

THE STATE OF SOUTH CAROLINA
IN THE SOUTH CAROLINA SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2013-001645
(Trial Court Case No. 2013-CP-23-1833)
Op. No. 2016-UP-184 (S.C. Ct. App. filed April 20, 2016)

D&C Builders, Inc.Appellant,

v.

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

v.

Scott Dodenhoff, Third-Party Defendant

of whom Richard M. Buckley is theRespondent.

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QUESTION PRESENTED

Does the issuance of an interlocutory order that is akin to a discovery order instructing the party moving for an attorney's disqualification to provide support for its motion constitute denial of a substantial right which would entitle Appellant to immediate appellate review under S.C. Code Ann. § 14-3-330, even when the Respondent has repeatedly offered consent to the relief sought?

STATEMENT OF THE CASE

In its Petition, the Appellant attempts to characterize this case as one that is both ripe for appeal and in need of review by this Court to determine an alleged ethical issue that Appellant asserts is raised by the trial court's preliminary order on its motion to disqualify Respondent's counsel. However, the trial court did not issue a dispositive ruling on Appellant's motion, and the Court of Appeals did not consider the merits of Appellant's argument for disqualification because the motion is not immediately appealable under South Carolina law.

The events giving rise to this appeal began in late 2011, when Respondent's son, Matt Buckley, contacted the Third-Party Defendant and Appellant's agent, Scott Dodenhoff, about the Respondent's desire to improve the residence on his property. (R. pp. 23-61). Before this dispute, Dodenhoff and Matt Buckley were lifelong friends. (Id.) Matt Buckley informed Dodenhoff that Respondent and Respondent's wife were elderly and in poor health, and that Respondent was the sole caretaker for his sick wife. (Id.) Respondent felt like he was no longer physically able care for his wife by himself, so he had asked his son and daughter-in-law, Matt and Pamela Buckley, to move their family of six from Charleston, South Carolina to Respondent's residence to help him and his wife through the

remaining days of her life. (Id.) Respondent told Matt and Pamela that he and his wife would be willing to take out a loan on the remaining equity in the property to pay for improvements that would make the residence suitable for their family, and Matt and Pamela agreed to move in. (Id.)

The Buckleys and Respondent explained to Dodenhoff that the maximum amount Respondent could spend on the improvements was \$78,000.00, the loan amount for which the Respondent had been approved. (Id.) Dodenhoff told the Buckleys that the construction company of which he was vice president, Appellant D&C Builders, Inc., could construct the project according to Respondent's plans and specifications for that maximum possible amount under a cost plus 10% basis. (Id.) In or about January 2012, Respondent entered into a contract with Appellant, via Dodenhoff, stating those terms and also that construction would be completed by the end of July 2012. (Id.) Appellant failed to complete the project in accordance with the contract, submitted bills in excess of the agreed-upon maximum amount, failed to cure the defects after adequate notice and opportunity, and unilaterally abandoned the project in October 2012. (Id.)

On February 10, 2013, the Appellant via Third-party Defendant, Scott Dodenhoff, served a Mechanic's Lien on Respondent and then filed the underlying lawsuit on April 1, 2013. (R. pp. 7-19). On or about March 19, 2013, attorney Jack Heckman called the undersigned attorney, M. Stokely Holder, who, at that time, was a member of the law firm of Kenison, Dudley & Crawford, LLC (the "KDC firm"), and explained to Holder that the Buckleys had contacted Heckman at the suggestion of a mutual friend to see if he would represent Mr. Buckley in the mechanic's lien matter. (R. pp. 110-115, 123-125). Heckman

asked Holder if the KDC firm would be interested in taking the case because, as Heckman told the Buckleys, he does not typically handle construction litigation cases and would usually refer them to Holder, who did handle those types of matters. (Id.) Holder told him that his firm would be glad to speak with the Buckleys once the KDC firm was able to run a conflict check. (Id.)

Upon the KDC firm running a standard conflict check, attorney Townes B. Johnson, III, and attorney John T. Crawford, Jr., both of the KDC firm, disclosed that they had previously represented the Appellant on a standard mechanic's lien foreclosure matter and that it was resolved amicably. (Id.) No one at the KDC firm had ever met the Buckleys or spoken to any of them before about anything. (Id.) The KDC firm concluded that the two matters were not substantially related and that no conflict existed. (Id.) Holder set up a consultation with Buckley's family, including Buckley's daughter-in-law and authorized agent, Pamela Buckley. (R. pp. 110-115).

