specificity requirements delineated in Rule 65, SCRCP¹ (a copy of said Motion to Reconsider without attachments is attached herein and incorporated by reference at “**Exhibit D**”). The Motion to Reconsider was based primarily on the lower Court’s prior ruling in regards to the production of the privilege log.

¹ The Appellant has never filed a Motion for Injunction or otherwise asserted a cause of action against the Respondent for an injunction. The first mention or reference to an ‘injunction’ was merely in the title to the Appellant’s Motion to Reconsider: “Motion to Reconsider, Clarify and Amend Order to Issue Injunction”, which was filed in response to an erroneous email sent by Judge Miller’s law clerk to all counsel wherein she states that “Judge Miller has asked me to check on the status of this case and whether a ruling is necessary for temporary injunction.” At no time prior to that email had the term ‘injunction’ been used in connection with this case. In fact, Judge Miller had earlier that day already sent an email directly to all counsel indicating that an “Order has been signed and is being filed with the Clerk of Court’s office this afternoon.” (Copies of said emails are attached hereto and incorporated herein by reference as “**Exhibit C**”.)

The lower court issued an order denying the Motion to Reconsider wherein the lower court did not specifically or substantively address the Appellant's 'injunction request' (a copy of said Order is attached herein and incorporated by reference as "Exhibit E"). The Appellant never filed a Motion to Reconsider in regards to its 'request' for an injunction or the purported lower court's ruling regarding same. Prior to the aforementioned privilege log deadline, the Appellant filed the underlying Notice of Appeal.

The lower court has not issued a final order on the Appellant's Motion to Disqualify. Likewise, the lower court has not issued a final judgment on any of the claims pending in the underlying lawsuit.

II. ARGUMENT

As was outlined in the recent South Carolina Supreme Court opinion in the case of Enersys Delaware, Inc. v. Hopkins, 401 S.C. 615, 738 S.E.2d 478 (2013):

The right of appeal arises from and is controlled by statutory law." Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). Generally, a party may only appeal from a final judgment, and piecemeal appeals should be avoided because most errors can be corrected through a new trial. Id. at 194–195, 607 S.E.2d at 708. Whether an order issued prior to or during trial is immediately appealable is governed primarily by Section 14–3–330 of the South Carolina Code (1979 & Supp.2012). Id. at 195, 607 S.E.2d at 708.

Section 14–3–330 provides this Court with appellate jurisdiction over:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An 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, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

Accordingly, an order must fall within one of the enumerated subsections to be immediately appealable. State v. Wilson, 387 S.C. 597, 600, 693 S.E.2d 923, 924 (2010).

Id. at 616-617, 738 S.E.2d at 479 (emphasis in original).

A. Appellate Jurisdiction - Injunction 'Request'

As discussed *supra*, the Appellant did not file a motion or claim for an injunction. The first reference by Appellant to an injunction came in response to an erroneous email sent by the lower court's office staff and in the form of a mere reference to "injunction" in Appellant's Motion to Reconsider the lower Court's ruling on a separate Motion filed by Appellant. Notwithstanding the fact that the Appellant failed to meet the specificity requirements delineated in Rule 65, SCRCF for a proper request for injunctive relief, the lower court never specifically ruled upon an injunction request in this case. Furthermore, the Appellant did not make a motion by way of Rule 59(e), SCRCF, or otherwise, to obtain a specific ruling on the issue. Therefore, the Appellant should be precluded from arguing this issue before this Court. Halbersberg v. Berry, 302 S.C. 97, 104, 394 S.E.2d 7, 12 (1990).

