THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC 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 the ..... Respondent.

REPLY MEMORANDUM OF RESPONDENT IN SUPPORT OF RESPONDENT'S MOTION TO STRIKE MATTER FROM APPELLANT'S DESGINATION AND BRIEF

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COMES NOW, Respondent, Richard M. Buckley ("Buckley"), by and through his undersigned attorney, and files this Reply Memorandum in Support of its Motion to Strike Matter from Appellant's Designation and Brief.

I. STATEMENT OF FACTS

For a thorough examination of the Facts, Respondent would refer the Court to the Statement of Case and Statement of Facts contained in Respondent's initial brief already filed with the Court in this matter as well as the summary of facts contained in Respondent's previously filed memorandums with the Court. However, by way of a brief summary, Respondent would present the following pertinent facts:

- Appellant filed a Motion to Disqualify Respondent's counsel on the basis that Respondent's counsel has an alleged conflict of interest due to its prior representation of Appellant in a separate matter that was filed in a separate jurisdiction, which included separate parties, involved entirely separate facts, and was disposed of at an entirely separate time.
- At no point in time while the Appellant's Motion to Disqualify was before the lower court did the Appellant ever introduce and make a part of the record in the lower court a single solitary document or record from the case which the Appellant bases its alleged conflict.
- The lower court held Appellant's Motion to Disqualify in abeyance.
- In holding the Appellant's Motion to Disqualify in abeyance, the lower court did not issue a dispositive ruling on the Appellant's Motion to Disqualify. Instead, the lower court ordered the production of the

purported confidential information that Appellant alleged forms the basis of the conflict.

- Without producing anything in response to the lower court's order, the Appellant then filed a motion to reconsider, which was denied by the lower court.
- Still without producing any documentation from the matter relied upon by Appellant as forming the basis of the alleged conflict, and while the lower court had still not issued a dispositive ruling on the Appellant's Motion to Disqualify, the Appellant then filed a Notice of Appeal.
- The Appeal requests this Court to: (1) reverse the lower court's order requiring the production of the alleged confidential information (which the Respondent has continuously offered its consent, to no avail); and (2) usurp the jurisdiction of the lower court by issuing the first and only order on the issue of whether Respondent's Counsel should be disqualified.

II. STANDARD OF REVIEW

An appellate court cannot consider issues on appeal which have not been preserved for appellate review. Ulmer v. Ulmer, 632 S.E.2d 858, 369 S.C. 486 (S.C. 2006) citing, In the Interest of Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) (holding that issues must be raised ***and ruled upon*** in the trial court to be preserved for appellate review); See also Busillo v. City of North Charleston, 745 S.E.2d 142, 404 S.C. 604 (S.C.App. 2013) citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating " an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for

appellate review") and Armstrong v. Collins, 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct.App.2005).

The Appellant has the burden of showing that the lower court erred in some respect; to do this, the appellant must place in the Record on Appeal evidence sufficient to support his argument. Conran v. Joe Jenkins Realty, Inc., 263 S.C. 332, 210 S.E.2d 309 (1974). "[R]ecords in another proceeding cannot be considered by an appellate court unless they were introduced and made a part of the Record in the same manner as other evidence" Beall v. Doe, 281 S.C. 363, 315 S.E. 2d 186 (Ct. App. 1984); Betsill v. Betsill, 187 S.C. 50, 196 S.E. 381 (1938).

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). The appellate court is confined to the record in deciding issues on appeal. Richland County v. Carolina Chloride, Inc., 382 S.C. 634, 677 S.E.2d 892 (Ct.App. 2009).

III. ARGUMENT

Not only is the Appellant attempting to get this Court to rule on a Motion that has yet to be ruled on by the lower court[1], the Appellant is attempting to have this Court review documentation and records that the lower court has never even seen. The former is what Respondent contends is the fundamental, root problem with the appellate posture of this case; the latter is simply incomprehensible.

The Appellant has attempted to include the following in the Record on Appeal in

1 This Motion further highlights the fundamental, omnipresent problem with this Court's current jurisdiction over this matter.

this matter:

23. Entire contents of Spartanburg County Court File of D&C Builders, Inc. v. TMKG, Inc., 2011-CP-42-04141

It is well established that the fundamental gate-keeping function of the Appellate courts of this State is to ensure that the issues on appeal, together with any substantive support thereof, be properly presented to and ruled upon by the lower court. Ulmer Id.; In the Interest of Michael H. at 732; Busillo Id.; Wilder Corp., Id.; Armstrong at 378; Conran Id.; Beall Id.; Betsill Id.; Elam Id.; White Id.; Carolina Chloride Id.

If the actual "Entire contents" of another case were allowed to be presented to the Appellate Court for the first time without any shred of any content of the same case being previously presented to, and ruled upon by, the lower court, the cornerstone of this Court's jurisdiction would be eviscerated (especially when the lower court, as is the case here, never even ruled on the underlying assertion purportedly related to the contents of that case). Id.

The Appellant attempts to justify the inclusion of this documentation into the record on appeal here by claiming the Respondent never took exception or made objection in the lower court to "Appellant's introduction and use of the information" to the lower court, and the lower court "refused to consider the facts presented by the TKMG Court file." See Appellant's Return to Respondent's Motion to Strike, and Memorandum for same. However, as evidenced by the transcripts and the Appellant's own subsequent summaries and descriptions of same to the lower court, those claims are misleading and a misrepresentation of the facts.

For starters, as is obvious from the Appellant's Motion and the entire transcripts referenced therein, the Appellant made references in its oral argument to only the

"complaint from the TKMG case, the answer and counterclaim, and the reply". The Appellant never referred to the "Entire contents of Spartanburg County Court File of D&C Builders, Inc. v. TMKG, Inc., 2011-CP-42-04141," which it is attempting to have included in the Record on this Appeal. Likewise, the Appellant never submitted any of the "Entire contents" of that case to the lower court for its review.

Moreover, the Appellant misrepresents the response of the lower court as being a "refus[al] to consider the facts presented by the TKMG Court file". The lower court, in simply stating in response to Appellant's counsel that the pleadings referenced by Appellant's counsel were "all public record", was merely underscoring the fact that the information in those documents cannot be considered confidential. As is clear from the context of the transcript, the discussion taking place at the time with the lower court was in regard to the purported confidential information that Appellant was attempting to describe in support of its argument to the lower court that Respondent's counsel be disqualified. See July 8, 2013 Transcript of Hearing.

