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
(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 is the .....Respondent.

AMENDED INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On February 10, 2013, the Appellant via Third-party Defendant, Scott Dodenhoff, executed and served a Mechanic's Lien on Respondent Richard M. Buckley, and filed the same the following day. ***[Mech. Lien]*** On April 1, 2013, the Appellant filed a lawsuit against Respondent for the foreclosure of the previously filed Mechanic's Lien. ***[Appellant Lawsuit]***

On May 13, 2013, the undersigned attorney, M. Stokely Holder, of the law firm of Kenison, Dudley & Crawford, LLC (the "KDC firm") filed a Motion to Dismiss, and an Answer together with Counterclaims and Third-Party Claims on behalf of Respondent. ***[2013 Action]***

On May 29, 2013, Appellant's counsel called Respondent's counsel and stated that the KDC firm has a conflict of interest as a result of merely previously representing Appellant in a separate matter. The KDC firm disagreed on the basis that the two cases were entirely separate and distinct. Appellant's counsel refused to agree that a law firm

that previously represented a client in one matter can later represent a separate client in a subsequent matter who is adverse to the previous client, regardless of whether the two matters are entirely unrelated. The KDC firm made it clear to Appellant's counsel that should Appellant advise the KDC firm of any specific information that it contends creates the conflict (to which the KDC firm was otherwise unaware), then the KDC firm would reconsider.

Thereafter, the KDC firm consulted with separate counsel to obtain advice regarding the Appellant's allegations. As a result, the KDC firm again determined that no conflict of interest existed.

Respondent's Motion to Dismiss was scheduled for a hearing on June 20, 2013. The day prior, June 19, 2013, the KDC firm called and left a message with Appellant's counsel reminding him of the change to the hearing time. The KDC firm also explained to Appellant's counsel that despite not having heard from him again in close to a month regarding any conflict of interest issues, the KDC firm would still be glad to discuss it with him should he still be of the opinion that a conflict exists. Hours later after the close of business, Appellant's counsel responded by email stating that he had received Respondent's message but it has been a busy day. ***[Transcript 7/8/13 Hearing]***

Not once in the lengthy period of time between the hearing and when Appellant's counsel made the above described call to the attorneys of the KDC firm, even including the 15 minutes prior to the hearing when Appellant's counsel spoke with the KDC firm attorney representing Buckley at the hearing (attorney F. Lee Prickett, III), did Appellant's counsel discuss the conflict of interest issue. Yet, as soon as the hearing on Buckley's

Motion to Dismiss began, Appellant's counsel presented to the court and the KDC firm for the first time his previously filed Motion to Disqualify together with an affidavit of Dodenhoff (both alleging improprieties against the KDC firm and its attorneys) that had been prepared at least one week before the hearing. ***[Transcript 6/20/13 Hearing]*** The court decided to hold the Respondent's Motion to Dismiss in abeyance pending the proper scheduling and hearing of Appellant's Motion to Disqualify. *Id.*

Judge Edward W. Miller then presided over the Motion to Disqualify. ***[Transcript 7/8/13 Hearing]*** The basis of Appellant's motion was that by virtue of the KDC firm merely representing Appellant in a lawsuit filed in 2011 for the foreclosure of a mechanic's lien on a commercial construction project (the "2011 Action"), it had a conflict of interest in representing Respondent in this "2013 Action" against Appellant. ***[Id.]*** As discussed in detail herein, this 2013 Action stems from a mechanic's lien filed by Appellant on what Respondent alleges to be an entirely unrelated residential construction project.

On Monday, July 15, 2013 at 4:54 PM, Judge Miller emailed all counsel of record and stated that a proposed order previously submitted by Respondent had been signed and filed. ***[7/15/13 4:54pm Email]*** The Order issued by Judge Miller specifically stated that Appellant's Motion to Disqualify shall be held in abeyance, and further ordered Appellant to submit a privilege log to the lower court, under an order of protection, containing the specific information and knowledge it contends the KDC firm acquired through its prior representation of Appellant which it alleges will injuriously affect Appellant in this action. ***[July 15, 2013 Order]***