B. Appellate Jurisdiction - Order on Motion to Disqualify

The afore-referenced Energysys case is perhaps the most analogous appellate case in this State to the current issues in the case at hand. Notably, in the Energysys case, the issue of appellate jurisdiction was related solely to the lower court's dispositive ruling (denial) on a motion to disqualify, where after the appeal was immediately taken without the case having first reached final judgment in the lower court. So, as in the Energysys case, the focus of the issue regarding appellate jurisdiction in this case centers on S.C. Code Ann § 14-3-330(2). See Id. at 617, 738 S.E.2d at 479 ("Thus, we must determine whether the order denying the disqualification of an attorney affects a substantial right such that the order is immediately appealable under subsection (2).") The Appellant, by reference to this subsection in the 'Standard of Review' portion of its Initial Brief, appears to concede that this particular contention in its appeal is governed by this subsection 2. (Initial Brief p. 13).

The glaring difference between the Energysys case and this case is that the lower court in Energysys actually issued a dispositive order on the motion; whereas, here, no such order has been rendered. Even still, in the Energysys case, the court held that there was no appellate jurisdiction because the order denying the motion to disqualify was not 'an order affecting a substantial right'. See Id. at 617-619, 738 S.E.2d at 479-480.

Like the Energysys case, the Appellant here argues that the Respondent's attorneys have learned confidences from its prior representation of Appellant which could be shared in its current representation of Respondent. Notwithstanding the void in evidence to substantiate such a position (and the void of an actual lower court ruling- either via

grant or denial of the motion), the courts of this State have established that even if a lower court denied a motion based on that very argument, no substantial right would be affected to trigger immediate appellate jurisdiction under S.C. Code Ann § 14-3-330. Energysys at 617-619, 738 S.E.2d at 479-480.

The reasons provided by the courts of this State for this position is that the ostensible danger posited in motions such as the one at issue can be redressed equally as well after trial as through an immediate appeal. Id. Moreover, the party originally moving for the disqualification may find through the course of litigating the case to completion in the lower court that an appeal is not necessary. Id.

The same rationale provided by the Energysys court can be applied to the situation at hand as it pertains to the Appellant's contentions regarding the lower court's order and requirement to produce a privilege log, especially considering the fact that the lower court was explicitly clear in its order that any such production would be subject to a protective order. As with this State's established position on the related issue of whether a direct appeal on a court's denial of a motion to disqualify is subject to immediate appellate jurisdiction, the lower court's ordering the production of a privilege log in the same context should also be viewed in the same light. The effect of a ruling to the contrary – allowing such a lesser issue as this to be subject to immediate appellate jurisdiction - would undermine the logic outlined by this State's appellate courts in cases such as Energysys, et al. by allowing the piecemeal appellate practice that it intended to preclude. As with the aforementioned greater issue addressed by the Energysys court, the ostensible danger posited by Appellant on this privilege log issue can be redressed

equally as well after trial as through an immediate appeal. Energysys at 617-619, 738 S.E.2d at 479-480. Likewise, the Appellant (with the security of the lower court's explicit protective order) may find that an appeal is not necessary after the course of litigating the case to completion in the lower court. Id.

III. CONCLUSION

Based on the arguments heretofore made together with the precedential authority in South Carolina relevant to the issues in this case, the Respondent respectfully requests that this court dismiss the appeal at issue and remand the case to the lower court for a full adjudication of the case, including a full adjudication of the motion at issue.

Respectfully Requested,

November 27, 2013



M. Stokely Holder (SC Bar # 73892)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. (864) 242-4899
Fax (864) 242-4844

Attorney for Respondent

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
7th JUDICIAL CIRCUIT
C.A. NO.: 2013-CP-23-1833

D&C Builders, Inc.,)
)
Plaintiff,)
)
Vs.)
)
Richard M. Buckley and)
Wells Fargo National Association,)
)
Defendants.)

Richard M. Buckley,)
)
Third-Party Plaintiff,)
)
Vs.)
)
Scott Dodenhoff,)
)
Third-Party Defendant.)

