

IN THE STATE OF SOUTH CAROLINA

In The South Carolina Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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

**REPLY TO RESPONDENT'S RETURN TO APPELLANT'S
PETITION FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

Argument 1

 I. Writ of Certiorari should be granted to review a Circuit Court order that disregards protections provided former clients under Rule 1.9 of the Rules of Professional Conduct as an order affecting substantial rights pursuant to S.C. Code § 14-3-330(2) to clarify the rights of former clients as compared with the right to choose one’s own counsel, an novel issue of law in the state of South Carolina. 1

Conclusion 5

ARGUMENT

- I. Writ of Certiorari should be granted to review a Circuit Court order that disregards protections provided former clients under Rule 1.9 of the Rules of Professional Conduct as an order affecting substantial rights pursuant to S.C. Code § 14-3-330(2) to clarify the rights of former clients as compared with the right to choose one's own counsel, an novel issue of law in the state of South Carolina.

The issue presented by this appeal is novel and clear. Rule 1.9(a) of the Rules of Professional Conduct states:

“A lawyer who has formerly represented a client in a matter *shall not thereafter represent another person in the same or a substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”

Rule 1.9(a), RPC, Rule 407, SCACR (Emphasis added).

Comment 3 to Rule 1.9 clarifies the standard by stating:

“Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or *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 client's position in the subsequent matter.*”

Rule 1.9 Cmnt. 3, RPC, Rule 407, SCACR (Emphasis added).

Comment 3 to Rule 1.9 clarifies this standard further by clearly stating:

“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.”

Rule 1.9 Cmnt. 3, RPC, Rule 407, SCACR (Emphasis added).

The Order of the Circuit Court being appealed herein specifically requires Appellant (a former client of Respondent's counsel):

“to submit to this Court a privilege log containing the specific information and knowledge it contends that KDC acquired through its prior representation of Plaintiff which will injuriously affect Plaintiff in this 2013 Action.”

Appendix, Vol. 1, p. 132. The Order then requires providing Appellant's former attorneys (Respondents current counsel) with the very information sought to be protected. Appendix, Vol. 1, p. 133.

The Circuit Court was fully aware of the requirements of Rule 1.9 and Comment 3, but insisted it could not make a decision on disqualification without knowing the confidential information Appellant's former attorney has to use. At the July 23, 2013 hearing, the Court stated unequivocally:

"You want me to disqualify Mr. Holder's law firm because of this prior representation. And you are claiming that they know something that would violate the attorney/client privilege, basically."

Appendix, Vol. 1, p. 178, ll 9-12.

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

Appendix, Vol. 1, p. 178, ll 19-22.

"If he and his firm knows some confidential, privileged information, all I'm asking you to do is to turn that over to me and to them so that they have an opportunity, 'cause I'm not going to know what they know or what's privileged, for them to respond under a protective order to explain what the -whether or not it is, in fact, privileged."

Appendix, Vol 1. p. 178, l. 23 – p. 179, l. 3.

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

Appendix, Vol. 1, p. 178, ll. 6-10 (Emphasis added).

The Circuit Court went on to state:

"This Rule is not to be viewed in isolation. Clients should be allowed to choose their lawyers. And to kick a lawyer off a case is a substantial, I don't want to say sanction, but remedy that's imposed for the requesting party. And I'm not going to do it out of this air."

Appendix, Vol. 1, p. 180, ll. 17-21.

In Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (S.C. 2005), this Court found, “the right to be represented by ones preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right” and granted appellate jurisdiction under S.C. Code § 14-3-330(2). Id. at S.E.2d 710. As shown in Appellant’s Petition, **every state and federal jurisdiction** that has addressed the comparison between a former client’s rights and the right to choose one’s counsel **has found the former client’s right to be superior to choosing one’s counsel.** Although the Court previously found the right to choose one’s own counsel a substantial right, this Court has never addressed the conflict of a former client’s rights versus the right to choose one’s counsel. As indicated by the actions of the Circuit Court and Appellant’s former attorney (Respondent’s counsel), clarification is most definitely needed. Based on these circumstances, if the right to choose one’s own attorney affects a substantial right to grant appellate jurisdiction, and every jurisdiction finds the rights of former clients are superior to choosing one’s own attorney, then an Order that affects a former client’s right to keep information confidential certainly must qualify as an equal substantial right to grant appellate jurisdiction.

