

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

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

RECEIVED

OCT 10 2014

SC Court of Appeals

D&C Builders, Inc.....Appellant,

v.

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

v.
Scott Dodenhoff, Third-Party Defendant

of whom:

Richard M. Buckley Respondent,

**RETURN TO RESPONDENT'S MOTION TO STRIKE MATTER
FROM APPELLANT'S DESIGNATION AND BRIEF**

Appellant, D&C Builders, Inc., by and through its undersigned attorney and pursuant to Rule 240(e), SCACR, hereby opposes the Motion to Strike Matter from Appellant's Designation and Brief filed by Respondent, Richard M. Buckley.

Respondent's Motion to Strike should be denied for several reasons. First, pursuant to Rule 210(c), SCACR, the information from the Spartanburg County Court

File of D&C Builders, Inc. v. TMKG, Inc., 2011-CP-42-04141 was presented to the trial court at the initial hearing held June 20, 2013 (Transcript of Hearing June 20, 2013, p. 3, l. 7 – p. 4, l. 6), offered and argued to the trial court at the second hearing held July 8, 2013 (Transcript of Hearing July 8, 2013 p. 4, l. 7 – p. 6, l. 14, p. 7, l. 14 – p. 10, l. 14, p. 19, l. 17 – p. 21, l. 18, p. 22, ll. 11-22, p. 23, ll. 12-21) and again argued to the Court at the hearing held July 23, 2013 (Transcript of Hearing July 23, 2013, p. 5, l. 13 – p. 6, l. 4), before having argument stopped by the Court for “rehashing the argument you made before.” (Transcript of Hearing July 23, 2013 p. 6, ll. 5-7).

Specifically see page 23 at lines 15 – 18 of the Transcript of the Hearing held July 8, 2013 where Appellant’s counsel stated, “Your Honor, I would be glad to let you look at the complaint from the TKMG case, the answer and counterclaim, and the reply. I have copies of them that I’ll be glad to hand you.” However, the Trial Court refused to consider the facts presented by the TKMG Court file because they were “all public record” (Transcript of Hearing July 8, 2013, p. 23, l. 22), and the Trial Court was erroneously focused on proof of non-public or confidential information being disclosed in contradiction to Rule 1.9 of the Rules of Professional Conduct.

Second, the records of the Spartanburg County Court File of D&C Builders, Inc. V. TMKG, Inc. and the details of Respondent’s council’s prior representation of Appellant were acknowledge by Respondent at the Hearing on June 20, 2013 without objection (Transcript of Hearing June 20, 2013, p. 4, l. 22 – p. 5, l. 1), acknowledged without objection **and argued** by the Respondent at the Hearing on July 8, 2013 (Transcript of Hearing July 8, 2013, p. 15, l. 20 – p. 16, l. 3), and made no objection to Appellant’s argument thereof at the hearing held July 8, 2014. **Respondent further**

specifically included “Pleadings and Entire File on 2011 Action” in its own Designation of Matter filed with the Court. However, although not one of the items stricken by the granting of Appellant’s Motion to Strike, Respondent voluntarily removed the 2011 Action File in its Amended Designation of Matter in obvious anticipation of the filing of this frivolous motion.

Respondent has also used the same documents it seeks to now strike for the support of its argument that the 2011 action and the 2013 action are not substantially related. The support for Respondent’s argument that the cases are not substantially related contained on pages 27 and 28 of Respondent’s Initial Brief is shown as “*[Pleadings in 2013 Action; Pleadings and Entire File on 2011 Action]*,” whereas, the exact same argument presented verbatim on pages 21 – 23 of Respondent’s Amended Initial Brief now show the support being “*[Pleadings in 2013 Action, Hearing Transcripts, All Affidavits]*.”

Finally, Respondent received Appellant’s Designation of Matter and Initial Brief on or about November 10, 2013. Appellant’s Designation of Matter clearly included the Entire Contents of the Court File regarding D&C Builders, Inc. v. TMKG, Inc. as part of the Record on Appeal and Appellant’s Initial Brief is replete with reference and argument related to the documents from this Court File the same as presented and argued to the Trial Court. Since receiving Appellant’s Designation and Initial Brief on November 10, 2013, Respondent has filed a Motion to Dismiss with accompanying Memorandum (November 27, 2013), Motion for Order Granting Partial Relief, 2nd Motion to Dismiss and accompanying Memorandum (April 10, 2014), Reply to Appellant’s Return to Respondent’s Motion for Order Granting Partial Relief and Motion to Dismiss


Appellant's Remaining Issue on Appeal (May 9, 2014), Respondent's Designation of Matter and Initial Brief (June 20, 2014) and finally a Return to Appellant's Motion to Strike Matter from Respondent's Designation and Brief (June 22, 2014). None of these filings make any reference, note or argument that the Court documents related to the 2011 Action should not be included in the Record on Appeal. Additionally, Respondent included the documents in its Designation of Matter and Brief.