At the consultation, Holder explained to her that the KDC firm had previously represented D&C Builders, Inc. in a matter that it understood to be completely separate and unrelated to the issue at hand. (R. pp. 110-115, 126-129). At that time, Mrs. Buckley explained that Dodenhoff (the Appellant's authorized agent) had, without being prompted in any way, voluntarily talked at great lengths to the Buckleys during the project at issue about a lawsuit that he was involved with at that time against who he described disparagingly as "the Germans." (Id.) Mrs. Buckley explained that Dodenhoff had spoken about how that lawsuit had impacted him and his company, the Appellant, financially, and how important the Buckley job was to them. (Id.)

The Buckleys further explained that, before their dispute arose, Dodenhoff had been a friend of Matt Buckley's since childhood and, as such, spoke with Buckley on a very frequent basis about a myriad of matters, including his business. (Id.; R. pp. 23-61). Dodenhoff had a known propensity to openly discuss his financial status and affairs, and frequently shared detailed information with the Buckleys about the corporate structure and financial status of his company. (Id.) The Buckleys also told the KDC firm that they were unaware the firm had previously assisted Dodenhoff with the prior lawsuit that he had discussed at length with them. (R. pp. 110-115, 126-129).

On May 13, 2013, the KDC firm filed an Answer along with Counterclaims, Third-Party Claims, and a Motion to Dismiss on behalf of the Respondent. (R. pp. 23-61). Appellant filed its Motion to Disqualify, in which it alleged that the KDC firm, by representing Appellant in a lawsuit filed in 2011 for the foreclosure of a mechanic's lien on a commercial construction project (the "2011 Action"), had a conflict of interest in representing Respondent in this entirely unrelated action against Appellant (the "2013 Action"). (R. pp. 63-64). The KDC firm reviewed the matter again, sought the assistance of outside counsel, and reached the same conclusion that no conflict existed. (R. pp. 110-129). In opposition to the Appellant's Motion to Disqualify, affidavits were filed by attorneys Holder, Heckman, Crawford and Johnson; and Mrs. Buckley filed an affidavit on behalf of the Buckleys. (Id.)

Through sworn affidavit testimony, Respondent (and Respondent's counsel) countered that the two cases were not factually related in any way and that, most importantly, no confidential factual information was obtained in the 2011 Action that could

be used in this action against the interests of Respondent because: (1) the KDC firm did not recall obtaining any confidential information in the 2011 Action; (2) the information obtained in the 2011 Action was a matter of public record; and, notably, (3) the Appellant itself had previously and voluntarily disclosed *to Respondent* extensive information and details about: (a) the 2011 Action; (b) Appellant's financial status; (c) the impact the outcome of the 2011 Action would have on the Appellant's financial status; (d) the Appellant's corporate structure; (e) the Appellant's ongoing operations; (f) the Appellant's authorized representative and its authority; and (f) details of the Appellant's ongoing legal matters – all of which the Appellant claimed forms the basis of the 'conflict.' (Id.) The Respondent also confirmed that all of its claims and assertions were based on knowledge gained solely through Respondent's personal dealings with Appellant, and not through Respondent's subsequent relationship with the KDC firm. (Id.)

The lower court then presided over a hearing on the Motion to Disqualify on July 8, 2013, during which the Appellant repeatedly alleged that the KDC firm obtained confidential factual information in the 2011 Action that it would then use in the 2013 Action to advance the Respondent's interests and that the two matters were substantially related. (R. pp. 130-139; 148-150). However, when the lower court inquired about what specific confidential information the KDC firm could have obtained, the Appellant could not articulate any such information. (R. pp. 150-152). Instead, the Appellant argued that it should not be required to submit the purported confidential information pursuant to a comment to Rule 1.9 of the South Carolina Rules of Professional Conduct. [R. pp. 135-139; 148-153). Without the request of Respondent, the lower court ultimately instructed

Appellant to provide a privilege log along with the purported confidential information to the court in support of its allegations. (R. pp. 153-154).

On July 15, 2013, the trial court emailed all counsel to notify them that a proposed order previously submitted by Respondent had been signed. (R. p. 236). The order, filed on July 16, 2013, required the Appellant to submit a privilege log to the court together with the documents referenced thereby, under an order of protection, containing the specific information and knowledge it contends the KDC firm acquired through its prior representation of Appellant which it alleges will injuriously affect the Appellant in this action. (R. p. 3-6). The order also specifically stated that the Appellant's Motion to Disqualify would be held in abeyance in the meantime. (Id.)