Despite the clarity of the Rule and Comments referenced above, Comment 3 to Rule 1.9 also provides a clear example, stating:

“For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce.”

Rule 1.9 Cmnt. 3, RPC, Rule 407, SCACR.

Appellant’s former counsel (Respondent’s counsel) represented Appellant for over a year in a financial matter obtaining a wealth of financial information as shown by

the Court records of the prior case contained in the Record. Appendix, Vol. 1, p. 371 – p. 502. Only weeks after ending that representation of Appellant, Appellant’s former counsel undertook representing Respondent and made allegations against its former client (Appellant) that included, it (1) **“did not have a functioning corporate structure, was incapable of making independent decisions, and did not follow the corporate formalities applicable to a South Carolina corporation at all pertinent times herein,”** (Appendix. p. 177, ¶ 116); (2) **“was insolvent prior to and/or during construction of the Project”** (Appendix. p. 178, ¶ 117); and (3) **“was grossly undercapitalized prior to and during construction of the Project.”** (Appendix. p. 178, ¶ 118; R. p. 67, ¶ 20). The “Project” being the renovation of Respondent’s home that was taking place while Appellant was being represented by Respondent’s counsel in the prior case.

Although there is ample other documentation in the Appendix, these allegations alone are sufficient to demonstrate a substantial risk that Appellant’s former attorney (Respondent’s counsel) is likely in possession of financial information obtained in the prior representation that could be used against Appellant in this case. But even the clarity provided by these accusations was ignored by the Circuit Court in issuing the Order being appealed and by the Appellate Court in dismissing the appeal as lacking jurisdiction.

The Bench and Bar need this Court to provide clarity as to the conflicts between the rights guaranteed former clients in the Rules of Professional Conduct and the rights to counsel of one’s choice. Without clarification, former clients will lose their protection and, suffering the shifted burden of proving the confidential information their former attorneys have to support disqualification, will shy away from being fully candid with their attorneys for fear of this happening to them.

“Confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship.” Rule 1.6 Cmnt. 2, RPC, Rule 407, SCACR. In this regard, it must be construed that the confidential nature of the attorney-client relationship constitutes a substantial right under S.C. Code §14-3-330(2).


Writ of Certiorari should therefore be granted to review the Circuit Court’s order pursuant to S.C. Code § 14-3-330(2) and address the novel issue of the rights of former clients as compared to the right to choose one’s own attorney.

CONCLUSION

Because of the significant impact of this decision, as well as and most especially the confusion and uncertainty the decision will inject into the legal profession, and for the above-stated reasons and authorities, D&C Builders respectfully petitions this Court to grant a Writ of Certiorari to review the decision of the Court of Appeals in this case, allow the appeal to proceed pursuant to S.C. Code Section 14-30-330(2) as the appeal of an Order affecting substantial rights, and provide clarification as to the protections afforded former clients under Rule 1.9 of the Rules of Professional Conduct in light of an Order requiring the disclosure of confidential information as a requirement for disqualification of a former attorney.

Respectfully submitted,

November 21, 2016



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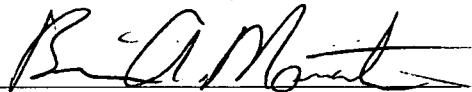
I hereby certify that that I have served a true copy of Appellant's Reply to Respondent's Return to Petition for Writ of Certiorari on Respondent and all parties of record by depositing a copy in the United States Mail, first class postage prepaid, on November 21, 2016, addressed to their attorneys of record as follows:

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