It is only following the Court's Order of August 21, 2014 granting Appellant's Motion to Strike specific matters from Respondent's Designation does Respondent now, ten (10) months and six (6) Appellate filings later, seek to have the file of the 2011 Action stricken from the Record. Such action in light of the clear documentation the information was presented to the Trial Court as well as Respondent's prior acknowledgment and current use of the same information only serves to show Respondent's true intention is to cause further delay in the determination of this appeal.

For these reasons as well as the accompanying memorandum, prior submissions of Appellant, the applicable South Carolina Appellate Court Rules and their related authority, Respondent's Motion to Strike Matter from Appellant's Designation and Brief should be denied.

Respectfully submitted,

October 9, 2014


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

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

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

RECEIVED

OCT 10 2014

SC Court of Appeals

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,

**MEMORANDUM OF APPELLANT IN OPPOSITION TO
RESPONDENT'S MOTION TO STRIKE MATTER FROM APPELLANT'S
DESIGNATION AND BRIEF**

Brian A. Martin
S.C. Bar No. 9791
Brian A. Martin, LLC
212 Trade Street
Greer, South Carolina 29651
(864) 879-7779
Attorney for Appellant

Other Counsel of Record:

M. Stokely Holder, Esq.
Kenison, Dudley & Crawford, LLC
704 E. McBee Avenue
Greenville, South Carolina 29601
Attorney for Respondent

H. Stewart James, Esq.
Babb & Brown, P.C.
505 W. Butler Rd.
Greenville, South Carolina 29607
Co-Counsel for Plaintiff

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
Post Office Box 71727
North Charleston, South Carolina 29415
Attorney for Defendant Wells Fargo

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Facts 1

Standard of Review 3

Argument 3

Conclusion 7

TABLE OF AUTHORITIES

Cases

Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (S.C.App. 1984)4

Elam v. South Carolina Dept. of Transp., 602 S.E.2d 772, 361 S.C. 9
(S.C. 2004).....3

Matthews v. Montgomery, 193 S.C. 118, 7 S.E.2d 841, 854 (1940).....4

Morris v. Doe, 367 S.C. 56, 624 S.E.2d 649 (S.C. 2006).....4

State v. White, 642 S.E.2d 607, 372 S.C. 364 (S.C.App. 2007).....3

Townsend v. Townsend, 323 323 S.C. 309, 474 S.E.2d 424 (S.C. 1996)1

Statutes & Rules

Rule 1.9, RPC, Rule 407, SCACR.....1

Rule 210(c), SCACR3, 4, 6

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

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 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. Despite Respondent’s contention to the contrary, 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.

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. 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 and therefore were argued to the Trial Court as being substantially related.

In support of this position, Appellant offered information from the Spartanburg County Court File of D&C Builders, Inc. v. TMKG, Inc., 2011-CP-42-04141 to the trial court at the initial hearing held June 20, 2013 (See attached Exhibit A: Transcript of Hearing June 20, 2013, p. 3, l. 7 – p. 4, l. 6), offered and argued to the trial court at the second hearing held July 8, 2013 (See attached Exhibit B: Transcript of Hearing July 8, 2013 p. 4, l. 7 – p. 6, l. 14, p. 7, l. 14 – p. 10, l. 14, p. 19, l. 17 – p. 21, l. 18, p. 22, ll. 11-22, p. 23, ll. 12-21) and again argued to the Court at the hearing held July 23, 2013 (See attached Exhibit C: Transcript of Hearing July 23, 2013, p. 5, l. 13 – p. 6, l. 4), before having argument stopped by the Court for “rehashing the argument you made before.” (Exhibit B, p. 6, ll. 5-7).

Specifically Appellant offered the Court the documents from the TMKG matter in stating, “Your Honor, I would be glad to let you look at the complaint from the TKMG case, the answer and counterclaim, and the reply. I have copies of them that I’ll be glad to hand you.” (Exhibit B, p. 23, ll. 15-18). The Trial Court refused to consider the facts presented by the TKMG Court file because they were “all public record” (Exhibit B, p. 23, l. 22).

At no time during any of the three hearings held on this matter on June 20, 2013, July 8, 2013 or July 23, 2013 did Respondent object to Appellant's use of, reference to, or argument based on the records of the Spartanburg County Court File of D&C Builders, Inc. V. TMKG, Inc. Respondent further specifically designated “Pleadings and

Entire File on 2011 Action” to be included in the Record on Appeal in its own Designation of Matter filed with the Court on or about June 20, 2014 and use such documents in support of its own arguments presented to the trial court and in its Initial Brief filed with this Court.

STANDARD OF REVIEW

Rule 210(c), SCACR requires that the record on appeal shall not include matter which was not presented to lower court. Elam v. South Carolina Dept. of Transp., 602 S.E.2d 772, 361 S.C. 9 (S.C. 2004), State v. White, 642 S.E.2d 607, 372 S.C. 364 (S.C.App. 2007).

