

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Presiding Judge

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

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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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**MEMORANDUM OF APPELLANT IN OPPOSITION TO  
RESPONDENT'S MOTION FOR ORDER GRANTING  
PARTIAL RELIEF AND MOTION TO DISMISS APPELLANT'S  
REMAINING ISSUE ON APPEAL**

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**SC Court of Appeals**

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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 for Order Granting Partial Relief and second Motion to Dismiss. Please note that all of the Exhibits attached to Appellant's previously filed Memorandum in Opposition to Respondent's Motion to Dismiss labeled Exhibits A through L, are specifically incorporated herein to prevent unnecessary duplication, and the additional Exhibits attached hereto are a supplement and continuation of the evidence presented previously to this Court.

### **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 as well as the summary of facts contained in Appellant's previously filed memorandum in opposition to Respondent's previous motion to dismiss. However, by way of a brief summary, 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 a conflict of interest. (See Exhibit A of prior Memorandum). 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. (See Exhibit B of prior Memorandum ¶ 4- ¶13).

The representation of Respondent in this matter by the Kenison Firm clearly violates 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.

At the hearing on the motion to disqualify Appellant argued to the Circuit Court that disqualification was warranted based on the former representation being "substantially related" to the current matter and that the Kenison Firm had obtained information, including confidential information from Appellant during that representation, that could be used against Appellant in the current matter in violation of Rule 1.9. (See Exhibit C, p. 3, l. 15 – p. 10, l. 14).

The intention to use such information from its prior representation was clearly demonstrated in Respondent's Answer, Counterclaims and Third-party Claims filed by the Kenison Firm (See Exhibit D of prior Memorandum) 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's sole argument against the motion to disqualify was 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 confidential information that could potentially create a conflict. (Exhibit C p. 17, l. 22 – p. 18, l. 2). The **only support** for these assertions were **sworn affidavits** of Attorneys Holder, Johnson and Crawford 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 these affidavits by members of the bar and the Court's stated familiarity with the attorneys (See Exhibit K p. 5, ll. 6-10), the Circuit Court ignored Appellants argument that disclosure was not required by the ethical rule given the cases were “substantially related,” and ordered Appellant to submit the information claimed to be confidential to both the Circuit Court **and** the Kenison Firm of. (Exhibit C p. 21, l. 19 – p. 25, l. 17). This order 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 ethical issues, and requested that the Respondent and Kenison Firm be enjoined from accessing any information. (See Exhibit H). Appellant also requested specific instruction from the Court as to how to address confidential attorney/client communications and that the Kenison Firm be enjoined from accessing the information provided. (See Exhibit H, p.

6) Without further clarification, the Circuit Court filed its written order on July 16, 2013. (See Exhibit I).

Appellant thereafter filed a motion to reconsider, clarify and amend order (Exhibit H), to which Respondent replied 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 (See Exhibit K) wherein the Circuit Court ruled that it could not determine disqualification without seeing the alleged confidential information (Exhibit K p. 4, ll. 19-22), and Respondent having an opportunity to contest the confidentiality. (Exhibit K p. 4 l. 23- p. 5, l. 3). The Circuit Court also admonished *Counsel for Appellant* that the only potential ethical violation would be Counsel failing to provide the information. (Exhibit K p. 6, ll. 23-25).

The Circuit Court denied the motion to reconsider, motion to clarify and motion to issue an injunction by written order filed July 25, 2013. (See Exhibit L).

During this time, Appellant also filed a complaint with the Commission on Lawyer Conduct regarding its former counsel’s determination to ignore the conflict and represent Respondent in this substantially related matter. The matter was referred to the Office of Disciplinary Counsel and following its investigation and receipt of the same information presented to the Circuit Court, the Office of Disciplinary Counsel **dismissed the complaints** against all three members of the bar. (See Notices of Dismissal attached and incorporated herein as “Exhibit M”).

