

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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SC Court of Appeals

**MEMORANDUM OF APPELLANT IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS**

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The Appellant, D&C Builders, Inc. (“D&C Builders”), by and through its undersigned attorney, files the following Memorandum in Opposition to Respondent’s Motion to Dismiss.

STATEMENT OF FACTS

For a thorough examination of the Facts, Appellant would refer the Court to the Statement of Case (p. 2-4) and Statement of Facts (p. 4-13) contained in Appellant’s Initial Brief already filed with the Court in this matter. However, by way of a summary and clarification of the incorrect and relevant omitted facts from Respondent’s recitation in his Memorandum, Appellant would present the following facts.

Appellant filed a motion to disqualify Respondent’s counsel and the entire Kenison Firm in this matter due to an obvious, material and un-waived conflict of interest. (A copy of such motion is attached herein and incorporated as “**Exhibit A**”). As demonstrated by the supporting Affidavit of Scott Dodenhoff (attached herein and incorporated as “**Exhibit B**”), the Kenison Firm (Respondent’s counsel) was actively representing Appellant as their client in a substantially related matter during the exact same time that the actions giving rise to the current claims between Appellant and Respondent were arising. (Exhibit B ¶ 4- ¶13).

The representation of Respondent in this matter by the Kenison Firm clearly violated Rule 1.9 of the Rules of Professional Conduct under the “substantially related” test promulgated by Comment 3 to Rule 1.9 and by the Supreme Court in Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (S.C. 1996). Both the prior representation (referred to as the TMKG case) and the present matter (referred to as the Buckley case) were actions to foreclose mechanic’s liens by Appellant. (Exhibit B ¶ 4-5, ¶ 18). Both

cases involved the same claims, counterclaims and defenses by and against Appellant as specifically compared in Appellant's Initial Brief at pages 7-9 and pages 38-40. The Kenison Firm pursued those claims and defended those counterclaims on behalf of Appellant in the TMKG case before changing sides less than a year later in direct violation of Rule 1.9 of the Rules of Professional Conduct to represent Buckley against Appellant in this case. (Exhibit B ¶ 5, ¶ 19-20).

At the hearing on the motion to disqualify and based on the Affidavit of Scott Dodenhoff and the pleadings in both the TMKG case and those filed by Respondent in the Buckley case, Appellant argued to the Circuit Court that disqualification is warranted based on the former representation being "substantially related" to the current matter. Appellant further argued that the Kenison Firm had obtained information, particularly confidential information, in its prior representation of Appellant regarding financial matters, corporate structure and internal operations that could be used against Appellant in the current matter in violation of Rule 1.9. (Transcript of Hearing held July 8, 2013 attached herein and incorporated as "**Exhibit C**" p. 3, l. 15 – p. 10, l. 14).

The intention to use such information gained from its prior representation was clearly demonstrated in Respondent's Answer, Counterclaims and Third-party Claims filed on behalf of Respondent in this matter (a copy of which is attached herein and incorporated as "**Exhibit D**") which included allegations against Appellant, their former client, that it (1) "**did not have a functioning corporate structure, was incapable of making independent decisions, and did not follow the corporate formalities applicable to a South Carolina corporation at all pertinent times herein,**" (Exhibit D p.26 ¶116); (2) "**was insolvent prior to and/or during construction of the Project**"

(Exhibit D p.27, ¶117); and (3) **“was grossly undercapitalized prior to and during construction of the Project.”** (Exhibit D p. 27, ¶118; Exhibit B p.3, ¶20).

The Kenison Firm challenged the motion to disqualify on the basis that they were unaware of any specific confidential matter at issue in the Buckley case, (Exhibit C p. 16, ll. 19-20), and had not been provided any specific alleged confidential information that could potentially create a conflict. (Exhibit C p. 17, l. 22 – p. 18, l. 2). In support of these assertions, Attorneys Holder, Johnson and Crawford all state in their respective affidavits (attached and incorporated herein as **“Exhibits E, F and G”** respectively) that they are “unaware of” or “do not remember” any confidential information provided by Appellant to them in connection with their prior representation against TMKG. (Exhibit E p.5, ¶ 13, Exhibit F p. 2, ¶ 4, Exhibit G p. 2, ¶ 4).

