

IN THE STATE OF SOUTH CAROLINA
In The South Carolina Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding 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. Petitioner,

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.

APPENDIX VOLUME I

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

D&C Builders, Inc., Appellant,

v.

Richard M. Buckley and Wells Fargo National
Association, Defendants,

Richard M. Buckley, Third-Party Plaintiff,

v.

Scott Dodenhoff, Third-Party Defendant,

Of whom Richard M. Buckley is the Respondent.

Appellate Case No. 2013-001645

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Unpublished Opinion No. 2016-UP-184
Heard October 14, 2015 – Filed April 20, 2016

APPEAL DISMISSED

Harold Stewart James, of Babb & Brown, PC, of
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582 S.E.2d 405, 406-07 (2003) ("Since a contempt order is final in nature, an order compelling discovery may be appealed only after the trial court holds a party in contempt."); *id.* at 577, 582 S.E.2d at 407 ("Thus, a party may comply with the order and waive any right to challenge it on appeal or refuse to comply with the order, be cited for contempt, and appeal."). Furthermore, 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. *See EnerSys Del., Inc. v. Hopkins*, 401 S.C. 615, 619, 738 S.E.2d 478, 480 (2013) (holding "an order denying a motion to disqualify an attorney is not immediately appealable").

APPEAL DISMISSED.

HUFF, A.C.J., and WILLIAMS and THOMAS, JJ., concur.

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

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Case Number: 2013-CP-23-1833
Appellate Case No. 2013-001643

SC Court of Appeals

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

v.

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

v.

Scott Dodenhoff, Third-Party Defendant

of whom:

Richard M. Buckley Respondent,

**PETITION FOR REHEARING AND/OR REHEARING *EN BANC* WITH
SUPPORTING MEMORANDUM**

Appellant, D&C Builders, Inc., by and through its undersigned attorney, hereby respectfully petitions the Court for rehearing or for a rehearing *en banc* pursuant to Rules 221(a) and 219(a), SCACR, based on points overlooked or misapprehended by this Court. The basis for the petition is as follows:

In its Unpublished Opinion No. 2016-UP-184, this Court dismissed the appeal of the trial court's order requiring Appellant to provide specific confidential information to support its Motion to Disqualify Respondent's Counsel in direct contradiction of Rule 1.9 of the South Carolina Rules of Professional Conduct and Comment 3 thereto based on a finding that the order was not immediately appealable. The Court's Opinion was based on a determination that the order appealed does not involve the issuance or denial of an injunction as defined in Black's Law Dictionary, and therefore meets no provision of South Carolina Code Section 14-3-330. The Court further found that the trial court's order was more like a discovery order, which is generally not appealable.

In comparing the trial court's order to a discovery order, the Court is viewing this case from a strictly procedural viewpoint. However, this trial court's order is directly contrary to the requirements of the Rules of Professional Conduct related to the situation presented and therefore makes it an ethical issue rather than a procedural issue. It is the ethical issue presented, and the substantial rights affected by the order and its precedent that make the trial court's order immediately appealable.

Disqualification is an ethical issue, not a procedural issue. See State of Arkansas v. Dean Foods Products Company, Inc., 605 F.2d 380, 384 (8th Cir. 1979)(citing American Can Company v. Citrus Feed Company, 436 F.2d 1125, 1127 (5th Cir. 1971)). The order of the trial court requires the disclosure of confidential client information to support disqualification which is directly contrary to the ethical requirements of Rule 1.9 and Comment 3 thereto of the Rules of Professional Conduct.

At oral argument, Appellant did agree that it was presented to the trial court as part of its Motion to Reconsider that Appellant was not opposed to providing the confidential information for the Court's review. To the trial court, Respondent was adamantly opposed to this request; however, on appeal, Respondent consents to the review of the information by the court only. Despite Respondent's change of position and consent, the controversy of this appeal still exists in that the trial court's order and the position taken by Respondent are directly contrary to the Rules of Professional Conduct leaving Appellant and Appellant's attorneys in limbo as to the priority of a trial court order that directly conflicts with the Rules of Professional Conduct. The dismissal of the appeal without further clarification or direction as to this conflict leaves Appellant in the same dilemma and will only result in the matter returning to this Court for further clarification.

In its unpublished opinion, the Court found that the appeal did not involve the issuance or denial of an injunction pursuant to South Carolina Code §14-3-330(4), however, the opinion does not address appellate jurisdiction under South Carolina Code §14-3-330(2) as the appeal of an order affecting a substantial right.

The Court makes reference in the unpublished opinion that even if the trial court's order could be construed as denying the motion to disqualify, Energys Delaware, Inc. v. Hopkins, 401 S.C. 615, 738 S.E.2d (2013) dictates that such denial is not immediately appealable. However, the trial court's order does not deny the motion to disqualify; the trial court *refused to consider* the motion to disqualify without the disclosure of specific confidential information. This situation is completely different from both Energys and the opposite holding in Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (S.C.

2005) that an order granting a motion to disqualify is immediately appealable under S.C. Code § 14-3-330(2) as it does affect a substantial right. Neither holding is directly applicable in the present case which presents an issue of first impression for this Court, namely, does an order to disclose confidential information to support disqualification, contrary to the Rules of Professional Conduct, affect a substantial right supporting appeal of that order?

In Energysys, the Court recognized that the trial Court used the appropriate “substantially related” assessment of both representations as the basis for denying disqualification, stating

The circuit court denied the motion [to disqualify] concluding that Harper’s previous assistance in developing Energysys’ litigation strategy was insufficient grounds upon which to disqualify him due to the dissimilarities of his previous representations and the current suit. (Emphasis added).

Id. at 615, S.E.2d at 479. Harper had previously represented Energysys in five employment related lawsuits seven (7) to nine (9) years before the alleged conflicting representation as compared to the breach of contract action Harper was pursuing against Energysys on behalf of Hopkins. Id. at 615, S.E.2d at 478-479. In the present case, however, the time between representations by Respondent’s attorneys was just a few months.

In Hagood, the trial Court used Rule 3.7 of the Rules of Professional Conduct which prohibits an attorney from representing a client when the attorney will be a witness in the proceeding to disqualify an attorney where a full-time employee of the attorney would be a witness rather than the attorney.

The circuit court concluded it would be improper under the Rules of Professional Conduct for an investigator or accident reconstruction expert who works as a full-time employee for Petitioner’s Attorney to testify on Petitioner’s behalf at trial.

Id. at S.E.2d 710. The Court analyzed the matter as a case of first impression just like the present case, and found that disqualifying a party's attorney affects a substantial right and may be immediately appealed under Section 14-3-330(2). Id. The Court went on to hold specifically

The right to be represented by an attorney of ones choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case. Moreover, 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.

Id. Finally, the Court stated, "Deprivation of the right to ones preferred attorney **would affect the attorney-client relationship, which is extremely important in our adversarial system.**" Id. (emphasis added).

In Enersys, the only substantial right examined in that case was the refusal to disqualify an attorney. Specific substantial rights Appellant contends are affected is the right to maintain confidential information relayed through confidential attorney-client communications and the right not to be forced to disclose such communications in order to support disqualification. Such forced disclosure of confidential information from a client must certainly be viewed equally if not more substantial than those examined by the Court in Hagood in that such an order will significantly impact the attorney-client relationship and overall litigation, from which no appeal could undo.

In preserving client confidences, a lawyer serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private. (Preamble ¶8, RPC, Rule 407, SCACR & Rule 1.6 Cmnt. 2, RPC, Rule 407, SCACR). Rule 1.6(a) more specifically

addresses this concept by requiring that “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.” Rule 1.6(a), RPC, Rule 407, SCACR. “A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.” Rule 1.6 Cmnt. 2, RPC, Rule 407, SCACR.

“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).

Rule 1.9(a) recognizes the continuation of the confidentiality obligation once representation is terminated by the mandate 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 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). Rule 1.9(c) offers further protection by prohibiting a lawyer from using any information to the disadvantage of a former client. Rule 1.9(c)(1), RPC, Rule 407, SCACR.

As referenced in Appellant’s argument above, the trial court’s order that Appellant provide specific confidential information directly overrides the mandate to protect a client’s confidential information. Comment 3 to Rule 1.9 confirms this where it clearly states:

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 trial court is directly at odds with the ethical rule therefore making this an ethical issue for this Court to review. The trial court's order requires Appellant to reveal specific confidential information to prove the Respondent's attorneys have such information to thereby justify disqualification. The trial court specifically stated, "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." (R p. 178, ll. 19-22).

As argued to the trial court, the "basis" for disqualification under Rule 1.9 is whether the prior and current cases are "substantially related." (R p. 179, l. 18 – p. 180, l. 4). The "substantially related" analysis is the only way to protect the confidential nature of attorney-client relationships in this type of situation. The rule was written this way on purpose and the Comments to the Rule further bear this out.

The significance of the confidentiality associated with the attorney-client relationship is demonstrated by the weight of existing legal authority addressing this same situation. Courts in other jurisdictions unanimously agree that confidential information must be protected, particularly in disqualification situations. The most similar case to the present matter is the case of Foulke v. Knuck, 784 P.2d 723, 162 Ariz. 517 (Ariz.App.Div. 2 1989). In Foulke, the attorney to be disqualified made the exact same claims as the Respondent's attorneys that no confidential information had been obtained except what is now publicly known. In response the Court stated that this:

...contention fails to recognize the mandatory nature of ER 1.9(a). The rule does not require that confidences and secrets be divulged in order for a conflict to exist or for disqualification to be proper. State v. Allen, 539 So.2d 1232, 1234-35, (La. 1989); see also Arkansas v. Dean Foods Products Co., 605

F.2d 380, 383 (8th Cir. 1979); United States v. Kitchin, 592 F.2d 900, 904 (5th Cir.), cert. denied, 444 U.S.843, 100 S.Ct. 86, 62 L.Ed.2d 56 (1979).

Regardless of what was communicated during the representation of the former client, the rule prohibits subsequent representation of an individual whose interests are substantially adverse to those of the former client.

Id. at 522, P.2d at 728. (citing T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F.Supp. 265, 268-69 (S.D.N.Y. 1953)). The Court elaborated by holding:

The former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.

Foulke at 522, P.2d at 728 (emphasis added). See also Cord v. Smith, 338 F.2d 516, 524-25, (9th Cir. 1964); Matter of Evans, 113 Ariz. 458, 462, 556 P.2d 792, 796 (1976).

The Washington Court of Appeals analyzed existing cases on the issue and stated:

The plain language of RPC 1.9 indicates actual proof of disclosure of confidential information is not necessary if the matters are substantially related. The weight of authority from other jurisdictions similarly interprets the rule as not requiring proof of disclosure of confidential information.

Teja v. Saran, 68 Wn.App. 793, 846 P.2d 1375 (Wash.App. Div. 1 1993)(emphasis added)(citing Foulke v. Knuck, 162 Ariz. 517, 522, 784 P.2d 723, 728 (1989); Brent v. Smathers, 529 So.2d 1267 (Fla.Dist.Ct.App. 1988); United States ex rel. Lord Elec. Co. v. Titan P. Constr. Corp., 637 F.Supp. 1556 (W.D.Wash. 1986); Junger Util. & Paving Co. v. Myers, 578 So.2d 1117 (Fla.Dist.Ct.App. 1989); Martindale v. Richmond, 301 Ark. 167, 782 S.W.2d 582, 584 (1990); Oxford Dev. Minn., Inc. v. Ramsey, 428 N.W.2d 434 (Minn.Ct.App. 1988); Reading Anthracite Co. v. Lehigh Coal & Nav. Co., 771

F.Supp. 113 (E.D.Pa. 1991); Green v. Montgomery Cy., Ala., 784 F.Supp. 841 (M.D.Ala. 1992).

North Carolina follows this rationale as well. Under Cannon 4 that requires an attorney to preserve the Confidences and Secrets of a client, EC4-4 states:

The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge....

Lowder v. All Star Mills, Inc., 60 N.C.App. 275, 280, 300 S.E.2d 230, 233 (N.C.App.

1983). Interpreting this Cannon, the Lowder Court further held:

It is not necessary to show the attorney received confidential information. The ethical duty of an attorney under EC4-4 is broader than the attorney-client evidentiary privilege.

Id. at 282, S.E.2d at 234.

The Court in Arkansas v. Dean Foods summed it up best when it stated:

To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule (protecting client confidences).

Dean Foods, 605 F.2d at 383.

The attorney-client relationship, both current and former, are of such importance that maintaining confidentiality and obligations to all clients is necessary for clients to trust their attorneys not to reveal confidential information and to never use information they obtained from the client against that client. When an attorney chooses to change sides and represent someone against a former client, the interests of justice are not served

when the attorney can simply claim he doesn't remember anything confidential or when the trial court can require disclosure of such confidential information as proof from the client. Such a requirement on the former client defeats the very purpose of the ethical rules and violates the protection of confidentiality upon which all clients rely in their relationship with attorneys.

Further proof of the importance of maintaining the confidential nature of attorney-client communication is the manner in which Rule 1.9 requires the Court to assess disqualification based on cases being "substantially related." Comment 3 provides in no uncertain terms:

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).

There is no better example than the facts of the present situation. Both the prior case where Respondent's attorneys represented Appellant and the present case representing Respondent both involve the collection and accounting of money. Respondent's attorneys obtained financial information from Appellant in the prior case and then turned around in the present case and alleged Appellant was "insolvent prior to and/or during construction of the Project" (R. p.51, ¶117) and "grossly undercapitalized prior to and during construction of the Project." (R. p. 51, ¶118, R. p. 67, ¶20). Remember, these statements are being made by the same attorneys representing Appellant while it was allegedly "insolvent" and "undercapitalized!"

Clearly, the allegation alone against a client you were representing at the time would indicate a conflict exists.

The ability to trust in the confidential nature of attorney-client communications is most certainly a substantial right which will be significantly impacted if the trial court is able to order Appellant to disclose confidential attorney-client communications as a requirement to support disqualification of Respondent's Attorneys. Such an order is in direct violation of the Rules of Professional Conduct, but is also contrary to the Supreme Court's holding in Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996) and the overwhelming authority from other jurisdictions.

The Supreme Court confirmed that examining a potential conflict prospectively is the test in holding in Townsend the standard for "substantially related" 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."

Id. at 315, S.E.2d at 429 (citing Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 1.9:104, at 293 (1996)(emphasis added)). In finding disqualification was warranted, the Supreme Court held:

Here, although he claims none of the same information was actually used in the two matters, Lawyer should have recognized the risk that information he gained during the custody matter in which he was the Daughter's guardian ad litem might prove relevant to the child support claim and particularly to the college support claim in the action in which he represented Father.

Id. at 317, S.E.2d at 429(emphasis added).

Given the standard and test set in Townsend, it cannot be protecting the client's interest or serving the interests of justice and the public's perception of how justice is

served to require the client to prove it shared confidential information with its former attorneys.

If “confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship” (Rule 1.6 Cmmnt. 2, RPC, Rule 407, SCACR), then this Court must protect that confidentiality, the sanctity of confidential attorney-client communications, and the fair administration of justice. If the disclosure of confidential information can be ordered to prove disqualification, the whole foundation of client protection crumbles. The Rules of Professional Conduct are designed to assure the protection of client confidences and the necessary confidential nature of the attorney-client relationship cannot simply be ignored in favor of an attorney that claims no such knowledge was obtained or exists.

In Hagood, the Court examined the impact of granting disqualification has on a client’s right to choose their own attorney and determined the right to choose one’s own attorney was a substantial right affected to grant appellate jurisdiction under S.C. Code § 14-3-330(2). Id. at S.E.2d 710. If the right to choose one’s attorney is considered a substantial right to grant jurisdiction, then the superior right to the fair administration of justice must also be a substantial right conveying appellate jurisdiction.

“This court has a duty to maintain the highest ethical standards of professional conduct to insure and preserve trust in the integrity of the bar.” H&C Corporation, Inc. v. Puka, No. 4:12-cv-00013-RBH , Lawyers Weekly No. 002-175-13, 4 pp. (R. Bryan Harwell, J.)(D.S.C. October 11, 2013). Citing Donaldson v. City of Walterboro Police Dept., No. 2:06-cv-02492-PMD, 2008 WL 906707 (D.S.C. March 31, 2008), The Puka Court, went on to hold:

As noted by Judge Duffy in Donaldson, “the court acknowledges that granting this Motion to Disqualify deprives the Plaintiff of his chosen counsel

and increases the length of time this case will remain pending. However, the court is mindful of its responsibility to uphold the South Carolina Rules of Professional Conduct..."

Puka, at p. 4 (citing Donaldson 2008 WL at *4)(emphasis added).

The trial court weighed the equities in Appellant's right to keep the information confidential with Respondent's right to have the attorney of his choosing. (R. p. 178, l. 9 – p. 179, l. 12, p. 180, ll. 17 – 21, p. 181, ll. 14-24). But contrary to Puka decision, the trial court erroneously believed that the right to choose one's counsel was superior to the right to maintain confidential information in a disqualification matter and the right to the fair administration of justice. (R. p. 180, ll. 17 – 21).

Dismissal of this appeal creates manifest uncertainty for attorneys as to the priority of the Rules of Professional Conduct when in conflict with an order of the trial court. The order of the trial court in this case requires Appellant to provide confidential information to support disqualification of Respondent's attorneys contrary to Rule 1.9 and Comment 3 thereto. The holdings of Energysys and Hagood use different standards to determine whether a substantial right is affected, but neither deal with the present situation where the trial court **refused to consider** disqualification without disclosure of the alleged confidential information.

If a trial court is able to issue orders directly contrary to the Rules of Professional Conduct, an attorney cannot know whether to follow the order of the trial court or follow the Rules of Professional Conduct. Great peril exists down either path. The unpublished opinion of this Court fails to address whether the order requiring disclosure of confidential information to support disqualification affects a substantial right and is therefore appealable pursuant to South Carolina Code §14-3-330(2).

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, Appellant petitions this Court for rehearing or rehearing *en banc*.

Respectfully submitted,

May 2, 2016

A handwritten signature in black ink, appearing to read "B. A. Martin", with a horizontal line drawn underneath it.

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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

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

RECEIVED

MAY 03 2016

SC Court of Appeals

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

v.

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

v.
Scott Dodenhoff, Third-Party Defendant

of whom:

Richard M. Buckley Respondent,

PROOF OF SERVICE

I hereby certify that that I have served a true copy of Appellant's Petition for Rehearing and/or Rehearing *en banc* with Supporting Memorandum on Respondent and all parties of record by depositing a copy in the United States Mail, first class postage prepaid, on May 2, 2016, addressed to their attorneys of record as follows:

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The South Carolina Court of Appeals

D&C Builders, Inc., Appellant,

v.

Richard M. Buckley and Wells Fargo National
Association, Defendants,

Richard M. Buckley, Third-Party Plaintiff,

v.

Scott Dodenhoff, Third-Party Defendant,

Of whom Richard M. Buckley is the Respondent.

Appellate Case No. 2013-001645

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Huff

J.

H B W O

J.

Paul W. Thomas

J.

FILED

9/15/16

Columbia, South Carolina

cc:

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IN THE STATE OF SOUTH CAROLINA

In The South Carolina Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

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

RECEIVED

JAN 12 2015

SC Court of Appeals

D&C Builders, Inc. Appellant,

v.

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

v.

Scott Dodenhoff Third-Party Defendant,

Of Whom,

Richard M. Buckley Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court err in Ordering Appellant to reveal specific confidential information learned or likely learned by Counsel for Respondent through confidential attorney-client communications in its prior representation of Appellant in order to substantiate the disqualification of Counsel for Respondent under Rule 1.9 of the South Carolina Rules of Professional Conduct?
- II. Did the Circuit Court err in refusing to grant an Injunction preventing Respondent and Counsel for Respondent from accessing the specific confidential information Appellant was ordered to provide to the Court to substantiate the disqualification of Counsel for Respondent under Rule 1.9 of the South Carolina Rules of Professional Conduct?
- III. Did the Circuit Court err in failing to find that the matters involved in the prior representation and current representation were "substantially related" and disqualify Respondent's Counsel?

STATEMENT OF CASE

This appeal involves Rule 1.9 of the Rules of Professional Conduct for attorneys and the rights associated with attorney-client confidential information in the course of seeking disqualification of an attorney under Rule 1.9. D&C Builders, Inc. ("D&C Builders") served and filed a Notice and Certificate of Mechanic's Lien against Richard M. Buckley ("Buckley") and Wells Fargo Bank, N.A. ("Wells Fargo") on February 11, 2013 in the amount of \$29,389.00. (R. pp. 7-11). D&C Builders then filed an action in Greenville County Court of Common Pleas on April 1, 2013 seeking to foreclose that Mechanic's Lien. (R. pp. 12-19). Wells Fargo filed an Answer and Consent to Reference on or about April 25, 2013. (R. p. 20). Richard M. Buckley, through his counsel M. Stokely Holder and the law firm of Kenison, Dudley & Crawford, LLC, (collectively "Kenison Firm") filed an Answer, Counterclaims and Third-Party claims against Third-Party Defendant Scott Dodenhoff ("Dodenhoff") on May 15, 2013. (R. pp. 25-61)

On May 15, 2013, Kenison Firm served both D&C Builders and Dodenhoff with Interrogatories, Request for Production of Documents and Requests to Admit. (R. pp. 184-216). Also on May 15, 2013, the Kenison Firm filed a Motion to Dismiss on behalf of Buckley. (R. pp. 23-24).

A Motion to Disqualify Attorney and Law Firm with supporting Affidavit was filed by D&C Builders on June 19, 2013 and served on Buckley and the Kenison Firm on June 20, 2013. (R. pp. 62-64). A hearing was scheduled on Buckley's Motion to Dismiss on June 20, 2013 before the Honorable Letitia Verdin. (R. pp. 70-75).