Immediately after that hearing, the Appellant submitted to the lower court a seven (7) paged single-space letter that, by Appellant's own admission, "summarize[d] what transpired at the hearing" and described in painstaking detail the "argument" made on behalf of Appellant. This letter was made an exhibit by Appellant to its Motion to Reconsider. See Motion to Reconsider. In said letter, the Appellant summarized that portion of the transcript which it has referenced here as "Appellant's introduction and use of the information" to the lower court and the lower court's "refusal to consider the facts presented by the TKMG Court file." Id.; July 8, 2013 Hearing Transcript, pp. 18-25. Interestingly, contrary to the descriptions now proffered by Appellant, Appellant

described this particular portion of the hearing as follows:

> 7. That Plaintiff ***has ready and can submit*** to the Court copies of the Pleadings, Affidavits and communications from the prior case for the Court to compare with the present case in order for the Court to see that the nature of the services law firm provided to Plaintiff in the prior case are the same as they are proposing to provide to Defendant in the present case, that the claims, counterclaims and defenses are the same, that both cases involve allegations against plaintiff of poor quality construction, financial improprieties and negligence.
>
> It was at this point that you requested what confidential information Plaintiff was contending the law firm obtained in the prior case that would be material in the present case or what information was Plaintiff contending law firm had that was confidential that could be used against it.

Motion to Reconsider, Ex. A, p. 5(emphasis added).

Despite the fact that the Appellant's "summary" is a misrepresentation of the particular list of "copies" that was communicated to the lower court (as evidenced by the transcript), it is clear from the Appellant's own statement to the lower court that it did not actually introduce or use any of the "Entire contents" at issue. Id.; 7/8/13 Hearing Transcript. Rather, the Appellant's own statement to the lower court confirms that it only told the lower court at the hearing that Appellant "can submit" them to the Court. Notwithstanding the fact that the Appellant's own summary and the transcript evidence that none of those documents were actually ever submitted, the Appellant's summary (as well as the transcript) is notably void of any alleged lower court "refusal to consider the facts presented by the TKMG Court file" as the Appellant now claims. Likewise, there is no evidence that the Appellant ever took exception to the now so-called "refusal".

Also attached to the Appellant's Motion to Reconsider was an additional written communication by the Appellant to the lower court describing the prior letter to be "[m]y lengthy summary of BOTH arguments of Plaintiff and Defendant **as well as my**

understanding of instruction by the Court was solely **for the purpose of providing as full of an understanding of all circumstances to assist in clarifying your direction**". See Motion to Reconsider, Ex. C(emphasis added in bold). Again, in this subsequent letter, the Appellant fails to mention any purported "refus[al]" of the lower court.

It remains abundantly clear from the transcript and the lengthy, detailed summaries of same provided by Appellant itself that the Appellant never "introduce[ed]" or "use[d]" the "Entire contents of Spartanburg County Court File of D&C Builders, Inc. v. TMKG, Inc., 2011-CP-42-04141" in the lower court. Likewise, it is just as clear from same that the lower court never "refused to consider the facts presented by the TKMG Court file"; rather, the lower court was never presented with them.

Furthermore, the Beall opinion cited by the Appellant states: "Had Conerly wished to question the consideration by the trial court of the pleadings or other records and matters in the earlier action, it was encumbent upon him to raise the issue by proper exceptions." Beall v. Doe, 281 S.C. 363, 315 S.E. 2d 186 (Ct. App. 1984). Applying the same standard here, if the Appellant thought the lower court had actually "refused to consider" the documents offered by Appellant, then it would be "encumbent upon him to raise the issue by proper exceptions." Id. As is clear from the transcript and the Appellant's detailed, lengthy summaries of same, the Appellant never made such exception, and the Appellant was never otherwise precluded from making the documents part of the record.

Contrary to the Appellant's use of the above Beall cite in support of its contention that the Respondent should have objected, the actual context of the lower court's statements (in pointing out the otherwise obvious fact that pleadings are public record

and not confidential) makes it clear how nonsensical it would be (and otherwise patently futile) for the Respondent to object to that statement of the lower court as being against the interests of Respondent. City of Columbia v. Myers, 278 S.C. 288, 294 S.E.2d 787 (1982)("it would be both futile and nonsensical for counsel to request curative instructions from a trial court which has already ruled an argument to be proper.").

The statement by the lower court regarding the public, non-confidential nature of the few pleadings referenced by Appellant had nothing to do with the lower court's alleged "refus[al] to consider the facts presented by the TKMG Court file", as the Appellant now alleges. Furthermore, if that is what the Appellant truly believed at the time, it should have, at a minimum, taken exception. Beall v. Doe, 281 S.C. 363, 315 S.E. 2d 186 (Ct. App. 1984) But, Appellant failed to do anything in response. Yet, the Appellant now attempts to present the "Entire contents" of this separate matter to this Court.

It remains clear that despite the opportunity to "introduce and use the information" in its arguments to the lower court, the Appellant never did. Had the Appellant actually presented any of the "Entire contents" of the other case, then upon review of same the Respondent would have then been able to make any objection. The reality is, however, that the Respondent did not offer into the record any of the contents of the other case, the lower never ruled on any such non-existent offer into the record, and the lower court never made a dispositive ruling on the Respondent's motion. So, as there is absolutely no basis in support of Appellant's apparent contention that the lower court issued a dispositive ruling on the seminal issue of disqualification, the record is also void of any "introduction and use" by Appellant or objection made by Appellant before

the lower court regarding the "Entire contents" of the other case. There being no such ruling, no such objection, and there likewise being no indication in the record that the lower court was presented with or reviewed any of the "Entire contents" of the other case, the Respondent's Motion to Strike should be granted.

IV. CONCLUSION

For the reasons stated above, Respondent's Motion to Strike should be granted and the specifically referenced items contained in Appellant's Designation should be stricken as well as any references, support or argument based on such matters in Appellant's Brief, so that the Record on Appeal to be prepared by Appellant's Counsel reflects those items that are in compliance with Rule 210(c) of the South Carolina Rules of Appellate Procedure.

Respectfully Requested,

October 16, 2014

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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

I N D E X

(There were no exhibits or witnesses presented).

P R O C E E D I N G S

THE COURT: D&C Builders versus Buckley. This is Buckley's motion to dismiss.

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

THE COURT: Go ahead and tell me about it.

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

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

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

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

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

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

A dispute arose after the construction was

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

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

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

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

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

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

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

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

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

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

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

THE COURT: No, I've got it.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you.

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

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

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

Verdin two weeks ago on our motion to dismiss. I think it's important to point out for the Court's knowledge that prior to that time when he filed a motion to disqualify, in fact weeks before that motion was filed, Mr. Martin contacted our office to discuss this issue. Initially he called me and I referred him to Mr. Crawford who is seated here beside me.

It's my understanding as to what Mr. Crawford told me about the substance of that conversation they discussed whether this conflict of interest exists and apparently they discussed it at length. They, as I understand it, agreed to disagree. The conclusion that each of them reached -- I think it's important to note that Mr. Crawford made it clear to Mr. Martin that if he felt as though there was a conflict of interest that existed and he needed to make a motion to the court to please provide us with the specifics as to what kind of confidential information he felt our firm had that would make this alleged conflict material.