ARGUMENT

Appellant offered information from the Spartanburg County Court File of D&C Builders, Inc. v. TMKG, Inc., 2011-CP-42-04141 to the trial court at the initial hearing held June 20, 2013 (Exhibit A, p. 3, l. 7 – p. 4, l. 6), offered and argued to the trial court at the second hearing held July 8, 2013 (Exhibit B, p. 4, l. 7 – p. 6, l. 14, p. 7, l. 14 – p. 10, l. 14, p. 19, l. 17 – p. 21, l. 18, p. 22, ll. 11-22, p. 23, ll. 12-21) and again argued to the Court at the hearing held July 23, 2013 (Exhibit C, p. 5, l. 13 – p. 6, l. 4).

Specifically Appellant offered the Court the documents from the TMKG matter in stating, “Your Honor, I would be glad to let you look at the complaint from the TKMG case, the answer and counterclaim, and the reply. I have copies of them that I’ll be glad to hand you.” (Exhibit B, p. 23, ll. 15-18). The Trial Court refused to consider the facts presented by the TKMG Court file because they were “all public record” (Exhibit B, p. 23, l. 22).

Based upon this information, there is no question that the records of the Spartanburg County Court File regarding D&C Builders, Inc. V. TMKG, Inc. were presented to the lower court meeting the requirements of Rule 210(c), SCACR.

Respondent proffers *Beall v. Doe*, 281 S.C. 363, 315 S.E.2d 186 (S.C.App. 1984) for the proposition that the Spartanburg County Court file cannot be part of the Record unless it was introduced as evidence. First, as already indicated, the information was offered to the Trial Court as indicated in the references to the Transcripts above. Second, like the records allowed to stand in *Beall*, Respondent has never contested or objected to the inclusion of these records and in fact, included them in his own designation and used them for support in his brief.

In *Beall*, the Court stated, “Had Conerly wished to question the consideration by the trial court of the pleadings and other records and matters in the earlier action, **it was encumbent upon him to raise the issue by proper exceptions.**” *Id.* at 372, S.E.2d at 192 (citing *Matthews v. Montgomery*, 193 S.C. 118, 7 S.E.2d 841, 854 (1940)). (See *Morris v. Doe*, 367 S.C. 56, 624 S.E.2d 649 (S.C. 2006) Footnote [1] “No party has objected to inclusion of the documents in the record on appeal. See Rule 210(c), SCACR.”) In the case at hand, not only did the Respondent not object, but referenced the same information to support his position that the two cases were *not* substantially related.

Respondent uses the same documents it seeks to now strike for the support of its argument that the 2011 action and the 2013 action are not substantially related. In reviewing Respondent’s argument that the cases are not substantially related contained on pages 27 and 28 of Respondent’s Initial Brief, Respondent designates the support for

the argument presented as “[*Pleadings in 2013 Action; Pleadings and Entire File on 2011 Action*].” Following the Court’s Order for Respondent to rewrite his brief excluding stricken material, Respondent submits the exact same argument verbatim on pages 21 – 23 of Respondent’s Amended Initial Brief that was presented on pages 27 and 28 of Respondent’s Initial Brief with the only changes being to the supporting documents that now show the support as “[*Pleadings in 2013 Action, Hearing Transcripts, All Affidavits*].” If these documents were used to support the original argument, and not a single word of the argument was changed, then surely those documents were still used for the argument presented just without receiving Respondent’s credit for their use.

Respondent’s failure to object to Appellant’s introduction and use of the information contained in the TKMG court file, and even more so, Respondent’s own designation of the documents in that file to be included in the Record and his use of those documents in the preparation and support of his own Brief clearly make them appropriate matter to be included in the Record on Appeal.

Additionally, Appellant would argue that Respondent has waived its opportunity to object to the designation of the TKMG documents based on the vast amount of time and actions in which the Respondent has engaged in this matter without raising this issue. Respondent received Appellant’s Designation of Matter and Initial Brief on or about November 10, 2013. Appellant’s Designation of Matter clearly included the Entire Contents of the Court File regarding D&C Builders, Inc. v. TMKG, Inc. as part of the Record on Appeal and Appellant’s Initial Brief is replete with reference and argument related to the documents from this Court File the same as presented and argued to the Trial Court.

Since receiving notice of Appellant's intent to use the TKMG documents on November 10, 2013, Respondent has filed a Motion to Dismiss with accompanying Memorandum (November 27, 2013), Motion for Order Granting Partial Relief, 2nd Motion to Dismiss and accompanying Memorandum (April 10, 2014), Reply to Appellant's Return to Respondent's Motion for Order Granting Partial Relief and Motion to Dismiss Appellant's Remaining Issue on Appeal (May 9, 2014), Respondent's Designation of Matter and Initial Brief (June 20, 2014) and finally a Return to Appellant's Motion to Strike Matter from Respondent's Designation and Brief (June 22, 2014). Not one of these filings make any reference, note, objection or argument that the Court documents related to the 2011 Action should not be included in the Record on Appeal.