Shortly after the lower court's aforementioned 4:54 PM email, at 5:13 PM on the same day, Judge Miller's law clerk sent an email to all counsel apparently by mistake stating that "Judge Miller has asked me to check on the status of this case and whether a ruling is necessary for temporary injunction. If you could please let me know, that would be great." ***[7/15/13 5:13 PM Email]*** This email, albeit apparently sent by mistake, was the first reference by anyone to any injunction. ***[Id.]*** In response, Respondent's counsel emailed the law clerk with copy to all counsel advising the law clerk of the prior email and order from Judge Miller making clear the issues had been ruled on by the Judge. ***[Email 7/15/13 5:21 PM]***

Appellant's counsel then responded the following day by email attaching its "Motion to Reconsider, Clarify and Amend Order to Issue Injunction" together with its associated argument to the lower court that it was thereby, as it had allegedly repeatedly done to that date, seeking an injunction to prohibit Respondent or the KDC firm "from seeing whatever the Judge is requesting that we provide, so that client confidences are not compromised." ***[7/16/13 Email]*** The Appellant's "Motion to Reconsider, Clarify and Amend Order to Issue Injunction" requested the injunction on the following narrow grounds: "that the Court enjoin Defendant and Defendant's Counsel from reviewing or accessing such confidential information being provided for the Court's review pursuant to such Order." ***[Motion to Reconsider]***

In response to Appellant's email and Motion, the lower court responded by questioning the basis of Appellant's position and providing further guidance by making clear that Appellant had not been ordered to disclose new information which had not been

previously disclosed to the KDC firm, "only information which he claims is confidential which he has previously disclosed to the KDC firm." ***[July 17, 2013 Email]*** In written response, Appellant's counsel offered several hypotheticals in objection to the Judge's instructions and concluded by suggesting to the lower court that Appellant may "request and obtain an advisory opinion from the Ethics Commission on the situation ... I believe that obtaining such guidance in light of the ethical complexities would be very beneficial". ***[July 18, 2013 Email]*** Respondent's counsel responded by email and letter outlining its opposition to the Appellant's position regarding disqualification, but also by requesting the lower court to partially grant the Appellant's Motion to Reconsider (by not requiring any privilege log at all) so that the lower court could then issue a dispositive order on the Motion to Disqualify. ***[July 18, 2013 Email and Letter]***

The lower court then scheduled a hearing on Appellant's "Motion to Reconsider, Clarify and Amend Order to Issue Injunction". On the hearing date, the lower court denied the Appellant's Motion and instructed Appellant to issue the privilege log by Friday, July 26, 2013. ***[Order July 25, 2013]***

On July 25, 2013, Appellant filed a Notice of Appeal making clear that it was "appeal[ing] the Order of the Honorable Edward W. Miller dated July 15, 2013 and filed July 16, 2013, ***requiring Appellant to provide specific confidential information to Counsel for Respondent*** in support of Appellant's ***pending*** Motion to Disqualify Counsel for Respondent." ***[Notice of Appeal (emphasis added)]***

STATEMENT OF FACTS

The Respondent is 84 years old. ***[2013 Action]*** The Appellant was contacted in late 2011 by Matt Buckley, the son of Respondent, whereby the Appellant was informed of Respondent's desire to improve the residence on his property. ***[Id.; Transcript 7/8/13 Hearing]*** Third-Party Defendant, Scott Dodenhoff, was the individual who dealt primarily with the Respondent and the representatives of Respondent (Matt Buckley and his wife/Respondent's daughter-in-law, Pamela Burns-Byers Buckley) regarding all aspects of the Project at issue on behalf of Appellant. ***[Id.; Affidavit of Buckley]***

Prior to the facts giving rise to the claims at issue, Dodenhoff and Matt Buckley were lifelong friends. ***[Id.]*** Upon first contacting Dodenhoff, Matt Buckley informed Dodenhoff of the facts giving rise to the Respondent's desire to improve the Property. ***[Id.]*** As communicated to Dodenhoff in late 2011, the facts giving rise to the Respondent's desire to improve the Property were as follows:

(a) the Property had been the location of Respondent's and Respondent's wife's primary residence for the past forty-four (44) years at that time;

(b) the Respondent was at that time, and remains so today, elderly and in declining health;

(c) the Respondent's wife of more than sixty (60) years ("Frances Buckley") was elderly and in poor health;

(d) the Respondent was the sole caretaker for his elderly and sick wife;

(e) the Respondent's wife desired to spend her remaining days with the Respondent at their residence on the Property;

(f) the Respondent desired for his wife of over 60 years to spend her remaining days alongside him at their residence on the Property;