Based on Respondent’s assertions, the Circuit Court requested Appellant provide the specific information it contended was learned in the prior representation that would be injurious to Appellant in the current case. (Exhibit C p. 21, ll. 19-22). Appellant argued that such specific disclosure was not required by the ethical rule given the cases were “substantially related” and objected to disclosing such information due to confidential nature of such information. (Exhibit C p. 21, l. 23 – p. 24, l. 9). The Circuit Court nevertheless ordered Appellant at the hearing to prepare and submit a privilege log to both the Circuit Court **and** the Kenison Firm of the information claimed to be confidential that the Kenison Firm could potentially use in the Buckley case. (Exhibit C p. 24 l.10- p. 25, l. 17). Although the order included that the privilege log would be under a protective order, it still required Appellant to provide the very information it was seeking to protect through the motion to disqualify to the very attorneys it was seeking to

prevent remembering and using such confidential information to Appellant's disadvantage.

Appellant requested clarification from the Circuit Court on the preparation of the privilege log and potential ethical issues implicated by the mere creation of the privilege log, as well as requested that the Respondent and Kenison Firm be enjoined from accessing any information provided by letter of July 11, 2013. (Exhibit A to Appellant's Motion to Reconsider, Clarify and Amend Order to Issue Injunction attached and incorporated herein as "**Exhibit H**"). In that letter, Appellant specifically expressed concern that complying with the Circuit Court's directive to produce the privilege log would force Counsel for Appellant to violate ethical obligations to his client. Appellant requested specific instruction as to how to address matters in the privilege log that were relayed through confidential attorney/client communications. (Exhibit A to Exhibit H, p. 6). Appellant again requested that the Kenison Firm be enjoined from accessing the information to be provided in the privilege log due to the irreparable harm it would cause to the Appellant. (Exhibit A to Exhibit H, p. 6). Without further clarification, the Circuit Court filed its written order on July 16, 2013. (Attached and incorporated herein as "**Exhibit I**").

Appellant thereafter filed a motion to reconsider, clarify and amend order to issue injunction on July 16, 2013. (Exhibit H). On July 18, 2013, Respondent forwarded a letter to the Circuit Court addressing Appellant's motion (attached and incorporated herein as "**Exhibit J**") and specifically stating unequivocally that "**no confidential information was gained by my firm in its prior representation of Plaintiff.**" (Exhibit

J p. 2, ll.27-29). The letter further states that “**The Plaintiff has failed to provide any “specific” confidential facts to counter this position.**” (Exhibit J p. 2, ll. 31-33).

A very brief hearing was held on July 23, 2013 on the motion to reconsider, clarify and amend order to issue injunction (transcript is attached and incorporated herein as “**Exhibit K**”) wherein the Circuit Court refused to consider disqualification without seeing the alleged confidential information Appellant claimed could be used (Exhibit K p. 4, ll. 19-22), and that such confidential information must be provided to the Respondents to review and be able to respond. (Exhibit K p. 4 l. 23- p. 5, l. 3). The Circuit Court admonished *Counsel for Appellant* that the only potential ethical violation would be Counsel failing to comply with the Order to produce the privilege log! (Exhibit K p. 6, ll. 23-25).

Despite Appellant’s position and the authority that disqualification should be based on the cases being “substantially related” and the substantial risk that the Kenison Firm obtained confidential information detrimental to Appellant, the Circuit Court denied the motion to reconsider, motion to clarify and motion to issue an injunction by written order filed July 25, 2013. (Attached and incorporated herein as “**Exhibit L**”). This appeal followed.

STANDARD OF REVIEW

The determination of whether a party may immediately appeal an order issued before final judgment is governed by S.C. Code Ann. § 14-3-330 and must fall into one of those categories to be immediately appealable. Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). An order granting, continuing, modifying, or refusing

an injunction is immediately appealable. S.C. Code Ann. § 14-3-330(4), Curtis v. State of South Carolina, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (S.C. 2001). “The denial of a party’s right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2).” Hagood at 709 (citing Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000)). The attorney-client relationship is extremely important in our adversarial system and the rights related to representation by a particular attorney are closely related to a particular mode of trial. Id. at 710.

ARGUMENT

Respondent’s motion to dismiss is centered on two arguments; (1) that there has been no ruling on a proper request for an injunction and (2) that no final judgment has been made in the lower court. As is demonstrated below, neither of these arguments are valid and even if merit is found in those arguments, appellate jurisdiction in this matter is further granted pursuant to the order of the lower court affecting a substantial right under S.C. Code § 14-3-330(2).