The hearing on the Motion to Dismiss was continued to give Buckley time to respond to the Motion to Disqualify and pending final resolution of the Motion to Disqualify. (R. p. 74, line 2). Judge Verdin stayed the time for D&C Builders and Dodenhoff to Reply to Counterclaims, Answer Third Party Claims, Respond to Interrogatories, Requests to Produce and Requests to Admit pending final resolution of the Motion to Disqualify. (R. p. 73, lines 17-21).

Buckley filed an Amended Answer, Counterclaims and Third-Party Claims on July 8, 2013. (R. pp. 76-109). The hearing on the Motion to Disqualify was also held on July 8, 2013 before the Honorable Edward Miller. (R. pp. 130-155). An Order was filed on July 16, 2013 requiring D&C Builders to submit a privilege log to the Court, Buckley and to the Kenison Firm to support its Motion to Disqualify "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." (R. p. 5, ¶ 4). The Motion to Disqualify was held in abeyance by the Court pending receipt of this information. (R. p. 6, ¶ 3).

On July 16, 2013, D&C Builders filed a Motion to Reconsider, Clarify and Amend Order to Issue Injunction with supporting Exhibits as to the Court Order of July 16, 2013. (R. pp. 156-160). A hearing was held on the Motion to Reconsider, Clarify and Amend Order to Issue Injunction on July 23, 2013 before the Honorable Edward W. Miller. (R. pp. 175-183).

An Order denying the Motion to Reconsider, Clarify and Amend Order to Issue Injunction was filed on July 25, 2013. (R. pp. 1-2). D&C Builders filed its Notice of Appeal on July 26, 2013. (R. pp. 248-249).

STATEMENT OF FACTS

This matter arises out of a motion to disqualify attorney Holder and the Kenison Firm from representing Defendant Buckley in this matter due to a conflict of interest. The Kenison Firm was actively representing Plaintiff D&C Builders, Inc. in a substantially related matter during the time that the actions giving rise to the current claims between D&C Builders and Buckley were arising. The Kenison Firm did not consult with D&C Builders to obtain consent prior to undertaking the current representation of Buckley. D&C Builders did not waive the conflict. (R. p. 68, ¶ 29).

Representation of D&C Builders.

D&C Builders is a construction company. Dodenhoff is a licensed contractor, shareholder, director and Vice President with the company. (R. p. 65, ¶ 2). On July 1, 2011, Dodenhoff retained the Kenison Firm to represent D&C Builders with regard to a large outstanding debt owed by a company called TMKG, Inc. for a construction job. (R. p. 65, ¶ 4). John T. Crawford, Jr. and Townes B. Johnson were the attorneys with the Kenison Firm representing D&C Builders in that case. (R. p. 65, ¶ 4). Dodenhoff was the sole contact with the Kenison Firm at all times on behalf of D&C Builders. (R. p. 66, ¶ 7).

During the course of the representation of D&C Builders by the Kenison Firm against TMKG, Inc., Dodenhoff provided confidential information to the Kenison Firm regarding the corporate structure and internal operations of D&C Builders. (R. p. 66, ¶ 9). Dodenhoff also provided confidential financial information related to the company

(R. p. 66, ¶ 11), as well as confidential information regarding his authorization and actions as an agent of the company. (R. p. 66, ¶ 12). Although some confidential information was provided in a written form such as e-mail communication, much of the information was provided to the attorneys at the Kenison Firm through verbal attorney/client communications. (R. p. 66, ¶ 8).

The Kenison Firm engaged in lengthy and extensive actions during its representation of D&C Builders against TMKG, Inc. It filed a Notice and Certificate of Mechanics' Lien on August 8, 2011 asserting a lien for services, materials and labor furnished in the amount of \$74,123.40. (R. pp. 269-270). On September 27, 2011, it filed a Lis Pendens, Summons and Complaint to foreclose the mechanics' lien on behalf of D&C Builders asserting claims for breach of contract, quantum meruit, and foreclosure of mechanics' lien (R. p. 256, ¶ 12 – p. 260, ¶ 35) and served interrogatories and requests for production of documents. (R. pp. 324-332). The Kenison Firm also filed a motion for partial summary judgment on behalf of D&C Builders on September 27, 2011. (R. pp. 278-280).

TMKG, Inc. filed an Answer and Counterclaims on November 22, 2011, denying the allegations of D&C Builders and asserting its own counterclaims against D&C Builders for breach of contract and quantum meruit. (R. p. 287, ¶ 12 – p. 288 ¶ 20).

The Kenison Firm filed a Reply to Counterclaims for D&C Builders on December 22, 2011 denying the allegations of the counterclaims and asserting affirmative defenses. (R. pp. 300-310). TMKG, Inc. filed a Memorandum in Opposition to D&C Builders' Motion for Partial Summary Judgment on February 29, 2012. (R. p. 311-315). The Kenison Firm filed a Motion to Compel Discovery with supporting

Exhibits on March 2, 2012. (R. pp. 321-339). On March 5, 2012, TMKG, Inc. filed a Petition to Vacate Mechanic's Lien and its own Motion for Partial Summary Judgment. (R. pp. 340-345). An offer of settlement was filed by the Kenison Firm on April 13, 2012. (R. pp. 356-357).

A hearing was held on the cross motions for summary judgment on April 19, 2012. (R. p. 355). An Affidavit of Scott Dodenhoff with supporting Exhibits was filed on April 19, 2012. (R. pp. 358-359). Following the hearing, an Order was entered on May 3, 2012 denying both motions for summary judgment. (R. p. 378-379). Subsequent to the denial of summary judgment, the parties engaged in extensive negotiations between April and July 2012 ultimately resulting in a settlement. (R. p. 67, ¶ 15). A Stipulation of Dismissal was filed on July 20, 2012. (R. p. 380).

Representation of Buckley.

In December of 2011, during the exact time the case against TMKG, Inc. was pending and the above-referenced discovery and motions were taking place, Dodenhoff was contacted by Buckley's son, Matt Buckley, about renovating Buckley's home. On January 4, 2012, Buckley and D&C Builders entered into an agreement to renovate Buckley's home located at 105 Cammer Ave. in Greenville (the "Buckley Project"). (R. p. 67, ¶ 14).

Construction on the Buckley Project began on February 5, 2012, two months prior to the TMKG summary judgment hearing, and continued through November 16, 2012. (R. p. 67, ¶ 15). The Certificate of Occupancy for the Buckley Project was issued on July 31, 2012. (R. p. 67, ¶ 16).

Upon the completion of the project, Buckley refused to pay the remaining balance due to D&C Builders for the renovations. (R. p. 67, ¶ 18). D&C Builders filed a Notice and Certificate of Mechanics' Lien to preserve its rights and then filed the current action to foreclose that Mechanics Lien. (R. p. 16, ¶ 4).

Buckley hired the Kenison Firm to defend the foreclosure action brought by D&C Builders. (R. p. 112, ¶ 7). On behalf of Defendant Buckley, the Kenison Firm filed an Answer, Counterclaims and Third-Party Claims against Dodenhoff individually. This Answer asserts fourteen (14) affirmative defenses, and although numbered differently, thirteen (13) of those defenses asserted in the Buckley Answer against D&C Builders were defenses also asserted by the Kenison Firm on behalf of D&C Builders in the Reply to the counterclaims in the TMKG, Inc. case. (Compare R. pp. 28-33 with R. pp. 306-309).

The initial Complaint filed by the Kenison Firm in the TMKG case on behalf of D&C Builders included causes of action for breach of contract (R. p. 256, ¶ 12 – p. 257, ¶ 16), quantum meruit (R. p. 257, ¶ 17 – p. 258, ¶ 20) and foreclosure of mechanics' lien. (R. p. 259, ¶ 28 – p. 260, ¶ 35). The Answer by TMKG asserted counterclaims against D&C Builders of breach of contract (R. p. 290, ¶ 37 – p. 291, ¶ 45), quantum meruit (R. p. 292, ¶ 53 – p. 293, ¶ 58) and vacation of mechanics' lien. (R. p. 291, ¶ 46 – p. 292, ¶ 52).

The D&C Builders complaint against Buckley simply asserts a cause of action of foreclosure of the mechanics' lien. (R. pp. 13-17). However, the Buckley Answer filed by the Kenison Firm includes eight (8) counterclaims against D&C Builders including

breach of contract, negligence, conversion, fraud, negligent misrepresentation, constructive fraud, and slander of title. (R. p. 39 ¶ 68 – 50 ¶ 114).

The Kenison Firm crossed the ethical line in alleging that its former client (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,”** (R. p. 50, ¶ 116); (2) **“was insolvent prior to and/or during construction of the Project”** (R. p. 51, ¶ 117); and (3) **“was grossly undercapitalized prior to and during construction of the Project.”** (R. p. 51, ¶ 118; R. p. 67, ¶ 20). Additionally, the Kenison Firm asserted Third-Party claims against Dodenhoff, the corporate representative for D&C, individually, that he (1) **treated debts and assets of D&C as his own personal debts** (R. p. 51, ¶ 120); (2) **dominated the finances, policies and business practices of D&C such that it was operated as a façade for his own personal operations** (R. p. 51, ¶ 121); and (3) **used his control of D&C to commit fraud against Buckley.** (R. p. 51, ¶ 122 – p. 52, ¶ 125; p.29, ¶131 – p.32, ¶148; R. p. 67, ¶ 20). The Kenison Firm also alleged that D&C Builders and Dodenhoff breached fiduciary duties by not properly maintaining, accounting, paying or applying funds paid to them in trust. (R. p. 59, ¶ 162).

In addition to the filing of the Answer, Counterclaims and Third-Party Claims, the Kenison Firm also served interrogatories and requests to produce on D&C Builders seeking information as to the corporate structure (R. p. 191, ¶ 16; p. 192, ¶ 18 ; p. 196, ¶ 17; p. 197, ¶18, 20), financial status (R. p. 190, ¶ 13 – p. 192, ¶ 20, p. 197, ¶ 18, 19) and information related to all jobs since January 1, 2011 (R. p. 192, ¶ 22), which would necessarily include all of the TMKG records. (R. p. 68, ¶ 21, 22). The Kenison Firm

also served Requests to Admit requesting D&C and Dodenhoff to admit that they do not maintain proper accounting records or appropriate tax records. (R. p. 198, ¶ 2; p. 199, ¶ 4-8; p. 68, ¶ 23).

Assertion of conflict of interest.

Based upon the allegations asserted by the Kenison Firm on behalf of Buckley, D&C Builders believed that confidential information obtained by the Kenison Firm in its representation of D&C Builders against TMKG, Inc. was being used, or was very likely to be used, against D&C Builders in the furtherance of the defenses and counterclaims of Buckley in this matter. (R. p. 68, ¶ 27, 28).

Prior to undertaking the representation of Buckley in this matter, the Kenison Firm was aware that it had previously represented D&C Builders in a prior mechanics' lien and foreclosure action against TMKG, Inc. (R. p. 111, ¶ 3). The Kenison Firm was also made aware of the conflict by Counsel for D&C Builders prior to the filing of the Motion to Disqualify. (R. p. 140, lines 4-12).

At the hearing on the Motion to Disqualify, D&C Builders presented the information referenced above and argued that the TMKG case and the Buckley case were "substantially related" under Rule 1.9 of the Rules of Professional Conduct and the representation of Buckley was prohibited. (R. p. 137, line 12 – p. 138, line 3). The Kenison Firm challenged the Motion to Disqualify on the basis that the facts of the Buckley case and the TMKG case are not "substantially related" and are "totally opposite," (R. p. 145, ll. 2-3), that they are unaware of any specific confidential matter at issue in the Buckley case, (R. p. 145, ll. 19-20), and have not been provided any specific

alleged confidential information that could potentially create a conflict. (R. p. 146, line 22 – p. 147, line 2). In support of these assertions, Attorneys Holder, Johnson and Crawford all state in their respective affidavits that they are “unaware of” or “do not remember” any confidential information provided by D&C Builders, Inc. to them in connection with their prior representation against TMKG, Inc. (R. p. 114, ¶ 13; p. 117, ¶ 4; p. 120, ¶ 4).

In addition to the above referenced Affidavits, the Kenison Firm also attempted to address the matter by filing an Amended Answer, Counterclaims and Third-Party claims removing some of the allegations against D&C Builders and Dodenhoff. (R. pp. 76 – 109).

During argument at the hearing, the Circuit Court requested D&C Builders provide the specific information it contended the Kenison Firm learned in its representation in the TMKG case that would be injurious to D&C Builders in the current case. (R. p. 150, lines 19-22). D&C Builders argued that such specific disclosure was not required by the ethical rule given the cases were “substantially related.” D&C Builders also objected to disclosing such information due to the client confidentiality. (R. p. 150, line 23 – p. 153, line 9). The Circuit Court nevertheless ordered D&C Builders to prepare and submit a privilege log to both the Court and the Kenison Firm of the information claimed to be confidential that the Kenison Firm could potentially use in the Buckley case. (R. p. 153, line 10 – p. 154, line 17).

Prior to the entry of the Order of July 16, 2013, counsel for D&C Builders requested clarification from the Circuit Court on the preparation of the privilege log and potential ethical issues implicated by the mere creation of the privilege log, as well as

requesting that the privilege log not be provided to the Kenison Firm. (R. p. 161 - 167). Specifically, Counsel expressed concern that complying with the Circuit Court's directive to produce the privilege log would arguably force Counsel to violate ethical obligations to his client. Counsel requested specific instruction as to how to address matters relayed in confidential attorney/client communications. (R. p. 166, lines 1-40). The Kenison Firm objected to this request and provided a proposed Order to the Circuit Court, which Order was signed by the Circuit Court without discussion and filed on July 16, 2013. (R. p. 168).

Having not received receiving further direction from the Circuit Court on the ethical issues raised in its letter, D&C Builders filed a Motion to Reconsider, Clarify and Amend Order to include Injunction again seeking clarification on the ethical issues. On July 18, 2013, the Kenison Firm forwarded a letter to the Court responding to the Motion to Reconsider and specifically stating unequivocally that **"no confidential information was gained by my firm in its prior representation of Plaintiff."** (R. p. 246, lines 27-29). The letter further states that **"The Plaintiff has failed to provide any "specific" confidential facts to counter this position."** (R. p. 246, lines 31-33).

A brief hearing was held on July 23, 2013 on the Motion to Reconsider wherein the Circuit Court expressed that it would not disqualify a law firm without some kind of basis (R. p. 178, lines 19-22), that if the Kenison Firm has confidential privileged information, and needed to have the opportunity to respond and explain whether it is or isn't privileged (R. p. 178 line 23 – p. 179, line 3). The Circuit Court admonished *Counsel for D&C Builders* that the only potential ethical violation would be Counsel failing to comply with the Order to produce the privilege log! (R. p. 180, lines 23-25).

Despite D&C Builder's position that a decision should be made based on the cases being "substantially related" and the likelihood that the Kenison Firm obtained confidential information rather than requiring disclosure of specific confidential attorney/client communications, the Circuit Court denied the motion to reconsider and upheld the Order for D&C Builders to provide a privilege log of the confidential privileged information it had provided to the Kenison Firm in the prior representation. This appeal followed.

STANDARD OF REVIEW

Whether a law supersedes the Rules of Professional Conduct is a question of law. Rule 1.6 Cmmnt. 13, RPC, Rule 407 SCACR. An appellate court may make its own determination on questions of law and need not defer to the trial court's rulings in this regard. Crossmann Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 47, 717 S.E.2d 589, 592 (2011)(citation omitted). "In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court." Hagood v. Sommerville, 362 S.C. 191, 191, 607 S.E.2d 707, 708 (S.C. 2005).

The determination of whether a party may immediately appeal an order issued before final judgment is governed by S.C. Code Ann. § 14-3-330 and must fall into one of those categories to be immediately appealable. Id. "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)." Id. at 709 [citing Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000)]. The attorney-client relationship is extremely important in our adversarial system and the rights related to representation by a particular attorney are

closely related to a particular mode of trial. Id. at 710. An order granting, continuing, modifying, or refusing an injunction is also immediately appealable. S.C. Code Ann. § 14-3-330(4), Curtis v. State of South Carolina, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (S.C. 2001).

ARGUMENT

A simple and logical rule is hammered into every law student in law school -- “You cannot represent a new client against an old client without there being a conflict of interest.” There are limited exceptions to this rule and sometimes it is permissible for an attorney to represent a new client against a former client. This case at bar between D&C Builders and Buckley does not fall into one of the narrow exceptions.

As the Supreme Court stated in State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (S.C. 2000):

Every South Carolinian has a vital interest in the fair administration of justice. This Court bears the ultimate responsibility for maintaining judicial integrity and the high standards of professional conduct among the members of the bar.

Id. at 449, S.E.2d at 109. The issues presented by this appeal are both “ethical” and “procedural” in nature. The right to choose one’s own counsel must be considered in light of the fair administration of justice. The novel question before this Court is “Through which lens should this matter be viewed?” From the facts and law presented, the Appellant contends that the ethical standards and the fair administration of justice should prevail over one client’s desire to choose its lawyer.

The federal courts agree as the United States Court of Appeals for the 8th Circuit, citing authority from the 5th Circuit has held, “**Disqualification is an ethical, not a legal**

matter.” State of Arkansas v. Dean Foods Products Company, Inc., 605 F.2d 380, 384 (8th Cir. 1979)(citing American Can Company v. Citrus Feed Company, 436 F.2d 1125, 1127 (5th Cir. 1971)). The New Jersey Supreme Court probably said it best:

The dynamics of litigation are far too subtle, the attorney’s role in that process is far too critical and the public’s interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyers’ representation in a given case.

Reardon v. Marlayne, Inc., 83 J.J. 460, 469, 416 A.2d 852, 857 (N.J. 1980).

The Kenison Firm was representing D&C Builders against TMKG, Inc. in a dispute over money and quality of work in a construction case at the same time D&C Builders was renovating Buckley’s home. The Kenison Firm’s representation lasted for over a year in that matter during which time D&C Builders provided a plethora of information about its company, its finances and its operations to the Kenison Firm in order to defend D&C Builders against TMKG.

Six months later, the Kenison Firm changed sides to represent Buckley against D&C Builders in their dispute over money and quality of work in a construction case.

The Kenison Firm claims there is no conflict representing Buckley because the individual attorneys “don’t remember” any confidential information learned from D&C Builders in the prior case. These attorneys also claim even if they did learn anything, what they learned either would not be relevant in this case or is no longer confidential because it was shared with a third party. The issue of whether they do or do not remember confidential information is not the standard for assessing whether there exists a conflict of interest under the Rules of Professional Conduct. There is the very real potential that, during the course of representation, the Kenison Firm will recall something

that is confidential or even that they use non-confidential information learned in the prior representation against their former client.

Rule 1.9 of the Rules of Professional Conduct states:

- (a) 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 that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- ...
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client or when the information has become generally known...

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

D&C Builders sought disqualification of the Kenison Firm because it undoubtedly obtained information in its prior representation that would be relevant to the Buckley matter. A conflict of interest therefore exists under Rule 1.9(a) and under Rule 1.9(c) where former attorneys are prohibited from using not only confidential information, but any information to the disadvantage of a former client.

The Kenison Firm's defense is that its attorneys don't recall anything that would be relevant so they cannot use any information against its former client and that D&C Builders hasn't provided any specifics to refute their position. The disclosure of "specifics" necessarily requires disclosure of information that was, or may have been, provided through confidential verbal attorney-client communications. The Circuit Court's Order improperly placed the burden of proof on D&C Builders.

I. The Circuit Court erred in Ordering Appellant to reveal specific confidential information learned or likely learned by Counsel for Respondent through confidential attorney-client communications in its prior representation of Appellant in order to substantiate the disqualification of Counsel for Respondent under Rule 1.9 of the South Carolina Rules of Professional Conduct.

The attorney-client relationship is of paramount importance in the legal profession. It demands a confidential trusting relationship that often develops over time. Hagood, at 710. In preserving client confidences, a lawyer serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private. (Preamble ¶8, RPC, Rule 407, SCACR & Rule 1.6 Cmnt. 2, RPC, Rule 407, SCACR). Rule 1.6(a) more specifically addresses this concept by requiring that “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.” Rule 1.6(a), RPC, Rule 407, SCACR. “A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.” Rule 1.6 Cmnt. 2, RPC, Rule 407, SCACR. **“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). In this particular case, ordering D&C Builders to provide confidential information from attorney-client communications to the very attorneys being sought to be disqualified would be irreparable. This harm could not be corrected by an appeal from final judgment. Once the information is disclosed, it can’t be undisclosed. A bell cannot be unrung.

The Kenison Firm currently represents Buckley and will necessarily share the information to determine its relevance, or confidential nature. Accordingly, if the Kenison Firm is disqualified, the information would still be usable by Buckley with subsequent counsel who would otherwise not have that knowledge. As the Order appealed affects a substantial right that could not be corrected by an appeal from final judgment, this Court has jurisdiction to address this matter under S.C. Code §14-3-330(2).

Rule 1.9(a) recognizes the continuation of the confidentiality obligation once representation is terminated by the mandate 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 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). Rule 1.9(c) offers further protection to the client by prohibiting a lawyer who has formerly represented a client from using any information to the disadvantage of that client. Rule 1.9(c)(1), RPC, Rule 407, SCACR. These protections are in place for the former clients, not for the attorneys.

D&C Builders has sought to disqualify the Kenison Firm and its attorneys from representing Buckley in this matter because the firm was actively representing D&C Builders in another collection/foreclosure matter during the time D&C Builders was renovating Buckley's home. During its attorney-client relationship, which lasted for over a year and involved extensive confidential attorney-client communications, D&C Builders provided the Kenison Firm with information related to its corporate structure, financial status, internal operations and actions related to the TMKG matter. This

information is now relevant in the Buckley matter based on the defenses and counterclaims asserted by the Kenison Firm against D&C Builders. The request for disqualification was mandated because the matters being “substantially related” in light of similar facts, claims and defenses of both cases.

