

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,

**RETURN TO RESPONDENT'S MOTION FOR ORDER GRANTING
PARTIAL RELIEF AND MOTION TO DISMISS APPELLANT'S
REMAINING ISSUE ON APPEAL**

Appellant, D&C Builders, Inc., by and through its undersigned attorney and pursuant to Rule 240(e), SCACR, hereby opposes the motion by Respondent, Richard M. Buckley, for an Order Granting Partial Relief and second (2nd) Motion to Dismiss.

Respondent's motions should be denied for multiple reasons to be addressed, but most obviously under Rule 269, SCACR as frivolous motions made solely for the

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purpose of delay. Respondent was given thirty (30) days to file his initial brief on March 10, 2014 when his previous motion to dismiss was denied. He then waited until the very last day of that time in which to file a motion for an extension of time to have another thirty (30) days and then subsequently file these motions (notably requesting further abeyance to file its brief pending this decision on these frivolous motions) again attempting to get this Court to relinquish jurisdiction. It is quite apparent that Respondent has never intended to file an initial brief and the current motions are made for the sole purpose of delay.

The motions should also be denied because this appeal presents a novel issue in South Carolina. Through sworn affidavits by three members of the bar, (See Memorandum of Appellant in Opposition to Respondent's Motion to Dismiss previously filed, Exhibits E, F and G), the ruling of the Circuit Court (See Memorandum of Appellant in Opposition to Respondent's Motion to Dismiss previously filed, Exhibits I, K p. 4, ll. 19-22 and p. 7, ll. 19-24, and L), and the refusal to act by the Office of Disciplinary Counsel (Exhibit M of Memorandum in Support of this Return), all of which are contrary to the clear language of Rule 1.9 of the Rules of Professional Conduct and Comment 3 thereto, it is clear that this particular Rule of Professional Conduct is subject to varying interpretations. As the guiding principles upon which the integrity of the legal profession is maintained, it is clear that both the bench and the bar need direction and clarification on how to interpret the Rules of Professional Conduct in this situation. A simple "consent" to remand the case back to the Circuit Court would be contrary to the obligation previously established by the South Carolina Supreme Court that "this Court bears the ultimate responsibility for maintaining judicial integrity and the high standards

of professional conduct among the members of the bar.” *State v. Quattlebaum*, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (S.C. 2000).

The granting of Respondent’s motion would also set a terrible precedent encouraging litigants to make completely unsupported arguments to a lower court while knowing that when faced with having to make a good faith argument to this Court, they could simply “consent” the argument wasn’t valid to begin with and seek to try a different argument with the lower court. The high standards of professional conduct expected of members of the bar by this Court require that such a course of action not be condoned or rewarded. The furtherance of such conduct would only serve to increase number of cases on the appellate docket.

Respondent further argues that because the Court granted jurisdiction under Section 14-3-330(4) as the appeal of an Order refusing to grant an injunction, and because Respondent is now willing to consent to the injunction, that jurisdiction no longer exists because no ruling was issued by the lower court on any other issue to establish jurisdiction. This argument is false in two respects also requiring that Respondent’s motions be denied.

First, in responding to Respondent’s previous motion to dismiss, Appellant demonstrated that appellate jurisdiction existed under both 14-3-330(4) as an order refusing to grant an injunction **and** 14-3-330(2) as an order affecting a substantial right. (See Memorandum of Appellant in Opposition to Respondent’s Motion to Dismiss previously filed, pp. 14 – 25). Obviously with the Court finding jurisdiction under 14-3-330(4) thereby denying the previous motion to dismiss, it was not necessary for the Court to confirm jurisdiction under 14-3-330(2). However, appellate jurisdiction clearly exists

under 14-3-33-(2) as affecting a substantial right as demonstrated by the Circuit Court's flat refusal to consider disqualification under the standard provided in the Rules of Professional Conduct without concrete proof of the possession of confidential information. The proposed "consent" of Respondent to remand to the Circuit Court **without** further instruction does absolutely nothing to change the impact the Court's refusal has on Appellant's substantial right to the fair administration of justice and the particular mode of trial to which it is entitled.