The attempted objection at this time is only made following the ruling in Appellant's favor striking specific matters from Respondent's Designation and requirement Respondent to re-write his Brief, and is made at this time purely to cause further delay in this appeal.

As required by Rule 210(c) of the South Carolina Appellate Court Rules, the information designated by Appellant to be included in the Record was presented to the lower court on multiple occasions and is therefore proper to be included in the Record. Respondent at no time objected to the use or inclusion of this information in the record at any of the hearings held before the trial court, designated the matter to be included in the Record initially for its own use, and clearly used this information in writing its own Brief to this Court.

CONCLUSION

For the reasons stated above, together with Appellant's previous filings with the Court and the exhibits attached thereto and incorporated herein, the additional exhibits attached hereto and the applicable legal authority, Respondent's Motion to Strike Matter from Appellant's Designation and Brief must be denied.

Respectfully submitted,

BRIAN A. MARTIN, LLC



Brian A. Martin
SC Bar # 9791
212 Trade St.
Greer, South Carolina 29651
(864) 879-7779

ATTORNEY FOR APPELLANT

Greenville, South Carolina
October 9th, 2014

1 STATE OF SOUTH CAROLINA)

COURT OF COMMON PLEAS
2013-1833

2 COUNTY OF GREENVILLE)
3)

4 D&C Builders)

TRANSCRIPT RECORD

5)
6 -vs-)

7 Richard M. Buckley)

8 July 8, 2013
9 Greenville, South Carolina

10 B E F O R E:

11 THE HONORABLE EDWARD MILLER, Judge.

12 A P P E A R A N C E S

13 Brian A. Martin, Esquire
Attorney for Plaintiff

14
15 Stokely Holder, Esquire
Attorney for the Defendant

16
17 CAROLINE HISKELL
18 Thirteenth Circuit Court Reporter
19
20
21
22
23
24
25

D&C Builders vs. Buckley

P R O C E E D I N G S

1
2 THE COURT: D&C Builders versus Buckley.

3 This is Buckley's motion to dismiss.

4 MR. MARTIN: Your Honor, if I may part of the
5 reason for the case being set for today was at prior
6 motion when motion to dismiss was being heard I made a
7 motion that I asked the Court to hear prior to the motion
8 to dismiss to disqualify the law firm based on conflict of
9 interest prior to the law firm pursuing any further action
10 on behalf of Mr. Buckley in this matter. I believe the
11 conflict is significantly and would like the Court to
12 address that and I think it should be addressed prior to
13 moving forward with this motion to dismiss.

14 THE COURT: Go ahead and tell me about it.

15 MR. MARTIN: This case arises out of a
16 construction. My client D&C Builders, Incorporated is a
17 small family run construction company. They've been in
18 business a long time since the 1960's.

19 D&C Builders contracted with Mr. Buckley
20 actually Mr. Buckley's son to do a home renovation at his
21 house in Candle Lane.

22 Mat Buckley and Scott Dodenhoff(ph) have been
23 lifelong friends. They grew up together, went to school
24 together, played sports together and have been friends
25 forever. Matt contacted Scott about doing the renovation

D&C Builders vs. Buckley

1 to his parent's home so that Matt and his family could
2 move here to Greenville and help take care of his parents
3 at the house.

4 The enter into an agreement in January of
5 2012. Construction began in February of 2012 and
6 continued through November of 2012.

7 During the time that from January of 2012 to
8 July 2012, D&C Builders was being represented by Mr. John
9 Crawford, Johnson and the Kenison Dudley Law Firm in
10 another mechanics lien foreclosure action that was going
11 on in Spartanburg County at that time. Those two cases,
12 the case that was going on in Spartanburg County was a
13 collection matter attempting to recover \$75,000 on behalf
14 of D&C Builders from a construction job. As part of that
15 case and that process, Mr. Dodenhoff was the primary
16 contact, the only contact with the attorneys at the
17 Kenison Dudley Firm providing them information about D&C
18 Builders and aspects of D&C Builders, the corporate
19 structure of D&C Builders about the impact of the outcome
20 of that case recovering that money, not recovering that
21 money to D&C Builders on that case that was going on in
22 Spartanburg plus his ongoing jobs, and at the same time he
23 is working on and doing renovations for Mr. Buckley that
24 the current case is about.

25 A dispute arose after the construction was

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA)	COURT OF COMMON PLEAS
)	2013-1833
)	
COUNTY OF GREENVILLE)	
)	
)	
)	TRANSCRIPT RECORD
D&C Builders)	
)	
)	
-vs-)	
)	
Richard M. Buckley)	

July 8, 2013
Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD MILLER, Judge.

A P P E A R A N C E S

Brian A. Martin, Esquire
Attorney for Plaintiff

Stokely Holder, Esquire
Attorney for the Defendant

CAROLINE HISKELL
Thirteenth Circuit Court Reporter

D&C Builders vs. Buckley

1 to his parent's home so that Matt and his family could
2 move here to Greenville and help take care of his parents
3 at the house.