In fact, Mr. Crawford went so far as to say if you will provide us with specifics, we'll be happy to look at our pleadings and make any necessary amendments.

The day before the hearing, I actually called Mr. Martin to make sure he was aware of the time change for that hearing and I also reminded him of what

Mr. Crawford had told him earlier and we'd be glad to address any specific concerns that he had with any conflict issue. I got an email after hours thanking me for the message and it's been a busy day.

And so we show up for the hearing the next morning and despite the fact that Mr. Martin was seated beside the attorney that represented Mr. Buckley at the time for 15 minutes prior to the hearing with the motion filed in hand and the affidavit that he had prepared a week before only at the time of our motion hearing was called did he provide the Court and us copies of his motion and this affidavit that he discussed before.

Now, thankfully we've had time to read the affidavit and the motion and prepare a response. We've provided the Court with the affidavit we prepared. One is from Attorney Jack Kegman, also Attorney John Crawford, Town(ph) Johnson in my office along with my own affidavit are submitted to the Court.

We also have an affidavit submitted on behalf of Mr. Buckley by Ms. Buckley, his daughter-in-law.

Just briefly going back through a factual background about how my firm got involved with this matter and how it relates to the prior representation of D&C Builders. I was contacted in late March of this year by Attorney Jack Kegman who had been approached by the

Buckleys to see if he would represent them in this matter. The affidavit and the motion submitted by Mr. Martin makes it sound as though the Buckleys came straight to us based on some knowledge they had gained through the construction of their house and we had represented D&C Builders through this separate matter. That's not true. They went to Jack Hegman first who through a mutual friend that Jack Hegman and Mr. Buckley's son shared.

Jack Hegman he practices in transactional law for the most part. He called me and asked me if I'd be interested in taking the case and I said that I would when I run a conflict check. Once I ran a conflict check, I talked to John Crawford in my office and made me aware of the prior representation of the company.

They discussed amongst themselves whether they felt like there would be a conflict of interest if we were to pursue the representation of Mr. Buckley. As I understand it, Mr. Buckley even sought outside legal who together with Mr. Johnson, Mr. Crawford, Mr. Kenison and Mr. Dudley in our office they all concluded that there was not a conflict of interest.

If I could pass up an opinion rendered by our appellant court. It is very much on point as the facts we have here. If you would turn to Page 5. This matter is Madison v. Graphic Fabrics, Inc. One of the issues that

was involved in the lawsuit that went up on appeal was whether the attorney who was representing Madison should have been disqualified as his attorney based on the allegation that he had represented the defendant, the company, in a prior lawsuit -- actually I believe there was more than one -- where the employer who he represented actually sued or been involved in lawsuits with other former employees involving the termination of employment.

As I understand it from the outside counsel that Mr. Crawford talked to in this matter, this attorney in this case as we understand it drafted the employee handbook for that company. In this case that same attorney represented a former employee of that company in a suit that he filed against the former employer, his former client.

On Page 5 of that opinion, I'll just read it to you where it lays out the rules fairly clear it says, "Generally an attorney can not in determination of employment represent ones interest in transaction adverse to that of his former client. However, an attorney is not prevented from representing a subsequent client, his former client, where the duties required of him do not conflict with those required in the first employment. The test of whether the attorney's employment is inconsistent with his duties to a former client is whether exceptance

of the new retainer will require him in forwarding the interest of the new client to do anything that will injuriously affect a former client in any matter in which he formerly represented. And also whether the attorney will be called on in his new relation to use against his former client any knowledge or information acquired in a former relationship."

In this case the dispute involved the question of whether Graphics breached it's contract with Madison and terminated him. There is no evidence that Madison's attorney would injury Graphics in connection with his former representation of the company, nor is there any evidence that Madison's counsel would be called upon to use any knowledge prior to the former relationship against Graphics in the present matter.

The fact that counsel previously represented Graphics in a dispute with a former employee was inefficient by itself to establish cause for disqualification.

Your Honor, our firm's representation of D&C Builders in the previous matter was limited to a simple mechanics lien foreclosure. As I understand the counterclaim that Mr. Martin referenced was a simple offset claim where the company alleged in the response that they were offset on the amount that was allegedly due

by D&C Builders.

The facts in this case and that case are totally opposites. As the affidavits that we submitted by our firm, the parties, no one in our office was aware of the facts and circumstances that gave rise to this current lawsuit at the time of our representation of D&C Builders.

In fact, I think it might be a little confusing that Mr. Martin was discussing the prior lawsuit that was resolved amicably last year, it was dismissed with prejudice. It wasn't until a half year or a year later that we were approached through Jack Hegman about Buckley.

The Buckleys had put in their affidavit that they were unaware that our firm had represented D&C Builders during the construction of their project. That being said what's also important and in Mr. Crawford and Mr. Johnson's affidavit, they make clear the facts of this case do not satisfy the elements that are outlined in this Madison matter. We're still unaware of the specific confidential matter that's at issue here.

On top of that, what's most striking in this matter is as its laid out by Ms. Buckley and her affidavit she makes it very clear and Mr. Martin touched on it, that this wasn't just a relationship between a builder and a homeowner. This was a relationship between Mr. Dodenhoff

who is a lifelong friend and Mr. Buckley's son. And through that relationship, as strange as it may sound, Mr. Dodenhoff apparently went to great lengths to describe the ongoing business operations of D&C Builders and the matters that are at issue in this prior lawsuit.

In fact, he described the opposing party in that lawsuit despairingly as the german and he talked to the Buckleys a number of times about that lawsuit and how it impacted his company financially how the Buckleys project was (inaudible) to him and that company.

It's striking in the affidavit provided by the Buckleys the details in which Mr. Dodenhoff went into when it came to these same issues that he's made light of in his affidavit. In fact, everything that's provided in his affidavit that's in support of his claim that our firm was in possession of this confidential information was completely undermined by the affidavit that Ms. Buckley has presented.

She explains in detail about the same exact matters that he had discussed with the client so there is no issues to whether that information is confidential.

Again, I can't stress enough, even though we've asked on a number of occasions and as you can see in the affidavit that Mr. Dodenhoff provided, there's no specifics that have been provided to us or the Court now

regarding any actually confidential that would potentially create a conflict of interest.

And, Your Honor, I have here today Mr. Crawford and Mr. Johnson and we would make them available for any in-camera review that you would like. What we've also done we've taken the extra step and like I said we're fairly certain and like I said we sought outside counsel and very comfortable with the law when it comes to as to whether we should be disqualified and this conflict of interest exists, completely out of good faith Mr. Buckley has agreed to amend the pleadings to delete the vale piercing claim. And as Mr. Martin eluded, that's the only claim they apparent have issue even though it wasn't substantiated. We would go ahead and deleted which we would have probably done if he would have contacted us before he filed the motion.