I. Appellate jurisdiction exists in this matter pursuant to S.C. Code § 14-3-330(4) as the appeal of an order refusing to grant an injunction.

Respondent contends that Appellant has never asked for an injunction, that any request for an injunction made did not meet the specificity requirements of Rule 65, SCRPC, and that the lower court never specifically ruled on the motion for injunction. All three of these assertions are incorrect based on the filings, arguments, evidence and rulings of the lower court contained in the exhibits hereto.

The issue of injunctive relief arose out of the Circuit Court’s order of July 16, 2013 wherein the Circuit Court ordered Appellant to provide specific information

provided to Respondent's counsel through confidential attorney-client communications in a prior matter that Appellant contended could be used against Appellant in the present matter. (Exhibit I pp. 2-3). Prior to the Circuit Court agreeing with Respondent that the Appellant must supply confidential information as proof, there was no need to request injunctive relief.

Despite the evidence and argument presented that the test was whether the cases were "substantially related", the Circuit Court solely focused on whether information the Kenison Firm obtained was privileged, (Exhibit C p. 21, l. 19 - p. 23, l. 24, Exhibit L, p. 7, ll. 20-23), and refused to consider the appropriate standard under the Rules of Professional Conduct or the Supreme Court's decision in Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996). (Exhibit C p. 8, ll. 16-25, p. 9, ll. 11-17, p. 21, l. 23 - p. 24, l. 9, Exhibit L p. 5, l. 18 - p. 6, l. 7).

In Townsend, the Court specifically rejected the argument that an attorney had to have actually obtained confidential information to support disqualification, holding the standard 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."

Id. at 315, S.E.2d at 429 (citing 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)(emphasis added)). Even more significant than the present case, the attorney in Townsend admitted having such information but claimed he didn't use it. However, in finding disqualification was warranted, the Supreme Court held:

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 the 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.

Id. at 317, S.E.2d at 429(emphasis added).

When the Circuit Court failed to give clear instructions in this matter and appropriately address Respondents access to such confidential information pursuant to Appellant's letter of July 11, 2013 (Exhibit H), Appellant filed its motion to reconsider, clarify and amend the order to issue and injunction which very clearly sets out the specifics required for an injunction in this situation. (Exhibit H ¶ 5-15).

To obtain an injunction, the requesting party must allege facts to demonstrate such an injunction is "reasonably necessary to protect the legal rights" of the requesting party. AJG Holdings, LLC v. Dunn, 382 S.C. 43, 51, 674 S.E.2d 505, 508 (S.C.App. 2009). For an injunction to be granted, a party "must establish that: (1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." Id. (Citing Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). Moreover, "before granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief." Id. (Citing Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 455, 626 S.E.2d 34, 36-37 (Ct. App. 2005).

In the interests of judicial economy, Appellant consolidated its motion to reconsider requiring the privilege log with its motion to clarify the information requested and its motion to issue an injunction preventing Respondent and the Kenison Firm from

obtaining the information. (Exhibit H). Respondent contends the only reference for injunction is in the title of the motion and that such request was based on an erroneous e-mail. (Respondent's Memorandum in Support of Motion to Dismiss p. 3). Despite Respondent's contention to the contrary, the evidence, allegations and specifics of the request for injunctive relief are clearly set forth in the body of the motion filed, the hearing transcripts and letter of July 11, 2013 seeking clarification of the order. (Exhibits H, C and K).

From the outset of the request by the Circuit Court at the July 8, 2013 hearing on the motion to disqualify, Appellant has objected to being required to produce information it relayed to Counsel for Respondent through confidential attorney-client communications. (Exhibit C p. 24, ll. 2 – 9). Rule 1.6 of the Rules of Professional Conduct clearly protects the rights clients have to the confidentiality of their communications with their attorneys. Rule 1.6, RPC, Rule 407 SCACR. Comment 3 to Rule 1.9 also states that a former client "is not required to reveal confidential information" to establish disqualification. Rule 1.9 Cmmt. 3, RPC, Rule 407, SCACR.