4 The enter into an agreement in January of
5 2012. Construction began in February of 2012 and
6 continued through November of 2012.

7 During the time that from January of 2012 to
8 July 2012, D&C Builders was being represented by Mr. John
9 Crawford, Johnson and the Kenison Dudley Law Firm in
10 another mechanics lien foreclosure action that was going
11 on in Spartanburg County at that time. Those two cases,
12 the case that was going on in Spartanburg County was a
13 collection matter attempting to recover \$75,000 on behalf
14 of D&C Builders from a construction job. As part of that
15 case and that process, Mr. Dodenhoff was the primary
16 contact, the only contact with the attorneys at the
17 Kenison Dudley Firm providing them information about D&C
18 Builders and aspects of D&C Builders, the corporate
19 structure of D&C Builders about the impact of the outcome
20 of that case recovering that money, not recovering that
21 money to D&C Builders on that case that was going on in
22 Spartanburg plus his ongoing jobs, and at the same time he
23 is working on and doing renovations for Mr. Buckley that
24 the current case is about.

25 A dispute arose after the construction was

D&C Builders vs. Buckley

1 done in Mr. Buckley's matter about the amount that was
2 due. D&C Builders retained another attorney to file a
3 mechanics lien on behalf of D&C Builders and in response
4 to that during the time he was working on Mr. Buckley's
5 house he talked about with Matt Buckley, Mr. Buckley's
6 son, about the case that was going on in Spartanburg
7 because it was a big deal. It was a big deal going on in
8 his life and in his business.

9 When he filed the lawsuit to foreclose on the
10 current mechanics lien on Mr. Buckley's property,
11 Mr. Buckley went and retained Kenison Law Firm to
12 represent him in this mechanics lien foreclosure.

13 In response to the complaint that was filed
14 for the foreclosure, the law firm Kenison Dudley filed an
15 answer, counterclaims, and a third-party claim against
16 Mr. Dodenhoff individually. In those counterclaims
17 against D&C Builders, they are alleging the same actions,
18 the same causes of actions and claims that were in the
19 Spartanburg case with the exception of fraud. In this
20 case they have alleged fraud against Mr. Dodenhoff and
21 against D&C Builders and a third-party action has been
22 brought against Mr. Dodenhoff in this matter.

23 But the claims and the issues are the same
24 but in addition in this case in their answer counterclaims
25 and third-party claim, they have alleged that D&C Builders

D&C Builders vs. Buckley.

1 has an inadequate corporate structure, is under funded and
2 under capitalized at the time that he was doing the
3 construction for Mr. Buckley, that Mr. Dodenhoff used --
4 was in sole control of the company to the extent that he
5 controlled the finances, the policies, the procedures and
6 that he used this corporate D&C Builders in his capacity
7 to commit the fraud against Mr. Buckley.

8 It seems apparent from those allegations and
9 from the circumstances of the situation that was going on
10 in Spartanburg at the time that he was doing the
11 construction for Mr. Buckley, that he law firm has a
12 material conflict of interest in being able to represent
13 Mr. Buckley in this matter when they already represented
14 D&C that was going on in Spartanburg during that time.

15 1.9 of the Rules of Professional Conduct, and
16 I have a copy of that for Your Honor if you'd like, says
17 that a lawyer who has formerly represented a client in a
18 matter shall not thereafter represent another person in
19 the same or substantially related matter in which the
20 person's interest are materially adverse to the interest
21 of the former client unless the former client gives
22 consent.

23 D&C Builders and Mr. Dodenhoff were never
24 contacted at all by the Kenison Dudley Firm at all about
25 representing Mr. Buckley prior to them filing answer,

D&C Builders vs. Buckley

1 counterclaim, cross claims, and he does not consent to
2 their representation.

3 Under Rule 1.9(c), it says, "A lawyer who has
4 formerly represented a client in the matter or whose
5 present or former firm has represented a client in the
6 matter shall not thereafter; Sub 1, use information
7 relating to the representation to the disadvantage of the
8 former client and 2, reveal information relating to the
9 representation except as these rules were permit."

10 Attached to my motion is an affidavit and
11 another copy of a motion if you would like that as well,
12 Your Honor.

13 THE COURT: No, I've got it.

14 MR. MARTIN: It's an affidavit Scott
15 Dodenhoff that meets all of the elements of this rule that
16 he provided information to Kenison Dudley firm regarding
17 the financial status, corporate structure of the law firm
18 that they represented him in this matter in Spartanburg,
19 that he has not consented and this is a substantially
20 related matter to that situation particularly because it
21 involves the financial aspects of the company in both
22 cases that he provided them information and they had
23 information with regard to the claims pursuing the
24 collections on \$75,000 at the time they are now alleging
25 he was under funded, under capitalized, and didn't have

D&C Builders vs. Buckley

1 enough money to do the job for Mr. Buckley and therefore
2 he committed fraud in taking Mr. Buckley's money in the
3 first place.