So it's our position that under the law, as it stands, there are no grounds for a motion to disqualify and certainly as they are now with the pleadings having been deleted there's still no grounds for the motion to disqualify to be granted.

Thank you.

THE COURT: Thank you.

MR. MARTIN: Your Honor, if I may address a few of these things. First, amending the pleadings does

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

MR. MARTIN: That connection simply is ---

THE COURT: They're friends.

MR. MARTIN: They were friends.

THE COURT: Okay.

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

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

THE COURT: That's all public record.

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

THE COURT: Who did they represent in the

former?

MR. MARTIN: What I'm saying is in that representation there would be information that they solicited or obtained or that he would provide to them in the course of that representation that would be confidential financial information that they would not give to the other side. The hard part here is I am certainly not in a position to disclose financial information ---

THE COURT: Okay. We'll, I'll tell you what we're going to do. You put together sort of a privilege log of this information and you submit it to me and I will examine what it is and submit it to them and they are under a protective order not to disclose it to anyone to determine what we're talking about.

Your position seems to me to be if you represent somebody, you are precluded from ever representing anybody else that might have a claim against that person.

MR. MARTIN: No, sir.

THE COURT: So I need to know what it is that's going to prevent that. So you put together a privilege log of information that you claim to be confidential that they could use in this case against your client. Let's see what it is. Let's find out what it is.

So you're motion to dismiss we're going to have to wait and see.

MR. MARTIN: I understand what you're asking me to do.

THE COURT: Put together a privilege log.

MR. MARTIN: Yes.

THE COURT: You're saying they're in possession of information of that they can use against your client in this case.

MR. MARTIN: I'm also saying there's information that they would have likely or could have reasonable obtained according to the Court's description of substantially related that may or may not have been obtained.

THE COURT: Let's fine out what it is. Do a privilege log, let them examine it and we'll just have to reconvene the hearing.

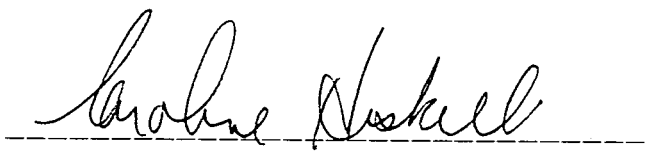
MR. MARTIN: Yes, sir.

MR. HOLDER: Thank you.

---END OF TRANSCRIPT RECORD---

I, the undersigned Caroline Hiskell, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas, Greenville, South Carolina on the 8th of July, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



Caroline Hiskell

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 JUL 16 P 1:20

D&C Builders, Inc.)
☒ Plaintiff) CASE NO.
) 2013-CP-23-1833
v.)
) MOTION AND ORDER INFORMATION
) FORM AND COVER SHEET
Richard M. Buckley And Wells Fargo N.A.)
☐ Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
Brian A. Martin, Bar No. 9791	M. Stokely Holder, Bar No. 73892
Address:	Address:
212 Trade Street, Greer, SC 29651	704 E. McBee Avenue, Greenville, SC 29601
phone: 864-879-7779 fax: 864-879-7171	phone: 864-242-4899 fax: 864-242-4844
e-mail: brian@martinlawsc.com other:	e-mail: holder@conlaw.com other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

B. A. Martin
Signature of Attorney for ☒Plaintiff / ☐Defendant

July 16, 2013
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	7th JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	C.A. NO.: 2013-CP-23-1833
D&C Builders, Inc.,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	
	)	
Richard M. Buckley and Wells Fargo National Association,	)	
	)	
Defendants.	)	**MOTION TO RECONSIDER, CLARIFY AND AMEND ORDER TO ISSUE INJUNCTION**
	)	
Richard M. Buckley,	)	
	)	
Third-Party Plaintiff,	)	
	)	
Vs.	)	
	)	
Scott Dodenhoff,	)	
	)	
Third-Party Defendant.	)	

Now comes the Plaintiff, by and through its undersigned counsel, and would respectfully request and hereby moves that the Court reconsider, clarify and amend its ruling and Order issued on July 15, 2013 requiring Plaintiff to submit to this Court and to counsel for Defendant Buckley a detailed privilege log containing specific confidential information and knowledge Plaintiff contends that Defendant's existing counsel acquired through its prior representation of Plaintiff and that would be injurious to Plaintiff if used by the Defendant in the above referenced matter.

In support of this motion, Plaintiff would ask the Court to re-examine the record of the hearing held on July 8, 2013, the pleadings, affidavits submitted, the undersigned's letter to the

Court of July 11, 2013 attached hereto as Exhibit A, Defense Counsel's e-mail objection to such letter attached hereto as Exhibit B, and the undersigned's e-mail response to Defense Counsel's objection by e-mail response attached hereto as Exhibit C. This information, constituting all of the evidence and arguments offered to the Court in this matter, clearly shows that:

1. Defense Counsel asked the Court to require Plaintiff to justify its claim that Defense Counsel be disqualified from this matter pursuant to Rule 1.9 of the South Carolina Rules of Professional Conduct by disclosing exactly the specific confidential information Plaintiff contends Defense Counsel has which was obtained in its prior representation of Plaintiff and could be used against Plaintiff in this case.

2. Rule 1.9 of the South Carolina Rules of Professional Conduct does not require the disclosure of the specific confidential information but provides under Comment # 3 to such rule that the representation will be prohibited "**if there otherwise is a substantial risk** that confidential factual information as would normally have been obtained in the prior representation **would** materially advance" the subsequent client's position.

3. Comment # 3 of Rule 1.9 of the South Carolina Rules of Professional Conduct also specifically states that "A former client **is not required** to reveal the confidential information learned by the lawyer in order to establish **a substantial risk** that the lawyer has confidential information to use in the subsequent matter."

4. The South Carolina Supreme Court applied the same standard in the controlling authority of *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (S.C. 1996) when it held the standard under Rule 1.9 is "whether the affected lawyer **would have or reasonably could have** learned confidential information in the first representation **that would be** of significance in the second."

5. The Order of the Court as issued will require Plaintiff's Counsel to disclose confidential information not only obtained from Plaintiff by Defense Counsel through confidential attorney/client communications in the prior matter, but also confidential information obtained by the undersigned in confidential attorney/client communications between Plaintiff and its existing Counsel in the present matter.

6. The disclosure of such confidential information relayed in confidential attorney/client communications is exactly the information the Plaintiff seeks to prevent disclosure of and use by the Defendant's Counsel by its Motion to Disqualify Defendant's counsel in this matter.

7. In requiring Plaintiff's Counsel to disclose this confidential information to Defense Counsel, Plaintiff will be forced to refresh Defense Counsel's memory of confidential information obtained previously through confidential attorney/client communications but not currently recalled providing additional information for Defendant's Counsel to use to the advantage of Defendant and causing further harm to the Plaintiff.