(g) the Respondent felt he was no longer physically able to care for his wife by himself at their residence on the Property and he needed help in order to satisfy their joint desire to have her spend her remaining days at their residence together;

(h) the Respondent contacted his son and daughter-in-law, Matt and Pamela Buckley, explained the above to them and reluctantly asked for their assistance;

(i) the Respondent asked Matt and Pamela Buckley if they would agree to move their family of six (6) from Charleston, South Carolina to the residence on the Property in order to help the Respondent and Frances Buckley through the remaining days of their lives (the Respondent, his wife and the family of Matt and Pamela Buckley, collectively hereinafter: the "Buckleys");

(j) the Respondent told Matt and Pamela Buckley that he and his wife would be willing to obtain a loan against the remaining equity in the Property in order to construct improvements thereon to allow the space necessary for Matt and Pamela Buckley's family to move in; and

(k) Matt and Pamela Buckley agreed to the Respondent's request.

[Id.]

In 2011, the Respondent initiated contact with his bank, Defendant Wells Fargo Bank ("Wells Fargo"), to determine the maximum loan amount he could obtain against the equity in the Property in order to use such loan monies for the construction of improvements thereon. ***[2013 Action]*** The Respondent received confirmation from Wells Fargo that Wells Fargo would lend $78,000.00 to Respondent via a home equity line of credit. ***[Id.]***

Thereafter, Matt Buckley contacted Dodenhoff to determine if Dodenhoff would in fact agree to make the certain improvements to the residence on the Property according to the plans and specifications of the Respondent and under the facts as aforesaid, and in hopes that the Buckleys could all reside together in the completed house prior to either of

Frances Buckley or Richard Buckley passing away. ***[Id.]*** Matt Buckley explained to Dodenhoff that the maximum amount of money that could be spent for the improvements was the $78,000.00 in loan funds that the Respondent had been approved for. ***[Id.]***

In late 2011, Dodenhoff told the Buckleys that Appellant could construct the Project as aforesaid for that maximum possible amount under a cost plus 10% basis. ***[Id.]*** In or about January 2012, Respondent entered into an agreement with Appellant via Dodenhoff (the "Contract") whereby the Appellant agreed as follows:

a) to construct improvements to the residence on the Property according to the specifications and design of the Respondent (the "Project");

b) to construct the Project on a cost-plus 10% basis with a guaranteed maximum possible amount of $78,000.00; and

c) to construct the Project by the end of July 2012, time is of the essence.

[Id.]

Upon the Appellant's initiation of work on the Project in January 2012, Dodenhoff physically appeared on-site to supervise and coordinate the work on the Project pursuant to his obligations as the purported general contractor for the Project. ***[Id.]*** As construction on the Project progressed beyond January 2012, Dodenhoff repeatedly failed to physically appear on-site at the Project to supervise and/or coordinate the work on the Project. ***[Id.]*** The Appellant hired unqualified and unlicensed contractors to perform work on the Project. ***[Id.]***

After construction was initiated on the Project, the Appellant would not bill the Respondent for consistent periods of time. ***[Id.]*** As the deadline for the completion of the Project approached in mid-2012, Frances Buckley died. At this same time, the Appellant began to send more billing information to the Respondent. ***[Id.]*** The bills that Appellant

ultimately sent to the Respondent were outdated, not truthful representations of the work completed and not in accordance with the Contract, as though Dodenhoff did not think the Appellant or the Buckleys would realize the discrepancies at a time when they were dealing with the loss of Frances Buckley. ***[Id.]***

The cumulative amount of the alleged debt represented by Appellant in all of the bills ultimately produced by Appellant to Respondent was in excess of the Contract amount. ***[Id.]*** Yet, the Appellant and the Respondent did not agree to any amendment to the amount or nature of the Contract, such that any debt alleged by Appellant in excess of the guaranteed maximum possible amount of $78,000.00 is unjustified. ***[Id.]***

To compound matters, after construction was initiated on the Project, and amid the Buckleys' concerns regarding the quality and oversight of the work being performed, together with the billing practices of Appellant, the Buckleys made attempts to contact Appellant to determine the status of construction and to discuss the Buckleys' issues with Appellant's construction of the Project, including the quality, conformity to the Respondent's design and specifications, evidence of costs, and timeliness of construction, many times to no avail as Dodenhoff was rarely in town and rarely on the Project site during the majority of Appellant's construction of the Project. ***[Id.]***