4 I don't think there is a question in this
5 matter with regard to the former representation although I
6 have a copy of the retainer agreement that I can supply if
7 necessary. I don't believe there's a question that
8 Mr. Buckley's interest are adverse to D&C Builders in this
9 situation and I really don't believe there's going to be a
10 question that the Kenison firm consulted or that D&C
11 Builders has waived the conflict of interest.

12 I think the issue that we need to talk about
13 is Mr. Crawford would contend that the matters are not
14 substantially related, that that's the key component in
15 assessing whether there's a conflict here.

16 Under Rule 1.9 in Comment 3 to the Rule we
17 have clarification of what substantially related means.
18 It says, "Matters are substantially related for purposes
19 of this rule if they involve the same transaction or if
20 there are otherwise a substantial risk that confidential
21 factual information as would normally have been obtained
22 in the prior representation would material advance the
23 client's position in the subsequent matter."

24 I think that's exactly what we have in this
25 case. There was financial information and corporate

D&C Builders vs. Buckley

1 structure information provided to the law firm that they
2 are now using or attempting to use to gain an advantage
3 for Mr. Buckley and for a disadvantage to D&C Builders.

4 In addition to that our Supreme Court has
5 defined substantially related in the case of Townson v.
6 Tallison, 1996. This case involves an attorney that
7 served as a guardian et litem in a family court matter
8 which was related to custody and support and then later
9 agreed to represent one of the parties in a subsequent
10 action related to that case and the Court stated under
11 Rule 1.9 that, "In determining whether the matter is
12 substantially related, one should consider among other
13 things whether the affected lawyer would have or
14 reasonable could have learned confidential information in
15 the first representation that would be of significance in
16 the second." And I think that is clearly what we have in
17 this situation.

18 At the time that this case arose, they were
19 actively representing him in another matter that is
20 exactly the same type of case with the same claims and the
21 same defenses. In that case they filed the complaint,
22 which is very similar to the complaint in this matter, but
23 then TMKG was the defendant in that case filed an answer
24 and counterclaims alleging the same types of claims that
25 were alleged in this case and the law firm filed a reply

D&C Builders vs. Buckley

1 to the counterclaim asserting the same defenses to those
2 counterclaims as it asserted to defenses to the complaint
3 in this case.

4 My client was the primary contact for that
5 case. He provided all of the information to them and with
6 the answer counterclaims and in particular the third-party
7 counterclaims are now seeking to use that information or
8 there's a substantial likelihood that they obtained
9 information that they would be using against D&C Builders
10 and against Scott Dodenhoff in this matter.

11 I think there's a material conflict of
12 interest and all of the attorneys at the law firm of
13 Kenison and Dudley should be disqualified from this
14 matter.

15 THE COURT: Thank you.

16 MR. HOLDER: Your Honor, Stokely Holder on
17 behalf of Kenison, Dudley & Crawford. As Mr. Martin
18 represented we do represent the defendant Mr. Richard
19 Buckley who is seated here with me today.

20 If I may, Your Honor, if I could approach
21 with some affidavits that have been filed with the Court.

22 Just briefly, Your Honor, before I describe
23 what's in those affidavits, we're here today as Mr. Martin
24 mentioned based on the motion he filed apparently minutes
25 prior to the hearing that was scheduled before Judge

D&C Builders vs. Buckley

1 not resolve the issue. If they take out vale piercing and
2 agree that they are not going to pursue the vale piercing,
3 that's a detriment to Mr. Buckley, so they're not
4 advocating. They're acting in his best interest.

5 THE COURT: You've got no business getting
6 involved in an attorney and their client's relationship.

7 MR. MARTIN: That's true and my point in that
8 is that the rules of professional conduct are set in such
9 a way for attorneys in law firms to stay out of that
10 situation so that it doesn't affect the interest of any
11 clients they are representing. If they have information
12 that would be relative to advancing Mr. Buckley's cause,
13 then the rules require them to act zealously in that
14 manner ---

15 THE COURT: That is between his counsel and
16 the client.

17 MR. MARTIN: Okay. The question or the issue
18 that they raised about providing them confidential
19 information, if you look at Rule 1.9 Comment 3, it
20 specifically says that, "A former client is not required
21 to reveal the confidential information learned by the
22 lawyer in order to establish a substantial risk that the
23 lawyer has confidential information to use in the
24 subsequent matter. Possession of such information based
25 on the nature of the services the lawyer provided the

D&C Builders vs. Buckley

1 former client and information that in the ordinary
2 practice would be learned by a lawyer providing those
3 services."