This appeal followed and Appellant filed and served its initial brief on Respondent on November 12, 2013. Rather than file an initial brief, Respondent filed a Motion to Dismiss on November 27, 2013 which was denied by this Court on March 10, 2014. Respondent was ordered to file his initial brief by April 9, 2014, but despite having five (5) months to prepare, Respondent files a motion for extension of time to file his initial brief on April 9, 2014. Appellant filed a return objecting to any extension of time and Respondent then filed the motions to which this return is directed on April 10, 2014.

Based on such motions, Respondent is now willing to “consent” that the argument made to the Circuit Court was invalid, unsupported and that the Circuit Court was in error to agree with Respondent, all in an attempt to remove appellate jurisdiction and dispose of the requirement to brief his argument to this Court. Respondent also seeks a second opportunity to have the remaining portions of the appeal to which he does not “consent” be dismissed, despite presenting the exact same argument from his prior motion to dismiss already denied by this Court by Order of March 10, 2014.

#### **STANDARD OF REVIEW**

In cases raising novel questions of law, the appellate court is free to decide those questions with no particular deference to the trial court. Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). 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. Id. “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 has made two motions for the Court’s consideration, a motion for Order granting partial relief and a motion to dismiss. The motion for an Order granting partial relief is based on Respondent’s desire to now “consent” that the Circuit Court was in error in agreeing with Respondent that Appellant must demonstrate proof Respondent’s Counsel obtained confidential information from its prior representation of Appellant and give such counsel the opportunity to refute such claims. The motion to dismiss is based on the position that the “consent” from the first motion eliminates appellate jurisdiction under S.C. Code § 14-3-330(4) and that there has been no ruling by the lower court on any remaining issue.

As demonstrated below, not only are these motions in violation of Rule 269, SCACR, both motions should be denied because (1) this matter is an issue of first impression in South Carolina and both the bench and bar clearly need direction in addressing this situation, (2) allowing a Respondent with a weak argument to “cherry pick” which relief they can live with and “consent to” in order to avoid complying with the Court’s Orders or to remove appellate jurisdiction sets a terrible precedent, and (3) even with Respondent’s suggested “consent” to relief, appellate jurisdiction remains with

this Court due to the ruling and order of the lower court affecting a substantial right under S.C. Code § 14-3-330(2).

**I. Respondent's motions should be denied under Rule 269, SCACR as frivolous motions made solely for the purpose of delay.**

Appellant filed and served its initial brief in this appeal on Respondent on November 12, 2013. Rather than filing an initial brief, Respondent filed a motion to dismiss on November 27, 2013 arguing the appeal was from an interlocutory order and no appellate jurisdiction existed. As required, the time for Respondent to file his initial brief was held in abeyance during the Court's consideration of the motion to dismiss.

Respondent's motion to dismiss was thereafter denied by this Court on March 10, 2014 and Respondent was given an additional thirty (30) days to file an initial brief. He then waited until the very last day of that additional time period to file a motion for an extension of time to have another thirty (30) days to file an initial brief. This motion was based on the assertion that the parties were engaged in settlement discussions.

Appellant filed a return opposing this motion for more time as Respondent had already had five (5) months to prepare, specifically including the last thirty (30) days by this Court and refuting that any meaningful settlement discussions were ongoing. Respondent's Exhibit B to his memorandum in support of these motions fully demonstrates the extent of the alleged "settlement discussions" referred to in such motion for more time. As can clearly be seen, the communications submitted begin the day before his initial brief is due and consists of the offer to "consent" to the only the partial relief that remands the matter back to the circuit court.

Based on Respondent's unwillingness to consent to all the relief requested, including disqualification, Respondent filed these motions for partial relief and a second motion to dismiss to further extend the time in which Respondent had to file an initial brief. Not only did Respondent ask for the thirty (30) day extension in its motion for extension of time, but also asks for this Court to hold all actions in abeyance during the consideration of these frivolous motions.

