

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case No. 2013-CP-23-1833

D& C Builders, Inc.Appellant,

v.

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

v.

Scott Dodenhoff, Third-Party Defendant

Of whom Richard M. Buckley is theRespondent.

RESPONDENT'S REPLY TO APPELLANT'S RETURN
TO RESPONDENT'S MOTION FOR ORDER GRANTING PARTIAL RELIEF; and
MOTION TO DISMISS APPELLANT'S REMAINING ISSUE ON APPEAL

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S.C. Code Ann. § 14-3-3304

OTHER AUTHORITIES

Rule 11, SCRPC1

COMES NOW, Respondent, Richard M. Buckley (“Buckley”), by and through his undersigned attorney, and files this Reply to Appellant’s Return (the “Appellant’s Return”) to Respondent’s Motion (the “Motion”) for Order Granting Partial Relief as Requested in Appellant’s Issues on Appeal Numbered I and II; and in Support of its Motion to Dismiss Appellant’s Issue Number III.

I. ARGUMENT

Appellant’s Return requests the denial of the Motion because “it would 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 the record reflects, the lower court has not ruled on the issue of disqualification. The Appellant acknowledges this otherwise readily apparent fact in its Return where it confirms that the lower court “[did] not determine disqualification”. See **page 4 of Return**. As the record also reflects, the lower court is who initiated the argument and subsequent order regarding those issues raised by Appellant for which the Respondent has offered his consent, to no avail. The Respondent did not request these rulings. In fact, the record reflects the *Respondent’s* request that the lower court *grant* the Appellant’s Motion to Reconsider the lower court’s Order regarding the injunctive relief and to issue a ruling on the underlying issue of disqualification. The lower court did not accept this request of Respondent. If the lower court had done so and actually issued an order in favor of Respondent on the Appellant’s request for disqualification, then the Respondent readily admits that the issue could properly come before this Court upon the final disposition of the case in the lower court. See **Appellant’s Exhibit J, p. 3**. The

record also reflects that, much like the Appellant's attempt to ambush Respondent with its Motion to Disqualify, the Appellant never made any effort under the spirit of Rule 11, SCRCF, to discuss these issues with Respondent prior to filing this appeal. The record also reflects that after the appeal was initiated, the Appellant rejected the good faith efforts made by Respondent to consent to relief requested by the Appellant.

Appellant's Return includes the serious yet wholly unsupported allegation that Respondent has filed the Motion at issue in a "frivolous" manner "solely for the purpose of delay". See **Return pp. 1-2**. Again, as the record reflects, the Motion at issue was filed only after the Appellant refused to accept the consent offered by Respondent to 2 of the 3 issues raised on appeal by the Appellant. If any attempts at frivolous delay have been initiated in this matter, it has not been that of Respondent.

The Appellant states in its Return: "[c]learly, 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." See **Return p. 8**. Not only does this statement enlighten the motives of Appellant in having this Court rule on an interlocutory matter, it is entirely based on a false premise and is further exemplary of a fundamental misunderstanding of the function of the lower court as compared to the function of this State's appellate court system. Due to the obvious fact that the lower court has not ruled in either the Respondent's or Appellant's favor on the underlying issue of disqualification, the conjecture initiated by the Appellant regarding the purported beliefs of Respondent on its chances of persuasion of one court versus another is void of logic, and perhaps indicative of not only

Appellant's own beliefs regarding its persuasiveness, or lack thereof, but also of Appellant's understanding and respect for the respective roles of this State's judiciary. The Respondent merely wants the lower court to issue an order on the issue of disqualification, which naturally must occur, *inter alia*, before this Court can assert its appellate role. The Respondent chooses not to respond in substance to the further unprofessional conjecture offered in the Return on what Appellant perceives as Respondent's intentions here, as the Respondent has full faith in this Court to use its learned discretion in understanding the true intentions being employed here, and the motives behind them.

Appellant's Return states that "there was a ruling by the lower court on the issue of disqualification for this Court to review." See **Return**, p. 4. Again, the record reflects the void of any such "ruling".