Appellant's counsel then filed a "Motion to Reconsider, Clarify and Amend Order to Issue Injunction" in which it requested "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." (R. pp. 156-160). In response, the Respondent stated to the court that it would not be opposed to a rescission of the order so as to allow the court to rule upon the ultimate issue of disqualification. After a hearing, the court denied the Appellant's Motion and ordered Appellant to provide the privilege log along with its associated documents. (R. pp. 1-2).

On July 26, 2013, Appellant filed a Notice of Appeal making clear that it was appealing the order "requiring Appellant to provide specific confidential information to Counsel for Respondent in support of Appellant's *pending* Motion to Disqualify Counsel for Respondent." (R. pp. 248-249) (emphasis added). On April 10, 2014, Respondent filed

a Motion for Order Granting Partial Relief and Motion to Dismiss Appellant's Remaining Issue on Appeal. (Appx. Vol. II pp. 678-703). In support of the motion, Respondent advised the Court of Appeals that it had offered to consent to the relief sought by Appellant on its first two issues on appeal, by agreeing that the Court of Appeals should vacate the trial court's original order and remand the case with instructions for the trial court to modify the order so as not to require Appellant to submit the privilege log. (Id.) The Appellant had refused to accept Respondent's consent to anything short of an order instructing the trial court to immediately disqualify Respondent's counsel. (Id.)

After oral argument, the Court of Appeals dismissed Appellant's appeal on April 20, 2016, and denied Appellant's Petition for Rehearing on September 15, 2016. Appellant's Petition for Writ of Certiorari should be denied because the Court of Appeals correctly determined that the trial court's order was not immediately appealable.

ARGUMENT

The Court of Appeals' dismissal of Appellant's appeal on the ground that the trial court's preliminary ruling on a motion for disqualification was not immediately appealable does not present a novel issue for determination by this Court. The Appellant's contention that it has been denied a substantial right by the mere issuance of the interlocutory order is without merit and does not entitle Appellant to immediate appellate review.

The Court of Appeals' dismissal of the appeal in this case was based on its determination that the trial court's order was not immediately appealable because the order did not fall under any subsections of S.C. Code Ann. § 14-3-330 allowing such an appeal, including 14-3-330(4). The court compared the order at issue in this case to an order

compelling discovery¹, which is also not immediately appealable because it is not final in nature. Furthermore, the court expressed uncertainty as to whether the trial court had conclusively ruled on the motion to disqualify, noting that “*even if* the trial court’s order could be construed as denying the motion to disqualify Buckley’s counsel, such an order is not immediately appealable.”

As the Court of Appeals noted in its decision, this Court has unequivocally held that an order denying a motion to disqualify an attorney is not immediately appealable. EnerSys Delaware, Inc. v. Hopkins, 401 S.C. 615, 619, 738 S.E.2d 478, 480 (2013). According to Appellant, however, review by this Court is necessary because the Court of Appeals failed to address whether the trial court’s “order” on Appellant’s motion to disqualify Respondent’s counsel affects another “substantial right” which would entitle the Appellant to immediate appeal under S.C. Code Ann. § 14-3-330(2).

Generally, “an order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed.” Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005). The provisions of Section 14-3-330 of the South Carolina Code provide exceptions to the general rule, which have been narrowly construed by this Court. Id. at 196, 607 S.E.2d at 709 (noting that “[p]iecemeal appeals should be avoided and most errors can be corrected through a new trial.”). Pursuant to § 14-3-330, an order issued prior to or during trial is immediately appealable only if it falls within one of the following subsections:

¹ Notably, as the Court of Appeals’ opinion states, the Appellant agreed with this analysis at oral argument.

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
- (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
- (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
- (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

Id. at 617, 738 S.E.2d at 479; see also S.C. Code Ann. § 14-3-330 (1979 & Supp. 2014).

In EnerSys Delaware, Inc. v. Hopkins, this Court analyzed the applicability of § 14-3-330(2) to an order denying a motion to disqualify a party's attorney. 401 S.C. at 617, 738 S.E.2d at 479. The case involved an attorney who represented EnerSys in a variety of employment law matters, serving as counsel of record in at least five employment-related suits between 2002 and 2004. Id. at 616, 738 S.E.2d at 478-79. EnerSys filed a lawsuit against a former employee in 2011 for several breach of contract claims based on violations of a confidentiality agreement and company policies related to computer use. Id. After the former employee retained the same attorney who had previously represented EnerSys, EnerSys filed a motion to have the attorney disqualified pursuant to Rule 1.9 of the Rules of Professional Conduct. Id. The trial court denied the motion because it determined that

the attorney's previous representations and the current suit were too dissimilar to justify disqualification. Id.