As demonstrated in the remainder of this memorandum, Respondent has absolutely no good faith basis upon which to make these motions. The motion for an Order granting partial relief is clearly made to escape having to justify to this Court the argument used to convince the Circuit Court to disregard the plain language of the rules of professional conduct; an argument that Respondent is now seeks to "consent" was invalid. The motion to dismiss is nothing more than using this creative attempt to avoid filing an initial brief to create another opportunity to move for a dismissal. Respondent therefore mischaracterizes the issues Respondent is not willing to "consent" to as not subject to appellate jurisdiction so that their "consent" results in remand to the Circuit Court. Clearly, Respondent believes that he has a better chance of persuading the Circuit Court to again ignore the plain language of the Rules of Professional Conduct on disqualification than he does of persuading this Court to do the same.

Based on the now willingness to "consent" that its argument to the Circuit Court was invalid and the Court was in error to agree with him, 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.

Respondent's motions should be denied under Rule 269, SCACR as frivolous motions made solely for the purpose of delay and this Court should review such actions within the Rule to impose any other relief or sanctions the Court deems appropriate.

**II. Respondent's motions should be denied as the issues presented in this appeal are novel and both the bench and bar are in need of clear direction from the Court in the application of the Rules of Professional Conduct.**

In cases raising novel questions of law, the appellate court is free to decide those questions with no particular deference to the trial court. Hagood at 194, S.E.2d at 708. The issues in this appeal have not been addressed by the Court before, and now that Respondent is faced with arguing against the overwhelming authority from other jurisdictions as demonstrated in Appellant's initial brief and memorandum filed in the first motion to dismiss, Respondent seeks to "consent" to some relief so that this argument is capable of being used in the future.

Respondent argued against the motion to disqualify of the Appellant by shifting the burden of proof onto the former client to prove its former counsel obtained specific confidential information that could be used against the former client. In support of this position, three members of the South Carolina Bar and the Kenison Firm, which was representing Appellant in a similar matter while the contract between Appellant and Respondent was being performed, filed sworn affidavits that they are "unaware of" or "do not remember" any confidential information provided by Appellant to them in connection with their prior representation. (Exhibit E p.5, ¶ 13, Exhibit F p. 2, ¶ 4, Exhibit G p. 2, ¶ 4).

Based on these affidavits, Respondent argued to the Circuit Court,

Again, I can't stress enough, even though we've asked on a number of occasions and as you can see in the affidavit that Mr. Dodenhoff provided, there's no specifics that have been provided to us or the Court now regarding any actually confidential [information] that would potentially create a conflict.

(Exhibit C, p. 17, l. 22 – p. 18, l. 2) (See also Exhibit B, Affidavit of Scott Dodenhoff).

Respondent goes even further in its response to Appellant's Motion to Reconsider, arguing,

**Mr. Martin cites that portion of comment 3 to Rule 1.9 of the South Carolina Rules of Professional Conduct which states that a former client is *not required* to reveal the purported confidential information. In support of his Motion to Reconsider, Mr. Martin states that his client "will be forced to disclose confidential information to Defense Counsel *that may not have been previously disclosed to Defense Counsel in the prior representation.*" This admission coupled with the clear desire of Plaintiff to not provide any of the purported confidential information all the while crying the (*potential*) existence of confidential information, presents the troubling scenario where the Plaintiff is attempting to use Rule 1.9 not as a shield but as a sword. This was surely not the intention behind the Rule.**

**It remains our position that the arguments and facts presented to the court show: ... (2) the existence of absolutely no specific confidential information learned in the first case such that there is no confidential information in the possession of Defendant's counsel that would be, or could be, of significance in the second case; and (3) Defendant's counsel will not be called on in this case to use against the Plaintiff any knowledge or information acquired by Defendant's counsel in the prior case that would injuriously affect the Plaintiff. Despite this clarity and despite the Court giving the Plaintiff the opportunity to produce anything to counter it, the Plaintiff has made it abundantly clear to the Court that it would rather assert what it argues is his right not to produce anything, including what he is alleging is *possibly* confidential information.**

(Exhibit J, p. 2-3).