8. In requiring Plaintiff's Counsel to disclose this confidential information to Defendant's Counsel, Plaintiff will be forced to disclose confidential information to Defense Counsel that may not have been previously disclosed to Defense Counsel in the prior representation again providing additional information for Defendant's Counsel to use to the advantage of Defendant and causing further harm to the Plaintiff.

9. The Plaintiff has not consented and does not consent to the disclosure of any confidential information relayed through confidential attorney/client communications it had with any of its attorneys.

10. The Order as issued will require the disclosure of confidential attorney/client communications between Plaintiff and Defense Counsel when they were representing Plaintiff in violation of Rule 1.6 of the Rules of Professional Conduct.

11. The Order as issued will require the disclosure of confidential attorney/client communications between Plaintiff and its existing Counsel in violation of Rule 1.6 of the Rules of Professional Conduct.

12. If the Court requires the disclosure of such confidential information obtained from confidential attorney/client communications, the Plaintiff will suffer irreparable harm because once that information is disclosed it cannot be undisclosed. Even under a protective order as issued by the Court, Defense Counsel will have such knowledge of the confidential information, some of which may not be remembered and some of which may not have been received, but all of which will provide information that will affect Defense Counsel's representation of the Defendant and the pursuit of this case on behalf of Defendant and to the disadvantage of the Plaintiff.

13. In the event the Court does not revise its Order, based on Rule 1.9 of the Rules of Professional Conduct, the Comments thereto and the Supreme Court's interpretation of this specific requirement of Rule 1.9 in *Townsend v. Townsend*, Plaintiff will likely succeed in challenging this requirement of this Order to provide such confidential information obtained through confidential attorney/client communications to Defense Counsel.

14. In the event the Court does not revise its Order and Plaintiff is required to disclose confidential information obtained through confidential attorney/client communications by this Order, there is no other remedy available to the Plaintiff other than an injunction against Defendant and Defense Counsel prohibiting them from accessing and reviewing such confidential information.

15. Plaintiff has objected to providing Defendant and Defense Counsel this confidential information at the hearing on July 8, 2013, in the letter to the Court of July 11, 2013 and in the e-mail response to Defendant's proposed Order of July 11, 2013 because of the potential irreparable harm to the Plaintiff, and has requested clarification and direction in avoiding disclosure of confidential attorney/client communications in violation of the Rules of Professional Conduct.

THEREFORE, based on the foregoing, the existing record in this matter including the pleadings, motions, affidavits, exhibits, arguments, the existing law of South Carolina, the Rules of Professional Conduct, and the preservation of the sanctity of confidential attorney/client communications, Plaintiff respectfully requests that the Court reconsider its ruling and Order of July 15, 2013, clarify the specific information that the Court desires to review from the Plaintiff including how Plaintiff is to address information obtained in verbal communications that constitute confidential attorney/client communications, and 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. A proposed Order to this affect, absent the specific information the Court is requesting to view is attached for the Court's convenience.

Respectfully submitted this 16th day of July, 2013.

Brian A. Martin (SC Bar #: 9791)
Brian A. Martin, LLC
212 Trade Street
Greer, SC 29651
(864) 879-7779
Attorney for Plaintiff

Greenville, South Carolina
July 16th, 2013

"EXHIBIT A"

BRIAN A. MARTIN LLC

ATTORNEY AT LAW

LICENSED IN SC & NC

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GREER, SOUTH CAROLINA 29651

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BRIAN@MARTINLAWSC.COM

July 11, 2013

VIA E-MAIL AND U.S. MAIL

The Honorable Edward W. Miller
Greenville County Courthouse
305 E. North St., Suite 219
Greenville, SC 29601

Re: *D & C Builders, Inc. v. Richard M. Buckley, et. al.*
Case #: 2013-CP-23-1833

Dear Judge Miller:

I appreciate your consideration and the opportunity to present arguments before you yesterday regarding Plaintiff's Motion to Disqualify Defendant's Attorney and Law Firm. I will also apologize in advance if my request for clarification in this letter is duplicative from your instructions at the hearing. But in trying to prepare the Privilege Log you requested at the hearing, if I understand your instructions correctly, I find myself in a significant ethical dilemma and believe that I do need a written Order instructing me in how to proceed.

To summarize what transpired at the hearing, Defendant's Motion to Dismiss was called and I requested the Court hear Plaintiff's Motion to Disqualify prior to the Motion to Dismiss such that the conflict of interest issue could be addressed prior to any further actions on the case by Mr. Holder and the current law firm. I was allowed to proceed and made the following argument that law firm be disqualified based on a material conflict of interest:

1. Plaintiff is a "Former Client" under Rule 1.9 of the Rules of Professional Conduct where law firm previously represented Plaintiff in another case involving the foreclosure of a mechanic's lien in Spartanburg County from July 1, 2011 to July 31, 2012.
2. Plaintiff performed the construction work for Defendant Buckley that is at issue in the present case while Plaintiff was being represented by law firm in the prior case.
3. Law firm is in violation of Rule 1.9(a) in that the interests of Plaintiff and Defendant are adverse, Plaintiff did not consent to law firm representing Defendant in the present case, and the two cases are substantially related.
4. The cases are substantially related within the definition of Rule 1.9 to justify such disqualification in that:

a) Both cases involve the foreclosure of a mechanic's lien by Plaintiff over construction work performed by Plaintiff and involve the same asserted counterclaims against Plaintiff, including improper and defective construction, inaccurate billing, lack of supporting documentation, and negligence, as well as the same asserted defenses, including law firm asserting the same defenses on behalf of the Defendant in the Answer in the present case that it asserted on behalf of the Plaintiff in the Reply to Counterclaims in the prior case.
b) Pursuant to the definition of "substantially related" contained in Comment 3 to Rule 1.9, that due to these competing representations by law firm, there is a substantial risk that confidential factual information as would normally have been obtained from Plaintiff by law firm in the prior representation would materially advance Defendant's position in the present case.
c) Pursuant to the Supreme Court's definition of "substantially related" in the case of *Townsend v. Townsend*, 323 S.C. 309 (1996), in determining whether a matter is "substantially related", one should consider, among other things, whether the affected lawyer would have or reasonably could have learned confidential information in the first representation that would be of significance in the second.
d) Pursuant to Comment 3 to Rule 1.9, in the case of an organizational client (of which Plaintiff is), 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.
e) Pursuant to Comment 3 to Rule 1.9, a former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.
f) That the services provided to Plaintiff in the prior case are identical to the services being provided to Defendant in the present case because the claims, counterclaims and defenses are the same.

5. That Plaintiff has demonstrated through Affidavit that he provided law firm information during its representation of Plaintiff in the prior case, some of which was confidential, including, but not limited to confidential information about the corporate structure and operations of the Plaintiff, confidential financial information and impact of the outcome of prior case on other projects of Plaintiff, the authority and actions of representatives of Plaintiff.