Despite being provided adequate notice and opportunity to cure the various construction defects plainly apparent on the Project, the Appellant has failed to do so. ***[Id.]*** Despite being provided adequate notice and opportunity to produce the backup information to support the costs Appellant has represented as being incurred for the Project, the Appellant has failed to do so. ***[Id.]*** Despite being provided adequate notice and opportunity

to cure the various work of Appellant which is not in conformance with the plans and specifications for the Project, the Appellant has failed to do so. ***[Id.]*** Despite adequate notice of the foregoing, the Appellant unilaterally ceased construction on the Project in October 2012 and has never returned to the Project. ***[Id.]***

Yet, on February 10, 2013, the Appellant – to the further shock and dismay of the Buckleys - served the Mechanic's Lien on Respondent and then filed the underlying lawsuit. ***[Mech. Lien]***

On or about March 19, 2013, attorney Jack Heckman called the undersigned, M. Stokely Holder, of the KDC firm and explained to attorney Holder that attorney Heckman had been contacted by Respondent and his family to see if attorney Heckman would represent Mr. Buckley in the above captioned matter. ***[Affidavits of Attorneys Holder, Heckman]*** Attorney Heckman explained to Attorney Holder that the Buckleys called him because of a mutual friend he shared with Matt Buckley, Respondent's son. ***[Id.]*** Attorney Heckman told attorney Holder that he had explained to the Buckleys that he does not typically handle construction litigation matters but that he would refer them to attorney Holder who he knew to handle these types of matters. ***[Id.]*** Attorney Heckman asked attorney Holder if the KDC firm would be interested in representing Buckley, and attorney Holder told him that his firm would be glad to speak with the Buckleys once he was able to run a conflict check. ***[Id.]*** At no time during any conversation with attorney Heckman was the KDC firm made aware by attorney Heckman or the Buckleys of any prior representation of the Appellant by the KDC firm. ***[Id.]***

Upon the KDC firm running a standard conflict check, attorney Townes B. Johnson, III, and attorney John T. Crawford, Jr., both of the KDC firm, disclosed that they had previously represented D&C Builders, Inc. on a standard mechanic's lien foreclosure matter whereby D&C Builders, Inc. had hired attorney Crawford to file a lien and foreclosure matter on behalf of D&C Builders, Inc. ***[Affidavits of Attorneys Crawford, Johnson, Holder]*** Attorneys Johnson and Crawford explained that they assisted with the litigation surrounding the claim and that it was resolved amicably. ***[Id.]*** The KDC firm concluded that the two matters were not substantially related and that no conflict existed. ***[Id.]***

Based on the conclusion reached by the KDC firm that no conflict of interest exists, attorney Holder agreed to a consultation with the family of Buckley, including Buckley's daughter-in-law and authorized agent, Pamela Buckley. ***[Affidavit of Attorney Holder]*** Prior to discussing anything with any of the Buckleys, no one at the KDC firm had ever met them or spoken to any of them before about anything. ***[Affidavits of Attorneys Holder, Crawford, Johnson]***

Upon first discussing the matter with Mrs. Buckley, attorney Holder explained to her that the KDC firm had previously represented D&C Builders, Inc. in a matter that it understood to be completely separate and unrelated to the issue at hand. ***[Affidavits of Buckley, Attorney Holder]*** At that very time, Mrs. Buckley explained that Scott Dodenhoff (the Appellant's authorized agent) had, without being prompted in any way, voluntarily talked at great lengths to the Buckleys during the project at issue about a lawsuit that he was involved with at that time against who he described disparagingly to the

Buckleys as "the Germans". ***[Id.]*** Mrs. Buckley explained to the KDC firm that Mr. Dodenhoff had spoken to the Buckleys in particular about how that lawsuit had impacted him and his company, the Appellant, financially and how important the Buckley job was to them. ***[Id.]***