On appeal, EnerSys argued that the denial of its motion for disqualification implicated its substantial right to a fair trial, asserting that if the attorney shared confidences he learned through his prior representation, a new trial would not provide an adequate remedy. Id. at 618, 738 S.E.2d at 480. The issue before the Court was whether the trial court's order denying the motion affected a "substantial right" under subsection (2) of § 14-3-330 justifying immediate appeal. Id.

In reaching its decision, the Court discussed its prior opinions regarding whether orders on motions for attorney disqualification were immediately appealable. Id. First, in Hagood, the Court considered the issue of whether *granting* a motion to disqualify an attorney in a civil action was immediately appealable under § 14-3-330. 362 S.C. 191, 194, 607 S.E.2d 708 (2005). The Court held that an order granting disqualification affects a party's substantial right to have an attorney of its choosing, which makes the order immediately appealable under subsection (2). Id. at 197-98, 607 S.E. 2d at 710. The Court concluded that the right to retain one's counsel of choice was a substantial right for appealability purposes, considering factors such as the importance of party's right to have its counsel of choice in adversarial system; the importance of the attorney-client relationship and the time it takes to develop; the unfairness of requiring a party to hire and pay for a new attorney to duplicate work already completed by the first attorney; and that a later appeal wouldn't protect the party's interests because it would be hard to determine whether any prejudice resulted from not using the preferred attorney. Id.; see also EnerSys,

401 S.C. at 618, 738 S.E.2d at 479-80.

Next, the Court cited its opinion in State v. Wilson, 387 S.C. 597, 693 S.E.2d 923 (2010), where it held that the grant of a defendant's motion to disqualify a solicitor was not immediately appealable because the policy considerations in Hagood of retaining counsel of one's choosing and the attorney-client relationship were not relevant factors in considering disqualification of the state's solicitor. Id.; see Wilson, 387 S.C. at 602-03, 693 S.E.2d at 926. Additionally, in Wilson, the Court distinguished the *denial* of a motion for disqualification, which "is not directly appealable as the ruling does not affect the merits or a party's substantial rights, nor does it effectively determine the action, and any error in the failure to grant the motion is more amendable to correction through the remedy of a new trial." 387 S.C. at 603(3), 693 S.E.2d at 926.

Ultimately, after considering those prior decisions, the Court held in EnerSys that the denial of the motion to disqualify did not implicate any substantial right pursuant to § 14-3-330(2); thus, it was not immediately appealable. 401 S.C. at 619, 738 S.E.2d at 480. Like Wilson, the policy considerations that drove the Court's holding in Hagood, including the right to choose an attorney, the importance of the attorney-client relationship, and the unfairness of having to obtain and pay a new attorney, were not implicated in EnerSys. Id. Furthermore, the Court disagreed with the appellant's contention that the denial implicated its substantial right to a fair trial because a new trial would not provide an adequate remedy if the attorney shared confidences he learned through his prior representation, "because in our view, this ostensible danger can be redressed equally as well as after trial as through an immediate appeal. Moreover, depending on the outcome at trial, EnerSys may find an

appeal is not necessary. We therefore find no substantial right has been affected by the order.” Id.

The EnerSys decision is particularly important in the present case, not only because the facts of EnerSys are nearly identical to those here, but also because Appellant relies heavily on the Court’s reasoning in EnerSys to support the position that its substantial rights were affected by issuance of the trial court’s interlocutory order. Like EnerSys, the Appellant here argued that the Respondent’s attorneys learned confidences from its prior representation of Appellant which could be shared in its current representation of Respondent. Notwithstanding the lack of evidence to substantiate that position, even if the trial court had actually denied Appellant’s motion for disqualification based on that argument, no substantial right would be affected to trigger immediate appellate jurisdiction under S.C. Code Ann. § 14-3-330. EnerSys at 617-619, 738 S.E.2d at 479-480.

The only sense in which this case sets forth a different situation from those already ruled upon by this Court in EnerSys and Hagood is that here, the trial court did not issue any dispositive order on Appellant’s motion. The judge merely ordered Appellant to submit a privilege log in support of its argument for disqualification. The issuance of a preliminary order requiring a moving party to present information supporting its motion for disqualification does not impact any substantial right of that party, nor does it determine the action or prevent a final judgment from which the party can later appeal. In fact, the Appellant has failed to present an argument as to how this order could not be addressed or adequately remedied on appeal from a final judgment.