Appellant's motion for an injunction alleges that compliance with the court's order requiring the disclosure to Respondent will violate Appellant's rights to keep this information confidential. (Exhibit H, ¶ 5-6). Appellant's motion also alleges that the forced disclosure of such information would require Appellant to (1) refresh the Kenison Firm's memory of the information and (2) potentially disclose more confidential information than previously disclosed. (Exhibit H ¶ 7-8). It would also require Appellant to disclose confidential information to its current counsel that it would otherwise not need to disclose. (Exhibit H ¶ 11). Appellant's motion alleges that the

disclosure of such information pursuant to the order would cause irreparable harm (Exhibit H ¶ 12), and that there is no adequate remedy after disclosure because once the disclosure is made it cannot be undisclosed. (Exhibit H ¶ 14). Finally, as demonstrated by the Rules of Professional Conduct and the overwhelming authority below, Appellant would likely succeed on the merits in preventing the ordered disclosure. (Exhibit H ¶ 13).

If Appellant is required to disclose the ordered information to the Kenison Firm, there would be no other remedy to address the irreparable harm. (Exhibit H ¶14). Once that information is disclosed, it can't be undisclosed. If the Circuit Court eventually denies the motion to disqualify, Appellant will have provided ammunition for the Kenison Firm to represent Respondent. Even if the Circuit Court eventually grants the motion to disqualify, the information disclosed in the log could be used against Appellant by Respondent. Even if the Circuit Court prohibits a new attorney for Respondent from using any of the disclosed information in the proceeding, the knowledge of the information will help shape a better strategy by the new attorney and provide direction to lead to the discovery of other similar information that could be used, all to the disadvantage of Appellant.

The trial judge most definitely understood the request to keep the information from Respondent and clearly indicated that he had, as required by Peek, weighed the equities in Appellant's right to keep the information confidential with Respondent's right to have the attorney of his choosing. (Exhibit K p. 4, l. 9 – p. 5, l. 12, p. 6, ll. 17 – 21, p. 7, ll. 14-24). As demonstrated in Appellant's second argument for denial of the motion to dismiss below, the trial judge erroneously believed that the right to choose one's

counsel was superior to the right to maintain confidential information in a disqualification matter and the right to the fair administration of justice. (Exhibit K, p. 6, ll. 17 – 21).

The Circuit Court attempted to give Appellant some additional protection by requiring the privilege log to be subject to a protective order. The purpose of an injunction is to “prevent irreparable harm.” AJG Holdings at 50, S.E.2d 508. Even under a protective order, the information being required to be provided to the Kenison Firm, requires providing that information to the very people it is sought to be protected from. Even under a protective order, the providing of that information would be to the distinct disadvantage of Appellant and constitute irreparable harm.

Both the TMKG case and the Buckley case involve the collection of money for construction work performed but not paid for. Both cases involve allegations that Appellant failed to properly perform work and was trying to collect more than is owed. Hypothetically speaking, if Appellant had provided information to the Kenison Firm during a verbal confidential attorney-client communication about other situations where Appellant had cut corners on jobs or other situations where clients accused them of overbilling to assist with defending the claims made by TMKG, that information would certainly be relevant and damaging to Appellant in the Buckley case. While it is conceivable that the Kenison Firm truly does not remember such information, forcing the disclosure of that information to the very attorneys sought to be disqualified puts the client in a quandary. Does the client disclose information and hope disqualification is granted and so information stays protected, or does the client not disclose and risk Respondent’s attorneys suddenly “remembering” more about the information provided in

the prior case than they do now. The entire basis for Rule 1.9 and the interpretation of what is “substantially related” is so attorneys can make the decision without placing clients in this unenviable position.

The standard set in Townsend for determining a conflict of interest is *prospective, not retrospective*. The test is whether the lawyer “would have or reasonably could have learned confidential information” not that the lawyer did in fact learn confidential information. Townsend at 315, S.E.2d at 429. How can it be protecting the client’s interest or serving the interests of justice and the public’s perception of how justice is served to require the client to prove he shared confidential information with the attorneys? That obligation is placed squarely on the attorneys by the Rules of Professional Conduct.

At the hearing on July 8, 2013, the Kenison Firm proposed that the South Carolina Court of Appeals case of Madison v. Graffix Fabrics, Inc., 304 S.C. 321, 404 S.E.2d 37 (S.C. App. 1991) was the controlling authority and was more applicable to this situation than Townsend. (Exhibit C p. 13, l. 22 – p. 15, l. 19). However, even Madison supports Appellants position in this situation as the Court further stated:

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.