The. Buckleys further explained to the KDC firm how Mr. Dodenhoff was Matt Buckley's childhood friend and, prior to the facts and circumstances giving rise to the underlying claims, his lifelong friend. ***[Id.; 2013 Action]*** The Buckleys explained to the KDC firm that, as such, Mr. Dodenhoff spoke with Matt Buckley on a very frequent basis about a myriad of matters, including, without limitation, the ongoing business of both Appellant, D&C Builders, Inc., and Mr. Dodenhoff. ***[Id.]*** The Buckleys told the KDC firm that Mr. Dodenhoff frequently shared detailed information with the Buckleys regarding the corporate structure and financial status of Mr. Dodenhoff and his company, which they did not think was very strange because of Mr. Dodenhoff's relationship with the Buckleys and Mr. Dodenhoff's known propensity to openly discuss his financial status and affairs. ***[Id.]***

The Buckleys explained to the KDC firm that they were unaware that the KDC firm had previously assisted Mr. Dodenhoff with the prior lawsuit that he had discussed at length with them. ***[Affidavits of Buckley, Attorney Holder]***

An Answer, Counterclaims, and Third-Party Claims together with a Motion to Dismiss was filed by the KDC firm on behalf of the Buckleys. ***[2013 Action]*** Appellant filed its Motion to Disqualify. The KDC firm again reviewed the matter and again sought the assistance of outside counsel, and again reached the same conclusion that no conflict existed. In opposition to the Appellant's Motion to Disqualify, affidavits were filed by

attorneys Holder, Heckman, Crawford and Johnson; and Mrs. Buckley filed an affidavit on behalf of the Buckleys. ***[Affidavits of Attorneys Heckman, Crawford, Johnson, Holder and Affidavit of Buckley]***

During the course of oral and written argument to the lower court in conjunction with Appellant's Motion to Disqualify, Appellant repeatedly *alleged* that the two matters are substantially related and that the KDC firm obtained confidential factual information from Appellant in the 2011 Action that will be used by the KDC firm in the 2013 Action to advance the interests of Respondent. ***[All Hearing Transcripts]*** However, when Judge Miller requested what the specific confidential information could be (as the affidavit testimony of the Buckleys showed that the Appellant itself had shared detailed information with the Respondent about not only what the Appellant was now complaining about as far as the corporate structure, finances and operation of Appellant but also details about the 2011 Action), Appellant could not articulate any specific information in support thereof. ***[Id.]*** Strikingly, the Appellant did not even produce one document from the 2011 Action in support of its position. Instead, the Appellant argued that it should not be required to submit the purported confidential information pursuant to a comment to Rule 1.9 of the SC Rules of Professional Conduct. ***[Id.; Email and Letter Correspondence from Appellant's Counsel to Lower Court]***

Strangely, yet glaringly, Appellant further argued that upon any such submission to the lower court, it may be determined that the information is not, in fact, confidential between Appellant and the KDC firm because it may end up being a case of such information not having been previously provided to the KDC firm. ***[July 11, 2013 email]***

The Appellant also represented to the lower court that Appellant understood the lower court had not ultimately ruled on the Motion to Disqualify. ***[July 11, 2013 Ltr, p. 6 ("Finally, in the event that the Motion to Disqualify is ultimately denied,...)]***

Respondent responded to the wavering assertions of Appellant by stating via sworn affidavit testimony that the two cases were not factually related in any way and, importantly, by making clear that there existed no confidential factual information obtained in the 2011 Action that could be used in this action against the interests of Respondent because: (1) the KDC firm did not recall obtaining any confidential information in the 2011 Action; (2) the information obtained in the 2011 Action was a matter of public record; and, notably, (3) the Appellant itself had previously and voluntarily disclosed *to Respondent* extensive information and details about: (a) the 2011 Action; (b) the financial status of the Appellant; (c) the impact the outcome of the 2011 Action would have on the financial status of Appellant; (d) the corporate structure of Appellant; (e) the ongoing operations of the Appellant; (f) the authorized representative of the Appellant and their authority; and (f) the details of the ongoing legal matters of the Appellant – all of which it claims forms the basis of the 'conflict'. ***[Hearing Transcripts; Affidavits of Buckley, Attorneys Holder, Crawford, Johnson]*** The Respondent confirmed via sworn testimony that the claims and assertions brought by Respondent in this 2013 Action are all based on the knowledge of factual information gained solely through Respondent's personal dealings with Appellant and not through Respondent's subsequent relationship with the KDC firm. ***[Id.]***

The Respondents have remained anxious to resolve the underlying dispute with the counsel of their choosing. Perhaps in recognition of the damning underlying facts, the Appellant has repeatedly delayed the inevitable litigation of the claims. This appeal, including the lack of support for the timeliness and substance of same - as described herein, together with the Appellant's other failed bites at the apple on the same issue in different forums evidences not only the Appellant's obvious desire to delay the resolution of the claims against it but also the palpable, inexplicable desire of Appellant to further damage the Respondent, and to attempt to harm the reputation of the KDC firm.