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSHER
2013 JUN 19 P 8:42

**MOTION TO DISQUALIFY
ATTORNEY AND LAW FIRM**

Now comes the Plaintiff, by and through its undersigned counsel, and moves this Court to disqualify attorney M. Stokely Holder and any attorney at the law firm of Kenison, Dudley & Crawford, LLC (hereinafter "Law Firm") from representing Defendant and Third-Party Plaintiff Richard M. Buckley (hereinafter "Defendant Buckley") in this matter based on a material conflict of interest. In support of this motion, Plaintiff offers the attached Affidavit of Scott Dodenhoff and the following information based on such Affidavit:


- (1) Law Firm previously represented Plaintiff extensively as their client from July 1, 2011 through July 31, 2012 in a similar foreclosure of mechanics' lien seeking to recover

EXHIBIT "A"

\$74,123.40 owed by TMKG, Inc. in Spartanburg County Court of Common Pleas case number 2011-CP-42-414.

- (2) During the course of that representation, Scott Dodenhoff was Law Firm's primary contact for Plaintiff and Scott Dodenhoff on behalf of Plaintiff provided Law Firm information, some of which was confidential, regarding its corporate structure and financial status at that time, in particular the financial impact on Plaintiff of the outcome in that case.
- (3) Plaintiff and Defendant Buckley's interests are materially adverse in this matter.
- (4) Law Firm has filed an Answer, Counterclaims against Plaintiff and Third-Party Complaint against Scott Dodenhoff on behalf of Defendant Buckley alleging among other things, that:
 - a. Plaintiff had an inadequate corporate structure; and
 - b. Plaintiff was insolvent or grossly undercapitalized during Buckley's project; and
 - c. Scott Dodenhoff treated the debts and assets of Plaintiff as his own; and
 - d. Scott Dodenhoff dominated the finances, policies and practices of Plaintiff; and
 - e. Scott Dodenhoff used his control of Plaintiff to commit fraud against Buckley.
- (5) Plaintiff's worked on this project for Defendant Buckley between January 2012 and November 16, 2012 with a Certificate of Occupancy obtained July 31, 2012, the same date the case Law Firm was previously representing Plaintiff on was finally dismissed.
- (6) As a result of these circumstances, these two cases are substantially related in that there is a substantial risk that confidential factual information obtained or that reasonably would have been obtained by Law Firm in the prior representation of Plaintiff would materially advance Defendant Buckley's position in this matter to the disadvantage of Plaintiff.
- (7) Law Firm has undertaken the representation of Defendant Richard M. Buckley without the consent of Plaintiff or a waiver by Plaintiff of the conflict of interest.

For the reasons stated herein, Plaintiff requests this Motion be granted and an Order be issued by the Court disqualifying attorney M. Stokely Holder and any attorney at the law firm of Kenison, Dudley & Crawford, LLC from representing Defendant Richard M. Buckley in this matter.



Brian A. Martin (SC Bar #: 9791)
Brian A. Martin, LLC
212 Trade Street
Greer, SC 29651
(864) 879-7779

Attorney for Plaintiff

Greenville, South Carolina
June 19, 2013

D&C Builders Inc vs. Richard M Buckley

FILED CLERK OF COURT
GREENVILLE CO S.C.
PAUL B. WICKENSIMER
2013 JUL 16 A 9:02

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), SCRPC; Rule 41(a).
 - SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):
 - Rule 40(j) SCRPC; 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;

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 15th day of July, 2013, and a copy mailed first class this 15th day of July, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Harold Stewart James Babb And Brown, P.C. 505
West Butler Road Greenville, SC 29607
Brian A. Martin 212 Trade St. Greer, SC 29651

Thomas A. Shook Finkel Law Firm LLC P.O. Box
71727 N. Charleston, SC 29415
M. Stokely Holder Kenison, Dudley & Crawford,
LLC 704 East Mcbee Avenue Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer - Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

D&C Builders, Inc.,)
)
Plaintiff,)

C.A. No.: 2013-CP-23-1833

vs.)

Richard M. Buckley and)
Wells Fargo National Association,)
)
Defendants;)

Richard M. Buckley,)
)
Third-Party Plaintiff,)

ORDER

vs.)

Scott Dodenhoff,)
)
Third-Party Defendant.)