Id. at 325, S.E.2d at 40, (Citing 7 Am.Jur.2d *Attorneys at Law* § 186).

The Madison Court specifically used the terminology of “knowledge or information” rather than “confidential knowledge” or “confidential information.” Based

on the answer, counterclaims and third-party claims filed by the Kenison Firm, (Exhibit D), it will be impossible for the Kenison Firm to forward the interests of Respondent without using information gained in the TMKG matter against Appellant in this matter.

Under the restrictions imposed on the Kenison Firm from their prior representation, they cannot advocate zealously for Respondent if they are not able to effectively question Dodenhoff at trial. The Court in United States v. Ross stated:

If the conflict could cause the defense attorney improperly to use privileged communications in cross-examination, then disqualification is appropriate. Indeed, it is also true that disqualification is equally appropriate if the conflict could deter the defense attorney from intense probing of the witness on cross-examination to protect privileged communications with the former client or to advance the attorney's own personal interest.

Ross at 1523. The Circuit Court again erroneously determined the decision for limited representation was between Buckley and the Kenison Firm telling Counsel for Appellant, “You’ve got no business getting involved in an attorney and their client’s relationship” and “That is between his counsel and the client.” (Exhibit C p. 19, ll. 1-16). On the contrary, that decision goes to the heart of the fair administration of justice, a substantial right (discussed below).

If the Circuit Court had at least issued an injunction against Respondent and the Kenison Firm as requested, the information could be provided to the Court for it to evaluate *prospectively* whether that information is of the type that would generally be confidential or, based on the circumstances of the two cases, be information that could be used to the disadvantage of Appellants in the present case. This procedure would have at least allowed the Circuit Court to conduct the analysis contemplated by the Rules of Professional Conduct and the Court in Townsend without jeopardizing the interests of either former or current client of the Kenison Firm.

Following the hearing on July 23, 2013, the Court filed a written order on July 25, 2013 denying Appellant's motion to reconsider, clarify and amend order to issue injunction. (Exhibit L). Such denial is a clear indication that the Circuit Court refused to grant an injunction as requested by Appellant.

Based on this information and supporting evidence, Appellant clearly requested by motion that the Circuit Court issue an injunction preventing Respondent and the Kenison Firm from accessing the confidential information ordered to be provided in a privilege log. The Circuit Court considered and ruled on Appellant's motion by written order denying the motion to issue an injunction, therefore, this Court has appellate jurisdiction to hear the appeal. An order granting, continuing, modifying, or refusing an injunction is immediately appealable. S.C. Code Ann. § 14-3-330(4), Curtis v. State of South Carolina, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (S.C. 2001).

II. Appellate jurisdiction exists in this matter pursuant to S.C. Code § 14-3-330(2) as the appeal of an order affecting a substantial right.

Respondent contends in support of its Motion to Dismiss that this case is most analogous to Energys Delaware, Inc. v. Hopkins, 401 S.C. 615, 738 S.E.2d (2013) because that case dealt with the denial of a motion to disqualify and the Court found in that case that an order denying a motion to disqualify was not an order affecting a substantial right. Respondent further argues this case doesn't rise even to the level of Energys because that case at least involved a dispositive order denying the motion to disqualify and there is no such dispositive order in this appeal. (Respondent's Memorandum in Support of Motion to Dismiss pp. 4-5).

Appellant does not dispute the holding of Enersys, however, just like the Court's opposite holding in Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (S.C. 2005) that an order granting a motion to disqualify affects a substantial right and is immediately appealable under S.C. Code § 14-3-330(2), neither holding is directly applicable in the present case which presents an issue of first impression for this Court.

In the present case, the Circuit Court refused to consider the motion to disqualify without the disclosure of specific confidential information allegedly provided in protected attorney-client communications to the very attorneys sought to be disqualified. This requirement is in direct violation of the Rules of Professional Conduct, is contrary to the Supreme Court's holding in Townsend as well as the overwhelming authority from other jurisdictions. Most importantly, however, a requirement to disclose such information significantly affects the substantial rights clients have in maintaining the confidential nature of attorney-client communications, the fair administration of justice, and to a particular mode of trial.

