

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case Number: 2013-CP-23-1833
Appellate Case No. 2013-001645

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..... Respondent,

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RETURN TO MOTION TO DISMISS

Appellant, D&C Builders, Inc., by and through its undersigned attorney and pursuant to Rule 224(e), SCACR, hereby opposes the Motion to Dismiss filed by Respondent, Richard M. Buckley, alleging a lack of appellate jurisdiction. Jurisdiction over the appeal in this matter is granted pursuant to S.C. Code Ann. § 14-3-330(4) as the appeal of an order refusing to grant an injunction **and** pursuant to S.C. Code Ann § 14-3-330(4) as the appeal of an order affecting a substantial right.

Appellant's appeal is not based on the order to produce a privilege log, but rather the specific information ordered disclosed in such privilege log, which constitutes both basis for the request for an injunction that was denied and the substantial right being affected. The Circuit Court order requires Appellant and Counsel for Appellant to directly violate Rule 1.6 of the Rules of Professional Conduct and disclose specific confidential attorney-client communications damaging to the Appellant to the very attorneys Appellant is seeking to disqualify. The Circuit Court's requirement of such disclosure for consideration of disqualification of Respondent's attorney directly contradicts Rule 1.9 and Comment 3 thereto of the Rules of Professional Conduct which clearly states, "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." Rule 1.9 Cmmt. 3, RPC, Rule 407, SCACR (Emphasis Added).

Despite this requirement and in order to protect its rights, Appellant sought to enjoin Respondent and his attorney from accessing confidential information from its prior representation of Appellant with the initial filing of the Motion to Disqualify and continued such requests at every opportunity to the Circuit Court. A motion for injunction was specifically requested in Appellant's motion to reconsider, clarify and amend order to issue injunction. The motion for the injunction was denied in the Circuit Court Order of July 25, 2013. As a result, appellate jurisdiction is granted pursuant to S.C. Code Ann § 14-3-330(4).

Additionally, the Circuit Court's order significantly affects the substantial right of Appellant to maintain the confidential nature of privileged communications with its


attorneys, both former and present, as well as the substantial right of Appellant to rely on compliance with the Rules of Professional Conduct to protect clients and ensure the fair administration of justice in South Carolina. Compliance with the order will also deny Appellant its right to a particular mode of trial, a well-established substantial right. Appellate jurisdiction is therefore appropriate under S.C. Code Ann. § 14-3-330(2)

Finally, Respondent's Motion to Dismiss seeks to mischaracterize Appellant's refusal to provide the ordered privilege log as a "procedural" issue rather than an "ethical" issue so as to avoid having to justify the clear violation of Rule 1.9 of the Rules of Professional Conduct to this Court. The Circuit Court furthered Respondent's claim that there was no "specific" confidential information in their possession by incorrectly balancing Appellant's right to keep its confidences with Respondent's right to choose its own counsel.

Appellant's opposition to Respondent's Motion is supported by the submissions of Appellant thus far, the applicable South Carolina Appellate Court Rules and their related authority, and upon such supporting memorandum and affidavits as are submitted in connection herewith.

Respectfully submitted,

December 9th, 2013


Brian A. Martin
S.C. Bar # 9791
Brian A. Martin, LLC
212 Trade Street
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(864) 879-7779
ATTORNEY FOR APPELLANT

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v.

Scott Dodenhoff, Third-Party Defendant

of whom:

Richard M. Buckley..... Respondent,

PROOF OF SERVICE

I hereby certify that that I have served a true copy of Appellant's Return to Respondent's Motion to Dismiss and Appellant's Memorandum in Opposition to Respondent's Motion to Dismiss on Respondent and all parties of record by depositing a copy in the United States Mail, first class postage prepaid, on December 10th, 2013, addressed to their attorneys of record as follows:

M. Stokely Holder, Esq.
Kenison, Dudley & Crawford, LLC
704 E. McBee Avenue
Greenville, South Carolina 29601

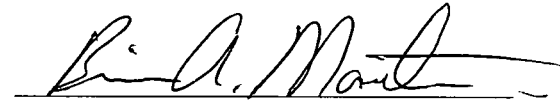
H. Stewart James, Esq.
Babb & Brown, P.C.
505 W. Butler Rd.
Greenville, South Carolina 29607

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Thomas A. Shook, Esq.
Finkel Law Firm, LLC
Post Office Box 71727
North Charleston, South Carolina 29415

I further certify pursuant to Rule 224(e), that Respondent's Motion to Dismiss and Memorandum in Support were received by the undersigned on December 2, 2013.

December 10th, 2013



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ATTORNEY FOR APPELLANT



BRIAN A. MARTIN, LLC
ATTORNEY AT LAW

December 10, 2013

Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *D&C Builders, Inc. v. Richard M. Buckley, et al.*
Greenville County Case #: 2013-CP-23-1833
Appellate Case No. 2023-001645

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Dear Ms. Kitchings:

Please find enclosed for filing in the above referenced matter an original and seven (7) copies each of Appellant's Return to Respondent's Motion to Dismiss and Memorandum in Opposition to Respondent's Motion to Dismiss, along with the required Proof of Service. I would appreciate your filing the original and returning a clocked copy to me in the enclosed self-addressed stamped envelope.

By copy of this letter, I am serving the same on all other parties via their counsel of record.

Thank you in advance for your assistance. Should you have any questions or need additional information, please do not hesitate to contact my office.

Sincerely,

Brian A. Martin

Enclosures

cc: M. Stokely Holder, Esquire
H. Stewart James, Esquire
Thomas A. Shook, Esquire