Clearly, Respondent interprets Comment 3 to Rule 1.9 that the former client must choose between providing the confidential information alleged in possession of former counsel to support disqualification or not be able to obtain disqualification. There is

simply no South Carolina authority to support this position is what was intended by the rules.

As an aside, there is ample authority from thirteen (13) other jurisdictions to support Appellant's position that are presented in its previously filed memorandum in opposition to Respondent's first motion to dismiss. All of those jurisdictions have confirmed that confidential information must be protected, particularly in disqualification situations and former clients cannot be forced to reveal such information to establish disqualification. (Memorandum of Appellant in Opposition to Respondent's Motion to Dismiss, pp. 19 – 23). Presumably, since Respondent could find no support to counter the argument and authority presented by Appellant, and as this Court denied the first motion to dismiss, Respondent seeks to use his "consent" to partial relief to remove his feet from the fire so to speak and avoid having a precedential opinion on the issue.

But not only do these members of the bar have a skewed interpretation of the Rules of Professional conduct in this situation, but the Circuit Court agreed with this interpretation and cautioned Appellant's counsel that he would be violating an ethical duty by not obeying the court's order to produce the requested confidential information. (See Exhibit K, p. 6 ll. 23-25). The Circuit Court either does not understand the rule or does not agree with the rule as it found it could not make a determination of disqualification without hearing the alleged confidential information and Respondent having the opportunity to refute its confidentiality. The Circuit Court stated

**This Rule is not to be viewed in isolation. Clients should be allowed to choose their lawyers. And to kick a lawyer off a case is a substantial, I don't want to say sanction, but remedy that's imposed for the requesting party. And I'm not going to do it out of this air. Okay?**

(Exhibit K, p. 6, ll. 17-21). The Circuit Court also stated

**I can't make a determination if they're disqualified or not without knowing about it. And I'm not going to know if the information is privileged unless they can show me – you could claim anything, that this – you could claim this is a secret and the other side doesn't know about it. How can they respond? It's called due process.**

(Exhibit K, p. 7, ll. 19-24).

With no other alternative, Appellant appealed the Order to obtain review by this Court and clarification for the bench and the bar as to whether a former client can be forced to reveal such confidential information to support disqualification as the Respondent argued. Now, Respondent is willing to “consent” the Circuit Court was in error, but does not want this Court to provide any direction or instruction to the Circuit Court or to the bar.

Finally, along with the appeal of the Circuit Court's Order, Appellant filed a complaint with the Commission on Lawyer Conduct presenting the same information for disciplinary action against these members of the bar for violating Rule 1.9 in representing an adverse party to a former client in a substantially related matter. The complaint was referred to the Office of Disciplinary Counsel and following their investigation, the Office of Disciplinary Counsel dismissed the complaints. (Exhibit L)

The Office of Disciplinary Counsel saw nothing wrong with Appellant's former counsel providing sworn affidavits that no confidential information was obtained in the course of representing Appellant, saw nothing wrong with shifting the burden of proof onto the client to prove possession of confidential information, and saw nothing wrong with attorneys representing an adversarial party to their former client on a similar dispute that arose while they were representing the former client. Finally, the Office of Disciplinary Counsel saw nothing wrong with the attorneys representing Appellant, a

corporation, in a financially related matter, and then turning around a few months later and alleging on behalf of Respondent that Appellant (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). If these allegations do not indicate an intent to use financial information obtained in the prior representation, what will?

Respondent's willingness to now "consent" after strongly arguing for the Circuit Court to require the production of "specific confidential information" begs the question as to how many other members of the bar are confused as to the application of Rule 1.9 and what is required for disqualification.