Although contending that the cases are not “substantially related,” the Kenison Firm actually challenged the disqualification on the theory that it does not remember obtaining any confidential information during the prior representation and D&C Builders had not provided any specific confidential information to them to justify disqualification. Despite the guidance contained in the Rules, the Circuit Court agreed with this strained logic and ordered D&C Builders to provide specific information that the Kenison firm obtained in the TMKG case that could now be used in the Buckley case.

The Court’s Order that D&C Builders provide specific confidential information is error and entirely improper under Rule 1.9, where Comment 3 to the Rule clearly states:

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.

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

The Order of the Circuit Court is directly at odds with the ethical rule. The Circuit Court is ordering D&C Builders to reveal specific confidential information to prove the Kenison Firm has such information to thereby justify disqualification. The Court specifically stated, “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.” (R. p. 178, lines 19-22).

As argued to the Circuit Court, the “basis” for disqualification under Rule 1.9 is whether the prior and current case are “substantially related.” (R. p. 179, line 18 – p. 180, line 4). The “substantially related” analysis is the only way to protect the attorney-client relationships in this type of situation. The rule was written this way on purpose and the Comments to the Rule further bear this out.

The Circuit Court, however, adamantly refused to consider this argument ordering the privilege log, stating, “Mr. Martin, you are just rehashing the argument you made before. *I’m not going to throw somebody out based on – without some reason to do it.*” (R. p. 180, lines 5-7). The Circuit Court further added:

Where’s the problem? I have made – let me just put it this way. I’ve made the ruling and argument is over. Okay? I normally don’t like to do that, but I’ve heard all this, I’ve examined it, read your motion, read everything. Turn over the privilege log.

I can’t make a determination if they’re disqualified or not without knowing about it. And I’m not going to know if the information is privileged unless they can show me – you could claim anything, that this – you could claim this is a secret and the other side doesn’t know about it. How can they respond? It’s called due process.

(R. p. 181, lines 14-24).

The Circuit Courts’ reasoning is contrary to the weight of existing legal authority. Courts that have addressed this issue in other jurisdictions unanimously agree that confidential information does not have to be disclosed to determine whether the conflict exists. The most similar case to the present matter is the case of Foulke v. Knuck, 784 P.2d 723, 162 Ariz. 517 (Ariz.App.Div. 2 1989). In Foulke, the attorney to be disqualified made the exact same claims as the Kenison Firm that no confidential

information had been obtained except what is now publicly known. In response the Court stated that this:

...contention fails to recognize the mandatory nature of ER 1.9(a). The rule does not require that confidences and secrets be divulged in order for a conflict to exist or for disqualification to be proper. State v. Allen, 539 So.2d 1232, 1234-35, (La. 1989); see also Arkansas v. Dean Foods Products Co., 605 F.2d 380, 383 (8th Cir. 1979); United States v. Kitchin, 592 F.2d 900, 904 (5th Cir.), cert. denied, 444 U.S.843, 100 S.Ct 86, 62 L.Ed.2d 56 (1979). Regardless of what was communicated during the representation of the former client, the rule prohibits subsequent representation of an individual whose interests are substantially adverse to those of the former client.

Id. at 522, P.2d at 728. [citing T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F.Supp. 265, 268-69 (S.D.N.Y. 1953)]. The court elaborated by holding:

The former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.

Foulke at 522, P.2d at 728 (emphasis added). See also Cord v. Smith, 338 F.2d 516, 524-25, (9th Cir. 1964); Matter of Evans, 113 Ariz. 458, 462, 556 P.2d 792, 796 (1976).

The Supreme Court of Iowa followed the same reasoning in Richers v. Marsh & McLennan Group Associates, 459 N.W.2d 478 (Iowa 1990), finding that the test is whether the relationship between the two cases are "substantially related."

If such a relationship is found then the court will assume that the attorney obtained information in the first representation that is relevant to the subsequent litigation. Emle Indus., Inc. v. Pantentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973); Killian v. Iowa District Court for Linn County, 452 N.W.2d 426, 430 (Iowa 1990); Alexander v. Superior Court, 141 Ariz. 157, 164, 685 P.2d 1309, 1316 (1984). The movant need not show that confidences and

secrets were divulged in order for a conflict to exist. Foulke v. Knuck, 162 Ariz. 517, 522, 784 P.2d 723, 728 (Ariz.App. 1989).

Richers, 459 N.W.2d at 481 (emphasis added).

The Washington Court of Appeals analyzed existing cases on the issue and stated:

The plain language of RPC 1.9 indicates actual proof of disclosure of confidential information is not necessary if the matters are substantially related. The weight of authority from other jurisdictions similarly interprets the rule as not requiring proof of disclosure of confidential information.

Teja v. Saran, 68 Wn.App. 793, 846 P.2d 1375 (Wash.App. Div. 1 1993)(emphasis added)[citing Foulke v. Knuck, 162 Ariz. 517, 522, 784 P.2d 723, 728 (1989); Brent v. Smathers, 529 So.2d 1267 (Fla.Dist.Ct.App. 1988); United States ex rel. Lord Elec. Co. v. Titan P. Constr. Corp., 637 F.Supp. 1556 (W.D.Wash. 1986); Junger Util. & Paving Co. v. Myers, 578 So.2d 1117 (Fla.Dist.Ct.App. 1989); Martindale v. Richmond, 301 Ark. 167, 782 S.W.2d 582, 584 (1990); Oxford Dev. Minn., Inc. v. Ramsey, 428 N.W.2d 434 (Minn.Ct.App. 1988); Reading Anthracite Co. v. Lehigh Coal & Nav. Co., 771 F.Supp. 113 (E.D.Pa. 1991); Green v. Montgomery Cy., Ala., 784 F.Supp. 841 (M.D.Ala. 1992)].

North Carolina follows this rationale as well. Under Cannon 4 that requires an attorney to preserve the Confidences and Secrets of a client, EC4-4 states:

The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge....

Lowder v. All Star Mills, Inc., 60 N.C.App. 275, 280, 300 S.E.2d 230, 233 (N.C.App. 1983). Interpreting this Cannon, the Lowder Court further held:

It is not necessary to show the attorney received confidential information. The ethical duty of an attorney under EC4-4 is broader than the attorney-client evidentiary privilege.

Id. at 282, S.E.2d at 234.

Perhaps the Court in Arkansas v. Dean Foods summed it up best when it stated:

To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule (protecting client confidences).

Dean Foods, 605 F.2d at 383.

The attorney-client relationship, both current and former, are of such importance that maintaining confidentiality and obligations to all clients is necessary for clients to trust their attorneys not to reveal confidential information and to never use information they obtained from the client against that client. When an attorney chooses to change sides and represent someone against a former client, the interests of justice are not served when the attorney can simply claim "I don't remember anything confidential" or "I didn't receive any confidential information." Requiring the former client to prove the lawyer has information he could possibly defeat the very purpose of the ethical rules.

Consistent with the overwhelming legal authority cited above, Rule 1.9 provides the answer as to what "basis" the Court needs before disqualifying an attorney. The inquiry is simply whether the cases are "substantially related." Comment 3 provides in no uncertain terms:

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). The example used in the Rule underscores the Rule's applicability in the case at bar:

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 seeking a divorce.

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

Both the TMKG case and the Buckley case involve the collection and accounting of money. The Kenison Firm obtained financial information from D&C Builders in the TMKG case and then turned around in the Buckley case and alleged D&C Builders was "insolvent prior to and/or during construction of the Project" (R. p. 51, ¶ 117) and "grossly undercapitalized prior to and during construction of the Project." (R. p. 27, ¶ 118; p. 67, ¶ 20).

The Kenison Firm contends the two cases are not "substantially" related and that "no confidential information was gained by my firm in its prior representation of Plaintiff." (R. p. 246, lines 27-29). Our Supreme Court has already held that this argument is without merit. Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (S.C. 1996).

In Townsend, the attorney argued that his representation of a child as a guardian-ad-litem in a family court case was not "substantially related" to his representation of the child's father later in a support action involving the same child, and that he didn't use any information from the first case in the second. The South Carolina Supreme Court specifically rejected those arguments holding the standard for "substantially related" 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."

Id. at 315, S.E.2d at 429 [citing Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 1.9:104, at 293 (1996)(emphasis added)]. Regarding the attorney's claim that he does not actually use any information, the Court held:

Here, although he claims none of the same information was actually used in the two matters, Lawyer should have recognized the risk that information he gained during the custody matter in which he was the Daughter's guardian ad litem might prove relevant to the child support claim and particularly to the college support claim in the action in which he represented Father.

Id. at 317, S.E.2d at 429(emphasis added). The Court found the attorney had a conflict of interest based upon these circumstances.

After arguing that it has no information that could be used in violation of Rule 1.9, the Kenison Firm takes their defense a step further by shifting the burden of proof onto their former client by asserting **"the Plaintiff has failed to provide any specific confidential facts to counter this position."** (R. p. 246, lines 31-33). The Rules of Professional Conduct are written to guide attorneys, not clients. The burden of proof in seeking disqualification is on the person seeking it, but only to the extent of demonstrating that the prior case and the present case are "substantially related" such that, under Townsend, the attorney **"would have or reasonably could have learned confidential information in the first representation that would be of significance in the second."** Id. at 317, S.E.2d at 429 (emphasis added). The Circuit Court erroneously adopted this shifting of the burden in ordering D&C Builders to disclose specific information provided to the Kenison Firm that could be used against it.

The Circuit Court apparently attempts to lessen the impact of requiring D&C Builders to provide specific confidential information by placing the privilege log under a protective order. (R. p. 6 ¶ 3). Unfortunately, a protective order does not protect D&C Builders at all in this case because the Order requires the information to be provided to the very people from whom it needs to be protected, Buckley and the Kenison Firm. (R. p. 178, line 23 – p. 179, line 3).

The entire reason for seeking disqualification of the Kenison Firm is to prevent the use of information obtained in the prior representation from being used against D&C Builders. (R. p. 158 ¶ 6). The Kenison Firm has already claimed it doesn't have any confidential information or its attorneys "don't remember" any confidential information. (R. p. 246, ll. 27-29; p. 114, ¶ 13; p. 117, ¶ 4; p. 120, ¶ 4). Therefore, any information provided in the ordered privilege log will either (1) refresh their memory, (2) be information they will now contend is no longer confidential, or (3) be new information that D&C Builders thought it had provided but had not actually provided. (R. p. 158, ¶ 7, 8). In either event, the providing of this information to Buckley and the Kenison Firm would clearly be giving the adversary more ammunition to use against D&C Builders. (R. p. 159, ¶ 12).

The Circuit Court's Order also would necessarily require Counsel for D&C Builders to turn over attorney work product. The Order requires providing information that is factually important to the case in counsel's opinion and would necessarily include facts that would be detrimental to D&C Builder's case against Buckley.

An additional ethical dilemma arises in that D&C Builders has not provided its current counsel the same information previously provided to the Kenison Firm in the

TMKG case. Therefore, to comply with the Circuit Court's order to prepare the privilege log, D&C Builders is required to reveal confidential information related to the TMKG case to current counsel who is then required to turn it over to the very party current counsel was retained to prevent using such information against D&C Builders. Since D&C Builders does not consent to the release of this information, compliance by current counsel would be in violation of Rule 1.6(a) of the Rules of Professional Conduct. Rule 1.6(a), RPC, Rule 407, SCACR. (R. p. 166).

Although Rule 1.6(b)(7) allows for an attorney to reveal confidential information when the lawyer reasonably believes necessary to comply with a court order (Rule 1.6(b)(7), RPC, Rule 407, SCACR), Comment 14 addresses this situation clearly:

A lawyer may be ordered to reveal information relating to the representation of a client by a court ...claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.

Rule 1.6 Cmnt. 14, RPC, Rule 407, SCACR. In attempting to raise this issue with the Circuit Court, counsel was admonished that the only ethical violation would be his failing to comply with an order of the Court. (R. p. 158, ¶ 5, 6; p. 166, lines 18-28; p. 180, lines 23-25).

If "confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship" (Rule 1.6 Cmnt. 2, RPC, Rule 407, SCACR), then this Court must protect that confidentiality, the sanctity of confidential attorney-client communications, and the fair administration of justice. If an attorney may avoid a conflict under Rule 1.9 by simply saying "I don't remember anything you told me," or "nothing you told me was or

is still confidential,” the whole foundation of client protection crumbles. The Rules of Professional Conduct which expressly provide that a client does not have to reveal specific confidential information to support disqualification, cannot be ignored simply because an attorney asks for it.

Although Buckley certainly has the right to choose his attorney, that right to counsel is not absolute. “This court has a duty to maintain the highest ethical standards of professional conduct to insure and preserve trust in the integrity of the bar.” H&C Corporation, Inc. v. Puka, No. 4:12-cv-00013-RBH , Lawyers Weekly No. 002-175-13, 4 pp. (R. Bryan Harwell, J.)(D.S.C. October 11, 2013). The Puka Court, citing Donaldson v. City of Walterboro Police Dept., No. 2:06-cv-02492-PMD, 2008 WL 906707 (D.S.C. March 31, 2008), went on to hold:

As noted by Judge Duffy in Donaldson, “the court acknowledges that granting this Motion to Disqualify deprives the Plaintiff of his chosen counsel and increases the length of time this case will remain pending. However, the court is mindful of its responsibility to uphold the South Carolina Rules of Professional Conduct...”

Puka, at p. 4 (citing Donaldson 2008 WL at *4)(emphasis added).

See also United States v. Ross, 33 F.3d 1507, 1523 (11th Cir. 1994), wherein the Court held:

The need for fair, efficient, and orderly administration of justice overcomes the right to counsel of choice where an attorney has an actual conflict of interest, such as when he has previously represented a person who will be called as a witness against a current client...

Id. (citing United States v. Casiano, 929 F.2d 1046, 1052 (5th Cir. 1991)).

The Rules of Professional Conduct are in place for attorneys to follow and recognize potential conflicts of interest before undertaking representation so as not to prejudice either client in the process. The Kenison Firm knew they had represented

D&C Builders before undertaking to represent Buckley. (R. p. 111, ¶ 3). They were also made aware of the conflict by Counsel for D&C Builders. (R. p. 140, lines 4-12). Rather than protect the interests of both clients, recognize the conflict and withdraw, the Kenison Firm has chosen to change sides and try to force D&C Builders to prove it provided confidential information or other information relevant in this matter. The actions by the Kenison Firm do absolutely nothing to protect the interests of their clients, both current and former. The actions of the Kenison Firm are designed to protect the Kenison Firm.

The ability to trust in the confidential nature of attorney-client communications is most certainly a substantial right which will be significantly impacted if the Circuit Court is able to order Appellant to disclose confidential attorney-client communications as a requirement for disqualification of the Kenison Firm. Such a requirement is contrary to the Rules of Professional Conduct and the existing legal authority both expressed by the South Carolina Supreme Court in Townsend, and by most all jurisdictions. The Order of the Circuit Court that D&C Builders provide specific information it contends the Kenison Firm obtained in its prior representation of D&C Builders goes against the fundamental principle in the attorney-client relationship of protecting the interests of clients.

The Order of the Circuit Court of July 16, 2013 should be vacated, the Kenison Firm and all attorneys should be immediately disqualified from further involvement in this matter and all actions and filings of the Kenison Firm in this matter should be vacated.

II. The Circuit Court erred in refusing to grant an Injunction preventing Respondent and Counsel for Respondent from accessing the specific confidential information Appellant was ordered to provide to the Court to substantiate the disqualification of Counsel for Respondent under Rule 1.9 of the South Carolina Rules of Professional Conduct.

Despite the clear consensus in other jurisdictions as detailed above, the Circuit Court solely focused on whether information the Kenison Firm has is privileged, (R. p. 150, line 19 – p. 152, line 24; p. 181, lines 20-23), and refused to consider the appropriate standard under the Rules of Professional Conduct. The proper inquiry is whether there is a “substantial risk” that the Kenison Firm has confidential information (Rule 1.9 Cmmt. 3, RPC, Rule 407, SCACR) or, under Townsend, whether it “would have or reasonably could have learned confidential information in the first representation that would be of significance in the second.” Id. at 315, S.E.2d at 429. (R. p. 137, lines 16-25; p. 138, lines 11-17; p. 150, line 23 – p. 153, line 9; p. 179, line 18 – p. 180, line 7).

As an alternative, to further assist the Court in protecting the interests of both clients, D&C Builders requested the Court to issue an injunction against the Kenison Firm from accessing the information required to be produced for the Court. (R. p. 160). The purpose of an injunction is to “prevent irreparable harm.” AJG Holdings, LLC v. Dunn, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (S.C.App. 2009). If the information is provided to the Kenison Firm, even under a protective order, the providing of that information would be to the distinct disadvantage of D&C Builders and constitute irreparable harm. (R. p. 159, ¶ 12).

Both the TMKG case and the Buckley case involve the collection of money for construction work performed but not paid for. Both cases involve allegations that D&C Builders failed to properly perform work and was trying to collect more than is owed.

(R. p. 290, ¶ 41-42; p. 37, ¶ 57-61; p. 39-41, ¶ 70). Hypothetically speaking, if D&C Builders had provided information to the Kenison Firm during a verbal confidential attorney-client communication about other situations where D&C Builders had cut corners on jobs or other situations where clients accused them of overbilling to assist with defending the claims made by TMKG, that information would certainly be relevant and damaging in the Buckley case. While it is conceivable that the Kenison Firm truly does not remember, forcing the disclosure of that information to the very attorneys sought to be disqualified puts the client in a quandary. Does the client disclose and hope disqualification is granted and the information is somehow protected from use by the new counsel for Buckley, or does the client not disclose and risk the attorneys with the Kenison Firm suddenly "*remembering*" more about the information provided in the prior case than they do now. The entire basis for Rule 1.9 and the interpretation of what is "substantially related" is so attorneys may make the decision without placing clients in this unenviable position.

The Kenison Firm claims that no one in its office was aware of the facts and circumstances that gave rise to the Buckley matter while they were representing D&C Builders in the TMKG matter. (R. p. 145, lines 4-6). D&C Builders was engaged in the construction on Buckley's house during that representation and discussed ongoing operations and the financial status of the company with the attorneys at the Kenison Firm. (R. p. 66, ¶ 11-13). In that situation, even the seemingly innocuous inquiry by the attorney during a telephone call of "How are things going?" becomes relevant confidential attorney-client information in the Buckley matter if, hypothetically, the response is "We're so busy I don't have time to be at all the job sites we've got going."

The Kenison Firm alleged in Buckley's Answer that Dodenhoff "failed to physically appear on site at the Project to supervise and/or coordinate the work." (R. p. 37, ¶ 56). It is irrelevant that the Kenison Firm doesn't remember every communication with D&C Builder during that representation and everybody working there now contends they were not told anything relevant to this case. It is enough that they were representing D&C Builders in another similar matter while D&C Builders was working for Buckley.

The New Jersey Supreme Court stated in Reardon v. Marlayne, Inc., 83 J.J. 460, 416 A.2d 852 (N.J. 1980):

Because an attorney's ethical obligation may often be uncertain, reliance on the good faith of an individual attorney in all its human frailty provides an inadequate safeguard against improper behavior, both actual and imagined.

Even the most rigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation and transforming it into a telling advantage in the subsequent litigation. Or, out of an excess of good faith, a lawyer might bend too far in the opposite direction, refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety.

Id. at 469, A.2d 857.

As demonstrated above by the overwhelming precedent from other jurisdictions and by the South Carolina Supreme Court's analysis in Townsend, D&C Builders should not be required to provide specific confidential information. (R. p. 159, ¶ 13). The Court in Townsend held that the standard for determining a conflict of interest is prospective, not retrospective. The test is whether the lawyer "would have or reasonably could have learned confidential information" not that the lawyer did in fact learn confidential information. Townsend at 315, S.E.2d at 429. How can it be protecting the client's interest or serving the interests of justice and the public's perception of how justice is served to require the client to prove he shared confidential information with the

attorneys? That obligation is placed squarely on the attorneys by the Rules of Professional Conduct.

The Circuit Court erroneously shifted that burden giving the Kenison Firm the benefit of the doubt on the claim they did not have any confidential information. In confirming the requirement of the privilege log, the Circuit Court stated:

“...my basic understanding of all lawyers is they swear an oath to be truthful and honest. 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. ...that’s what you’re talking about them doing.”

(R. p. 179, lines 3-10).

The Kenison Firm proposes that the South Carolina Court of Appeals case of Madison v. Graffix Fabrics, Inc., 304 S.C. 321, 404 S.E.2d 37 (S.C. App. 1991) is the controlling authority and is more applicable to this situation than Townsend. (R. p. 142, line 22 – p. 144, line 19). The holding in Madison is that “an attorney is not prevented from representing a subsequent client against a former client where the duties required of him do not conflict with the duties in the first employment.” Id. at 325, S.E.2d at 40. The Kenison Firm claims that their respective duties to both Buckley and D&C Builders do not conflict because they don’t have any confidential information from the prior representation and the facts of these cases are totally different. (R. p. 144, line 20 – p. 145, line 6). Despite Madison being five years before the Court’s more specific clarification of Rule 1.9 in Townsend, even Madison supports D&C Builders position in this situation as the Court further stated:

The test of whether the attorney’s employment is inconsistent with his duty to a 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.