Appellant's Return requests the denial of the Motion because "both the bench and the bar are in need of clear direction from the Court in the application of the Rules of Professional Conduct." Out of respect for the sanctity of this Court, the undersigned purposefully did not notify this Court of the Office of Disciplinary Counsel's prior rulings in favor of Respondent's counsel. Now that Appellant has introduced these rulings to the Court¹, the Respondent respectfully suggests that these rulings speak for themselves. As is readily apparent in the Return, the vast majority of Appellant's voluminous argument is a higher pitched version of what has already been argued before the lower court and the Office of Disciplinary Counsel (the "ODC")- the result of which is just one substantive ruling, that of the ODC. The record now reflects that the Office of

¹ Notably, these rulings were not appealed despite notice to Appellant of its right to do just that.

Disciplinary counsel is the only entity that has ruled on the underlying issue. Rather than properly appealing that ruling, the Appellant has initiated this Appeal with, in conjunction with the noticeable void of authority in support thereof, its increasingly perspicuous motives to try and disparage Respondent's counsel in hopes of using the threat thereof to leverage a positive outcome for itself on the seminal (unripe) issue of disqualification. The attempts to cloak such personal motives as a "novel" issue and "a case of first impression" evidence the Appellant's palpable desire to not only get continuing (untimely) bites at the apple but to present this unripe issue in a (false) light in an effort to gain leverage with the threat of publication of what the Appellant and its counsel obviously take pleasure in viewing as a threat to the professional standing of Respondent's counsel. Why else would the Appellant and its counsel be so adamantly opposed to accepting the consent offered by the opposing party to the relief *the Appellant, itself*, has requested?

Appellant's Return requests the denial of the Motion because "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)." The prior order of this Court, and specifically the limited grounds provided therein, speaks for itself. And, insofar as the remaining issue on appeal is concerned (that being disqualification- in light of Respondent's consent to the other relief requested by Appellant in its appeal) what remains glaring is the dearth of authority in support of this Court being able to hear an appeal of an issue that has not been the subject of a definitive order from the lower court.

II. CONCLUSION

Based on the arguments heretofore made together with the precedential authority in South Carolina relevant to the issues addressed herein and the overriding fundamental principles of judicial economy, the Respondent respectfully requests an Order from this Court granting the Respondent's Motion.

Respectfully Requested,



May 9th, 2014

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Appellate Case No. 2013-001645
(Trial Court Case No. 2013-CP-23-1833)

D& C Builders, Inc.Appellant,

v.

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

v.

Scott Dodenhoff, Third-Party Defendant

Of whom Richard M. Buckley is theRespondent.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Reply to Appellant's Return to Respondent's Motion for Order Granting Partial Relief; and Motion to Dismiss Appellant's Remaining Issue on Appeal in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States mail, first-class postage prepaid this 9th day of May, 2014, addressed as follows:

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May 9; 2014

Hon. Jenny Abbott Kitchings
Clerk of Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: *D&C Builders, Inc. v. Richard M. Buckley, et al.*
Of Whom Richard M. Buckley is the Respondent
Appeal from Greenville County
C.A. No.: 2013-CP-23-1833
Appellate Case No.: 2013-001645

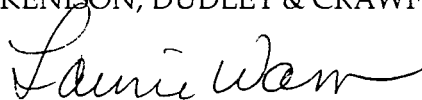
To Whom It May Concern:

Please find enclosed the original and six (6) copies of Respondent's Reply to Appellant's Return to Respondent's Motion for Order Granting Partial Relief and Motion to Dismiss Appellant's Remaining Issue on Appeal, with Proof of Service in the above referenced matter. By copy of this letter, we are serving one copy of each upon all counsel of record.

Thank you for your assistance in this matter and please do not hesitate to contact our office if you have any questions.

Very truly yours,

KENISON, DUDLEY & CRAWFORD, LLC



Laurie Warren
Legal Assistant

/lkw

Enclosures

cc: Brian A. Martin, Esq.
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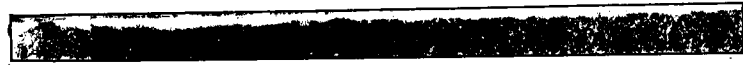
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