If Rule 1.9, as Appellant argued in its initial brief and Respondent now "consent," was erroneously interpreted by the Circuit Court and the Office of Disciplinary Counsel refuses to act on, what Appellant argued in its initial brief and Respondent now "consents," is a violation of the Rules of Professional Conduct, then this Court must provide guidance to the bar as to how to address this situation in the future. This Court must determine disqualification as requested by Appellant and specifically instruct the Circuit Court in how to determine disqualification in the future without requiring a former client to provide confidential information.

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).

Granting Respondent’s motion for partial relief will leave the bench and the bar with varying interpretations on what is required for disqualification under Rule 1.9 and whether former clients must prove the existence of confidential information to establish disqualification. As an issue of first impression in this state, this Court must deny Respondent’s motions and provide guidance and instruction on how to balance the rights of all parties involved and still accomplish the fair administration of justice.

**III. Respondent’s motions should be denied so as not to set a precedent of encouraging litigants to make unsupported and invalid arguments to the trial court knowing they can simply “consent” to relief at a later time.**

As stated above, Respondent’s willingness to now “consent” that his argument to the Circuit Court was erroneous is nothing more than an attempt to escape having to justify its argument to this Court. Respondent cannot be allowed to “cherry pick” the relief to which is shall be subjected as a means of avoiding the hard questions this Court would surely ask of a stance that is the polar opposite of the intent of the Rules of Professional Conduct.

Respondent was obviously aware that his argument to the Circuit Court was shifting the burden of proof for disqualification onto the former client in direct

opposition to the Rules of Professional Conduct. Respondent argued this position with great fervor to the Circuit Court and was counting on winning the first motion to dismiss with this Court to avoid having to present this position on appeal. Upon having the first motion to dismiss denied and faced with apparently being unable to even draft a response to Appellant's initial brief, Respondent devised this plan to "consent" as an attempt to avoid having his feet held to the fire to justify the argument made to the Circuit Court.

Granting Respondent's motions would set a terrible precedent of encouraging litigants to make unsupported arguments to a lower court and fight the appeal while knowing that when faced with having to eventually make a good faith argument to this Court, they could simply "consent" the argument wasn't valid to begin with, eliminate appellate jurisdiction and try a different approach 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.

This "consent" plan attempted by the Respondent serves only to benefit the Respondent and the motions must be denied as allowing these motions would set a terrible precedent for future litigants and the courts.

**IV. Respondent's motion to dismiss should be denied as it has already been addressed by the Court in the denial of the prior motion to dismiss and appellate jurisdiction exists under S. C. Code Section 14-3-330(2).**

Respondent argues that because this Court granted jurisdiction under S.C. Code Section 14-3-330(4) as the appeal of an Order refusing to grant an injunction, and since Respondent is now willing to "consent" to the injunction, appellate jurisdiction no longer exists. This Court has already denied Respondent's first motion to dismiss, as

acknowledge by Respondent in his own memorandum, (Page 4, footnote 1) and granted jurisdiction. Despite Respondent's creative attempt, his request to "consent" the Circuit Court was in error does not eliminate appellate jurisdiction in this matter.

In responding to Respondent's first motion to dismiss, Appellant demonstrated that appellate jurisdiction existed under both S.C. Code Section 14-3-330(4) as an order refusing to grant an injunction **AND under S.C. Code Section 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, which is incorporated herein by reference as if restated verbatim). Obviously with the Court finding jurisdiction under Section 14-3-330(4) and thereby denying the motion to dismiss, it was not necessary for the Court to also confirm jurisdiction in its Order under Section 14-3-330(2). Despite Appellant's argument on this point taking a significant portion of its previously filed memorandum, Respondent has failed to even acknowledge, let alone argue against the Circuit Court's rulings affecting a substantial right.