Id. at 325, S.E.2d at 40, (Citing 7 Am.Jur.2d *Attorneys at Law* § 186). Most importantly, the Madison Court said “knowledge or information” rather than “confidential knowledge” or “confidential information.” Based on the allegations made in the Answer, Counterclaims and Third-Party Claims filed by the Kenison Firm, there is simply no way the Kenison Firm can forward any interests of Buckley without using information gained in the TMKG matter against D&C Builders in this matter.

The Kenison Firm cannot advocate zealously for Buckley if it is not able to effectively question Dodenhoff at trial. The Court in United States v. Ross stated:

If the conflict could cause the defense attorney improperly to use privileged communications in cross-examination, then disqualification is appropriate. Indeed, it is also true that disqualification is equally appropriate if the conflict could deter the defense attorney from intense probing of the witness on cross-examination to protect privileged communications with the former client or to advance the attorney’s own personal interest.

Ross at 1523. The Circuit Court determined the decision for limited representation was between Buckley and the Kenison Firm telling Counsel for D&C Builders, “You’ve got no business getting involved in an attorney and their client’s relationship” and “That is between his counsel and the client.” (R. p. 148, lines 1-16). Contrarily, that decision goes to the heart of the fair administration of justice.

Finally, if D&C Builders is required to disclose the information to the Kenison Firm, there would be no other remedy to address the harm. (R. p. 159, ¶ 14). Once that information is disclosed, it can’t be undisclosed. If the Court denies the Motion to Disqualify, D&C Builders has provided ammunition for the Kenison Firm to represent

Buckley. Even if the Court grants the Motion to Disqualify, the information disclosed in the log could be used against D&C Builders by Buckley. If Buckley obtains a new attorney and the Court prohibits the use of any of that information in the proceeding, the knowledge of the information may help shape a better strategy by the new attorney or provide direction to lead to the discovery of other similar information that could be used, all to the disadvantage of D&C Builders.

If the Court had issued an injunction against Buckley and the Kenison Firm from accessing the information, the requested information could be provided to the Court for it to evaluate prospectively whether that information is of the type that would generally be confidential or, based on the circumstances of the two cases, be information that could be used to the disadvantage of D&C Builders in the present case. This procedure would have at least allowed the Circuit Court to conduct the analysis contemplated by the Rules of Professional Conduct and the Court in Townsend without jeopardizing the interests of either former or current client of the Kenison Firm.

Based upon the circumstances that providing the requested information to Buckley and the Kenison Firm would be to the distinct disadvantage of D&C Builders, that the legal standard under Townsend and Madison demonstrate the information is not necessary to make an analysis for disqualification, and the fact that D&C Builders would be left with no other remedy once that information was released, the Circuit Court erred in failing to issue an injunction preventing Buckley and the Kenison Firm from accessing the requested information.

If this Court decides against the well reasoned opinions of other jurisdictions and holds that South Carolina requires disclosure of specific confidential information to

support an attorney disqualification, this Court must nevertheless reverse the Circuit Court's order denying the request for an injunction and remand the matter with instructions to the Circuit Court to protect the fair administration of justice. There is ample information in the Record on Appeal to overwhelmingly support finding that these matters are "substantially related" and this Court should instruct the Circuit Court to immediately disqualify the Kenison Firm from representing Buckley in this matter and vacate all filings and actions taken by the Kenison Firm on behalf of Buckley. Alternatively, Appellant would ask that the Circuit Court be instructed to issue an injunction on the information provided by D&C Builders pursuant to the Order of July 16, 2013 and for the Circuit Court to assess the information provided pursuant to such Order prospectively under the "substantially related" test promulgated by the Supreme Court in Townsend, to wit: whether the Kenison Firm would have or reasonably could have learned such confidential information in its representation of D&C Builders that may become relevant in representing Buckley against D&C Builders.

III. The Circuit Court erred in failing to find that the matters involved in the prior representation and current representation were "substantially related" and disqualify Respondent's Counsel?

The Kenison Firm was actively representing D&C Builders in a "substantially related" case while D&C Builders was doing the construction for Buckley that gives rise to the current case. The Kenison Firm was attempting to collect \$75,000 that was due to D&C Builders from TMKG during that time and then alleges on behalf of Buckley that during that same time D&C Builders "was insolvent prior to and/or during construction of the Project" (R. p. 51, ¶ 117) and "was grossly undercapitalized prior

to and during construction of the Project.” (R. p. 51, ¶ 118; p. 67, ¶ 20). There can simply be no clearer situation where disqualification must be ordered, but that is far from the only example in this case.

The Kenison Firm was representing D&C Builders as a corporate entity in the case against TMKG, Inc. Unbelievably, the Kenison Firm alleged on behalf of Buckley against D&C Builders that it **“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.”** (R. p. 50, ¶ 116). The Kenison Firm dealt exclusively with Dodenhoff as a representative of D&C Builders, gathering information about the company’s operations to defend it against TMKG, and now allege on behalf of Buckley that Dodenhoff **treated debts and assets of D&C Builders as his own personal debts** (R. p. 51, ¶ 120), **dominated the finances, policies and business practices of D&C Builders such that it was operated as a façade for his own personal operations** (R. p. 51, ¶ 121), and **used his control of D&C Builders to commit fraud.** (R. p. 51, ¶122, 123; p. 52, ¶145, 125; p. 53, ¶131 – p. 56, ¶148; p. 67, ¶ 20).

After this information was brought to light in the Motion to Disqualify, the Kenison Firm filed an Amended Complaint removing all of the above allegations. (R. p. 147, lines 6-12; pp. 76-109). Removing those specific allegations does not alter the fact that, as stated in Rule 1.9 Comment 3, “a substantial risk that confidential factual information as would have normally 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. Whether the Kenison Firm has any information upon which to

base these allegations when initially pled is irrelevant as to whether they should be representing Buckley in the first place. The mere assertion of these allegations demonstrate that the information obtained from D&C Builders and Dodenhoff in the TMKG representation would be relevant in forwarding the interest of Buckley under Madison. Id. at 325, S.E.2d at 40. This scenario fits neatly in the definition of “substantially related” matters under Rule 1.9 and Townsend.

Additional comparisons confirm the TMKG case and the Buckley case are “substantially related” when it comes to analyzing this situation under Rule 1.9. Appellant offered to provide the Circuit Court with the documentation from the TMKG case to compare with the Buckley case. (R. p. 152, lines 15-18). In comparing the pleadings, the claims and defenses are virtually identical. (R. p. 134, line 16 – p. 135, line 7). In its Answer for Buckley, the Kenison Firm asserts fourteen (14) affirmative defenses. Although numbered differently in this Answer, thirteen (13) of those defenses against D&C Builders were also asserted by the Kenison Firm on behalf of D&C Builders in the Reply to the counterclaims of TMKG, Inc. (R. pp. 28-33; pp. 292-295). The Complaint filed by the Kenison Firm in the TMKG case on behalf of D&C Builders included causes of action for breach of contract, (R. p. 256), quantum meruit, (R. p. 257), and foreclosure of mechanics’ lien. (R. p. 259). The Answer by TMKG asserted counterclaims against D&C Builders of breach of contract, (R. p. 290), quantum meruit (R. p. 292) and vacation of mechanics’ lien. (R. p. 291). The D&C Builders Complaint in the Buckley action simply asserts a cause of action of foreclosure of the mechanics’ lien. (R. pp. 13-17) However, the Buckley Answer filed by the Kenison Firm includes eight (8) counterclaims against D&C Builders including breach of contract, negligence,

conversion, fraud, negligent misrepresentation, constructive fraud, and slander of title. (R. pp. 39-50). Can there be a better example of changing sides?

Although the Buckley matter deals with a different property and a different contract than the TMKG matter, both cases involve the same allegations against D&C Builders by both TMKG and Buckley, including non-performance, (Compare R. p. 291, ¶ 43 with R. p. 39, ¶ 70; p. 48, ¶ 104), unsatisfactory performance, (Compare R. p. 292, ¶ 54 with R. p. 40, ¶ 70(e)), negligence, (Compare R. p. 5, ¶ 40 with R. p. 42, ¶ 74), unlawful demands for payment, (Compare R. p. 291, ¶ 43, 48 with R. p. 37, ¶ 60, 61; p. 46, ¶ 86; p. 47, ¶ 95; p. 53, ¶ 132; p. 55, ¶ 141; p. 57, ¶ 151), insufficient documentation to support payment due (Compare R. p. 291, ¶ 47 with R. p. 38, ¶ 65, p. 59, ¶ 162), and failure to complete the project (Compare R. p. 291, ¶ 43 with R. p. 16, ¶ 40(b)). The Kenison Firm was charged with defending D&C Builders against these claims brought by TMKG, but now wants to change sides to assert these same claims against its former client in representing Buckley. Despite the Kenison Firm's assertion that the two cases are "totally opposites," (R. p. 145, lines 2-3), the cases clearly meet the standard of being "substantially related."

Rule 1.9(a) of the Rules of Professional Conduct prohibits an attorney from representing someone in a "substantially related" matter when that person's interests are materially adverse to the interests of the former client. Rule 1.9(a), RPC, Rule 407, SCACR. "Substantially related" is defined in Comment 3 as when there "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; by the South Carolina Supreme

Court in Townsend as when “the affected attorney would have or reasonably could have learned confidential information in the first representation that would be of significance in the second,” Id. at 315, S.E.2d at 429; and even by the Court in Madison “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.” Id. at 325, S.E.2d at 40. Based on the pleadings and Affidavit of Scott Dodenhoff, it is clear that these two cases meet the definition of being “substantially related” so as to preclude representation of Buckley by the Kenison Firm.

Disqualification is mandated by Rule 1.9(c) which prohibits a lawyer from using any information relating to the representation of the former client to the disadvantage of the former client. Rule 1.9(c)(1), RPC, Rule 407, SCACR. The Circuit Court and the Kenison Firm appear to presume this requirement only applies to the use of confidential information against a former client, and as has already been discussed previously, the Kenison Firm contends it has no confidential information from the prior representation. The Rule does not say “confidential information” but rather just “information.” The Kenison Firm would argue the exception included in the Rule for when information becomes generally known clarifies that the Rule has to be talking about confidential information. “Generally known” and “not confidential” are two very different things. It is “generally known” that McDonalds is fast food restaurant, but it is not generally known where they buy their hamburger buns. It may be “generally known” that D&C Builders does construction work, but not generally known who associated with D&C Builders is a licensed general contractor. That information is readily available on the

Department of Labor's website, but "readily available" and "generally known" are two very different things.

This logic is clearly recognized by other courts such as in North Carolina where it has been held that "an attorney should not use against a former client information he has received while representing that client although the information is not confidential and is available to others." Lowder at 282, S.E.2d at 234.

The Kenison Firm contends that Buckley's daughter-in-law confirms in her affidavit that Dodenhoff told Ms. Buckley about everything he now contends was confidential information in the TMKG matter, including ongoing operations and the financial status of the company. (R. p. 146, lines 3-21). The Kenison Firm then bootstraps this contention into arguing that there is no more confidential information. Even if Dodenhoff talked with the Buckleys about some aspects of the company, which is still denied but for the purposes of this argument, knowledge by one or two people does not constitute "generally known." See Foulke v. Knuck at 523, S.E.2d at 728 (holding the mere fact that such confidences become public record does not change their character). Accordingly, under Rule 1.9(c), the Kenison Firm would still be prohibited from using any information obtained in the prior representation of D&C Builders to advance the interests of Buckley.

The Circuit Court found that if the Kenison Firm and Buckley want to limit how the Kenison Firm advocates for Buckley, that decision is between them. (R. p. 148, lines 1-16). Respectfully, the Circuit Court's approach makes no sense. How can Buckley make an informed decision on staying with the Kenison Firm when he doesn't know what they can't use or if some of that information could be possibly discovered and used to his

benefit by another attorney that did not have the present conflict of interest? Once again, one of the reasons we have the Rules of Professional Conduct is so attorneys recognize the potential for these conflicts and don't make them worse by undertaking a representation when their obligations to a former client restrict their ability to act in the best interests of their new client. It is the reason the standard of "substantially related" is prospective instead of retrospective.

The Kenison Firm is ethically prohibited from representing Buckley in this matter. It was representing D&C Builders in a similar claim at the same time D&C Builders was working on the Buckley Project. The communications between D&C Builders and Kenison attorneys was extensive during that time and the information Dodenhoff claims to have provided them is also the same type of information you would expect an attorney pursuing and defending those claims would need. The pleadings of both the TMKG case and the Buckley case clearly bear out both cases involve the same causes of action, defenses and even the same allegations against D&C Builders by TMKG and by Buckley. The Kenison Firm's claim that it should be allowed to represent Buckley unless D&C Builders provides concrete specific examples of confidential information is outrageous. The Circuit Court's refusal to consider disqualification without the concrete proof the Kenison Firm demands is an obvious error that needs to be corrected by this Court for the benefit of D&C Builders, and all attorneys and former clients of attorneys in South Carolina.

This Court should immediately disqualify the Kenison Firm and all of its attorneys from representing Buckley in this matter and vacate all filings and actions taken by the Kenison Firm on Buckley's behalf.

CONCLUSION

This appeal deals with a clear disagreement between the parties on how the Rules of Professional conduct are interpreted, specifically regarding Rule 1.9 and the duties owed to a former client. A review of the facts, pleadings and transcripts clearly demonstrate that counsel for Appellant and counsel for Respondent have very different interpretations of the requirements placed upon attorneys by these Rules. It seems highly unlikely that both interpretations can be correct, therefore, it is likely that a much broader section of the bar are also misinterpreting the application of this Rule. Therefore, in addition to addressing the specific matters on appeal, it is Appellant's hope the Court takes this opportunity to clarify the correct interpretation for the entire bar on these issues.

For the reasons stated above, the Order of the Circuit Court requiring Appellant to provide specific information pursuant to a privilege log to support disqualification of the Kenison Firm and its attorneys should be vacated, the Kenison Firm and all its attorneys should be immediately disqualified from representing Buckley in this matter and all filings and actions taken by the Kenison Firm on Buckley's behalf should be vacated.

In the alternative, based on the overwhelming information supporting that the matters are "substantially related, the Order of the Circuit Court should be vacated and the matter remanded with instructions for the Circuit Court to immediately disqualify the Kenison Firm and its attorneys from representing Buckley in this matter and to vacate all filings and actions taken by the Kenison Firm on Buckley's behalf.

Should this Court determine disqualification is not warranted on the information presented, and that specific confidential information may be ordered provided to support disqualification, then the Order of the Circuit Court should be vacated and the matter remanded with instructions for the Circuit Court to modify its order to issue an injunction on the information provided by D&C Builders pursuant to the Order of July 16, 2013 and instruct the Circuit Court to assess the information provided prospectively under the "substantially related" test promulgated by the Supreme Court in Townsend, to wit: whether the Kenison Firm would have or reasonably could have learned confidential information in its representation of D&C Builders that may become relevant in representing Buckley against D&C Builders?

Respectfully submitted,

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A handwritten signature in dark ink, appearing to read "B.A. Martin", written over a horizontal line.

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January 12, 2015

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JAN 12 2015

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

Edward W. Miller, Presiding Judge

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

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

v.

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

v.

Scott Dodenhoff, Third-Party Defendant

of whom:

Richard M. Buckley.....Respondent,

CERTIFICATE

I, Brian A. Martin, Esquire, attorney for Appellant, certify that Appellant's Final Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.



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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,

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I certify that that I have served the Final Brief of Appellant on Respondent and all parties of record by depositing a copy in the United States Mail, first class postage prepaid, on January 12, 2015, addressed to their attorneys of record as follows:

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IN THE STATE OF SOUTH CAROLINA
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v.

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

v.

Scott Dodenhoff, Third Party Defendant,

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN ORDERING APPELLANT TO REVEAL TO THE LOWER COURT AND TO RESPONDENT'S COUNSEL THE SPECIFIC INFORMATION THAT APPELLANT HAS ONLY GENERALLY ALLEGED TO BE INFORMATION PREVIOUSLY PROVIDED BY APPELLANT TO RESPONDENT'S COUNSEL WHICH ALLEGEDLY SUBSTANTIATES APPELLANT'S REQUEST FOR DISQUALIFICATION?
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 - A. IF NOT, IS THE APPEAL OF THIS ISSUE RIPE?
 - B. IF SO, DID THE LOWER COURT COMMIT ERROR?

STATEMENT OF THE CASE

On February 10, 2013, the Appellant via Third-party Defendant, Scott Dodenhoff, executed and served a Mechanic's Lien on Respondent Richard M. Buckley, and filed the same the following day. *[R. pp. 7-11]* On April 1, 2013, the Appellant filed a lawsuit against Respondent for the foreclosure of the previously filed Mechanic's Lien. *[R. pp. 12-19]*

On May 13, 2013, the undersigned attorney, M. Stokely Holder, of the law firm of Kenison, Dudley & Crawford, LLC (the "KDC firm") filed a Motion to Dismiss, and an Answer together with Counterclaims and Third-Party Claims on behalf of Respondent. *[R. pp. 23-61]*

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

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

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

Respondent's Motion to Dismiss was scheduled for a hearing on June 20, 2013. The day prior, June 19, 2013, the KDC firm called and left a message with Appellant's counsel reminding him of the change to the hearing time. The KDC firm also explained to Appellant's counsel that despite not having heard from him again in close to a month regarding any conflict of interest issues, the KDC firm would still be glad to discuss it with him should he still be of the opinion that a conflict exists. Hours later after the close of business, Appellant's counsel responded by email stating that he had received Respondent's message but it has been a busy day. *[R. pp. 130-155]*

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

Motion to Dismiss began, Appellant's counsel presented to the court and the KDC firm for the first time his previously filed Motion to Disqualify together with an affidavit of Dodenhoff (both alleging improprieties against the KDC firm and its attorneys) that had been prepared at least one week before the hearing. *[R. pp. 70-75]* The court decided to hold the Respondent's Motion to Dismiss in abeyance pending the proper scheduling and hearing of Appellant's Motion to Disqualify. *[Id.]*

Judge Edward W. Miller then presided over the Motion to Disqualify. *[R. pp. 130-155]* The basis of Appellant's motion was that by virtue of the KDC firm merely representing Appellant in a lawsuit filed in 2011 for the foreclosure of a mechanic's lien on a commercial construction project (the "2011 Action"), it had a conflict of interest in representing Respondent in this "2013 Action" against Appellant. *[Id.]* As discussed in detail herein, this 2013 Action stems from a mechanic's lien filed by Appellant on what Respondent alleges to be an entirely unrelated residential construction project.

On Monday, July 15, 2013 at 4:54 PM, Judge Miller emailed all counsel of record and stated that a proposed order previously submitted by Respondent had been signed and filed. *[R. pp. 236]* The Order issued by Judge Miller specifically stated that Appellant's Motion to Disqualify shall be held in abeyance, and further ordered Appellant to submit a privilege log to the lower court, under an order of protection, containing the specific information and knowledge it contends the KDC firm acquired through its prior representation of Appellant which it alleges will injuriously affect Appellant in this action. *[R. pp. 3-6]*

Shortly after the lower court's aforementioned 4:54 PM email, at 5:04 PM on the

same day, Judge Miller's law clerk sent an email to all counsel apparently by mistake stating that "Judge Miller has asked me to check on the status of this case and whether a ruling is necessary for temporary injunction. If you could please let me know, that would be great." [R. pp. 241-242] This email, albeit apparently sent by mistake, was the first reference by anyone to any injunction. [Id.] In response, Respondent's counsel emailed the law clerk with copy to all counsel advising the law clerk of the prior email and order from Judge Miller making clear the issues had been ruled on by the Judge. [R. p. 241]

Appellant's counsel then responded the following day by email attaching its "Motion to Reconsider, Clarify and Amend Order to Issue Injunction" together with its associated argument to the lower court that it was thereby, as it had allegedly repeatedly done to that date, seeking an injunction to prohibit Respondent or the KDC firm "from seeing whatever the Judge is requesting that we provide, so that client confidences are not compromised." [R. pp. 240-241] The Appellant's "Motion to Reconsider, Clarify and Amend Order to Issue Injunction" requested the injunction on the following narrow grounds: "that the Court enjoin Defendant and Defendant's Counsel from reviewing or accessing such confidential information being provided for the Court's review pursuant to such Order." [R. pp. 156-174]

In response to Appellant's email and Motion, the lower court responded by questioning the basis of Appellant's position and providing further guidance by making clear that Appellant had not been ordered to disclose new information which had not been previously disclosed to the KDC firm, "only information which he claims is confidential which he has previously disclosed to the KDC firm." [R. p. 240] In written response,

Appellant's counsel offered several hypotheticals in objection to the Judge's instructions and concluded by suggesting to the lower court that Appellant may "request and obtain an advisory opinion from the Ethics Commission on the situation ... I believe that obtaining such guidance in light of the ethical complexities would be very beneficial". [R. pp. 238-240] Respondent's counsel responded by email and letter outlining its opposition to the Appellant's position regarding disqualification, but also by requesting the lower court to partially grant the Appellant's Motion to Reconsider (by not requiring any privilege log at all) so that the lower court could then issue a dispositive order on the Motion to Disqualify. [R. pp. 238, 245-247]

The lower court then scheduled a hearing on Appellant's "Motion to Reconsider, Clarify and Amend Order to Issue Injunction". On the hearing date, the lower court denied the Appellant's Motion and instructed Appellant to issue the privilege log by Friday, July 26, 2013. [R. pp. 1-2]

On July 25, 2013, Appellant filed a Notice of Appeal making clear that it was "appeal[ing] the Order of the Honorable Edward W. Miller dated July 15, 2013 and filed July 16, 2013, *requiring Appellant to provide specific confidential information to Counsel for Respondent* in support of Appellant's *pending* Motion to Disqualify Counsel for Respondent." [R. pp. 248-249 (*emphasis added*)]

STATEMENT OF FACTS

The Respondent is 84 years old. [R. pp. 23-61] The Appellant was contacted in late 2011 by Matt Buckley, the son of Respondent, whereby the Appellant was informed of Respondent's desire to improve the residence on his property. [*Id.*; R. pp. 130-155]

Third-Party Defendant, Scott Dodenhoff, was the individual who dealt primarily with the Respondent and the representatives of Respondent (Matt Buckley and his wife/Respondent's daughter-in-law, Pamela Burns-Byers Buckley) regarding all aspects of the Project at issue on behalf of Appellant. *[Id.; R. pp. 126-129]*

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

- (a) the Property had been the location of Respondent's and Respondent's wife's primary residence for the past forty-four (44) years at that time;
- (b) the Respondent was at that time, and remains so today, elderly and in declining health;
- (c) the Respondent's wife of more than sixty (60) years ("Frances Buckley") was elderly and in poor health;
- (d) the Respondent was the sole caretaker for his elderly and sick wife;
- (e) the Respondent's wife desired to spend her remaining days with the Respondent at their residence on the Property;
- (f) the Respondent desired for his wife of over 60 years to spend her remaining days alongside him at their residence on the Property;
- (g) the Respondent felt he was no longer physically able to care for his wife by himself at their residence on the Property and he needed help in order to satisfy their joint desire to have her spend her remaining days at their residence together;
- (h) the Respondent contacted his son and daughter-in-law, Matt and Pamela Buckley, explained the above to them and reluctantly asked for their assistance;

- (i) the Respondent asked Matt and Pamela Buckley if they would agree to move their family of six (6) from Charleston, South Carolina to the residence on the Property in order to help the Respondent and Frances Buckley through the remaining days of their lives (the Respondent, his wife and the family of Matt and Pamela Buckley, collectively hereinafter: the "Buckleys");
- (j) the Respondent told Matt and Pamela Buckley that he and his wife would be willing to obtain a loan against the remaining equity in the Property in order to construct improvements thereon to allow the space necessary for Matt and Pamela Buckley's family to move in; and
- (k) Matt and Pamela Buckley agreed to the Respondent's request.