2013 JUL 16 A 9:02

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSMEYER

Date of Hearing: July 8, 2013
Judge: Honorable Edward W. Miller
Attorney for D&C Builders, Inc.: Brian A. Martin, Esq.
Attorney for Richard M. Buckley: M. Stokely Holder, Esq.

The instant matter came before me on the 8th day of July, 2013 pursuant to the Motion filed by Plaintiff D&C Builders, Inc. ("Plaintiff") to disqualify M. Stokely Holder, Esquire, and the law firm of Kenison, Dudley & Crawford, LLC (collectively, "KDC") from representing Defendant Richard M. Buckley.

Attorneys Townes B. Johnson, III, and John T. Crawford, Jr. of KDC represented Plaintiff D&C Builders, Inc. in a prior lawsuit that was filed in September, 2011 and dismissed with prejudice in July, 2012 (hereinafter, the "2011 Action"). Plaintiff D&C Builders, Inc., through separate counsel, initiated the underlying action against Defendant Buckley in February, 2013 (hereinafter, the "2013 Action"). Through a referral from another law firm, Defendant Buckley hired KDC in March 2013 to represent his interests in this 2013 Action.

It is the Plaintiff's contention that the present representation by KDC of Defendant Buckley in the current 2013 Action conflicts with KDC's prior representation of Plaintiff D&C Builders, Inc. in the 2011 Action. In particular, the Plaintiff claims that KDC's current employ is inconsistent with their duty to Plaintiff pursuant to their prior representation of Plaintiff in the 2011 Action. More specifically, the Plaintiff contends that KDC's representation of Defendant Buckley, in forwarding his interest in this 2013 Action, will injuriously affect the Plaintiff because KDC will be called on in this 2013 Action to use against the Plaintiff knowledge and information acquired by KDC in KDC's former representation of Plaintiff in the 2011 Action.

For the reasons that follow, the Plaintiff's Motion shall be held in abeyance.

The Plaintiff shall have until 5:00p.m. on July ²⁵~~19~~, 2013 to submit to this Court a privilege log containing the specific information and knowledge it contends that KDC acquired through its prior representation of Plaintiff which will injuriously affect Plaintiff in this 2013 Action. This information shall include, without limitation, copies of any and all documents evidencing same, together with dates, times, witnesses and

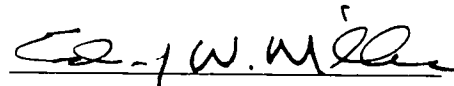
names of all parties alleged to be a part thereof. The Plaintiff shall provide a copy of its submission to counsel for Defendant Buckley.

Within ten (10) days from the receipt by the Court and KDC of Plaintiff's full submission, KDC shall be given ten (10) days from the date thereof to submit any response to the Court with copy to Plaintiff's counsel.

The submission by Plaintiff and any response provided by KDC shall be subject to this order of protection of the Court: The information submitted shall only be accessed by the office of Defendant's counsel, Plaintiff, and the office of Plaintiff's counsel. None of the information submitted shall be disseminated in any form or fashion at any time to anyone outside of the above named without the prior written consent of the Court.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Disqualify is hereby held in abeyance subject to the terms herein, and the information produced by the parties in accordance with the terms herein shall be subject to the order of protection outlined above.

IT IS SO ORDERED!


Edward W. Miller
Judge, 13th Judicial Circuit

July 15, 2013
Greenville, South Carolina

Stokely Holder

From: Miller, Edward W. [emillerj@sccourts.org]
Sent: Monday, July 15, 2013 4:54 PM
To: Stokely Holder; Brian A. Martin
Cc: 'Stewart James'; ashook@finkellaw.com
Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Mr. Holder's proposed Order has been signed and is being filed with the Clerk of Court's office this afternoon. Plaintiff's due date for the submission is July 25, 2013.