Appellate jurisdiction clearly exists under 14-3-330(2) as affecting a substantial right. As pointed out in Argument II above, the Circuit Court flat out refused to consider disqualification without Appellant providing specific confidential information in the possession of Respondent's counsel, a position Respondent now "consents" was error. However, the proposed "consent" of Respondent to remand to the Circuit Court intentionally without further instruction does absolutely nothing to change the impact the Circuit Court's ruling has on Appellant's substantial right to the fair administration of justice and the particular mode of trial to which it is entitled.

It the first motion to dismiss, Respondent relied on the recent Supreme Court decision of Enersys Delaware, Inc. v. Hopkins, 401 S.C. 615, 738 S.E.2d (2013) that a motion to disqualify does not affect a substantial right. Respondent further argued this case didn't even rise to the level of Enersys because Enersys 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 argued before and maintains that the position now that neither Enersys (denying motion to disqualify is not immediately appealable) or the opposite holding in Hagood (granting motion to disqualify is immediately appealable) are directly applicable in this case. 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. Appellant further argued the Circuit Court's requirement to provide specifics was in direct violation of the Rules of Professional Conduct, contrary to the Supreme Court's holding in Townsend, and clearly 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. (Appellant's Memorandum in Opposition to Motion to Dismiss, pp. 14-25).

In attempting to rebrand the current motion to dismiss as different than the first motion to dismiss, Respondent no longer relies on Enersys, a 2013 decision specifically dealing with a motion to disqualify, but instead cites the 1995 decision of Peterkin v. Brigman, 319 S.C. 367, 461 S.E.2d 809 (S.C. 1995)(appeal of the refusal to approve a settlement agreement), the 1993 decision of Mid-State Distributors, Inc. v. Century

Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (S.C. 1993)(lack of personal jurisdiction), and the 1979 decision of Knowles v. Standard Savings and Loan Association, 274 S.C. 58; 261 S.E.2d 49 (S.C. 1979)(order of class certification) as towering over the alleged “dearth of authority in this State, and in this Country, to support a contrary determination.” (Respondent’s Motion for Order Granting Partial Relief; and Motion to Dismiss Appellant’s Remaining Issue on Appeal, p. 3) The cases are also used to support Respondent’s claim that this Court cannot address the issue of disqualification since Respondent erroneously asserts there was no final determination on the issue of disqualification by the lower court.

First, Appellant has already demonstrated to this Court as shown above that the Circuit Court did make a final determination on disqualification; ***it ruled that it could not rule without Appellant providing specific confidential information.*** The Respondent is now willing to “consent” that ruling was in error, but does not want the Circuit Court given any guidance on how disqualification should be addressed without having the specific confidential information.

Second, Respondent’s entire argument is that, now that he “consents” the Circuit Court was in error, appellate jurisdiction no longer exists under Section 14-3-330(1). Without conceding that argument, Appellant has not contended that jurisdiction exists under Section 14-3-330(1) but rather under Section 14-3-330(2) and Section 14-3-330(4). Respondent presented no authority to refute, and hasn’t even argued against, Appellant’s position in response to the first motion to dismiss that appellate jurisdiction exists under 14-3-330(2) as affecting a substantial right.

Respondent's proposed authority does not address any of the substantial rights that are affected in the present case. In Peterkin, the Court ruled as part of its decision that the refusal to approve a settlement agreement did not prevent a judgment from being rendered, therefore it did not affect a substantial right under 14-3-330(2). Id. at 368, S.E.2d at 810. The Mid-State decision specifically notes in footnote 4 that the Court had previously ruled the denial of a motion to dismiss for lack of jurisdiction did not impair a substantial right. Id. at 336, S.E.2d at 781. Likewise, the Court in Knowles recognized that the Court had already determined that class certification was procedural in nature and did not involve substantial or essential legal rights. Id. at 59, S.E.2d at 49.