[Id.]

In 2011, the Respondent initiated contact with his bank, Defendant Wells Fargo Bank ("Wells Fargo"), to determine the maximum loan amount he could obtain against the equity in the Property in order to use such loan monies for the construction of improvements thereon. *[R. pp. 23-61]* The Respondent received confirmation from Wells Fargo that Wells Fargo would lend \$78,000.00 to Respondent via a home equity line of credit. *[Id.]*

Thereafter, Matt Buckley contacted Dodenhoff to determine if Dodenhoff would in fact agree to make the certain improvements to the residence on the Property according to the plans and specifications of the Respondent and under the facts as aforesaid, and in hopes that the Buckleys could all reside together in the completed house prior to either of Frances Buckley or Richard Buckley passing away. *[Id.]* Matt Buckley explained to Dodenhoff that the maximum amount of money that could be spent for the improvements was the \$78,000.00 in loan funds that the Respondent had been approved for. *[Id.]*

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

- a) to construct improvements to the residence on the Property according to the specifications and design of the Respondent (the "Project");
- b) to construct the Project on a cost-plus 10% basis with a guaranteed maximum possible amount of \$78,000.00; and
- c) to construct the Project by the end of July 2012, time is of the essence.

[Id.]

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

After construction was initiated on the Project, the Appellant would not bill the Respondent for consistent periods of time. *[Id.]* As the deadline for the completion of the Project approached in mid-2012, Frances Buckley died. At this same time, the Appellant began to send more billing information to the Respondent. *[Id.]* The bills that Appellant ultimately sent to the Respondent were outdated, not truthful representations of the work completed and not in accordance with the Contract, as though Dodenhoff did not think the

Appellant or the Buckleys would realize the discrepancies at a time when they were dealing with the loss of Frances Buckley. *[Id.]*

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

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

Despite being provided adequate notice and opportunity to cure the various construction defects plainly apparent on the Project, the Appellant has failed to do so. *[Id.]* Despite being provided adequate notice and opportunity to produce the backup information to support the costs Appellant has represented as being incurred for the Project, the Appellant has failed to do so. *[Id.]* Despite being provided adequate notice and opportunity to cure the various work of Appellant which is not in conformance with the plans and specifications for the Project, the Appellant has failed to do so. *[Id.]* Despite adequate

notice of the foregoing, the Appellant unilaterally ceased construction on the Project in October 2012 and has never returned to the Project. *[Id.]*

Yet, on February 10, 2013, the Appellant – to the further shock and dismay of the Buckleys - served the Mechanic's Lien on Respondent and then filed the underlying lawsuit. *[R. pp. 7-11]*

On or about March 19, 2013, attorney Jack Heckman called the undersigned, M. Stokely Holder, of the KDC firm and explained to attorney Holder that attorney Heckman had been contacted by Respondent and his family to see if attorney Heckman would represent Mr. Buckley in the above captioned matter. *[R. pp. 110-115, 123-125]* Attorney Heckman explained to Attorney Holder that the Buckleys called him because of a mutual friend he shared with Matt Buckley, Respondent's son. *[Id.]* Attorney Heckman told attorney Holder that he had explained to the Buckleys that he does not typically handle construction litigation matters but that he would refer them to attorney Holder who he knew to handle these types of matters. *[Id.]* Attorney Heckman asked attorney Holder if the KDC firm would be interested in representing Buckley, and attorney Holder told him that his firm would be glad to speak with the Buckleys once he was able to run a conflict check. *[Id.]* At no time during any conversation with attorney Heckman was the KDC firm made aware by attorney Heckman or the Buckleys of any prior representation of the Appellant by the KDC firm. *[Id.]*

Upon the KDC firm running a standard conflict check, attorney Townes B. Johnson, III, and attorney John T. Crawford, Jr., both of the KDC firm, disclosed that they had previously represented D&C Builders, Inc. on a standard mechanic's lien foreclosure

matter whereby D&C Builders, Inc. had hired attorney Crawford to file a lien and foreclosure matter on behalf of D&C Builders, Inc. *[R. pp. 119-122, 116-118, 110-115]* Attorneys Johnson and Crawford explained that they assisted with the litigation surrounding the claim and that it was resolved amicably. *[Id.]* The KDC firm concluded that the two matters were not substantially related and that no conflict existed. *[Id.]*

Based on the conclusion reached by the KDC firm that no conflict of interest exists, attorney Holder agreed to a consultation with the family of Buckley, including Buckley's daughter-in-law and authorized agent, Pamela Buckley. *[R. pp. 110-115]* Prior to discussing anything with any of the Buckleys, no one at the KDC firm had ever met them or spoken to any of them before about anything. *[R. pp. 110-115, 119-122, 116-118]*

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

The Buckleys further explained to the KDC firm how Mr. Dodenhoff was Matt Buckley's childhood friend and, prior to the facts and circumstances giving rise to the

underlying claims, his lifelong friend. [*Id.*; *R. pp. 23-61*] The Buckleys explained to the KDC firm that, as such, Mr. Dodenhoff spoke with Matt Buckley on a very frequent basis about a myriad of matters, including, without limitation, the ongoing business of both Appellant, D&C Builders, Inc., and Mr. Dodenhoff. [*Id.*] The Buckleys told the KDC firm that Mr. Dodenhoff frequently shared detailed information with the Buckleys regarding the corporate structure and financial status of Mr. Dodenhoff and his company, which they did not think was very strange because of Mr. Dodenhoff's relationship with the Buckleys and Mr. Dodenhoff's known propensity to openly discuss his financial status and affairs. [*Id.*]

The Buckleys explained to the KDC firm that they were unaware that the KDC firm had previously assisted Mr. Dodenhoff with the prior lawsuit that he had discussed at length with them. [*R. pp. 126-129, 110-115*]

An Answer, Counterclaims, and Third-Party Claims together with a Motion to Dismiss was filed by the KDC firm on behalf of the Buckleys. [*R. pp. 23-61*] Appellant filed its Motion to Disqualify. The KDC firm again reviewed the matter and again sought the assistance of outside counsel, and again reached the same conclusion that no conflict existed. In opposition to the Appellant's Motion to Disqualify, affidavits were filed by attorneys Holder, Heckman, Crawford and Johnson; and Mrs. Buckley filed an affidavit on behalf of the Buckleys. [*R. pp. 123-125, 119-122, 116-118, 110-115, 126-129*]

During the course of oral and written argument to the lower court in conjunction with Appellant's Motion to Disqualify, Appellant repeatedly *alleged* that the two matters are substantially related and that the KDC firm obtained confidential factual information from Appellant in the 2011 Action that will be used by the KDC firm in the 2013 Action

to advance the interests of Respondent. *[R. pp. 70-75, 130-155, 175-184]* However, when Judge Miller requested what the specific confidential information could be (as the affidavit testimony of the Buckleys showed that the Appellant itself had shared detailed information with the Respondent about not only what the Appellant was now complaining about as far as the corporate structure, finances and operation of Appellant but also details about the 2011 Action), Appellant could not articulate any specific information in support thereof. *[Id.]* Strikingly, the Appellant did not even produce one document from the 2011 Action in support of its position. Instead, the Appellant argued that it should not be required to submit the purported confidential information pursuant to a comment to Rule 1.9 of the SC Rules of Professional Conduct. *[Id.; R. pp. 218-227]*

Strangely, yet glaringly, Appellant further argued that upon any such submission to the lower court, it may be determined that the information is not, in fact, confidential between Appellant and the KDC firm because it may end up being a case of such information not having been previously provided to the KDC firm. *[R. p. 233]* The Appellant also represented to the lower court that Appellant understood the lower court had not ultimately ruled on the Motion to Disqualify. *[R. p. 224 ("Finally, in the event that the Motion to Disqualify is ultimately denied,...")]*

Respondent responded to the wavering assertions of Appellant by stating via sworn affidavit testimony that the two cases were not factually related in any way and, importantly, by making clear that there existed no confidential factual information obtained in the 2011 Action that could be used in this action against the interests of Respondent because: (1) the KDC firm did not recall obtaining any confidential

information in the 2011 Action; (2) the information obtained in the 2011 Action was a matter of public record; and, notably, (3) the Appellant itself had previously and voluntarily disclosed to Respondent extensive information and details about: (a) the 2011 Action; (b) the financial status of the Appellant; (c) the impact the outcome of the 2011 Action would have on the financial status of Appellant; (d) the corporate structure of Appellant; (e) the ongoing operations of the Appellant; (f) the authorized representative of the Appellant and their authority; and (f) the details of the ongoing legal matters of the Appellant – all of which it claims forms the basis of the ‘conflict’. [R. pp. 70-75, 175-184; 126-129, 110-115, 119-122, 116-118] The Respondent confirmed via sworn testimony that the claims and assertions brought by Respondent in this 2013 Action are all based on the knowledge of factual information gained solely through Respondent’s personal dealings with Appellant and not through Respondent’s subsequent relationship with the KDC firm. [Id.]

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

ARGUMENT

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

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

This narrow issue involves an instruction from the lower court that was never requested by Respondent. [*R. pp. 70-75, 130-155, 175-183*] While the Respondent certainly understands the position of the lower court and the fundamental fairness associated with the due process aspects attendant thereto, the Respondent, as evidenced by its representations to the lower court, requested that the lower court grant the Appellant's Motion to Reconsider as it pertained to the lower court's instructions to Appellant to submit a privilege log. [*R. pp. 238, 245-247*] In other words, the Respondent requested that the lower court rescind that portion of its Order requiring the Appellant to submit a privilege log. [*Id.*] In so requesting, the Respondent was hopeful the lower court would agree and then issue an order on the main issue of disqualification, so as to expedite the resolution of this matter. [*Id.*] Instead, the lower court denied the Appellant's Motion to Reconsider. [*R. pp. 1-2*]

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

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

It remains abundantly clear from the entire record on appeal, to include, without limitation, the transcripts and the Appellant's own representations to both the lower court and to this court that the lower court never issued a dispositive order on the issue of whether Respondent's counsel should be disqualified. [R. pp. 70-75, 130-155, 175-183; 217-247; 1-6]

The Order of the lower court states in no uncertain terms that "the Plaintiff's Motion [to Disqualify] shall be held in abeyance." [R. p. 6 (*emphasis added*)] The Appellant's separate correspondence to the lower court states that "in the event that the Motion to Disqualify is ultimately denied..." [R. p. 224 (*emphasis added*)] The Appellant also provided the lower court and this Court with its Notice of Appeal which clearly states that it was appealing "the Order of the [lower court] requiring Appellant to provide specific confidential information to Counsel for Respondent in support of Appellant's pending motion to Disqualify Counsel for Respondent." [*Id.*; R. pp. 248-249 (*emphasis added*)] Not that stating the obvious is necessary, as the record remains clearly void of any ruling on the Motion to Disqualify, the Appellant has continuously acknowledged this glaring fact by repeatedly stating that the Motion to Disqualify was held in abeyance by the lower court pending receipt of this information.

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

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

"The right of appeal arises from and is controlled by statutory law." Hagood

v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). Generally, a party may only appeal from a final judgment, and piecemeal appeals should be avoided because most errors can be corrected through a new trial. Id. at 194–195, 607 S.E.2d at 708. Whether an order issued prior to or during trial is immediately appealable is governed primarily by Section 14–3–330 of the South Carolina Code (1979 & Supp.2012). Id. at 195, 607 S.E.2d at 708.

Section 14–3–330 provides this Court with appellate jurisdiction over:

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

Accordingly, an order must fall within one of the enumerated subsections to be immediately appealable. State v. Wilson, 387 S.C. 597, 600, 693 S.E.2d 923, 924 (2010).

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

Moreover, South Carolina law is clear that “[n]o order is final until it is written and entered.” Corbin v. Kohler Co., 351 S.C. 613, 620, 571 S.E.2d 92, 96 (Ct.App.2002); Simpson v. Simpson, 377 S.C. 519, 525, 660 S.E.2d 274, 277 (Ct. App. 2008). The lower court has not issued any order on the ultimate issue of disqualification that could in any

way fall within any of the four enumerated subsections provided for by Statute. Therefore, the Appellant's attempt to have this Court rule on the issue of disqualification is not ripe.

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

The glaring difference between the Energysys case and this case is that the lower court in Energysys actually issued a dispositive order on the motion; whereas, here, no such order has been rendered. **Even still, in the Energysys case, the court held that there was no appellate jurisdiction because the order denying the motion to disqualify was not 'an order affecting a substantial right'.** See Id. at 617-619, 738 S.E.2d at 479-480.

Like the Energysys case, the Appellant here argues that the Respondent's attorneys have learned confidences from its prior representation of Appellant which could be shared in its current representation of Respondent. Notwithstanding the void in evidence to substantiate such a position (and the void of an actual lower court ruling- either via grant or denial of the motion), the courts of this State have established that even if a

lower court denied a motion based on that very argument, no substantial right would be affected to trigger immediate appellate jurisdiction under S.C. Code Ann § 14-3-330. Enersys at 617-619, 738 S.E.2d at 479-480.

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

The same rational provided by the Enersys court can be applied to the situation at hand as it pertains to the Appellant's contentions regarding the lower court's order and requirement to produce a privilege log, especially considering the fact that the lower court was explicitly clear in its order that any such production would be subject to a protective order. As with this State's established position on the related issue of whether a direct appeal on a court's denial of a motion to disqualify is subject to immediate appellate jurisdiction, the lower court's ordering the production of a privilege log to Respondent in the same context should also be viewed in the same light. The effect of a ruling to the contrary – allowing such a lesser issue as this to be subject to immediate appellate jurisdiction - would undermine the logic outlined by this State's appellate courts in cases such as Enersys, et al. by allowing the piecemeal appellate practice that it intended to preclude. As with the aforementioned greater issue addressed by the Enersys court, the ostensible danger posited by Appellant on this privilege log issue can be redressed equally as well after trial as through an immediate appeal. Enersys at 617-619,

738 S.E.2d at 479-480. Likewise, the Appellant (with the security of the lower court's explicit protective order) may find that an appeal is not necessary after the course of litigating the case to completion in the lower court. Id.

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

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

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

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

In order to present the perceived issue as though it is otherwise ripe for appeal as a matter affecting a substantial right of a party (despite the clarity of the Energys opinion concluding otherwise on the exact same issue), the Appellant has gone to great lengths in

what it must feel is its free bite at the apple, to date, to frame the issue of disqualification as an ethical issue. The Appellant's arguments asserting the two actions are substantially related and that the KDC firm obtained confidential information in the 2011 Action that it has used, or may use, to the disadvantage of Appellant in the 2013 Action form the basis of Appellant's claim of ethical malfeasance.

Interestingly, this is how the Appellant framed the same issue to the lower court when it stated in writing to the lower court that it may "request and obtain an advisory opinion from the Ethics Commission on the situation ... I believe that obtaining such guidance in light of the ethical complexities would be very beneficial".¹ [R. pp. 238-240].

Rule 1.9(a) of the South Carolina Rules of Professional Conduct is inapplicable here due to, *inter alia*, the failure of the Plaintiff to prove the two matters are "substantially related".² Rule 1.9(c) provides, in pertinent part:

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

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

The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a

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

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

lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. ... The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

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

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

The KDC firm did not violate the Rules of Professional Conduct. The two cases at issue are not substantially related. [*R. pp. 1-183*] They are entirely separate and distinct situations/transactions with entirely distinct facts. [*Id.*] The only similarity is that they both involve mechanic's liens and the same standard defenses you see in virtually all such contested claims – albeit the liens are on different properties, against different owners, in different industries (commercial versus residential), securing different alleged debts and arising from completely unrelated facts. [*Id.*] Likewise, there is no evidence to support Appellant's claim that the KDC firm obtained confidential information from its prior representation of Appellant that it could now use against Appellant. [*Id.*] What remains clear is that the Appellant allowed the information it has complained about³ to be generally known – to (at a minimum) *the Defendant/Respondent in this action*. As for the extremely general references/complaints made by Appellant to the lower court regarding what Appellant deems to be the “confidential information” at issue, the affidavits provided on

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

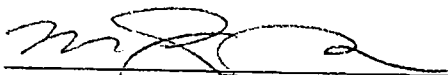
behalf of Respondent completely and categorically reject the slightest notion that the same so-called confidential information was ever held in confidence by Appellant.

CONCLUSION

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

Respectfully Requested,

January 8, 2015



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CERTIFICATE OF COUNSEL

The undersigned hereby certified that Respondent's Final Brief complies with Rule 211(b), SCACR.

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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge.

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

RECEIVED

JAN 12 2015

SC Court of Appeals

D&C Builders, Inc. Appellant,

v.

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

vs.
Scott Dedenhoff, Third-Party Defendant

of whom:

Richard M. Buckley Respondent.

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SUMMARY

Regardless of how hard Respondent's and counsel for Respondent work to skew the facts or shift responsibility, they cannot escape the plain language of the Rules of Professional Conduct or that the representation of Respondent by the Kenison Law Firm is directly contradictory to those Rules.

From a factual standpoint, Respondent's counsel clearly admits that it was aware of its prior representation by the Kenison Firm of Appellant prior to undertaking representation of Respondent. (Respondent's Brief, p. 11, R. p. 111 ¶ 3, p. 116 ¶ 2, p. 119 ¶ 2). Sifting through Respondent's lengthy statement of alleged facts, it is clearly noticeable that Appellant was never contacted about consenting to the representation as required by Rule 1.9(a). Rule 1.9, RPC, Rule 407, SCACR.

Respondent does not challenge that the Kenison Firm was representing Appellant during the exact time that Appellant was performing the very construction work for Respondent at issue in this action. However, Respondent maintains that such representation does not preclude the Kenison Firm from representing Respondent UNLESS Appellant can prove it provided confidential information to the law firm that could be used against it in this case.

Respondents seek for the Court to view this situation as a "procedural" issue and place the burden of proof on the former client, yet fails to provide a single citation of legal authority from any jurisdiction for this position. The reason for this failure is quite simple; there is no authority for this position because it is contrary to the Rules of

Professional Conduct, the protection of the client and the fair administration of justice in this and every other jurisdiction.

The Kenison Firm made a mistake in undertaking the representation of Respondent in this matter without contacting Appellant first. Rather than admit the mistake, Respondent's counsel compounded that error by successfully arguing to the Circuit Court that the burden of proof was on their former client to prove them wrong. However, as stated in Respondent's brief, not only the Kenison Firm, but other attorneys they consulted with (Respondent's Brief, p. 2, lines 7-9, p. 12, lines 20-22, R. p. 142, lines 17-21, p. 112 ¶ 6, p. 120-121 ¶ 6), the Circuit Court, as well as the "different forums" Appellant has raised this same issue (See Respondent's Brief, p. 15, lines 5-6), all agreed with the twisted logic contrary to the language of the Rules that a former client must "prove" the possession of specific confidential information to justify disqualification.

The absolute girth of authority contained herein and in Appellant's Brief demonstrate that Respondent and the Kenison Firm's position is contrary to the clear ethical standards set by the Rules of Professional Conduct and contrary to the fair administration of justice.

ARGUMENT

I. Respondent's Request and the Circuit Court's Order for Appellant to provide specific confidential information to substantiate Appellant's Request for Disqualification is directly contrary to the Rules of Professional Conduct.

In its argument, Respondent attempts to distance itself from this error in judgment by asserting that this "narrow issue involves an instruction from the lower court that was never requested by Respondent." (Respondent Brief, p. 15). Unfortunately, the clear evidence in the Record and most telling in Respondent's Counsel's own words show that Respondent was requesting at every opportunity that the Appellant be made to provide specific confidential information to support disqualification.

In support of Respondent's position, three members of the South Carolina Bar and the Kenison Firm, which was representing Appellant in a similar matter while the contract between Appellant and Respondent was being performed, filed sworn affidavits that they are "unaware of" or "do not remember" any confidential information provided by Appellant to them in connection with their prior representation. (R. p. 114, ¶ 13, p. 117, ¶ 4, p. 120, ¶ 4).