ARGUMENT

I. DID THE LOWER COURT ERR IN ORDERING APPELLANT TO REVEAL TO THE LOWER COURT AND TO RESPONDENT'S COUNSEL THE SPECIFIC INFORMATION THAT APPELLANT HAS ONLY GENERALLY ALLEGED TO BE INFORMATION PREVIOUSLY PROVIDED BY APPELLANT TO RESPONDENT'S COUNSEL WHICH ALLEGEDLY SUBSTANTIATES APPELLANT'S REQUEST FOR DISQUALIFICATION?

The following argument of Respondent should not be considered a waiver of its position as described below regarding the timeliness/ripeness of Appellant's appeal of this issue.

This narrow issue involves an instruction from the lower court that was never requested by Respondent. ***[Transcripts of Lower Court Hearings]*** While the Respondent certainly understands the position of the lower court and the fundamental fairness associated with the due process aspects attendant thereto, the Respondent, as evidenced by its representations to the lower court, requested that the lower court grant the Appellant's Motion to Reconsider as it pertained to the lower court's instructions to Appellant to submit a privilege log. ***[Email and Letter July 18, 2013]*** In other words, the Respondent

requested that the lower court rescind that portion of its Order requiring the Appellant to submit a privilege log. ***[Id.]*** In so requesting, the Respondent was hopeful the lower court would agree and then issue an order on the main issue of disqualification, so as to expedite the resolution of this matter. ***[Id.]*** Instead, the lower court denied the Appellant's Motion to Reconsider. ***[Order July 25, 2013]***

Subject to only this Court's dismissal of the remaining issues on appeal or this Court's affirmation of the lower court on same, the Respondent remains willing to consent to the relief requested by Appellant on this issue.

II. DID THE LOWER COURT ISSUE A DISPOSITIVE ORDER DENYING THE APPELLANT'S MOTION TO DISQUALIFY?

It remains abundantly clear from the entire record on appeal, to include, without limitation, the transcripts and the Appellant's own representations to both the lower court and to *this court* that the lower court never issued a dispositive order on the issue of whether Respondent's counsel should be disqualified. ***[Transcripts of all Lower Court Hearings; all Correspondence between Counsel and/or the Lower Court; all Orders of the Lower Court]***

The Order of the lower court states in no uncertain terms that "**the Plaintiff's Motion [to Disqualify] shall be held in abeyance.**" ***[7/15/13 Order, p. 3(emphasis added)]*** The Appellant's separate correspondence to the lower court states that "***in the event that* the Motion to Disqualify is ultimately denied...**" ***[App. Ltr 7/11/13, p. 6(emphasis added)]*** The Appellant also provided the lower court and this Court with its Notice of Appeal which clearly states that it was appealing "the Order of the [lower court] requiring Appellant to provide specific confidential information to Counsel for Respondent

in support of Appellant's **pending motion to Disqualify Counsel for Respondent**." ***[Id.; Notice of Appeal (emphasis added)]*** Not that stating the obvious is necessary, as the record remains clearly void of any ruling on the Motion to Disqualify, the Appellant has continuously acknowledged this glaring fact by repeatedly stating that the Motion to Disqualify was held in abeyance by the lower court pending receipt of this information.

A. IF NOT, IS THE APPEAL OF THIS ISSUE RIPE?

As was outlined in the recent South Carolina Supreme Court opinion in the case of Enersys Delaware, Inc. v. Hopkins, 401 S.C. 615, 738 S.E.2d 478 (2013):

> "The right of appeal arises from and is controlled by statutory law." Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). Generally, a party may only appeal from a final judgment, and piecemeal appeals should be avoided because most errors can be corrected through a new trial. Id. at 194–195, 607 S.E.2d at 708. Whether an order issued prior to or during trial is immediately appealable is governed primarily by Section 14–3–330 of the South Carolina Code (1979 & Supp.2012). Id. at 195, 607 S.E.2d at 708.
>
> Section 14–3–330 provides this Court with appellate jurisdiction over:
>
> > (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided,* that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
> > (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
> > (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
> > (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or

> granting, continuing, modifying, or refusing the appointment of a receiver.
>
> Accordingly, an order must fall within one of the enumerated subsections to be immediately appealable. State v. Wilson, 387 S.C. 597, 600, 693 S.E.2d 923, 924 (2010).