4 That's what we're saying has happened here.
5 These are two exactly identical cases. The case that is
6 raised, the 1991 appellant case of Madison, first, I would
7 point out this is prior to Supreme Court's determination
8 of what substantially related is in the Townson Case in
9 1996, but most importantly I would go to the exact
10 language of this case. "An attorney is not prevented from
11 representing a subsequent client when the duties required
12 of him do not conflict with those required of the first
13 employment. The test is whether the attorney's employment
14 is inconsistent with his duty to the former client is
15 whether expectance of the new retainer will require him in
16 forwarding the interest of the new client to do anything
17 that will injuriously affect the former client in any
18 matter he formerly represented --"

19 THE COURT: What is it that their
20 representation in this case -- how is that going to impact
21 your client?

22 MR. MARTIN: The information that they have
23 knowledge of with regard to decision that Mr. Dodenhoff
24 talked with them about or gave them information about that
25 he made or he controlled and did, they're alleging that he

D&C Builders vs. Buckley

1 used his control as an individual in these capacities to
2 further the benefits of the company to Mr. Buckley's
3 detriment.

4 The communicated with him for over a year in
5 lengthy process in Spartanburg County all the way through
6 summary judgment. These cases are similar in the respect
7 of in that case allegations were made that work that was
8 performed was not sufficient was not adequate. TMKG had
9 to get other companies to come in and redo work that he
10 had do or they redid things themselves and they were
11 offset.

12 In this case, he's finished all the work.
13 They paid him to a point and then said we don't have any
14 more money. In the first case, TMKG still agrees that
15 they owed a little bit of money but they were trying to
16 discount and get that balance set off. The claims were
17 the same that he didn't do proper work in that case. The
18 Buckleys are saying he didn't do proper work in this case.

19 THE COURT: Well, what did the Kenison Dudley
20 Firm learn in their representation in the first case
21 that's going to injuriously affect your client in this
22 case?

23 MR. MARTIN: They have alleged that D&C
24 Builders was under funded and under capitalized while
25 doing the construction project for Mr. Buckley. At the

D&C Builders vs. Buckley

1 time that they were representing him, they were gaining
2 financial information, confidential information about his
3 finances, the way he spent money with his business, and
4 the impact of collecting or not collecting the \$75,000.

5 It's the construction industry, Your Honor.
6 He was attempting to collect money from a company that
7 owed him money that he had already paid out to
8 subcontractors. The knowledge that they would have that
9 he had expended that money puts them in a position to use
10 that information in the allegations that ---

11 THE COURT: And that was all in the
12 allegations in the former lawsuit, is that right?

13 MR. MARTIN: No, sir. What I'm saying is
14 that information would have been information --- the
15 information that they would have obtained or needed to
16 obtain to respond to discovery request for interrogatory
17 for request to produce -- I've got all that stuff I'll be
18 glad to show you -- the information that they would have
19 gotten from him to deal with that case in the ordinary
20 course of handling that case on his behalf in managing
21 those defenses would contain him telling them confidential
22 information ---

23 THE COURT: What is that? What is that? Who
24 is the sole -- is there a sole shareholder in D&C
25 Builders?

D&C Builders vs. Buckley.

1 MR. MARTIN: No, sir, it is Mr. Dodenhoff and
2 his father.

3 THE COURT: And what is the lifelong friends
4 in the company?

5 MR. MARTIN: Matt Buckley had no business in
6 the company at all.

7 THE COURT: Okay.

8 MR. MARTIN: That connection simply is ---

9 THE COURT: They're friends.

10 MR. MARTIN: They were friends.

11 THE COURT: Okay.

12 MR. MARTIN: And now it simply has changed
13 hands. In this situation in the ordinary course of
14 representing D&C Builders in the exact same case -- and,
15 Your Honor, I would be glad to let you look at the
16 complain from the TKMG case, the answer and counterclaim,
17 and the reply. I have copies of them that I'll be glad to
18 hand you.

19 The affidavits that were filed in that case
20 alleging the same types of misconduct against D&C Builders
21 they've alleged in this case all done in the prior case.

22 THE COURT: That's all public record.

23 MR. MARTIN: That part is, but what I'm
24 saying ---

25 THE COURT: Who did they represent in the

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

D & C BUILDERS, INC.,)
)
 PLAINTIFF,)
)
 -VS-)
)
 RICHARD M. BUCKLEY, ET AL,)
)
 DEFENDANTS.)
)

2013-CP-23-01833

TRANSCRIPT OF RECORD

JULY 23, 2013
GREENVILLE, SOUTH CAROLINA

BEFORE:

THE HONORABLE EDWARD W. MILLER

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

BRIAN A. MARTIN, ESQUIRE

ATTORNEY FOR DEFENDANT:

M. STOKELY HOLDER, ESQUIRE

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

1 **THE COURT:** All right, Mr. Martin, we're here on your
2 motion to reconsider.

3 **MR. MARTIN:** Thank you, Your Honor. Please the Court. I
4 appreciate the opportunity and the time that you have given in
5 this case. And I first would like to apologize to you if I am
6 over-thinking the situation.

7 **THE COURT:** Well, here's the deal.

8 **MR. MARTIN:** Yes, sir.