However, as Appellant demonstrated in the argument to the first motion to dismiss by Respondent, the Hagood court analyzed disqualification as a case of first impression just like the present case, and found that a ruling disqualifying a party's attorney does affect a substantial right and may be immediately appealed under Section 14-3-330(2). Id. The Court went on to hold specifically

**The right to be represented by an attorney of ones choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case. Moreover, the right to be represented by ones preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right.**

Id. Finally, the Court stated, "Deprivation of the right to ones preferred attorney **would affect the attorney-client relationship, which is extremely important in our adversarial system.**" Id. (emphasis added).

The Respondent's right of choosing his own attorney was exactly the reason cited by the Circuit Court as to why it was not able to rule on disqualification without giving

the Respondent the opportunity to refute the claim that its counsel possessed confidential information. (See p. 11-12 supra and Exhibit K, p. 7, ll. 19-24). However, now that Respondent is willing to “consent” this decision was error, despite the ruling of the Circuit Court that it could not make a decision without this information, Respondent again argues in support of its new motion to dismiss that the Circuit Court has made no ruling on the issue of disqualification and has not failed to apply certain case law because it hasn’t yet applied any law.

Appellant presented evidence to the Circuit Court that the prior representation and current representation were substantially related, but the Circuit Court refused to consider the evidence. Appellant presented the Affidavit of Scott Dodenhoff and a comparison of the pleadings of both cases, and then argued to the Circuit Court that the law to be applied in considering disqualification was expressed by the Supreme Court in Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996). (Exhibit C., p. 8, l. 12 – p. 10, l. 10, and Exhibit H, ¶ 2, 3 & 4).

At the hearing on Appellant’s Motion to Reconsider, Appellant attempted to point out that this particular situation is exactly why the Rule against representing an adversary to a former client in a substantially related case was written the way that it was written.

**In reading the Rule and the court’s analysis of that Rule as I can find, I believe that this particular situation is the reason the Rule is written the way that it is for lawyers. And I believe that it is the way – the reason that the court in the Rule put the qualification of substantially related being the determining factor of this case versus another case determining whether confidential information has been, could be, or will be used, but whether that the two types of cases are so similar in nature that the information that an attorney would obtain in that representation would necessarily, or most likely, or there would be a substantial risk, which is the language used in the Rule –**

(Exhibit K, p. 5, l. 18 – p. 6, l. 4)

After cutting Appellant's argument short, the Circuit Court stated **"You are just rehashing the argument you made before. I'm not going to throw somebody out based on – without some reason to do it."** (Exhibit K, p. 6, ll. 5-7). The Circuit Court refused to consider analyzing the evidence presented under the standard given by the Rules of Professional Conduct and the Supreme Court in Townsend, of looking at the facts of the two cases and determining if there would be a "substantial risk" that the counsel would have obtained confidential information.

Again, as an issue of first impression, this Court is free to take its own view of the evidence presented. Hagood. Appellant presents a detailed comparison on pages 37-40 of its initial brief previously filed with this Court, comparing the former representation and the current representation, which the Circuit Court would have seen had it been willing to look at the evidence offered and consider it pursuant to the appropriate "substantially related" test. The only evidence Respondent has offered to refute the cases being "substantially related" is the general contention that both cases were foreclosures but otherwise unrelated. The Circuit Court was presented the information to make a decision under the applicable standard but determined that it was impossible to rule under that standard without specific proof that confidential information had been exchanged.

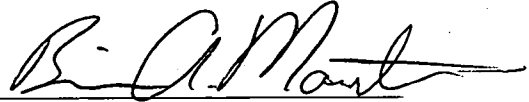
Based on the impact the order of the Circuit Court will have on the substantial right to maintain confidences and to the fair administration of justice, appellate jurisdiction is granted pursuant to S.C. Code § 14-3-330(2).

**CONCLUSION**

For the reasons stated above, together with Appellant's initial brief, Appellant's memorandum in opposition to respondent's motion to dismiss filed with the Court and the exhibits attached thereto and incorporated herein, the additional exhibits attached hereto and the applicable legal authority, Respondent's motion for Order granting partial relief and his second motion to dismiss must be denied. The Court should further examine these motions within the context of SCACR 269 as frivolous motions made solely for the purpose of delay and Order any other relief the Court deems necessary.