Enersys Delaware, Inc. v. Hopkins, at 616-617, 738 S.E.2d at 479 (emphasis in original).

Moreover, South Carolina law is clear that "[n]o order is final until it is written and entered." Corbin v. Kohler Co., 351 S.C. 613, 620, 571 S.E.2d 92, 96 (Ct.App.2002); Simpson v. Simpson, 377 S.C. 519, 525, 660 S.E.2d 274, 277 (Ct. App. 2008). The lower court has not issued any order on the ultimate issue of disqualification that could in any way fall within any of the four enumerated subsections provided for by Statute. Therefore, the Appellant's attempt to have this Court rule on the issue of disqualification is not ripe.

The afore-referenced Enersys case is perhaps the most analogous appellate case in this State to the current issues in the case at hand. Notably, in the Enersys case, the issue of appellate jurisdiction was related solely to the lower court's dispositive ruling ***(denial)*** on a motion to disqualify, where after the appeal was immediately taken without the case having first reached final judgment in the lower court. So, as in the Enersys case, the focus of the issue regarding appellate jurisdiction in this case centers on S.C. Code Ann § 14-3-330(2). See Id. at 617, 738 S.E.2d at 479 ("Thus, we must determine whether the order denying the disqualification of an attorney affects a substantial right such that the order is immediately appealable under subsection (2).") The Appellant appears to concede that this particular contention in its appeal is governed by this subsection 2.

The glaring difference between the Enersys case and this case is that the lower court in Enersys actually issued a dispositive order on the motion; whereas, here, no such

order has been rendered. **Even still, in the Enersys case, the court held that there was no appellate jurisdiction because the order denying the motion to disqualify was not 'an order affecting a substantial right'**. See Id. at 617-619, 738 S.E.2d at 479-480.

Like the Enersys case, the Appellant here argues that the Respondent's attorneys have learned confidences from its prior representation of Appellant which could be shared in its current representation of Respondent. Notwithstanding the void in evidence to substantiate such a position (and the void of an actual lower court ruling- either via grant or denial of the motion), the courts of this State have established that even if a lower court denied a motion based on that very argument, no substantial right would be affected to trigger immediate appellate jurisdiction under S.C. Code Ann § 14-3-330. Enersys at 617-619, 738 S.E.2d at 479-480.

The reasons provided by the courts of this State for this position is that the ostensible danger posited in motions such as the one at issue can be redressed equally as well after trial as through an immediate appeal. Id. Moreover, the party originally moving for the disqualification may find through the course of litigating the case to completion in the lower court that an appeal is not necessary. Id.

The same rational provided by the Enersys court can be applied to the situation at hand as it pertains to the Appellant's contentions regarding the lower court's order and requirement to produce a privilege log, especially considering the fact that the lower court was explicitly clear in its order that any such production would be subject to a protective order. As with this State's established position on the related issue of whether a direct appeal on a court's denial of a motion to disqualify is subject to immediate

appellate jurisdiction, the lower court's ordering the production of a privilege log to Respondent in the same context should also be viewed in the same light. The effect of a ruling to the contrary – allowing such a lesser issue as this to be subject to immediate appellate jurisdiction - would undermine the logic outlined by this State's appellate courts in cases such as Enersys, *et al.* by allowing the piecemeal appellate practice that it intended to preclude. As with the aforementioned greater issue addressed by the Enersys court, the ostensible danger posited by Appellant on this privilege log issue can be redressed equally as well after trial as through an immediate appeal. Enersys at 617-619, 738 S.E.2d at 479-480. Likewise, the Appellant (with the security of the lower court's explicit protective order) may find that an appeal is not necessary after the course of litigating the case to completion in the lower court. Id.

B. IF SO, DID THE LOWER COURT COMMIT ERROR?

The Respondent submits this argument without waiving any other argument of Respondent regarding the validity or ripeness of such an issue on appeal.

By framing its third issue on appeal as it did ("The Circuit Court erred in failing to find that the matters involved in the prior representation and current representation were "substantially related" and disqualify Respondent's Counsel"), the Appellant appears to contend the lower court actually issued an order finding the 2011 Action and the 2013 Action were not substantially related (completely contradicting the numerous other representations Appellant has made regarding the void of any such order). That is the premise behind the Appellant's entire argument in support of its third issue on appeal.