Based on these affidavits, Respondent argued to the Circuit Court,

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 [information] that would potentially create a conflict.

(R. p. 146, line 22 – p. 147, line 2)(Emphasis added). (See also R. pp. 65-69).

Respondent goes even further in its response to Appellant's Motion to Reconsider, arguing,

Mr. Martin cites that portion of comment 3 to Rule 1.9 of the South Carolina Rules of Professional Conduct which states that a former client is *not required* to reveal the purported confidential information. In support of his Motion to Reconsider, Mr. Martin states that his client "will be forced to disclose confidential information to Defense Counsel *that may not have been previously disclosed to Defense Counsel in the prior representation.*" This admission coupled with the clear desire of Plaintiff to not provide any of the purported confidential information all the while crying the *(potential)* existence of confidential information, presents the troubling scenario where the Plaintiff is attempting to use Rule 1.9 not as a shield but as a sword. This was surely not the intention behind the Rule.

It remains our position that the arguments and facts presented to the court show: ... (2) the existence of absolutely no specific confidential information learned in the first case such that there is no confidential information in the possession of Defendant's counsel that would be, or could be, of significance in the second case; and (3) Defendant's counsel will not be called on in this case to use against the Plaintiff any knowledge or information acquired by Defendant's counsel in the prior case that would injuriously affect the Plaintiff. Despite this clarity and despite the Court giving the Plaintiff the opportunity to produce anything to counter it, the Plaintiff has made it abundantly clear to the Court that it would rather assert what it argues is his right not to produce anything, including what he is alleging is *possibly* confidential information.

(R. pp. 246 - 247). (Emphasis added).

Clearly, Respondent interprets Comment 3 to Rule 1.9 as requiring the former client to choose between providing the confidential information alleged in possession of former counsel to support disqualification or not be able to obtain disqualification. Respondent offers no South Carolina authority to support this position is what was intended by the rules.

Courts in other jurisdictions, however, unanimously agree that confidential information must be protected, particularly in disqualification situations. The most similar case to the present matter is the case of Foulke v. Knuck, 784 P.2d 723, 162 Ariz. 517 (Ariz.App.Div. 2 1989). In Foulke, the attorney to be disqualified made the exact

same claims as the Kenison Firm that no confidential information had been obtained except what is now publicly known. In response the Court stated that this:

...contention fails to recognize the mandatory nature of ER 1.9(a). The rule does not require that confidences and secrets be divulged in order for a conflict to exist or for disqualification to be proper. State v. Allen, 539 So.2d 1232, 1234-35, (La. 1989); see also Arkansas v. Dean Foods Products Co., 605 F.2d 380, 383 (8th Cir. 1979); United States v. Kitchin, 592 F.2d 900, 904 (5th Cir.), cert. denied, 444 U.S.843, 100 S.Ct 86, 62 L.Ed.2d 56 (1979). Regardless of what was communicated during the representation of the former client, the rule prohibits subsequent representation of an individual whose interests are substantially adverse to those of the former client.

Id. at 522, P.2d at 728. (citing T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F.Supp. 265, 268-69 (S.D.N.Y. 1953)). The Court elaborated by holding:

The former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.

Foulke at 522, P.2d at 728 (emphasis added). See also Cord v. Smith, 338 F.2d 516, 524-25, (9th Cir. 1964); Matter of Evans, 113 Ariz. 458, 462, 556 P.2d 792, 796 (1976).

The Washington Court of Appeals analyzed existing cases on the issue and stated:

The plain language of RPC 1.9 indicates actual proof of disclosure of confidential information is not necessary if the matters are substantially related. The weight of authority from other jurisdictions similarly interprets the rule as not requiring proof of disclosure of confidential information.

Teja v. Saran, 68 Wn.App. 793, 846 P.2d 1375 (Wash.App. Div. 1 1993)(emphasis added)(citing Foulke v. Knuck, 162 Ariz. 517, 522, 784 P.2d 723, 728 (1989); Brent v.

Smathers, 529 So.2d 1267 (Fla. Dist. Ct. App. 1988); United States ex rel. Lord Elec. Co. v. Titan P. Constr. Corp., 637 F. Supp. 1556 (W.D. Wash. 1986); Junger Util. & Paving Co. v. Myers, 578 So.2d 1117 (Fla. Dist. Ct. App. 1989); Martindale v. Richmond, 301 Ark. 167, 782 S.W.2d 582, 584 (1990); Oxford Dev. Minn., Inc. v. Ramsey, 428 N.W.2d 434 (Minn. Ct. App. 1988); Reading Anthracite Co. v. Lehigh Coal & Nav. Co., 771 F. Supp. 113 (E.D. Pa. 1991); Green v. Montgomery Cy., Ala., 784 F. Supp. 841 (M.D. Ala. 1992).

North Carolina follows this rationale as well. Under Canon 4 that requires an attorney to preserve the Confidences and Secrets of a client, EC4-4 states:

The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge....

Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 280, 300 S.E.2d 230, 233 (N.C. App. 1983). Interpreting this Canon, the Lowder Court further held:

It is not necessary to show the attorney received confidential information. The ethical duty of an attorney under EC4-4 is broader than the attorney-client evidentiary privilege.

Id. at 282, S.E.2d at 234.

The Court in Arkansas v. Dean Foods summed it up best when it stated:

To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule (protecting client confidences).

Dean Foods, 605 F.2d at 383.

The attorney-client relationship, both current and former, are of such importance that maintaining confidentiality and obligations to all clients is necessary for clients to trust their attorneys not to reveal confidential information and to never use information they obtained from the client against that client. When an attorney chooses to change sides and represent someone against a former client, the interests of justice are not served when the attorney can simply claim "I don't remember anything confidential" or "I didn't receive any confidential information" and demand proof from the client. Such a requirement on the former client defeats the very purpose of the ethical rules and violates the protection of confidentiality upon which all clients rely in their relationship with attorneys.

Further proof of the importance of maintaining the confidential nature of attorney-client communication is the manner in which Rule 1.9 requires the Court to assess disqualification based on cases being "substantially related." Comment 3 provides in no uncertain terms:

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).

There is no better example than the facts of the present situation. Both the TMKG case and the Buckley case involve the collection and accounting of money. The Kenison Firm obtained financial information from Appellant in the TMKG case and then turned around in the Buckley case and alleged Appellant was "insolvent prior to and/or

during construction of the Project” (R. p. 51, ¶117) and “grossly undercapitalized prior to and during construction of the Project.” (R. p. 51, ¶118, p. 67, ¶20).

The Supreme Court confirmed that examining a potential conflict prospectively is the test in holding in Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996) that the standard for “substantially related” 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.”

Id. at 315, S.E.2d at 429.

But not only do these members of the bar have a skewed interpretation of the Rules of Professional conduct in this situation, but the Circuit Court either does not understand the rule or does not agree with the rule as it found it could not make a determination of disqualification without hearing the alleged confidential information and Respondent having the opportunity to refute its confidentiality. The Circuit Court stated

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. Okay?

(R. p. 180, lines 17-21). The Circuit Court also stated

I can’t make a determination if they’re disqualified or not without knowing about it. And I’m not going to know if the information is privileged unless they can show me – you could claim anything, that this – you could claim this is a secret and the other side doesn’t know about it. How can they respond? It’s called due process.

(R. p. 181, lines 19-24).

With no other alternative, Appellant appealed the Order to obtain review by this Court and clarification for the bench and the bar as to whether a former client can be

forced to reveal such confidential information to support disqualification as the Respondent argued. Only now, in the face of overwhelming legal authority to the contrary, is Respondent willing to “consent to the relief requested” but continues to refuse to admit that Respondent’s position or the Circuit Court was in error.

“This court has a duty to maintain the highest ethical standards of professional conduct to insure and preserve trust in the integrity of the bar.” H&C Corporation, Inc. v. Puka, No. 4:12-cv-00013-RBH , Lawyers Weekly No. 002-175-13, 4 pp. (R. Bryan Harwell, J.)(D.S.C. October 11, 2013). The Puka Court, citing Donaldson v. City of Walterboro Police Dept., No. 2:06-cv-02492-PMD, 2008 WL 906707 (D.S.C. March 31, 2008), went on to hold:

As noted by Judge Duffy in Donaldson, “the court acknowledges that granting this Motion to Disqualify deprives the Plaintiff of his chosen counsel and increases the length of time this case will remain pending. However, the court is mindful of its responsibility to uphold the South Carolina Rules of Professional Conduct...”

Puka, at p. 4 (citing Donaldson 2008 WL at *4)(emphasis added).

As the guiding principles upon which the integrity of the legal profession is maintained, it is clear that both the bench and the bar need direction and clarification on how to interpret the Rules of Professional Conduct in this situation. To remand the case back to the Circuit Court without clear direction would be contrary to the obligation previously established by the South Carolina Supreme Court that “this Court bears the ultimate responsibility for maintaining judicial integrity and the high standards of professional conduct among the members of the bar.” State v. Quattlebaum, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (S.C. 2000).

II. The Circuit Court's refusal to rule on disqualification without proof by the Appellant of the possession of specific confidential information by the Kenison Firm is a decision that affects a substantial right under S.C. Code § 14-3-330(2) for which this Court can and should review.

Respondent contends that the Circuit Court did not rule on the issue of disqualification and therefore, the issue of disqualification cannot be reviewed by this Court. In support of this position, Respondent claims that this case is most analogous to Enersys Delaware, Inc. v. Hopkins, 401 S.C. 615, 738 S.E.2d (2013) because that case dealt with the denial of a motion to disqualify and the Court found in that case that an order denying a motion to disqualify was not an order affecting a substantial right.

Respondent further argues this case doesn't rise even to the level of Enersys because that case at least involved a dispositive order denying the motion to disqualify and there is no such dispositive order in this appeal.

Appellant does not dispute the holding of Enersys, however, just like the Court's opposite holding in Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (S.C. 2005) that an order granting a motion to disqualify affects a substantial right and is immediately appealable under S.C. Code § 14-3-330(2), neither holding is directly applicable in the present case which presents an issue of first impression for this Court.

In the present case, the Circuit Court refused to consider the motion to disqualify without the disclosure of specific confidential information allegedly provided in protected attorney-client communications to the very attorneys sought to be disqualified. This requirement is in direct violation of the Rules of Professional Conduct, is contrary to the Supreme Court's holding in Townsend as well as the overwhelming authority from other jurisdictions. Most importantly, however, a requirement to disclose such

information significantly affects the substantial rights clients have in maintaining the confidential nature of attorney-client communications and the fair administration of justice.

Respondent points out in the Energys decision that the Court focused on whether the denial of a motion to disqualify affects a substantial right and contends the present case is similar because like Energys the Appellant contends that Respondent's attorneys learned confidences in its prior representation which could be used in the current representation of Respondent. A glaring difference between the cases, however, is that in Energys, the prior representation was seven (7) to nine (9) years before the alleged conflicting representation. Id. at 615, S.E.2d at 478-479. The time difference before changing sides by the Kenison Firm in this matter was less than one (1) year. (R. p. 145, lines 10 – 12). Information is far more likely to be recalled over such a short period as compared to even seven years. A similar concern obviously also existed in Hagood where the granting of disqualification was held to be immediately appealable. The important difference in these two cases from the one at hand is that in both Energys and Hagood, the Circuit Court judge made his ruling to grant or deny disqualification based on the applicable standard under the Rules of Professional Conduct.

In Energys, the Court recognized that the Circuit Court used the appropriate “substantially related” assessment of both representations as the basis for denying disqualification, stating

The circuit court denied the motion [to disqualify] concluding that Harper's previous assistance in developing Energys' litigation strategy was insufficient grounds upon which to disqualify him due to the dissimilarities of his previous representations and the current suit. (Emphasis added).

Id. at 615, S.E.2d at 479. Harper had previously represented Enersys in five employment related lawsuits as compared to the breach of contract action Harper was now pursuing against Enersys on behalf of Hopkins. Id. at 615, S.E.2d at 478-479.

In Hagood, the trial Court used Rule 3.7 of the Rules of Professional Conduct which prohibits an attorney from representing a client when the attorney will be a witness in the proceeding to disqualify an attorney where a full-time employee of the attorney would be a witness rather than the attorney.

The circuit court concluded it would be improper under the Rules of Professional Conduct for an investigator or accident reconstruction expert who works as a full-time employee for Petitioner's Attorney to testify on Petitioner's behalf at trial.

Id. at S.E.2d 710. The Court analyzed the matter as a case of first impression just like the present case, and found that disqualifying a party's attorney affects a substantial right.

Id. The Court went on to hold specifically

The right to be represented by an attorney of ones choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case. Moreover, 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.

Id.

Respondent's position is that no substantial right is affected in this case based on the analysis in Enersys, however, the only substantial right examined in Enersys was the refusal to disqualify an attorney. Specific substantial rights Appellant contends are affected is the right to maintain confidential information relayed through confidential attorney-client communications and the right not to be forced to disclose such communications in order to substantiate disqualification. Such forced disclosure of

confidential information from a client must certainly be viewed equally if not more substantial than those examined by the Court in Hagood in that such an order will significantly impact the attorney-client relationship and overall litigation, from which no appeal could undo.

In preserving client confidences, a lawyer serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private. (Preamble ¶8, RPC, Rule 407, SCACR & Rule 1.6 Cmnt. 2, RPC, Rule 407, SCACR). Rule 1.6(a) more specifically addresses this concept by requiring that “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.” Rule 1.6(a), RPC, Rule 407, SCACR. “A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.” Rule 1.6 Cmnt. 2, RPC, Rule 407, SCACR.

“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.

Rule 1.9(a) recognizes the continuation of the confidentiality obligation once representation is terminated by the mandate 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 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). Rule 1.9(c) offers further protection by prohibiting a lawyer from using any information to the disadvantage of a former client. Rule 1.9(c)(1), RPC, Rule 407, SCACR.

Respondent would argue that such right is not affected due to the Circuit Court's requirement that the requested privilege log would be under a protective order. (R. p. 6). Unfortunately, a protective order does not protect Appellant at all in this situation because the Order requires the information to be provided to the very people from whom it needs to be protected, Respondent and the Kenison Firm. (R. p. 178, line 23 – p. 179, line 3).

The substantial right to maintain confidences is further affected by the Circuit Court's order in that it requires Appellant to disclose information to its current attorney that it would not otherwise disclose in the representation of the current matter. Further, to comply with the Circuit Court's order, Appellant is required to reveal confidential information related to the TMKG case to current counsel who is then required to turn it over to the very party current counsel was retained to prevent using such information against Appellant. Since Appellant does not consent to the release of this information, compliance by current counsel would be in violation of Rule 1.6(a) of the Rules of Professional Conduct. Rule 1.6(a), RPC, Rule 407, SCACR. (R. p. 166).

Additionally, Comment 14 to Rule 1.6 requires Appellant's counsel to raise these issues, stating

Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.

Rule 1.6 Cmmt. 14, RPC, Rule 407, SCACR. In attempting to raise this issue with the Circuit Court, counsel was admonished that the only ethical violation would be his failing to comply with an order of the Court. (R. p. 158, ¶5-6; p. 166; p.180, lines 23-25).

If “confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship” (Rule 1.6 Cmmt. 2, RPC, Rule 407, SCACR), then this Court must protect that confidentiality, the sanctity of confidential attorney-client communications, and the fair administration of justice. If the disclosure of confidential information can be ordered to prove disqualification, the whole foundation of client protection crumbles. The Rules of Professional Conduct are designed to assure the protection of client confidences and the necessary confidential nature of the attorney-client relationship cannot simply be ignored in favor of an attorney that claims no such knowledge was obtained.

In Hagood, the Court examined the impact of granting disqualification has on a client’s right to choose their own attorney and determined the right to choose one’s own attorney was a substantial right affected to grant appellate jurisdiction under S.C. Code § 14-3-330(2). Id. at S.E.2d 710. If the right to choose one’s attorney is considered a substantial right to grant jurisdiction, then the superior right to the fair administration of justice must certainly be a substantial right as well.

The ability to trust in the confidential nature of attorney-client communications is most certainly a substantial right which will be significantly impacted if the Circuit Court is able to order Appellant to disclose confidential attorney-client communications as a requirement for disqualification of the Kenison Firm. Such a requirement is contrary to the Rules of Professional Conduct and the existing legal authority both expressed by the South Carolina Supreme Court in Townsend, and by most jurisdictions. Given the

circumstances and claims of Respondent, this Court must provide clarity and direction to the bench and the bar in dealing with this type of situation in the future.

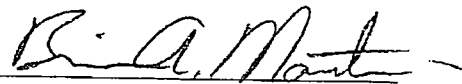
CONCLUSION

For the reasons stated above, the Order of the Circuit Court requiring Appellant to provide specific information pursuant to a privilege log to support disqualification of the Kenison Firm and its attorneys should be vacated, the Kenison Firm and all its attorneys should be immediately disqualified from representing Buckley in this matter and all filings and actions taken by the Kenison Firm on Buckley's behalf should be vacated.

In addition, this Court should provide clarification for the benefit of the entire bench and bar as to the correct interpretation of the Rules of Professional Conduct when it comes to undertaking representation against a former client.

Respectfully submitted,

BRIAN A. MARTIN, LLC



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

ATTORNEY FOR APPELLANT

Greenville, South Carolina
January 12, 2015

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JAN 12 2015

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

Edward W. Miller, Presiding Judge

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

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

v.

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

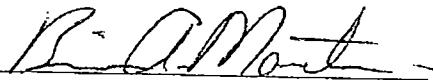
v.
Scott Dodenhoff, Third-Party Defendant

of whom:

Richard M. Buckley.....Respondent,

CERTIFICATE

I, Brian A. Martin, Esquire, attorney for Appellant, certify that Appellant's Final Reply Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.



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

January 12, 2015

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

Edward W. Miller, Presiding Judge

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

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

v.

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

v.

Scott Dodenhoff, Third-Party Defendant

of whom:

Richard M. Buckley Respondent,

PROOF OF SERVICE

I certify that that I have served the Final Reply Brief of Appellant on Respondent and all parties of record by depositing a copy in the United States Mail, first class postage prepaid, on January 12, 2015, addressed to their attorneys of record as follows:

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

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

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

January 12, 2015



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

ATTORNEY FOR APPELLANT

IN THE STATE OF SOUTH CAROLINA

In The South Carolina Court of Appeals

RECEIVED

JAN 12 2015

SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

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

D&C Builders, Inc. Appellant,

v.

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

v.

Scott Dodenhoff Third-Party Defendant,

Of Whom,

Richard M. Buckley Respondent.

RECORD ON APPEAL

Brian A. Martin, Esquire
BRIAN A. MARTIN, LLC
212 Trade Street
Greer, South Carolina 29651
(864) 879-7779
Attorney for Appellant

M. Stokely Holder, Esquire
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(843) 577-5460
Attorney for Defendant Wells Fargo, N.A.

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FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP231833

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL R. WICKENS

D&C Builders, Inc.

2013 JUL 25 A 11

Richard M. Buckley And
Wells Fargo N.A.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order; (formal order to follow)

☒ Statement of Judgment by the Court:

Motion to reconsider, clarify and amend order to issue injunction has been denied. Plaintiff is ordered to produce the privilege log by 5:00p.m. on July 26, 2013 as required by the previously issued formal order.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled; if there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Signature]

Circuit Court Judge

2130

Judge Code

7/23/13

Date

For Clerk of Court Office Use Only

This judgment was entered on July 25, 2013, and a copy mailed first class or placed in the appropriate attorney's box on July 25, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Brian A. Martin 212 Trade Street Greer, SC 29651

ATTORNEY(S) FOR THE PLAINTIFF(S)

M. Stokely Holder 704 E. McBee Avenue Greenville, SC 29601

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2013CP2301833

D&C Builders Inc vs. Richard M Buckley

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a).
SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court;

Dated at Greenville, South Carolina, this.

Court Reporter: _____

PRESIDING JUDGE -

This judgment was entered on the 15th day of July, 2013, and a copy mailed first class this 15th day of July, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Harold Stewart James Babb And Brown, P.C. 505
West Butler Road Greenville, SC 29607
Brian A. Martin 212 Trade St. Greer, SC 29651

Thomas A. Shook Finkel Law Firm LLC P.O. Box
71727 N. Charleston, SC 29415
M. Stokely Holder Kenison, Dudley & Crawford,
LLC 704 East McBee Avenue Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer - Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

D&C Builders, Inc.,)

C.A. No.: 2013-CP-23-1833

Plaintiff,)

vs.)

Richard M. Buckley and
Wells Fargo National Association,)

Defendants;)

Richard M. Buckley,)

Third-Party Plaintiff,)

ORDER

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.

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"). Through a referral from another law firm, Defendant Buckley hired KDC in March 2013 to represent his interests in this 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 Action. More specifically, the Plaintiff contends that KDC's representation of Defendant Buckley, in forwarding his interest in this 2013 Action, will injuriously affect the Plaintiff because KDC will be called on in this 2013 Action to use against the Plaintiff knowledge and information acquired by KDC 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 ²⁵~~18~~, 2013 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. This information shall include, without limitation, copies of any and all documents evidencing same, together with dates, times, witnesses and

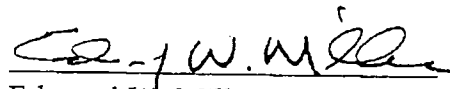
names of all parties alleged to be a part thereof. The Plaintiff shall provide a copy of its submission to counsel for Defendant Buckley.

Within ten (10) days from the receipt by the Court and KDC of Plaintiff's full submission, KDC shall be given ten (10) days from the date thereof to submit any response to the Court with copy to Plaintiff's counsel.