As the Court of Appeals aptly noted in its dismissal order, the Appellant admitted

at oral argument that the trial court's order in this case is akin to a discovery order, which is not directly appealable. The Court of Appeals agreed with Appellant on that point, citing this Court's holdings in Wieters v. Bon-Secours-St. Francis Xavier Hosp., Inc., 381 S.C. 332, 673 S.E.2d 417 (2009) and Tucker v. Honda of S.C. Mfg., Inc., 354 S.C. 574, 582 S.E.2d 405 (2003) regarding trial court orders compelling discovery. In Wieters, this Court vacated an opinion by Court of Appeals because the appellate court incorrectly held that a circuit court's discovery order compelling a hospital to produce confidential files was immediately appealable. 381 S.C. at 333, 673 S.E.2d at 418. In Tucker, this Court affirmed the Court of Appeals' holding that an order compelling discovery is not immediately appealable, even if the order is challenged as violating attorney-client privilege. 354 S.C. at 577, 582 S.E.2d at 406-07. The appellate court correctly dismissed the appeal because it determined the order was interlocutory, as the appellant had not refused to comply with the order but appealed "the mere issuance of the order." Id. (noting that an order compelling discovery may be appealed only after the trial court holds a party in contempt).

The Appellant contends that its "specific substantial rights to maintain confidential information related through confidential attorney-client communications and the right not to be forced to disclose such communications in order to support disqualification" have been affected by the trial court's interlocutory order. However, the courts of this State have never acknowledged such rights in connection with § 14-3-330(2). This Court has repeatedly held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2). Hagood, 362 S.C. at 196, 607 S.E.2d at 709. Closely related to the right of a particular mode of trial is the right to be

represented by one's preferred attorney, which can be affected by the grant of a motion for disqualification. Id. at 198, 607 S.E.2d at 710.

It is only logical that an order *granting* disqualification, rather than denying a motion for disqualification, would impact a party's substantial right to retain counsel of its choice. The policy considerations that led to the Court's decision in Hagood (the importance of a party's right to have its counsel of choice; the importance of the attorney-client relationship and the time it takes to develop; the unfairness of requiring a party to hire and pay for a new attorney to duplicate work already completed by the first attorney) are not implicated by the denial of a motion to disqualify, and they are similarly not implicated in this case. The Appellant's decision to file its appeal prematurely, before the lower court even issued a dispositive order on the motion, does not change the rule of law that applies to this issue.

Finally, the impropriety of this appeal is buttressed by the fact that the Appellant refused to accept Respondent's consent to the relief requested by Appellant. The Court of Appeals noted at the outset of its opinion that it "question[s] whether an actual controversy still exists as to disclosure of the confidential information in a privilege log" because during oral argument, the Appellant indicated that it would be agreeable to an *in camera* review of the privilege log by the court, as long as Respondent was not allowed access to the information, and the Respondent consented to that relief. As the record reflects, the Respondent offered its consent to the Appellant's request that Appellant not be required to provide the alleged confidential information, both before and during the pendency of this appeal. (R. pp. 245-247; Appx. Vol II pp. 678-702).

The basis for Appellant's refusal to accept Respondent's consent to relief was that the Appellant wanted an order from the Court of Appeals finding that the lower court erred in failing to disqualify Respondent's counsel. (Appx. Vol. II pp. 704-709). That was one of Appellant's stated issues on appeal, notwithstanding the fact that the lower court never issued an order on that ultimate issue. (Appx. Vol. I p. 26). Curiously, though, the Appellant appears to have not only conceded that point (that the lower court never issued a final decision on the merits of the disqualification issue); the Appellant is actually using it now as its primary support for the Petition at issue. (See Petition p. 7). Thus, the only issue Appellant seeks to have addressed by way of this Petition is that which – notwithstanding its ripeness on appeal - the Respondent has remained willing to offer its consent. This 'moving target' appellate practice of Appellant should serve to underscore the lack of merit associated with the Appellant's Petition.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari and permit this case to be adjudicated on the merits by the trial court.

Respectfully submitted,



November 14, 2016

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THE STATE OF SOUTH CAROLINA
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Of whom Richard M. Buckley is theRespondent.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of Respondent's Return to Petition for Writ of Certiorari in the above-referenced case has been served on all parties of record by electronic mail and by mailing a copy of same in the United States mail, first-class postage prepaid this 14th day of November, 2016, addressed as follows:

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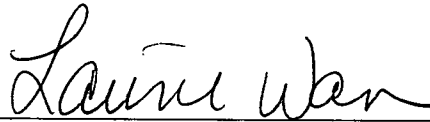
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