Respondent points out in the Enersys decision that the Court focused on whether the denial of a motion to disqualify affects a substantial right and contends the present case is similar because like Enersys the Appellant contends that Respondent's attorneys learned confidences in its prior representation which could be used in the current representation of Respondent. A glaring difference between the cases, however, is that in Enersys, the prior representation was seven (7) to nine (9) years before the alleged conflicting representation. Id. at 615, S.E.2d at 478-479. The time difference before changing sides by the Kenison Firm in this matter was less than one (1) year. (Exhibit C p. 16, ll. 10 – 12). Information is far more likely to be recalled over such a short period

Rule 1.9 Cmnt. 3, RPC, Rule 407, SCACR (Emphasis added).

The order of the Circuit Court is directly at odds with the ethical rule. The Circuit Court is ordering Appellant to reveal specific confidential information to prove the Kenison Firm has such information to thereby justify disqualification. The Court specifically stated, “I’m not going to automatically disqualify a law firm from representation. If you want me to do something of that significant of nature, then there has to be some kind of basis.” (Exhibit K p. 4, ll. 19-22).

As argued to the Circuit Court, the “basis” for disqualification under Rule 1.9 is whether the prior and current case are “substantially related.” (Exhibit K p. 5, l. 18 – p. 6, l. 4). The “substantially related” analysis is the only way to protect the confidential nature of attorney-client relationships in this type of situation. The rule was written this way on purpose and the Comments to the Rule further bear this out.

The significance of the confidentiality associated with the attorney-client relationship is demonstrated by the weight of existing legal authority addressing this same situation. Courts in other jurisdictions unanimously agree that confidential information must be protected, particularly in disqualification situations. The most similar case to the present matter is the case of Foulke v. Knuck, 784 P.2d 723, 162 Ariz. 517 (Ariz.App.Div. 2 1989). In Foulke, the attorney to be disqualified made the exact same claims as the Kenison Firm that no confidential information had been obtained except what is now publicly known. In response the Court stated that this:

...contention fails to recognize the mandatory nature of ER 1.9(a). The rule does not require that confidences and secrets be divulged in order for a conflict to exist or for disqualification to be proper. State v. Allen, 539 So.2d 1232, 1234-35, (La. 1989); see also Arkansas v. Dean Foods Products Co., 605 F.2d 380, 383 (8th Cir. 1979); United States v. Kitchin, 592 F.2d 900, 904 (5th Cir.), cert. denied, 444 U.S.843, 100 S.Ct 86, 62 L.Ed.2d 56 (1979).

Regardless of what was communicated during the representation of the former client, the rule prohibits subsequent representation of an individual whose interests are substantially adverse to those of the former client.

Id. at 522, P.2d at 728. (citing T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F.Supp. 265, 268-69 (S.D.N.Y. 1953)). The Court elaborated by holding:

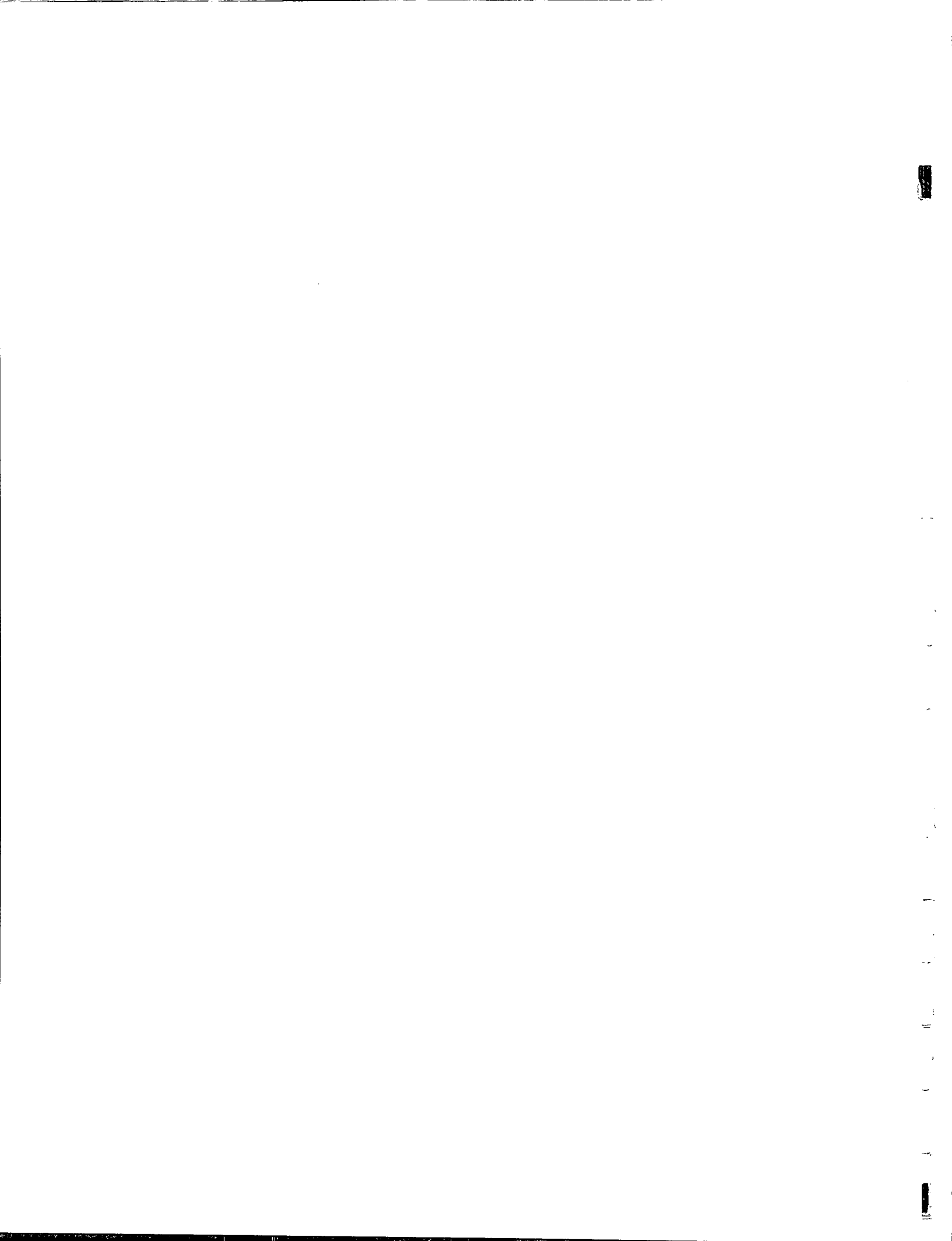
The former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.

Foulke at 522, P.2d at 728 (emphasis added). See also Cord v. Smith, 338 F.2d 516, 524-25, (9th Cir. 1964); Matter of Evans, 113 Ariz. 458, 462, 556 P.2d 792, 796 (1976).

The Washington Court of Appeals analyzed existing cases on the issue and stated:

The plain language of RPC 1.9 indicates actual proof of disclosure of confidential information is not necessary if the matters are substantially related. The weight of authority from other jurisdictions similarly interprets the rule as not requiring proof of disclosure of confidential information.

Teja v. Saran, 68 Wn.App. 793, 846 P.2d 1375 (Wash.App. Div. 1 1993)(emphasis added)(citing Foulke v. Knuck, 162 Ariz. 517, 522, 784 P.2d 723, 728 (1989); Brent v. Smathers, 529 So.2d 1267 (Fla.Dist.Ct.App. 1988); United States ex rel. Lord Elec. Co. v. Titan P. Constr. Corp., 637 F.Supp. 1556 (W.D.Wash. 1986); Junger Util. & Paving Co. v. Myers, 578 So.2d 1117 (Fla.Dist.Ct.App. 1989); Martindale v. Richmond, 301 Ark. 167, 782 S.W.2d 582, 584 (1990); Oxford Dev. Minn., Inc. v. Ramsey, 428 N.W.2d 434 (Minn.Ct.App. 1988); Reading Anthracite Co. v. Lehigh Coal & Nav. Co., 771



CONCLUSION

Appellate jurisdiction exists with this Court through S.C. Code § 14-3-330(4) as an order refusing to grant an injunction and §14-3-330(2) as an order affecting a substantial right.

For the reasons stated above, together with Appellant's Initial Brief filed with the Court, the exhibits attached hereto and the applicable legal authority, Respondent's motion to dismiss for lack of appellate jurisdiction must be denied.

Respectfully submitted,

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