9 **THE COURT:** You want me to disqualify Mr. Holder's law
10 firm because of this prior representation. And you are
11 claiming that they know something that would violate the
12 attorney/client privilege, basically.

13 I mean, I've thought of different analogies. One is in a
14 trade secret case, one side alleges that the other side is
15 violating a trade secret. There is no way that anyone, a
16 fact-finder or a judge, anybody can determine whether or not
17 there's a trade secret unless they know what the party claims
18 it is.

19 I'm not going to automatically disqualify a law firm from
20 representation. If you want me to do something of that
21 significant of nature, then there has to be some kind of
22 basis.

23 If he and his firm knows some confidential, privileged
24 information, all I'm asking you to do is to turn that over to
25 me and to them so that they have an opportunity, 'cause I'm

1 not going to know what they know or what's privileged, for
2 them to respond under a protective order to explain what the
3 -- whether or not it is, in fact, privileged. Because my
4 basic understanding of all lawyers is they swear an oath to be
5 truthful and honest.

6 And if -- and I know Mr. Holder's law firm. And if they
7 are in possession of privileged information, then they're not
8 going to want to risk their law license on one case. And
9 that's what they're talking -- that's what you're talking
10 about them doing.

11 So unless there is -- you got some other very persuasive
12 argument, I want the log done by Friday.

13 **MR. MARTIN:** Yes, sir. First I would say, I absolutely
14 understand the quandary because I have thought about it. And
15 my own respects, I certainly agree with you that I don't
16 believe that Mr. Holder and his firm would put his law license
17 on the line in this situation.

18 In reading the Rule and the court's analysis of that Rule
19 as I can find, I believe that this particular situation is the
20 reason the Rule is written the way that it is for lawyers.
21 And I believe that it is the way -- the reason that the court
22 in the Rule put the qualification of substantially related
23 being the determining factor of this case versus another case
24 determining not whether confidential information has been,
25 could be, or will be used, but whether that the two types of

1 cases are so similar in nature that the information that an
2 attorney would obtain in that representation would
3 necessarily, or most likely, or there would be a substantial
4 risk, which is the language used in the Rule ---

5 **THE COURT:** Mr. Martin, you are just rehashing the
6 argument you made before. I'm not going to throw somebody out
7 based on -- without some reason to do it. Okay?

8 **MR. MARTIN:** Yes, Your Honor.

9 **THE COURT:** So produce the log. It's as simple as that.
10 This happens quite frequently, believe it or not, that
11 privileged logs are required to be produced for one reason or
12 another.

13 If it's produced and I rule that they're not disqualified
14 and they -- and they violate some privilege -- there are
15 courts that can review what goes on here.

16 **MR. MARTIN:** Yes, sir.

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

22 **MR. MARTIN:** Yes, sir.

23 **THE COURT:** You're not violating any ethical duty on your
24 part unless you just fail to comply with an order of the
25 court. And that's what this is. Okay?

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

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

RECEIVED

OCT 10 2014

SC Court of Appeals

D&C Builders, Inc.....Appellant,

v.

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

v.

Scott Dodenhoff, Third-Party Defendant

of whom:

Richard M. Buckley..... Respondent,

PROOF OF SERVICE


I hereby certify that that I have served a true copy of Appellant's Return to Respondent's Motion to Strike Matter from Appellant's Designation and Brief and Memorandum in Support of Appellant's Return on Respondent and all parties of record by depositing a copy in the United States Mail, first class postage prepaid, on October 9th, 2014, addressed to their attorneys of record as follows:

M. Stokely Holder, Esq.
Kenison, Dudley & Crawford, LLC
704 E. McBee Avenue
Greenville, South Carolina 29601

H. Stewart James, Esq.
Babb & Brown, P.C.
505 W. Butler Rd.
Greenville, South Carolina 29607

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
Post Office Box 71727
North Charleston, South Carolina 29415

October 9th, 2014



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

ATTORNEY FOR APPELLANT



BRIAN A. MARTIN, LLC
ATTORNEY AT LAW

RECEIVED
OCT 10 2014
SC Court of Appeals

October 9, 2014

VIA OVERNIGHT DELIVERY

Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
1205 Pendleton St.
Columbia, SC 29201

Re: *D&C Builders, Inc. v. Richard M. Buckley, et al.*
Greenville County Case #: 2013-CP-23-1833
Appellate Case No. 2023-001645

Dear Ms. Kitchings:

Please find enclosed for filing in the above referenced matter an original and seven (7) copies each of Appellant's Return and Memorandum in Support of Appellant's Return to Respondent's Motion to Strike Matter from Appellant's Designation and Brief in opposition to such motions, along with the required Proof of Service. I would appreciate your filing the originals and returning one clocked copy of each to me in the enclosed self-addressed stamped envelope.

By copy of this letter, I am serving the same on all other parties via their counsel of record.

Thank you in advance for your assistance. Should you have any questions or need additional information, please do not hesitate to contact my office.

Sincerely,

Brian A. Martin

Enclosures

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