Ned Miller

From: Stokely Holder [mailto:holder@conlaw.com]
Sent: Thursday, July 11, 2013 11:58 AM
To: Brian A. Martin; Miller, Edward W.
Cc: 'Stewart James'; ashook@finkellaw.com
Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Dear Judge Miller,

In brief response, I'm not quite sure what purpose the lengthy "summary" provided by Mr. Martin serves. The court reporter's record of the hearing together with the documents of public record speak for themselves. I am unaware of any concern heretofore expressed by the Court as to what transpired at the hearing, the legal authority at issue, or the import of the Court's ruling. The majority of the lengthy letter provided by Mr. Martin appears to be an attempt to prolong the arguments already made to the Court and/or an attempt to move the court to reconsider an order that has yet to be signed or filed by the Court (on a motion that has not been ruled on).¹

In response to Mr. Martin's concerns regarding the publication of the privilege log, it bears noting that the Court ruled in fairly clear terms that the privilege log will be subject to a protective order. Based on the breadth of Mr. Martin's letter to the Court, together with the lack of support produced to date by the Plaintiff in support of its Motion, the undersigned finds it interesting that Mr. Martin omitted this portion of the court's ruling from his letter. And, from a practical standpoint, the undersigned finds it disconcerting that one of the concerns expressed by Mr. Martin regarding the production of the privilege log is that it not be provided to my office. In light of the motion being held in abeyance pending the court's review of the privilege log (under a protective order) and in light of Mr. Martin's position that this alleged confidential information is allegedly already in my office's possession, I cannot think of a valid reason for this qualification.

For the Court's reference, please find attached a complete draft of a proposed order which we feel accurately reflects the Court's ruling on this matter.

Should the Court have any questions or concerns, we will be glad to work with the Court and Mr. Martin to address same.

Respectfully,

Stokely Holder

¹ Based on the repeated representations of Plaintiff's counsel that the underlying case and the prior case are similar in virtually all respects, we simply direct the Court's attention to the documents of public record in each case, including the pleadings. The significant differences between the two cases are glaring.

From: Brian A. Martin [<mailto:brian@martinlawsc.com>]
Sent: Thursday, July 11, 2013 10:28 AM
To: emillerj@sccourts.org
Cc: 'Stewart James'; Stokely Holder; ashook@finkellaw.com
Subject: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Dear Judge Miller,

Please review the attached letter and Draft Order regarding your instructions at the hearing in the above referenced matter held before you on July 8, 2013. By copy of this e-mail and by U.S. Mail, I am providing all counsel of record of copy of this same information. Please let me know if you have any questions or need any further information from me.

Sincerely, Brian A. Martin

Brian A. Martin, LLC
Attorney at Law
212 Trade Street
Greer, SC 29651
(864) 879-7779
(864) 879-7171 Fax
brian@martinlawsc.com

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Stokely Holder

From: Miller, Edward W. Law Clerk (Courtney S. Camferdam) [emillerlc@sccourts.org]
Sent: Monday, July 15, 2013 5:04 PM
To: brian@martinlawsc.com; Stokely Holder
Subject: FW: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Judge Miller has asked me to check on the status of this case and whether a ruling is necessary for temporary injunction. If you could please let me know that would be great.

Thanks,

Courtney Camferdam
Law Clerk to the Honorable Edward W. Miller
305 E. North Street, Suite 219
Greenville, South Carolina 29601
(864) 467-8558
(864) 233-4173 Fax
emillerlc@sccourts.org

From: Miller, Edward W.
Sent: Monday, July 15, 2013 9:28 AM
To: Miller, Edward W. Law Clerk (Courtney S. Camferdam)
Subject: FW: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

From: Brian A. Martin [<mailto:brian@martinlawsc.com>]
Sent: Thursday, July 11, 2013 1:18 PM
To: 'Stokely Holder'; Miller, Edward W.
Cc: 'Stewart James'; ashook@finkellaw.com
Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Dear Judge Miller,

With all due respect to Mr. Holder, I certainly agree that the record of the hearing, documents submitted and legal authority will speak for itself. My lengthy summary of BOTH arguments of Plaintiff and Defendant as well as my understanding of instruction by the Court was solely for the purpose of providing as full of an understanding of all circumstances to assist in clarifying your direction regarding the Privilege Log. If I incorrectly stated or mischaracterized Mr. Holder's arguments presented at the hearing in any way, I certainly would like for him to address those to be sure your instructions to me are clear. I am not trying to extend the arguments but am asking to be clear on what you are requesting I provide.