6. That law firm has already demonstrated either its intent to use, the substantial risk that it could use or at least the relevance and potential to use any such confidential information and/or other information (not necessarily confidential) obtained in its prior representation of Plaintiff to the disadvantage of Plaintiff in violation of Rule 1.9(c)(1) by making allegations in its Answer, Counterclaims and Third-Party Claims on behalf of Defendant in the present case that include:
a) Plaintiff did not have a functioning corporate structure and did not follow corporate formalities;

b) Plaintiff was insolvent prior to and/or during construction of the project (while same law firm was attempting to recover $75,000 for Plaintiff in prior case.);
c) Plaintiff was grossly undercapitalized prior to and during construction of project.

7. Based upon these circumstances, law firm has a material conflict of interest and should be disqualified from representing Defendant in the present matter.

Attorney for Defendant then presented the following information and arguments against disqualification:

1. Attorney for Plaintiff contacted Attorney for Defendant several weeks prior to the filing of Motion to Disqualify concerned about the potential conflict of interest.
2. Attorney for Defendant advised he did not believe there was a conflict of interest, that the two cases are not substantially related and that he is not aware of any confidential information obtained in the prior case that would be relevant or useful in the present case.
3. If Attorney for Plaintiff could identify specific confidential information obtained in the prior case that would be relevant in the present case, Attorney for Defendant would reconsider the issue.
4. Attorney for Plaintiff never provided any specific confidential information he contended was relevant but proceeded to file the Motion to Disqualify.
5. Attorney for Plaintiff has still not provided any specific confidential information the he contends was obtained by law firm in the prior representation that would be relevant and useful in the present representation to warrant disqualification.
6. Defendant presented an Affidavit from Attorney John H. Heckman to the extent that Defendant was referred to law firm by Mr. Heckman and not through Defendant's prior knowledge of law firm's previous representation of Plaintiff.
7. Defendant presented Affidavits from Attorneys for Defendant, M. Stokely Holder, John T. Crawford and Townes B. Johnson wherein each states:
   a) They were aware of law firm's prior representation of Plaintiff prior to undertaking representation of Defendant.
   b) They did not believe that the two cases were related in any way.
   c) They did not remember any confidential information disclosed to them during the prior representation of Plaintiff.
   d) They did not recall Plaintiff sharing any information about the Defendant or the project for Defendant during the prior representation of Plaintiff.
   e) In the prior representation, they did not obtain any information from Plaintiff regarding its financial status or the impact the outcome of the prior representation would have on that financial status.
   f) Any information obtained in the prior representation was a matter of public record.
   g) They do not believe the duties required in representing Defendant in the present case conflict with the duties required in representing Plaintiff in the prior case.
   h) They do not believe forwarding the interests of the Defendant in this matter will improperly injuriously affect Plaintiff.
8. Defendant presented an Affidavit of Pamela Burns-Byers Buckley stating:
   a) Defendant was referred to law firm by Attorney John H. Heckman.

b) Defendant was not aware that law firm had previously represented Plaintiff until disclosed by law firm.

c) Law firm advised Defendant that it did not believe any conflict existed in representing Defendant.

d) Plaintiff had previously and voluntarily disclosed to Defendant information and details about the prior representation, including details of the case, the financial status of the company, and the impact the outcome would have on the financial status of the company.

e) Plaintiff had shared information with Defendant regarding the corporate structure, financial status, ongoing operations, authorized representatives and their authority.

f) Plaintiff had shared extensive details with Defendant regarding the company and its ongoing legal matters.

g) All claims filed on behalf of Defendant are based on knowledge gained solely through Defendant's personal dealings with Plaintiff and not through any information from law firm.

9. Defendant has filed an Amended Answer, Counterclaims and Third-Party Claim removing the Counterclaim against Plaintiff that contains the allegations that:

a) Plaintiff did not have a functioning corporate structure and did not follow corporate formalities;

b) Plaintiff was insolvent prior to and/or during construction of the project (while same law firm was attempting to recover $75,000 for Plaintiff in prior case.);

c) Plaintiff was grossly undercapitalized prior to and during construction of project.

10. Defendant offered the South Carolina Court of Appeals case of *Madison v. Graffix Faabrix, Inc.*, 304 S.C. 321 (S.C.App. 1991) wherein states:
"an attorney is not prevented from representing a subsequent client against a former client where the duties required of him do not conflict with those required in the first employment. The test of whether the attorney's employment is inconsistent with his duty to the former client is whether acceptance of the new retainer will require him, in forwarding the interest of the new client, to do anything that will injuriously affect a former client in any matter in which he formerly represented him, and also whether the attorney will be called on, in his new relation, to use against a former client any knowledge or information acquired in the former relationship."

11. The prior representation of Plaintiff involved a simple mechanic's lien foreclosure and was a setoff claim whereas the current case involves fraud by the Plaintiff such that the facts of the two cases are polar opposites.

12. The prior case was resolved amicably by the parties and dismissed with prejudice.

13. Law firm was not approached about current representation until a half year later after prior case was dismissed.

14. There was no confidential information given to law firm as alleged in Plaintiff's affidavit and any information given wasn't confidential as the same information was provided to Defendant pursuant to the conversations referenced in the Affidavit of Pamela Burns-Byers Buckley.

15. Based on the standard in *Madison*, that the two cases are not related, that law firm is not aware of any confidential information gained in the prior representation of Plaintiff

or related to the current case that will be compromised in the current representation of Defendant, and that Plaintiff has not provided any specific confidential information he contends was obtained in the prior representation that could be used to his disadvantage in the current matter, the Motion to Disqualify should be denied.

In rebuttal to these arguments, I presented the following:

1. Amendment of the Pleadings does not eliminate the risk of harm to the Plaintiff in law firm using information that fueled the allegations of inadequate corporate structure and insolvency to begin with to the disadvantage of the Plaintiff in the other claims or at some future point in the collection on a judgment should one be obtained.
2. Amendment of the Pleadings also does not address the prohibition of law firm's representation under Rule 1.9(a) if these cases are substantially related.
3. The Supreme Court's definition of "substantially related" in the *Townsend* case in 1996 provides more direction in this matter than the Court of Appeals decision in *Madison* in 1991 by defining "substantially related" to include situations where the attorney "would have or reasonably could have learned confidential information in the first representation that would be of significance in the second."
4. That in *Townsend*, the attorney also claimed no confidential information was used but the Court stated the lawyer should have recognized the risk that information gained in the first matter might prove relevant in the second.
5. To Defendants point that Plaintiff has not provided any confidential information that could be used, Comment 3 to Rule 1.9 specifically provides that "A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter.
6. The Comment also says that a conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.
7. That Plaintiff has ready and can submit to the Court copies of the Pleadings, Affidavits and communications from the prior case for the Court to compare with the present case in order for the Court to see that the nature of the services law firm provided to Plaintiff in the prior case are the same as they are proposing to provide to Defendant in the present case, that the claims, counterclaims and defenses are the same, that both cases involve allegations against plaintiff of poor quality construction, financial improprieties and negligence.