Second, there was a ruling by the lower court on the issue of disqualification for this Court to review. The Circuit Court ruled that it was impossible to grant or deny the request for disqualification without knowing specifically what confidential information counsel for Respondent may possess; a ruling that is directly contrary to the Rules of Professional Conduct and to which Respondent is now willing to "consent" was incorrect. (See Memorandum of Appellant in Opposition to Respondent's Motion to Dismiss previously filed, Exhibit K p. 4, ll. 19-22 and p. 7, ll. 19-24). If the Circuit Court deemed it impossible to rule on disqualification without receiving such information and Respondent is now willing to "consent" that Appellant cannot be required to provide such information, then remand to the Circuit Court without instruction from this Court on how to proceed will not yield any different ruling than the existing ruling by the Circuit Court that disqualification cannot be decided.

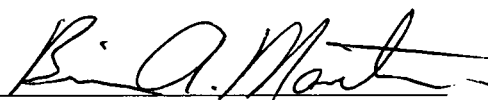
Respondent continues to examine this issue as a "procedural" issue rather than an "ethical" issue and once again, by these motions, seeks to escape from being forced to justify how the Rules of Professional Conduct allow counsel for Respondent to represent an adverse party (Respondent) to a former client (Appellant) when the claims between

the adverse party (Respondent) and former client (Appellant) arose while counsel was representing the former client (Appellant) in a substantially related matter. Respondent cannot justify this position under any circumstances, but is unwilling to “consent” to this requested relief. This Court must deny the motions of the Respondent, review the argument and applicable authority and provide guidance to the bar of this state how to address disqualification in these circumstances.

This Return is based on the submissions of both parties to the Court in this matter thus far, the applicable South Carolina Appellate Court Rules and their related authority, and upon such supporting memorandum and affidavits submitted in connection herewith.

For the reasons stated above, Respondent’s motion for an Order granting partial relief and motion to dismiss remaining issues on appeal should be denied and the Court should review these motions by Respondent under Rule 269, SCACR for the determination of additional relief or action by the Court.

Respectfully submitted,



Brian A. Martin
S.C. Bar # 9791
Brian A. Martin, LLC
212 Trade Street
Greer, South Carolina 29651
(864) 879-7779
ATTORNEY FOR APPELLANT

April 29, 2014

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,

PROOF OF SERVICE

I hereby certify that that I have served a true copy of Appellant's Return to Respondent's Motion for Order Granting Partial Relief and Motion to Dismiss and Memorandum in Support of Appellant's Return on Respondent and all parties of record by depositing a copy in the United States Mail, first class postage prepaid, on April 29, 2014, 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

April 29, 2014

A handwritten signature in black ink, appearing to read "B. A. Martin", written over a horizontal line.

Brian A. Martin
Brian A. Martin, LLC
S.C. Bar # 9791
212 Trade Street
Greer, South Carolina 29651
(864) 879-7779

ATTORNEY FOR APPELLANT



BRIAN A. MARTIN, LLC
ATTORNEY AT LAW

April 29, 2014

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

Dear Ms. Kitchings:

Please find enclosed for filing in the above referenced matter an original and seven (7) copies each of Appellant's Return and Memorandum in Support of Appellant's Return to Respondent's Motion For Order Granting Partial Relief and Motion to Dismiss in opposition to such motions, along with the required Proof of Service. I would appreciate your filing the originals and returning one clocked copy of each 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

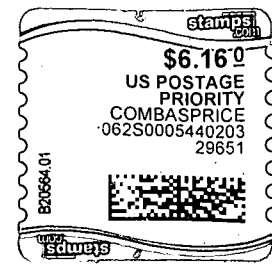
Enclosures

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

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Brian A. Martin, LLC
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Greer, SC 29651

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