To that end, I do appreciate Mr. Holder pointing out that the Court's direction at the hearing that the Privilege Log would be subject to a protective Order was not included in the summary. It should have been and was not left out intentionally. By my letter, I am asking that you reconsider requiring the Privilege Log be provided to Mr. Holder even under a protective order for the reasons stated in my letter and the risk that in complying, I may end up inadvertently providing information to the Defendant that they do not already have or do not recall.

If it is your Order that such information be provided under a Protective Order, I would ask that such requirement be included in the Order issued and will be glad to provide a revised proposed Order containing such language.

Should the Court consider using Mr. Holder's submitted Order, I would object to the last sentence of the second paragraph beginning with "Through a referral from another law firm" be removed as this was an argument of Defendant that was not ruled on by the Court at the hearing and would seem to bear no relevance to the issue of what information should be included in the Privilege Log. I would also ask that you specifically address in the Order how information and knowledge not contained in any prepared documents or witnessed by anyone other than client and attorneys (ie. verbal communications) be addressed, including information provided during confidential attorney/client conversations. Mr. Stokely's proposed Order does not seem to address that situation and is a primary concern of mine in not violating my own ethical obligations to my client.

Again, I am not asking for anything further in this matter than written clear direction from the Court on the information to be provided in the Privilege Log, including what type and specific information the Court wants to see, how to address verbal information provided in confidential attorney/client communications and for the Court to reconsider requiring this information be provided to the attorneys for the Defendant for their review.

Please let me know if you need anything further. Sincerely, Brian A. Martin

Brian A. Martin, LLC
Attorney at Law
212 Trade Street
Greer, SC 29651
(864) 879-7779
(864) 879-7171 Fax
brian@martinlawsc.com

Please note that my e-mail has recently changed. Please update this information in your contacts.

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Sent: Thursday, July 11, 2013 11:58 AM
To: Brian A. Martin; emillerj@sccourts.org
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Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

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In response to Mr. Martin's concerns regarding the publication of the privilege log, it bears noting that the Court ruled in fairly clear terms that the privilege log will be subject to a protective order. Based on the breadth of Mr. Martin's letter to the Court, together with the lack of support produced to date by the Plaintiff in support of its Motion, the undersigned finds it interesting that Mr. Martin omitted this portion of the court's ruling from his letter. And, from a practical standpoint, the undersigned finds it disconcerting that one of the concerns expressed by Mr. Martin regarding the production of the privilege log is that it not be provided to my office. In light of the motion being held in abeyance pending the court's review of the privilege log (under a protective order) and in light of Mr. Martin's position that this

alleged confidential information is allegedly already in my office's possession, I cannot think of a valid reason for this qualification.

For the Court's reference, please find attached a complete draft of a proposed order which we feel accurately reflects the Court's ruling on this matter.

Should the Court have any questions or concerns, we will be glad to work with the Court and Mr. Martin to address same.

Respectfully,

Stokely Holder

1 Based on the repeated representations of Plaintiff's counsel that the underlying case and the prior case are similar in virtually all respects, we simply direct the Court's attention to the documents of public record in each case, including the pleadings. The significant differences between the two cases are glaring.

From: Brian A. Martin [<mailto:brian@martinlawsc.com>]
Sent: Thursday, July 11, 2013 10:28 AM
To: emillerj@sccourts.org
Cc: 'Stewart James'; Stokely Holder; ashook@finkellaw.com
Subject: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Dear Judge Miller,

Please review the attached letter and Draft Order regarding your instructions at the hearing in the above referenced matter held before you on July 8, 2013. By copy of this e-mail and by U.S. Mail, I am providing all counsel of record of copy of this same information. Please let me know if you have any questions or need any further information from me.