It was at this point that you requested what confidential information Plaintiff was contending the law firm obtained in the prior case that would be material in the present case or what information was Plaintiff contending law firm had that was confidential that could be used against it. When I indicated that I was not prepared to disclose such confidential information, you instructed me to prepare a Privilege Log with the information for you to review and to forward to the Defendants counsel and that we would resume the hearing after that information was reviewed. I will again apologize, for this is the point at which I became confused. In attempting to prepare what I believe you are requesting, it began to appear as if

in complying with your request, I would be violating my own ethical responsibilities to my client. So before I proceed further, I believe it prudent to request clarification by written order as to what you are requesting I provide.

My understanding of your instruction at the hearing is for me to prepare a Privilege Log that contains the specific information my client provided to law firm in the prior representation as confidential attorney/client privileged communications that Plaintiff now contends was confidential information that could be used against the Plaintiff in the current matter. I understand that law firm contends there are none and that if there were any then the Affidavit of Pamela Burns-Byers Buckley supports such information is no longer confidential, and perhaps your instruction to provide the Privilege Log to Defendant's counsel is so that they can confirm whether the claimed information is indeed confidential information they received. My concerns with this instruction are that it seems to require me and my client to 1) disclose confidential attorney/client communications both between Plaintiff and law firm and Plaintiff and me; and 2) to not only provide these confidential attorney/client communications for the Court to evaluate, but also to provide them to counsel for Defendants to review.

In thinking further about providing the information you requested, I am concerned that complying with this instruction (as I understand it) without a written order may subject me to claims of violating Rule 1.6 of the Rules of Professional Conduct in that I would be disclosing confidential attorney/client communications both between my client and the law firm of which I am currently not privy and also confidential attorney/client communications between my client and myself. I am also concerned that requiring such confidential attorney/client communications be provided to the Defense for their review would be prejudicial to the Plaintiff in the event, as indicated in the Affidavits, Attorneys do not recall some of the information at this time but would have their memories refreshed by that contained in the Privilege Log, or should a more specific Affidavit be required of Ms. Buckley the information to refresh her memory would be readily available to the detriment of the Plaintiff. Finally, in the event that the Motion to Disqualify is ultimately denied, having provided the Defendant with the confidential attorney/client communications Plaintiff contends justify disqualification would essentially provide the Defense additional information that could also be used against the Plaintiff in the present case.

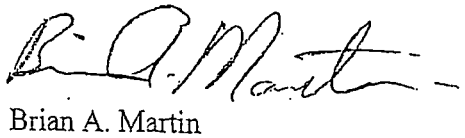
In order to be sure I am providing the correct information that you were seeking in your instruction to prepare the Privilege Log, and particularly in light of my own ethical obligations if I am being requested to disclose confidential attorney/client communications, I would request that you issue a written Order specifically clarifying what information you are requesting I provide in the Privilege Log for your review. I would also request that I not be required to provide this information to the Defense but for your review only to protect from it being used by the Defense as indicated above.

For your convenience, I have attached a draft Order including as much information as I felt confident of with regard to your instructions. I am also glad to complete the Order for your review if you would provide me the instructional language as to what you are specifically requesting that I include in the privilege log and whether or not you are specifically requiring me to provide this information to the Defense for their review despite my objections.

I apologize for the length of this letter, but felt it important to be sure I was clear in my understanding of the arguments I presented, the arguments Defendant presented and your instructions as I understood them. I certainly do not intend to misstate or mischaracterize the Defendant's position on this matter and would encourage them to clarify any argument or position of theirs I have left out or misstated. My purpose is simply to obtain specific clarification as to the information you are requesting I provide in the Privilege Log for your review and have that in a written order for my own protection if it is requiring me to disclose confidential attorney/client communications.

Thank you for your time and consideration and I await your further instruction. Should you have any questions or need additional information, please feel free to give me a call at your leisure.

Sincerely,



Brian A. Martin

Enclosure

Cc: Scott Dodenhoff, D&C Builders, Inc.
H. Stewart James, Esq.
Thomas A. Shook, Esq.
M. Stokely Holder, Esq.

Brian A. Martin

From: Stokely Holder [holder@conlaw.com]
Sent: Thursday, July 11, 2013 11:58 AM
To: Brian A. Martin; emillerj@sccourts.org
Cc: 'Stewart James'; ashook@finkellaw.com
Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley
Attachments: Proposed Order.doc

Dear Judge Miller,
In brief response, I'm not quite sure what purpose the lengthy "summary" provided by Mr. Martin serves. The court reporter's record of the hearing together with the documents of public record speak for themselves. I am unaware of any concern heretofore expressed by the Court as to what transpired at the hearing, the legal authority at issue, or the import of the Court's ruling. The majority of the lengthy letter provided by Mr. Martin appears to be an attempt to prolong the arguments already made to the Court and/or an attempt to move the court to reconsider an order that has yet to be signed or filed by the Court (on a motion that has not been ruled on).1

In response to Mr. Martin's concerns regarding the publication of the privilege log, it bears noting that the Court ruled in fairly clear terms that the privilege log will be subject to a protective order. Based on the breadth of Mr. Martin's letter to the Court, together with the lack of support produced to date by the Plaintiff in support of its Motion, the undersigned finds it interesting that Mr. Martin omitted this portion of the court's ruling from his letter. And, from a practical standpoint, the undersigned finds it disconcerting that one of the concerns expressed by Mr. Martin regarding the production of the privilege log is that it not be provided to my office. In light of the motion being held in abeyance pending the court's review of the privilege log (under a protective order) and in light of Mr. Martin's position that this alleged confidential information is allegedly already in my office's possession, I cannot think of a valid reason for this qualification.

For the Court's reference, please find attached a complete draft of a proposed order which we feel accurately reflects the Court's ruling on this matter.

Should the Court have any questions or concerns, we will be glad to work with the Court and Mr. Martin to address same.

Respectfully,

Stokely Holder

1 Based on the repeated representations of Plaintiff's counsel that the underlying case and the prior case are similar in virtually all respects, we simply direct the Court's attention to the documents of public record in each case, including the pleadings. The significant differences between the two cases are glaring.