The submission by Plaintiff and any response provided by KDC shall be subject to this order of protection of the Court: The information submitted shall only be accessed by the office of Defendant's counsel, Plaintiff, and the office of Plaintiff's counsel. None of the information submitted shall be disseminated in any form or fashion at any time to anyone outside of the above named without the prior written consent of the Court.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Disqualify is hereby held in abeyance subject to the terms herein, and the information produced by the parties in accordance with the terms herein shall be subject to the order of protection outlined above.

IT IS SO ORDERED!


Edward W. Miller
Judge, 13th Judicial Circuit

July 15, 2013
Greenville, South Carolina

2013011240

Book:MI 78

Feb 11, 2013 11:10:12 AM

Rec: 11.00 Cnty Tax: 0.00

M/LIEN

5 PG

Page:970

Cons: 0.00

State Tax: 0.00

ELECTRONICALLY FILED IN GREENVILLE COUNTY, SC

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

**NOTICE AND CERTIFICATE OF
MECHANIC'S LIEN**

TO: Richard M. Buckley
105 Cammer Ave.
Greenville, SC 29605

Wells Fargo Bank, National Association

NOTICE IS HEREBY GIVEN THAT D&C Builders, Inc., is due the sum of *Twenty-nine Thousand, Three Hundred Eighty-nine and 00/100ths Dollars (\$29,389.00)*, from Richard M. Buckley, a statement of a just and true account of said indebtedness, with all just credits given, being attached hereto and made a part hereof.

That said debt is due the undersigned for labor performed or furnished, and/or materials furnished, and actually used in the erection, alteration or repair of buildings or structures situated on, or in otherwise improving, the real estate hereinafter described, by virtue of an agreement with, or by consent of **Richard M. Buckley**, the owner thereof, or a person or persons authorized by, or rightfully acting for, said owner, or said debt is due the undersigned because such improvements have been authorized by said owner. That, as shown by the attached statement, the undersigned labored on, or furnished labor and materials for, such buildings, structures, or improvements, within ninety days of the date hereof, to wit, on or after the 16th day of November, 2012.

That by virtue thereof, by the service and filing of this Notice and Certificate, and pursuant to the provisions of the Statutes in such cases made and provided, the undersigned has and claims a lien to secure the payment of the debt so due and the costs of enforcing said lien upon the buildings or structures herein above mentioned and upon the following described real estate.

All that lot of land in the City of Greenville, County of Greenville, State of South Carolina, known and designated as Lot No. 35, and a rear portion of Lot No. 36, on plat of G. F. Cammer recorded in Plat Book L, Page 115, in the RMC Office for Greenville County, South Carolina, and having according to said plat, and a recent survey made July, 1958 by R. W. Dalton, the following metes and bounds, courses and distances, to-wit:

BEGINNING at an iron pin on the southeast side of Cammer Avenue, the front joint corner of Lots Nos. 35 and 36; thence with the southeast side of Cammer Avenue, S. 41-12 W. 67 feet to an iron pin, corner of Lot No. 42; thence with the rear line of Lot Nos. 42 and 41 N. 35-07 E. 130.7 feet to an iron pin on the southwest side of Meyers Drive (formerly Marietta Street) thence with the southwest side of Meyers Drive N. 47-38 W. 11 feet to an iron pin; thence through Lot No. 36 S. 35-07 W. 63.5 feet to an iron pin in the joint line of Lot Nos. 35 and 36; thence with the joint line of said lots N. 48-48 W. 200 feet to the beginning corner.

This being the same property conveyed to Richard M. Buckley and Mary Frances S. Buckley by deed from Louis N. Ornitz dated June 6, 1967 and recorded on June 13, 1967 in the Office of the Register of Deeds for Greenville County in Deed Book 821 at Page 496. Thereafter, Richard M. Buckley and Mary Frances S. Buckley conveyed said property unto themselves as joint tenants with right of survivorship and not as tenants in common by

BOOK: 78 PAGE: 971

deed dated May 26, 2005 and recorded in the Greenville County Register of Deeds Office in Book 2147 at Page 1233 on June 1, 2005.

D&C Builders, Inc.

By Scott Dodenhoff
Scott Dodenhoff

Subscribed and sworn to before me
this 8th day of February, 2013

Allen B. Husted
Notary Public for South Carolina
My Commission Expires: 9/17/18

BOOK: 78 PAGE: 972

Statement of Account

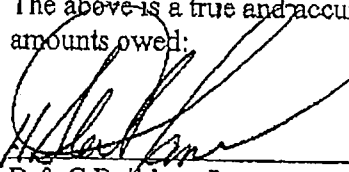
Balance owed on invoices for labor and materials
furnished in connection with the remodeling of home
located at 105 Cammer Avenue., Greenville, SC

\$29,389.00

Total to Date:

\$29,389.00

The above is a true and accurate statement of the
amounts owed:



D & C Builders, Inc.

By: H. Stewart James, Attorney

BOOK: 78 PAGE: 973

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

AFFIDAVIT OF SERVICE

On the 8th day of February, 2013, I served the within Notice and Certificate of Mechanic's Lien upon **Wells Fargo Bank, N.A.** and/or the person in possession of the real estate described therein, by delivering to Corporation Service Company, Registered Agent, 1703 Laurel Street, Columbia, South Carolina, 29201 via certified mail, return receipt requested, certified mail receipt number 7009 2820 0002 4635 1980. I am not a party to this proceeding.

Ann Hutsell

Ann Hutsell

Subscribed and sworn to before me this
8th day of February, 2013.

Cynthia C. Webb

Notary Public for South Carolina

My Commission Expires: 11/28/2021

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE OFFICE OF THE
REGISTER OF DEEDS

D & C Builders, Inc.,

Petitioner (s).

VS.

Richard M. Buckley,

Respondent (s).

NOTICE AND CERTIFICATE OF
MECHANIC'S LIEN

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me the undersigned, who, being duly sworn, says that he served a Notice And Certificate of Mechanic's Lien, and a Statement of Account, in the above entitled matter on, **Richard M. Buckley**, personally, and leaving with him one copy of the same at the following address: 105 Cammer Avenue, Greenville, South Carolina 29605 on the 10th day of February, 2013 at 3:18p.m.. The deponent is not a party to nor interested in this action. I certify that I am over the age of 18 and that said documents were served in accordance with state laws.

SWORN to before me this the
10th day of February, 2013

Notary Public for South Carolina

My Commission expires: 09/24/2020

Chris L. Ellenburg
Preferred Process Systems
P.O. Box 1519
Taylors, South Carolina 29687

Description of Person receiving: male, White, 75-85, 5'07"-5'10", 140-150lbs

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

) IN THE COURT OF COMMON PLEAS
) FOR THE THIRTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2013-CP-23- 01833

D&C Builders, Inc.,
Plaintiff,
vs.

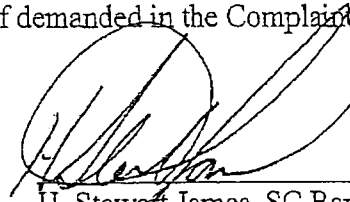
Richard M. Buckley and Wells Fargo
National Association,
Defendants.

SUMMONS

FILED IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
GREENVILLE, SOUTH CAROLINA
MARCH 22, 2013
PM 2:55

TO THE DEFENDANTS ABOVE-NAMED:

You are hereby summoned and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the Complaint, upon the subscriber at 505 West Butler Road, Greenville, South Carolina within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Complaint within that time, the Plaintiff will apply to the Court for the relief demanded in the Complaint and a judgment by default will be rendered against you for the relief demanded in the Complaint.



H. Stewart James, SC Bar No. 69110
BABE AND BROWN, P.C.
Attorney for Plaintiff
505 West Butler Road
Greenville, South Carolina 29607
Telephone: (864) 422-0022
Facsimile: (864) 277-4007

Greenville, South Carolina
March 22, 2013

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
CASE NO. _____

D&C Builders, Inc.,)
Plaintiff,)
vs.)

2013-CP-23- 01833

COMPLAINT
Foreclosure of Mechanic's Lien

Richard M. Buckley,)
Wells Fargo Bank, National)
Association,)
Defendants.)

FILED-CLERK OF COURT
GREENVILLE, CO. S.C.
JAN 29 2014 PM 2:55

THIS ACTION IS AN ATTEMPT TO COLLECT A DEBT AND ANY
INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

The Plaintiff, complaining of the above-named Defendant, would respectfully
show unto the Court as follows:

1. The Plaintiff is a corporation, chartered under the laws of the State of South Carolina.
2. The Defendant, Richard M. Buckley, is a resident of the County of Greenville, State of South Carolina.
3. The Defendant, Wells Fargo Bank, National Association, is a mortgage lender doing business in Greenville County and the holder of two mortgages on the real estate which is the subject of this action.
4. The Plaintiff is informed and believes that Defendant, Richard M. Buckley, is now and were at the times hereinafter mentioned, the owner of the real estate described herein below; that the real estate which is the subject of this Paragraph and this action is described as follows:

All that lot of land in the City of Greenville, County of Greenville,
State of South Carolina, known and designated as Lot No. 35, and a rear
portion of Lot No. 36, on plat of G. F. Cammer recorded in Plat Book L,

Page 115, in the RMC Office for Greenville County, South Carolina, and having according to said plat, and a recent survey made July, 1958 by R. W. Dalton, the following metes and bounds, courses and distances, to-wit:

BEGINNING at an iron pin on the southeast side of Cammer Avenue, the front joint corner of Lots Nos. 35 and 36; thence with the southeast side of Cammer Avenue, S. 41-12 W. 67 feet to an iron pin, corner of Lot No. 42; thence with the rear line of Lot Nos. 42 and 41 N. 35-07 E. 130.7 feet to an iron pin on the southwest side of Meyers Drive (formerly Marietta Street) thence with the southwest side of Meyers Drive N. 47-38 W. 11 feet to an iron pin; thence through Lot No. 36 S. 35-07 W. 63.5 feet to an iron pin in the joint line of Lot Nos. 35 and 36; thence with the joint line of said lots N. 48-48 W. 200 feet to the beginning corner.

This being the same property conveyed to Richard M. Buckley and Mary Frances S. Buckley by deed from Louis N. Ornitz dated June 6, 1967 and recorded on June 13, 1967 in the Office of the Register of Deeds for Greenville County in Deed Book 821 at Page 496. Thereafter, Richard M. Buckley and Mary Frances S. Buckley conveyed said property unto themselves as joint tenants with right of survivorship and not as tenants in common by deed dated May 26, 2005 and recorded in the Greenville County Register of Deeds Office in Book 2147 at Page 1233 on June 1, 2005.

The above referenced property shall hereinafter be referred to as "the Property."

5. That at the request of Defendant Richard M Buckley, Plaintiff provided labor and/or materials for the improvement of the Property, that there is due and owing Plaintiff for the labor and/or materials furnished in connection with the improvement to the Property, the sum of Twenty-Nine Thousand Three Hundred Eighty-Nine Dollars and 00/100 (\$29,389.00) Dollars plus interest thereon and attorneys fees and costs.
6. That the aforesaid labor and/or materials were incorporated into the improvements on the Property and were made with the knowledge and consent of the owners of the Property, Richard M. Buckley; that accordingly, a Mechanics Lien attached to the interest of Richard M. Buckley, on the Property in favor of Plaintiff in the sum of Twenty-Nine Thousand Three Hundred Eighty-Nine and 00/100 (\$29,839.00) Dollars plus attorneys fees and

costs, by filing a Notice and Certificate of Mechanics Lien in the Office of the Register of Deeds for Greenville County in Book MI 78 at Page 90 and which was filed within ninety (90) days of providing said labor and/or materials; that a copy of said Mechanics Lien is attached hereto and incorporated herein by reference.

7. That the Plaintiff is informed and believes that it is entitled to recover reasonable attorney's fees in this action and that the same should be added to the amount due herein and collected out of the proceeds of the sale of the Property.
8. That Plaintiff is informed and believes that Wells Fargo may claim two mortgages over the Property, which mortgages were recorded in the Office of the Register of Deeds for Greenville County in Mortgage Book 4775 at Page 589 and Mortgage Book 4775 at Page 603; that Plaintiff is informed and believes that Plaintiff's Mechanics Lien should be sold subject to the lien of Wells Fargo pursuant to said Mortgages.
9. That Plaintiff is informed and believes it is entitled to have its foresaid Mechanics Lien foreclosed and the Property sold at Public Auction, subject to the lien of the Mortgages, but free and clear of the claims of the Defendants hereto, and the proceeds derived from the sale thereof applied to the satisfaction of the indebtedness due Plaintiff for the improvements to the Property, together with reasonable attorneys fees and costs, as set forth hereinabove.
10. Upon information and belief, the total amount due by the Defendant at the time of filing this complaint by Richard M. Buckley is as follows:

Labor and Materials for Lot #104,	\$29,389.00
Finance Charge	2,130.76
Attorney fees	950.00
Court Costs for this action:	<u>287.92</u>

Total:	\$32,757.62

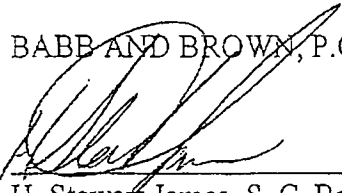
WHEREFORE, having fully set forth its Complaint, the Plaintiff prays that this court inquire into the matters set forth herein:

1. That the amount due by the Defendant for unpaid materials and labor be ascertained and determined under the direction of this Court, together with attorney's fees and costs of this action.
2. That the Plaintiff have judgment against Richard M. Buckley, in the amount of Twenty-Nine Thousand Three Hundred Eighty-Nine and 00/100 (\$29,389.00) Dollars plus interest or finance charges in the amount of Two Thousand, One Hundred Thirty and 70/100 (\$2,130.70) Dollars plus attorney fees of Nine Hundred Fifty and 00/100 (\$950.00) and costs of Two Hundred Eighty-Seven and 92/100 (\$287.92);
3. That Plaintiff be awarded reasonable attorneys fees for instituting and maintaining the within foreclosure of Mechanics Lien, and that such sum be added to the indebtedness due Plaintiff and collected from the proceeds of the sale of the Property;
4. That Plaintiff's Mechanics Lien over the Property be foreclosed and the equity of redemption of the Defendants to this action be forever barred and the Property be sold at public auction according to the statutory laws of the State of South Carolina, free and clear of claims and liens of any of the parties herein, but subject to the lien of the Mortgage, and that the

proceeds derived from the sale of the Property be applied toward the satisfaction of the indebtedness due Plaintiff for the labor and/or materials furnished for the improvement of the Property as set forth herein, reasonable attorney's fees and costs of this action;

5. For such other and further relief as to the Court seems just and proper.

BABB AND BROWN, P.C.



H. Stewart James, S. C. Bar # 69110
Attorney for Plaintiff
505 W. Butler Road
Greenville, South Carolina 29607
Telephone (864) 422-0022

Greenville, South Carolina
March 22, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

D&C Bulders, Inc.)

Plaintiff,)

Richard M. Buckley and Wells Fargo
National Association,)

Defendants.)

IN THE COURT OF COMMON PLEAS
C.A. NO. 2013-CP-23- 01833

LIS PENDENS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
2013 APR -1 PM 2:55

NOTICE IS HEREBY GIVEN that an action has been or will be commenced in this Court upon Complaint of the above-named Plaintiff against the above-named Defendant, Richard M. Buckley, for the nonpayment of labor and materials furnished in connection with the improvement of the property described as follows:

All that lot of land in the City of Greenville, County of Greenville, State of South Carolina, known and designated as Lot No. 35, and a rear portion of Lot No. 36, on plat of G. F. Cammer recorded in Plat Book L, Page 115, in the RMC Office for, Greenville County, South Carolina, and having according to said plat, and a recent survey made July, 1958 by R. W. Dalton, the following metes and bounds, courses and distances, to-wit:

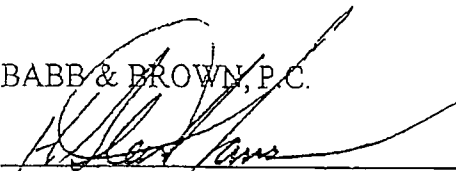
BEGINNING at an iron pin on the southeast side of Cammer Avenue, the front joint corner of Lots Nos. 35 and 36; thence with the southeast side of Cammer Avenue, S. 41-12 W. 67 feet to an iron pin, corner of Lot No. 42; thence with the rear line of Lot Nos. 42 and 41 N. 35-07 E. 130.7 feet to an iron pin on the southwest side of Meyers Drive (formerly Marietta Street) thence with the southwest side of Meyers Drive N. 47-38 W. 11 feet to an iron pin; thence through Lot No. 36 S. 35-07 W. 63.5 feet to an iron pin in the joint line of Lot Nos. 35 and 36; thence with the joint line of said lots N. 48-48 W. 200 feet to the beginning corner.

This being the same property conveyed to Richard M. Buckley and Mary Frances S. Buckley by deed from Louis N. Ornitz dated June 6, 1967 and recorded on June 13, 1967 in the Office of the Register of Deeds for Greenville County in Deed Book 821 at Page 496. Thereafter, Richard M. Buckley and Mary Frances S. Buckley conveyed said property unto themselves as joint tenants with right of survivorship and not as tenants in common by deed dated May 26, 2005 and recorded in the Greenville County Register of Deeds Office in Book 2147 at Page 1233 on June 1, 2005.

RECORDED IN BOOK VVI PAGE 001

Tax Map No. 0213.00- 03-025-00

BABB & BROWN, P.C.



H. Stewart James (SC Bar # 69110)
Attorney for Plaintiff
505 W. Butler Road
Greenville, South Carolina 29607
Telephone: (864) 422-0022

March 22, 2013
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

D & C Builders, Inc.,

PLAINTIFF,

vs.

Richard M. Buckley, Wells Fargo Bank,
National Association
DEFENDANTS.IN THE COURT OF COMMON PLEAS
C/A NO: 2012-CP-18-2840ANSWER
AND
CONSENT TO REFERENCE

The Defendant, Wells Fargo Bank, National Association, answering the Complaint of the Plaintiff, would respectfully allege that:

1. Defendant admits the allegations of the Complaint that are matters of public record, and for lack of information, denies each and every allegation contained in the Complaint except to the extent hereinafter specifically admitted, modified or explained, and demands strict proof thereof.

2. Defendant craves reference to the documents, which are the subject of the Plaintiff's action and to the public records of Greenville County and denies anything that is inconsistent therewith.

3. Defendant admits the allegations of Paragraphs 3 and 8 of the Plaintiff's Complaint which state this Defendant's mortgage liens are prior and senior to the lien of the Plaintiff.

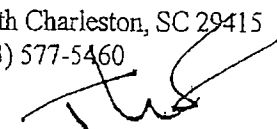
4. In further answering Paragraphs 3 and 8 this Defendant is informed and believes that all sums expended in defending its mortgage liens, including reasonable attorney's fees, are sums secured by the terms of its mortgage instruments and that any sale of the subject property would be subject to the mortgage liens of this Defendant.

5. Defendant consents to having this matter referred to the Master in Equity for Dorchester County, or a Special Referee as deemed appropriate by the Court, pursuant to Rule 53(b) SCRPC (as amended).

WHEREFORE, Defendant Wells Fargo Bank, National Association, having fully set forth its Answer, this Defendant prays that this Honorable Court inquire into the matters set forth herein, determine and protect the priorities of the parties, and for such other and further relief as may be just and proper.

FINKEL LAW FIRM LLC
Post Office Box 71727
North Charleston, SC 29415
(843) 577-5460

BY:

- 
- ☒ Thomas A. Shook, SC Bar # 68340
☐ Susan S. White, SC Bar # 5453
☐ Andrew M. Wilson, SC Bar # 72553
☐ Elizabeth S. Moore, SC Bar # 69236
☐ Teresa D. VanVlake, SC Bar # 11118
Attorneys for Defendant

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

D&C Builders, Inc.

Plaintiff,

Richard M. Buckley and Welis Fargo
Bank, National Association,
Defendants.

IN THE COURT OF COMMON PLEAS
C.A. NO. 2013-CP-23-01833

AMENDED
LIS PENDENS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
2013 MAY -8 AM 9:00

NOTICE IS HEREBY GIVEN that an action has been or will be commenced in this Court upon Complaint of the above-named Plaintiff against the above-named Defendant, Richard M. Buckley, for the nonpayment of labor and materials furnished in connection with the improvement of the property described as follows:

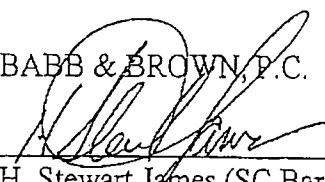
All that lot of land in the City of Greenville, County of Greenville, State of South Carolina, known and designated as Lot No. 35, and a rear portion of Lot No. 36, on plat of G. F. Cammer recorded in Plat Book L, Page 115, in the RMC Office for Greenville County, South Carolina, and having according to said plat, and a recent survey made July, 1958 by R. W. Dalton, the following metes and bounds, courses and distances, to-wit:

BEGINNING at an iron pin on the southeast side of Cammer Avenue, the front joint corner of Lots Nos. 35 and 36; thence with the southeast side of Cammer Avenue, S. 41-12 W. 67 feet to an iron pin, corner of Lot No. 42; thence with the rear line of Lot Nos. 42 and 41 N. 35-07 E. 130.7 feet to an iron pin on the southwest side of Meyers Drive (formerly Marietta Street) thence with the southwest side of Meyers Drive N. 47-38 W. 11 feet to an iron pin; thence through Lot No. 36 S. 35-07 W. 63.5 feet to an iron pin in the joint line of Lot Nos. 35 and 36; thence with the joint line of said lots N. 48-48 W. 200 feet to the beginning corner.