Sincerely, Brian A. Martin

Brian A. Martin, LLC
Attorney at Law
212 Trade Street
Greer, SC 29651
(864) 879-7779
(864) 879-7171 Fax
brian@martinlawsc.com

Please note that my e-mail has recently changed. Please update this information in your contacts.

The information contained in this email message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, email or facsimile.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
7th JUDICIAL CIRCUIT
C.A. NO.: 2013-CP-23-1833

D&C Builders, Inc.,)
)
Plaintiff,)

Vs.)

Richard M. Buckley and)
Wells Fargo National Association,)
)
Defendants.)

MOTION TO RECONSIDER,
CLARIFY AND AMEND ORDER
TO ISSUE INJUNCTION

Richard M. Buckley,)
)
Third-Party Plaintiff,)

Vs.)

Scott Dodenhoff,)
)
Third-Party Defendant.)

Now comes the Plaintiff, by and through its undersigned counsel, and would respectfully request and hereby moves that the Court reconsider, clarify and amend its ruling and Order issued on July 15, 2013 requiring Plaintiff to submit to this Court and to counsel for Defendant Buckley a detailed privilege log containing specific confidential information and knowledge Plaintiff contends that Defendant's existing counsel acquired through its prior representation of Plaintiff and that would be injurious to Plaintiff if used by the Defendant in the above referenced matter.

In support of this motion, Plaintiff would ask the Court to re-examine the record of the hearing held on July 8, 2013, the pleadings, affidavits submitted, the undersigned's letter to the

EXHIBIT "D"

Court of July 11, 2013 attached hereto as Exhibit A, Defense Counsel's e-mail objection to such letter attached hereto as Exhibit B, and the undersigned's e-mail response to Defense Counsel's objection by e-mail response attached hereto as Exhibit C. This information, constituting all of the evidence and arguments offered to the Court in this matter, clearly shows that:

1. Defense Counsel asked the Court to require Plaintiff to justify its claim that Defense Counsel be disqualified from this matter pursuant to Rule 1.9 of the South Carolina Rules of Professional Conduct by disclosing exactly the specific confidential information Plaintiff contends Defense Counsel has which was obtained in its prior representation of Plaintiff and could be used against Plaintiff in this case.

2. Rule 1.9 of the South Carolina Rules of Professional Conduct does not require the disclosure of the specific confidential information but provides under Comment # 3 to such rule that the representation will be prohibited "if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance" the subsequent client's position.

3. Comment # 3 of Rule 1.9 of the South Carolina Rules of Professional Conduct also specifically states that "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 information to use in the subsequent matter."

4. The South Carolina Supreme Court applied the same standard in the controlling authority of *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (S.C. 1996) when it held the standard under Rule 1.9 is "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."

5. The Order of the Court as issued will require Plaintiff's Counsel to disclose confidential information not only obtained from Plaintiff by Defense Counsel through confidential attorney/client communications in the prior matter, but also confidential information obtained by the undersigned in confidential attorney/client communications between Plaintiff and its existing Counsel in the present matter.

6. The disclosure of such confidential information relayed in confidential attorney/client communications is exactly the information the Plaintiff seeks to prevent disclosure of and use by the Defendant's Counsel by its Motion to Disqualify Defendant's counsel in this matter.

7. In requiring Plaintiff's Counsel to disclose this confidential information to Defense Counsel, Plaintiff will be forced to refresh Defense Counsel's memory of confidential information obtained previously through confidential attorney/client communications but not currently recalled providing additional information for Defendant's Counsel to use to the advantage of Defendant and causing further harm to the Plaintiff.

8. In requiring Plaintiff's Counsel to disclose this confidential information to Defendant's Counsel, Plaintiff will be forced to disclose confidential information to Defense Counsel that may not have been previously disclosed to Defense Counsel in the prior representation again providing additional information for Defendant's Counsel to use to the advantage of Defendant and causing further harm to the Plaintiff.

9. The Plaintiff has not consented and does not consent to the disclosure of any confidential information relayed through confidential attorney/client communications it had with any of its attorneys.