Brian A. Martin

From: Brian A. Martin [brian@martinlawsc.com]

Sent: Thursday, July 11, 2013 1:18 PM

To: 'Stokely Holder'; 'emillerj@sccourts.org'

Cc: 'Stewart James'; 'ashook@finkellaw.com'

Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Dear Judge Miller,

With all due respect to Mr. Holder, I certainly agree that the record of the hearing, documents submitted and legal authority will speak for itself. My lengthy summary of BOTH arguments of Plaintiff and Defendant as well as my understanding of instruction by the Court was solely for the purpose of providing as full of an understanding of all circumstances to assist in clarifying your direction regarding the Privilege Log. If I incorrectly stated or mischaracterized Mr. Holder's arguments presented at the hearing in any way, I certainly would like for him to address those to be sure your instructions to me are clear. I am not trying to extend the arguments but am asking to be clear on what you are requesting I provide.

To that end, I do appreciate Mr. Holder pointing out that the Court's direction at the hearing that the Privilege Log would be subject to a protective Order was not included in the summary. It should have been and was not left out intentionally. By my letter, I am asking that you reconsider requiring the Privilege Log be provided to Mr. Holder even under a protective order for the reasons stated in my letter and the risk that in complying, I may end up inadvertently providing information to the Defendant that they do not already have or do not recall.

If it is your Order that such information be provided under a Protective Order, I would ask that such requirement be included in the Order issued and will be glad to provide a revised proposed Order containing such language.

Should the Court consider using Mr. Holder's submitted Order, I would object to the last sentence of the second paragraph beginning with "Through a referral from another law firm" be removed as this was an argument of Defendant that was not ruled on by the Court at the hearing and would seem to bear no relevance to the issue of what information should be included in the Privilege Log. I would also ask that you specifically address in the Order how information and knowledge not contained in any prepared documents or witnessed by anyone other than client and attorneys (ie. verbal communications) be addressed, including information provided during confidential attorney/client conversations. Mr. Stokely's proposed Order does not seem to address that situation and is a primary concern of mine in not violating my own ethical obligations to my client.

Again, I am not asking for anything further in this matter than written clear direction from the Court on the information to be provided in the Privilege Log, including what type and specific information the Court wants to see, how to address verbal information provided in confidential attorney/client communications and for the Court to reconsider requiring this information be provided to the attorneys for the Defendant for their review.

Please let me know if you need anything further. Sincerely, Brian A. Martin

Brian A. Martin, LLC
Attorney at Law
212 Trade Street
Greer, SC 29651
(864) 879-7779
(864) 879-7171 Fax
brian@martinlawsc.com

Please note that my e-mail has recently changed. Please update this information in your contacts.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	13th JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	C.A. NO.: 2013-CP-23-1833
D&C Builders, Inc.,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	
	)	
Richard M. Buckley and Wells Fargo National Association,	)	
	)	
Defendants.	)	
	)	**ORDER**
Richard M. Buckley,	)	
	)	
Third-Party Plaintiff,	)	
	)	
Vs.	)	
	)	
Scott Dodenhoff,	)	
	)	
Third-Party Defendant.	)	

Date of Hearing:	July 8, 2013
Judge:	Honorable Edward W. Miller
Attorney for D&C Builders, Inc.:	Brian A. Martin, Esq.
Attorney for Richard M. Buckley:	M. Stokely Holder, Esq.

An Order was previously issued and filed by the Court in this matter on July 15, 2013 requiring Plaintiff to prepare and submit a privilege log. That Order is hereby rescinded and replaced with the following Order:

The instant matter came before me on the 8th day of July, 2013 pursuant to the Motion filed by Plaintiff D&C Builders, Inc. ("Plaintiff") to disqualify M. Stokely Holder, Esquire, and the law

firm of Kenison, Dudley & Crawford, LLC (collectively, "KDC") from representing Defendant Richard M. Buckley.

Attorneys Townes B. Johnson, III, and John T. Crawford, Jr. of KDC represented Plaintiff D&C Builders, Inc. in a prior lawsuit that was filed in September, 2011 and dismissed with prejudice in July, 2012 (hereinafter, the "2011 Action"). Plaintiff D&C Builders, Inc., through separate counsel, initiated the underlying action against Defendant Buckley in February, 2013 (hereinafter, the "2013 Action").

It is the Plaintiff's contention that the present representation by KDC of Defendant Buckley in the current 2013 Action conflicts with KDC's prior representation of Plaintiff D&C Builders, Inc. in the 2011 Action. In particular, the Plaintiff claims that KDC's current employ is inconsistent with their duty to Plaintiff pursuant to their prior representation of Plaintiff in the 2011 More specifically, the Plaintiff contends that KDC's representation of Defendant Buckley, in forwarding his interest in this 2013 Action is prohibited by Rule 1.9 of the Rules of Professional Conduct, will injuriously affect the Plaintiff because KDC will be called on in this 2013 Action to use against the Plaintiff knowledge and information, including confidential information acquired by KDC through confidential attorney/client communications with Plaintiff, in KDC's former representation of Plaintiff in the 2011 Action.

For the reasons that follow, the Plaintiff's Motion shall be held in abeyance.

The Plaintiff shall have until 5:00p.m. on July 26, 2013 to submit to this Court a privilege log containing the following specific information and knowledge for the Court's review that Plaintiff contends KDC acquired through its prior representation of Plaintiff and which could injuriously affect Plaintiff if used by KDC in this 2013 Action:

(1)

The Plaintiff shall not be required to provide a copy of its submission to counsel for Defendant Buckley. Defendant Buckley and KDC are hereby specifically restricted and enjoined from accessing and/or reviewing such information submitted to the Court pursuant to this Order until further Order of the Court.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Disqualify is hereby held in abeyance subject to the terms herein and submission of the information requested by the Plaintiff in accordance with the terms herein, and the Defendant and KDC are hereby specifically restricted and enjoined from accessing and/or reviewing such information submitted to the Court.

IT IS SO ORDERED!

Edward W. Miller
Judge, 13th Judicial Circuit

July ___, 2013
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	7th JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	C.A. NO.: 2013-CP-23-1833
D&C Builders, Inc.,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	
	)	
Richard M. Buckley and Wells Fargo National Association,	)	
	)	
Defendants.	)	
	)	CERTIFICATE OF SERVICE
	)	
Richard M. Buckley,	)	
	)	
Third-Party Plaintiff,	)	
	)	
Vs.	)	
	)	
Scott Dodenhoff,	)	
	)	
Third-Party Defendant.	)	

I certify that on the 16th day of July, 2013, I served a copy of Plaintiff's Motion to Reconsider, Clarify and Amend Order to Issue Injunction on behalf of Plaintiff D&C Builders, Inc. and Third-Party Defendant Scott Dodenhoff in the above referenced matter upon the Attorneys of Record by e-mail and by U.S. Mail first class postage pre-paid and addressed as follows:

Attorney for the Plaintiff

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

Attorney for Defendant Wells Fargo, N.A.

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

Attorney for the Defendant & Third-Party Plaintiff Richard M. Buckley

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

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brian@martinlawsc.com

July 16, 2013
Greenville, South Carolina