Respectfully submitted,

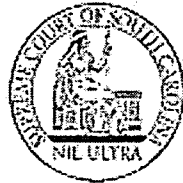
BRIAN A. MARTIN, LLC



Brian A. Martin  
SC Bar # 9791  
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(864) 879-7779

**ATTORNEY FOR APPELLANT**

Greenville, South Carolina  
April 29, 2014



**The Supreme Court of South Carolina**  
**OFFICE OF DISCIPLINARY COUNSEL**

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Disciplinary Counsel

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Assistant Disciplinary Counsel

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December 27, 2013

PERSONAL & CONFIDENTIAL

Scott Dodenhoff  
131 Sandpiper Lane  
Greenville, SC 29607

Re: Lawyer: M. Stokely Holder, Esquire  
Case Number: 13-DE-L-1116

Dear Mr. Dodenhoff:

This office previously informed you of its intent to dismiss the complaint you filed in connection with the above-referenced matter. You were given thirty days to submit your written request for a review of that decision. No request was received from you. Accordingly, the complaint in this matter is dismissed pursuant to the provisions of Rule 19(d)(1) of RLDE. As required by these rules, a copy of this letter is being sent to Mr. Holder as notice of the dismissal of this complaint.

Sincerely,

William C. Campbell

WCC/

cc: Brian Patrick Murphy, Esquire  
Counsel for Mr. Holder



The Supreme Court of South Carolina  
OFFICE OF DISCIPLINARY COUNSEL

Lesley M. Coggiola  
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December 27, 2013

PERSONAL & CONFIDENTIAL

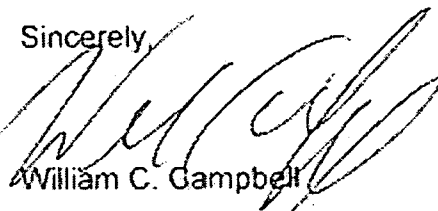
Scott Dodenhoff  
131 Sandpiper Lane  
Greenville, SC 29607

Re: Lawyer: John T. Crawford, Jr., Esquire  
Case Number: 13-DE-L-1115

Dear Mr. Dodenhoff:

This office previously informed you of its intent to dismiss the complaint you filed in connection with the above-referenced matter. You were given thirty days to submit your written request for a review of that decision. No request was received from you. Accordingly, the complaint in this matter is dismissed pursuant to the provisions of Rule 19(d)(1) of RLDE. As required by these rules, a copy of this letter is being sent to Mr. Crawford as notice of the dismissal of this complaint.

Sincerely,



William C. Campbell

WCC/

cc: Brian Patrick Murphy, Esquire  
Counsel for Mr. Crawford



**The Supreme Court of South Carolina**  
**OFFICE OF DISCIPLINARY COUNSEL**

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December 19, 2013

PERSONAL AND CONFIDENTIAL

Scott Dodenhoff  
131 Sandpiper Lane  
Greenville, SC 29607

RE: Lawyer: Townes Boyd Johnson, III, Esquire  
Case Number: 13-DE-L-1114

Dear Mr. Dodenhoff:

As we discussed, we have received and reviewed your complaint against Townes Boyd Johnson, III, Esquire. The authority of this office and the jurisdiction of the Commission on Lawyer Conduct concerning complaints against lawyers are limited to issues of whether a lawyer has committed misconduct or is incapacitated within the guidelines of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, adopted by the Supreme Court of South Carolina.

We find that the allegations you have raised as to Mr. Johnson would not constitute misconduct or incapacity under these rules. For this reason, your complaint is dismissed pursuant to the provisions of Rule 413-19(a), SCACR.

Sincerely,

*Tiffany Richardson*  
Tiffany N. Richardson

TNR/clg