10. The Order as issued will require the disclosure of confidential attorney/client communications between Plaintiff and Defense Counsel when they were representing Plaintiff in violation of Rule 1.6 of the Rules of Professional Conduct.

11. The Order as issued will require the disclosure of confidential attorney/client communications between Plaintiff and its existing Counsel in violation of Rule 1.6 of the Rules of Professional Conduct.

12. If the Court requires the disclosure of such confidential information obtained from confidential attorney/client communications, the Plaintiff will suffer irreparable harm because once that information is disclosed it cannot be undisclosed. Even under a protective order as issued by the Court, Defense Counsel will have such knowledge of the confidential information, some of which may not be remembered and some of which may not have been received, but all of which will provide information that will affect Defense Counsel's representation of the Defendant and the pursuit of this case on behalf of Defendant and to the disadvantage of the Plaintiff.

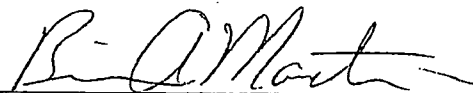
13. In the event the Court does not revise its Order, based on Rule 1.9 of the Rules of Professional Conduct, the Comments thereto and the Supreme Court's interpretation of this specific requirement of Rule 1.9 in *Townsend v. Townsend*, Plaintiff will likely succeed in challenging this requirement of this Order to provide such confidential information obtained through confidential attorney/client communications to Defense Counsel.

14. In the event the Court does not revise its Order and Plaintiff is required to disclose confidential information obtained through confidential attorney/client communications by this Order, there is no other remedy available to the Plaintiff other than an injunction against Defendant and Defense Counsel prohibiting them from accessing and reviewing such confidential information.

15. Plaintiff has objected to providing Defendant and Defense Counsel this confidential information at the hearing on July 8, 2013, in the letter to the Court of July 11, 2013 and in the e-mail response to Defendant's proposed Order of July 11, 2013 because of the potential irreparable harm to the Plaintiff, and has requested clarification and direction in avoiding disclosure of confidential attorney/client communications in violation of the Rules of Professional Conduct.

THEREFORE, based on the foregoing, the existing record in this matter including the pleadings, motions, affidavits, exhibits, arguments, the existing law of South Carolina, the Rules of Professional Conduct, and the preservation of the sanctity of confidential attorney/client communications, Plaintiff respectfully requests that the Court reconsider its ruling and Order of July 15, 2013, clarify the specific information that the Court desires to review from the Plaintiff including how Plaintiff is to address information obtained in verbal communications that constitute confidential attorney/client communications, and that the Court enjoin Defendant and Defendant's Counsel from reviewing or accessing such confidential information being provided for the Court's review pursuant to such Order. A proposed Order to this affect, absent the specific information the Court is requesting to view is attached for the Court's convenience.

Respectfully submitted this 16th day of July, 2013.



Brian A. Martin (SC Bar #: 9791)
Brian A. Martin, LLC
212 Trade Street
Greer, SC 29651
(864) 879-7779
Attorney for Plaintiff

Greenville, South Carolina
July 16th, 2013

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP231833

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER

D&C Builders, Inc.

Richard M. Buckley And
Wells Fargo N.A.

2013 JUL 25 A 11:10

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (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), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; 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; (formal order to follow) Statement of Judgment by the Court:

Motion to reconsider, clarify and amend order to issue injunction has been denied. Plaintiff is ordered to produce the privilege log by 5:00p.m. on July 26, 2013 as required by the previously issued formal order.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Eric W. Wick
Circuit Court Judge

2130
Judge Code

7/23/13
Date

For Clerk of Court Office Use Only

This judgment was entered on July 25, 2013, and a copy mailed first class or placed in the appropriate attorney's box on July 25, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Brian A. Martin 212 Trade Street Greer, SC 29651

ATTORNEY(S) FOR THE PLAINTIFF(S)

M. Stokely Holder 704 E. McBee Avenue Greenville, SC 29601

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

Court Reporter