However, again, the entire record on appeal does not support this contention. It is telling that the Appellant concedes that it is Appellant's position that a decision *should be made* based on the cases being substantially related and the likelihood that the Kenison Firm obtained confidential information rather than requiring disclosure of specific confidential attorney/client communication. So, per the Appellant's own admission, the lower court has not even issued an order on the issue.

In order to present the perceived issue as though it is otherwise ripe for appeal as a matter affecting a substantial right of a party (despite the clarity of the Enersys opinion concluding otherwise on the exact same issue), the Appellant has gone to great lengths in what it must feel is its free bite at the apple, to date, to frame the issue of disqualification as an ethical issue. The Appellant's arguments asserting the two actions are substantially related and that the KDC firm obtained confidential information in the 2011 Action that it has used, or may use, to the disadvantage of Appellant in the 2013 Action form the basis of Appellant's claim of ethical malfeasance.

Interestingly, this is how the Appellant framed the same issue to the lower court when it stated in writing to the lower court that it may "request and obtain an advisory opinion from the Ethics Commission on the situation ... I believe that obtaining such guidance in light of the ethical complexities would be very beneficial"1. ***[July 18, 2013 Email]***.

Rule 1.9(a) of the South Carolina Rules of Professional Conduct is inapplicable here due to, *inter alia*, the failure of the Plaintiff to prove the two matters are "substantially

1 Of course, the timing of this statement to the lower court – being after the lower court's order was issued – further highlights the fact that the lower court never ruled on the Motion to Disqualify.

related".2 Rule 1.9(c) provides, in pertinent part:

> "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use the information relating to the representation to the disadvantage of the former client **except ... when the information has become generally known**".

Furthermore, Comment 2 to Rule 1.9 provides, in pertinent part:

> The scope of a "matter" for purposes of this Rule may **depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree.** When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. **On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. ... The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.**

Further still, Comment 3 to this Rule provides, in pertinent part:

> ... **Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. ... In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation;** on the other hand, **knowledge of specific facts gained in a prior representation that are relevant to the matter in question** ordinarily will preclude such representation.

The KDC firm did not violate the Rules of Professional Conduct. The two cases at issue are not substantially related. ***[Pleadings in 2013 Action, Hearing Transcripts, All Affidavits]*** They are entirely separate and distinct situations/transactions with entirely distinct facts. ***[Id.]*** The only similarity is that they both involve mechanic's liens and the

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2 The opinion rendered by the South Carolina Supreme Court in the *Townsend* case referenced by Appellant specifically states that the Supreme Court's discussion in that case on the issue of Conflict of Interest "applies only to attorney guardians ad litem in child custody and support actions." *Townsend v. Townsend*, 323 S.C. 309, 315, 474 S.E.2d 424, 428 (1996). This is far from such an action.

same standard defenses you see in virtually all such contested claims – albeit the liens are on different properties, against different owners, in different industries (commercial versus residential), securing different alleged debts and arising from completely unrelated facts. ***[Id.]*** Likewise, there is no evidence to support Appellant's claim that the KDC firm obtained confidential information from its prior representation of Appellant that it could now use against Appellant. ***[Id.]*** What remains clear is that the Appellant allowed the information it has complained about[3] to be generally known – to (at a minimum) *the Defendant/Respondent in this action.* As for the extremely general references/complaints made by Appellant to the lower court regarding what Appellant deems to be the "confidential information" at issue, the affidavits provided on behalf of Respondent completely and categorically reject the slightest notion that the same so-called confidential information was ever held in confidence by Appellant.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court affirm the lower court, or dismiss this appeal and remand the case back to the lower court for a proper and complete adjudication of the issues.

[SIGNATURE ON NEXT PAGE]

3 Strikingly, not one document from the 2011 Action was made a part of the record in the lower court by Appellant.

Respectfully Requested,

September 10, 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

Case No. 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 is the .....Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of Respondent's Amended Initial Brief in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States mail, postage prepaid this 10th day of September, 2014, addressed as follows:

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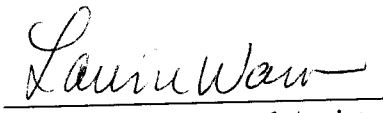

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