This being the same property conveyed to Richard M. Buckley and Mary Frances S. Buckley by deed from Louis N. Ornitz dated June 6, 1967 and recorded on June 13, 1967 in the Office of the Register of Deeds for Greenville County in Deed Book 821 at Page 496. Thereafter, Richard M. Buckley and Mary Frances S. Buckley conveyed said property unto themselves as joint tenants with right of survivorship and not as tenants in common by deed dated May 26, 2005 and recorded in the Greenville County Register of Deeds Office in Book 2147 at Page 1233 on June 1, 2005.

Tax Map No. 0213.00- 03-025-00

BABB & BROWN, P.C.



H. Stewart James (SC Bar # 69110)
Attorney for Plaintiff
505 W. Butler Road
Greenville, South Carolina 29607
Telephone: (864) 422-0022

May 2, 2013
Greenville, South Carolina

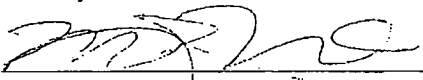
STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF GREENVILLE)
 2013 MAY 15 PM 4:46
 D&C Builders, Inc.,) C.A. No.: 2013-CP-23-1833
) FILED-CLERK OF COURT
 Plaintiff,) GREENVILLE CO. S.C.
)
 vs.) DEFENDANT RICHARD M. BUCKLEY'S
) MOTION TO DISMISS
)
 Richard M. Buckley and)
 Wells Fargo National Association,)
)
 Defendants.)
 _____)

Defendant, Richard M. Buckley, by and through his undersigned attorney, hereby moves this Court to dismiss the Plaintiff's cause of action to foreclose on a purported "Mechanic's Lien". This motion is made pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure, for Plaintiff's failure to state facts sufficient to constitute a cause of action against Defendant Richard M. Buckley. Dismissal of Plaintiff's cause of action to foreclose on the purported mechanic's lien is appropriate because, as is clear from the face of the Plaintiff's Complaint and the "Mechanics Lien" referenced and incorporated therein by Plaintiff, the subject "Mechanics Lien" was not filed in accordance with the requirements of S.C. Code Ann. § 29-5-15, *et seq.*

For these reasons, the Defendant, Richard M. Buckley, respectfully requests the Court to dismiss the Plaintiff's cause of action to foreclose on the purported "Mechanics Lien".

Respectfully submitted this 15th day of May, 2013,

Greenville, South Carolina


 M. Stokely Holder (SC Bar# 73892)
 KENISON, DUDLEY & CRAWFORD, LLC
 704 E. McBee Avenue
 Greenville, South Carolina 29601
 PH: (864) 242-4899
 FAX: (864) 242-4844

Attorney for Defendant Richard M. Buckley

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

D&C Builders, Inc.,

Plaintiff,

vs.

Richard M. Buckley and
Wells Fargo National Association,

Defendants;

IN THE COURT OF COMMON PLEAS

C.A. No.: 2013-CP-23-1833

CERTIFICATE OF SERVICE

This is to certify that I have served a true copy of the foregoing Defendant Richard M. Buckley's Motion to Dismiss on all counsel of record on this 16th day of May, 2013, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

H. Stewart James, Esquire
Babb & Brown, PC
505 W Butler Road
Greenville, SC 29607
Attorney for Plaintiff D&C Builders, Inc.



Laurie Warren
Legal Assistant

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

D&C Builders, Inc.,)

C.A. No.: 2013-CP-23-1833

Plaintiff,)

vs.)

Richard M. Buckley and
Wells Fargo National Association,)

DEFENDANT RICHARD M. BUCKLEY'S
ANSWER, COUNTERCLAIMS AND
THIRD-PARTY CLAIM

Defendants;)

Richard M. Buckley,)

Third-Party Plaintiff,)

vs.)

Scott Dodenhoff,)

Third-Party Defendant.)

FILED IN CLERK'S OFFICE
GREENVILLE, S.C.
PAUL J. WILKINSON
2013 MAY 15 P 4:48

TO: H. STEWART JAMES, ESQ., ATTORNEY FOR PLAINTIFF, D&C BUILDERS, INC.:

Defendant and Third-Party Plaintiff, Richard M. Buckley ("Defendant" and/or "Third-Party Plaintiff"), subject to his Motion to Dismiss filed contemporaneously herewith, hereby answers the Complaint of Plaintiff, D&C Builders, Inc. ("Plaintiff"), by denying each and every allegation not hereinafter specifically admitted, demanding strict proof thereof, and further responds as follows:

1. Upon information and belief, Defendant admits the allegations in paragraph 1 of the Complaint.

2. Defendant admits the allegations of paragraph 2 of the Complaint.

3. Upon information and belief, the Defendant admits only so much of the allegations contained in paragraph 3 of the Complaint in that the Defendant owns property located at 105 Cammer Avenue in the County of Greenville, State of South Carolina, and has mortgaged such property to Wells Fargo Bank. The Defendant craves reference to the records in the Greenville County Register of Deeds Office regarding any further description thereof, such that any allegation contained in paragraph 3 of the Complaint that contradicts said records is hereby denied and strict proof demanded thereof.

4. Upon information and belief, the Defendant admits only so much of the allegations contained in paragraph 4 of the Complaint in that the Defendant owns property located at 105 Cammer Avenue in the County of Greenville, State of South Carolina. The Defendant craves reference to the records in the Greenville County Register of Deeds Office regarding any further description thereof, such that any allegation contained in paragraph 4 of the Complaint that contradicts said records is hereby denied and strict proof demanded thereof.

5. The Defendant denies the allegations of paragraph 5 of the Complaint and demands strict proof thereof. Further, certain allegations of paragraph 5 of the

Complaint contain a legal conclusion such that an answer thereto is not required of the Defendant; however, to the extent an answer is required of the Defendant, the Defendant hereby denies same and demands strict proof thereof.

6. The Defendant denies the allegations of paragraph 6 of the Complaint and demands strict proof thereof. Further, certain allegations of paragraph 6 of the Complaint contain a legal conclusion such that an answer thereto is not required of the Defendant; however, to the extent an answer is required of the Defendant, the Defendant hereby denies same and demands strict proof thereof. The Defendant craves reference to the records in the Greenville County Register of Deeds Office, such that any allegation contained in paragraph 6 of the Complaint that contradicts said records is hereby denied and strict proof demanded thereof.

7. The Defendant denies the allegations of paragraph 7 of the Complaint and demands strict proof thereof. Further, certain allegations of paragraph 7 of the Complaint contain a legal conclusion such that an answer thereto is not required of the Defendant; however, to the extent an answer is required of the Defendant, the Defendant hereby denies same and demands strict proof thereof.

8. The Defendant craves reference to the records in the Greenville County Register of Deeds Office, such that any allegation contained in paragraph 8 of the Complaint that contradicts said records is hereby denied and strict proof demanded thereof. Further, the Defendant denies the remaining allegations of paragraph 8 of the

Complaint and demands strict proof thereof. Further, certain allegations of paragraph 8 of the Complaint contain a legal conclusion such that an answer thereto is not required of the Defendant; however, to the extent an answer is required of the Defendant, the Defendant hereby denies same and demands strict proof thereof. Further still, upon information and belief, the sale of Plaintiff's Mechanic's Lien is not an appropriate remedy for any action brought pursuant to S.C. Code Ann. § 29-5-10, *et seq.*

9. The Defendant denies the allegations of paragraph 9 of the Complaint and demands strict proof thereof. Further, certain allegations of paragraph 9 of the Complaint contain a legal conclusion such that an answer thereto is not required of the Defendant; however, to the extent an answer is required of the Defendant, the Defendant hereby denies same and demands strict proof thereof.

10. The Defendant denies the allegations of paragraph 10 of the Complaint and demands strict proof thereof.

11. The Defendant denies the allegations and prayer(s) for relief found in the "WHEREFORE" section of Plaintiff's Complaint and demands strict proof thereof.

FOR A SECOND DEFENSE
(Failure to state a claim or cause of action)

12. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

13. The Defendant alleges that the complaint fails to sufficiently constitute a cause of action against this answering Defendant or fails to state facts upon which a claim can be based.

FOR A THIRD DEFENSE
(Unclean Hands)

14. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

15. The Defendant alleges that the Plaintiff's action is barred under the equitable doctrine of unclean hands.

FOR A FOURTH DEFENSE
(Plaintiff bad faith)

16. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

17. The Defendant alleges that the Plaintiff's bad faith bars its claims or that any damages must be reduced as a result of Plaintiff's comparative bad faith.

FOR A FIFTH DEFENSE
(Laches, Estoppel and/or Waiver)

18. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

19. The Defendant alleges that the Plaintiff's claims are barred by the doctrines of laches, waiver and/or estoppel.

FOR A SIXTH DEFENSE
(Intervening Factors and/or Acts)

20. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

21. The Defendant alleges that the Plaintiff's claims are barred by intervening factors and/or intervening acts and wrongdoing of parties other than Defendant, which were the actual and proximate cause of Plaintiffs' alleged damages.

FOR A SEVENTH DEFENSE
(Failure to Mitigate)

22. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

23. The Defendant alleges that Plaintiff's claims are barred due to the Plaintiff's failure to mitigate their damages.

FOR AN EIGHTH DEFENSE
(No Proximate Cause)

24. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

25. The Defendant alleges that Plaintiff's claims are barred due to the lack of proximate cause between Plaintiff's alleged damages and the actions/inactions of the Defendant.

FOR A NINTH DEFENSE
(Defendants obligations, if any, void or excused)

26. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

27. The Defendant would allege that, to the extent Plaintiff alleges Defendant had any obligation as to which full performance has not been rendered or excused, that obligation did not exist or was based upon acts or omissions that were void or otherwise extinguished.

FOR A TENTH DEFENSE
(Failure of condition precedent to performance)

28. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

29. The Defendant would allege that, to the extent Plaintiff alleges Defendant had any obligation or duty as to which full performance has not been rendered or excused, not all conditions precedent to said obligations or duties occurred.

FOR AN ELEVENTH DEFENSE
(Offset)

30. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

31. The Defendant would allege that, to the extent Plaintiff alleges Defendant had any obligation or duty as to which full performance has not been rendered or excused, the Defendant is due an offset equal to a portion of, all, or more of the debt alleged by the Plaintiff.

FOR AN ELEVENTH DEFENSE
(Plaintiff's Negligence)

32. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

33. The Defendant alleges that Plaintiff's claims are barred in whole or in part due to Plaintiff's negligent work.

FOR A TWELFTH DEFENSE
(Plaintiff's Breach of Contract)

34. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

35. The Defendant would allege that, to the extent Plaintiff alleges the existence of valid enforceable contract, Plaintiff's claims are barred in whole or in part due to Plaintiff's breach of the contract.

FOR A THIRTEENTH DEFENSE
(Right to add additional affirmative defenses)

36. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

37. The Defendant alleges that because the complaint is couched in conclusionary terms, answering Defendant cannot fully anticipate all affirmative defenses that may be applicable to the within action. Accordingly, the right to assert additional affirmative defenses, if and to the extent that such affirmative defenses are applicable, is hereby reserved.

FOR A FOURTEENTH DEFENSE
BY WAY OF COUNTERCLAIMS & THIRD-PARTY CLAIM

38. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

39. Defendant and Third-Party Plaintiff is a citizen and resident of the State of South Carolina, and owns property in Greenville County, State of South Carolina with an address of 105 Cammer Avenue (the "Property").

40. Upon information and belief, the Plaintiff is a corporation existing and doing business in Greenville County, State of South Carolina.

41. Upon information and belief, the Third-Party Defendant, Scott Dodenhoff ("Dodenhoff"), is a citizen and resident of the County of Greenville and State of South Carolina.

42. The Property which is at the center of this dispute is located in Greenville County, South Carolina.

43. Venue and jurisdiction are proper in this Court.

FACTUAL BACKGROUND

44. The Plaintiff was contacted in late 2011 by Matt Buckley, the son of Defendant, whereby the Plaintiff was informed of Defendant's desire to improve the residence on the Property.

45. Dodenhoff was the party who dealt primarily with the Defendant and the representatives of Defendant- Defendant's son, Matt Buckley, and Defendant's daughter-in-law, Pamela Burns-Byers Buckley, regarding all aspects of the Project at issue.

46. Prior to the facts giving rise to the claims herein, Scott Dodenhoff and Matt Buckley were lifelong friends.

47. Upon first contacting Scott Dodenhoff, Matt Buckley informed Dodenhoff of the facts giving rise to the Defendant's desire to improve the Property.

48. As communicated to Dodenhoff in late 2011, the facts giving rise to the Defendant's desire to improve the Property were as follows:

- (a) the Property had been the location of Defendant's and Defendant's wife's primary residence for the past forty-four (44) years at that time;
- (b) the Defendant was at that time, and remains so today, elderly and in declining health (82 years old);
- (c) the Defendant's wife ("Frances Buckley") was elderly and in poor health;
- (d) the Defendant was the sole caretaker for his elderly and sick wife;
- (e) the Defendant's wife desired to spend her remaining days with the Defendant at their residence on the Property;
- (f) the Defendant desired for his wife to spend her remaining days alongside him at their residence on the Property;
- (g) the Defendant felt he was no longer physically able to care for his wife by himself at their residence on the Property and he needed help in order to satisfy their joint desire to have her spend her remaining days at their residence together;
- (h) the Defendant contacted his son and daughter-in-law, Matt and Pamela Buckley, explained the above to them and reluctantly asked for their assistance;
- (i) the Defendant asked Matt and Pamela Buckley if they would agree to move their family of six (6) from Charleston, South Carolina to the residence on the Property in order to help the Defendant and Frances Buckley through the remaining days of their lives (the Defendant, his wife and the family of Matt and Pamela Buckley, collectively hereinafter: the "Buckleys");
- (j) the Defendant told Matt and Pamela Buckley that he would be willing to obtain a loan against the remaining equity in the Property in order to construct improvements thereon to allow the space necessary for Matt and Pamela Buckley's family to move in; and

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

49. In 2011, the Defendant initiated contact with his bank, Defendant Wells Fargo Bank ("Wells Fargo"), to determine the maximum loan amount he could obtain against the equity in the Property in order to use such loan monies for the construction of improvements thereon.

50. The Defendant received confirmation from Wells Fargo that Wells Fargo would lend \$78,000.00 to Defendant via a home equity line of credit.

51. Matt Buckley contacted Dodenhoff, Matt's childhood friend, to determine if Dodenhoff would agree to make certain improvements to the residence on the Property according to the plans and specifications of the Defendant and under the facts as aforesaid.

52. Matt Buckley explained to Dodenhoff that the maximum amount of money that could be spent for the improvements was the \$78,000.00 in loan funds that the Defendant had been approved for.

53. In late 2011, Dodenhoff told the Buckleys that Plaintiff could construct the Project for that maximum possible amount under a cost plus 10% basis.

54. In or about January 2012, Defendant entered into an agreement with Plaintiff via Dodenhoff (the "Contract") whereby the Plaintiff agreed as follows:

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

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

c) to construct the Project by the end of July 2012.

55. Upon the Plaintiff's initiation of work on the Project in January 2012, Dodenhoff physically appeared on-site to supervise and coordinate the work on the Project pursuant to his obligations as the purported general contractor for the Project.

56. As construction on the Project progressed beyond January 2012, Dodenhoff repeatedly failed to physically appear on-site at the Project to supervise and/or coordinate the work on the Project.

57. Upon information and belief, the Plaintiff hired unqualified and unlicensed contractors to perform work on the Project.

58. After construction was initiated on the Project, the Plaintiff would not bill the Defendant for consistent periods of time.

59. As the deadline for the completion of the Project approached in the summer of 2012, the Plaintiff began to send more billing information to the Defendant.

60. The bills that Plaintiff ultimately sent to the Defendant were outdated, not truthful representations of the work completed and not in accordance with the Contract.

61. The cumulative amount of the alleged debt represented by Plaintiff in all of the bills ultimately produced by Plaintiff to Defendant was in excess of the Contract amount.

62. The Plaintiff and the Defendant did not agree to any amendment to the amount or nature of the Contract, such that any debt alleged by Plaintiff in excess of the guaranteed maximum possible amount of \$78,000.00 is unjustified.

63. After construction was initiated on the Project, and amid the Buckleys' concerns regarding the quality and oversight of the work being performed, together with the billing practices of Plaintiff, the Buckleys made attempts to contact Plaintiff to determine the status of construction and to discuss the Buckleys' issues with Plaintiff's construction of the Project, including the quality, conformity to the Defendant's design and specifications, evidence of costs, and timeliness of construction, many times to no avail as Dodenhoff was rarely in town and rarely on the Project site during the majority of Plaintiff's construction of the Project.

64. Despite being provided adequate notice and opportunity to cure the various construction defects plainly apparent on the Project, the Plaintiff has failed to do so.

65. Despite being provided adequate notice and opportunity to produce the backup information to support the costs Plaintiff has represented as being incurred for the Project, the Plaintiff has failed to do so.

66. Despite being provided adequate notice and opportunity to cure the various work of Plaintiff which is not in conformance with the plans and specifications for the Project, the Plaintiff has failed to do so.

67. Despite adequate notice of the foregoing, the Plaintiff unilaterally ceased construction on the Project in October 2012 and has never returned to the Project.

**FOR A FIRST COUNTERCLAIM
(Breach of Contract)**

68. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

69. Pursuant to their agreement, the Defendant and Plaintiff agreed and understood that:

- (a) the Defendant's residence was to be built as substantially similar to the certain plans and specifications agreed upon by the Defendant and Plaintiff, with such additions and modifications that were subsequently agreed upon by the Defendant and Plaintiff;
- (b) the contract completion deadline would be end of July 2012
- (c) the payment to Plaintiff by Defendant would be on a cost-plus basis with a guaranteed maximum possible amount of \$78,000.00, and pursuant to Plaintiff's representations to the Defendant of work being complete in accordance with the agreement between Defendant and Plaintiff;
- (d) the Project was to be built pursuant to applicable building codes, norms, customs, standards and laws; and
- (e) the improvements to Defendant's Property was to be built free of defective and negligent labor and materials.

70. During the course of Plaintiff's attempted construction of the improvements on Defendant's Property, the Plaintiff breached its agreement with the Defendant inasmuch as:

- (a) the Project was not constructed pursuant to the certain plans and specifications agreed upon by the Defendant and Plaintiff, and Plaintiff made unapproved, negligent, unreasonable and/or irrational deviations from said plans and specifications that have adversely affected the use and function of the residence;
- (b) the construction completion deadline was exceeded as the construction of the house was never completed by Plaintiff in accordance with its agreement with Defendant as Plaintiff unilaterally ceased construction and left the job without returning in October 2012;
- (c) Plaintiff wrongfully terminated its contract with Defendant by refusing to complete the construction of the residence pursuant to the agreed upon terms of its agreement with the Defendant, by refusing to provide the Defendant with any substantive evidence of the costs incurred by Plaintiff to construct the residence and by refusing to return to the Defendant's residence to complete the construction, all despite requests made by Defendant;
- (d) Plaintiff failed to construct the residence pursuant to applicable building codes, norms, customs, standards and laws, including, without limitation, Plaintiff's hiring and employment of unqualified, unskilled, and/or illegal laborers;
- (e) Despite requests by the Defendant and despite the inherent obligations of Plaintiff as a licensed contractor, Plaintiff failed to construct the residence free of defective and negligent labor and materials as evidenced by, without limitation, the following:
 - (i) improper, defective and/or inadequate waterproofing;
 - (ii) improper, defective and/or inadequate flooring;
 - (iii) improper, defective and/or inadequate cabinetry;
 - (iv) improper, defective and/or inadequate framing of structure;
 - (v) improper, defective and/or inadequate molding and trim work;
 - (vi) improper, defective and/or inadequate painting;

- (vii) improper, defective and/or inadequate drywall;
- (viii) improper, defective and/or inadequate electrical system(s);
- (ix) improper, defective and/or inadequate doors;
- (x) improper, defective and/or inadequate cleaning of interior and exterior of residence;
- (xi) improper, defective and/or inadequate phone line(s);
- (xii) improper, defective and/or inadequate HVAC system;
- (xiii) improper, defective and/or inadequate doorframes;
- (xiv) improper, defective and/or inadequate bathtubs;
- (xv) improper, defective and/or inadequate toilets;
- (xvi) improper, defective and/or inadequate staining;
- (xvii) improper, defective and/or inadequate stairs;
- (xviii) improper, defective and/or inadequate insulation;
- (xix) improper, defective and/or inadequate windows.

71. As a direct and proximate result of said breaches, the Defendant has suffered actual, consequential and special damages in an amount to be determined by a jury, which are hereby prayed for, together with interest, costs, and attorneys fees.

FOR A SECOND COUNTERCLAIM
(Negligence)

72. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

73. Associated with the construction of the residence, the Plaintiff owed a duty to Defendant to complete the construction in accordance with local building codes and consistent with local norms, customs, standards and laws, including, without limitation and at a minimum, compliance with manufacturers' installation guidelines.

74. Plaintiff, in failing to exercise due care in the construction on Defendant's residence, was negligent, willful, wanton and reckless in one or more of the following particulars:

- (a) the Project was not constructed pursuant to the certain plans and specifications agreed upon by the Defendant and Plaintiff, and Plaintiff made unapproved, negligent, unreasonable and/or irrational deviations from said plans and specifications that have adversely affected the use and function of the residence;
- (b) the construction completion deadline was exceeded as the construction of the house was never completed by Plaintiff in accordance with its agreement with Defendant as Plaintiff unilaterally ceased construction and left the job without returning in October 2012;
- (c) Plaintiff wrongfully terminated its contract with Defendant by refusing to complete the construction of the residence pursuant to the agreed upon terms of its agreement with the Defendant, by refusing to provide the Defendant with any substantive evidence of the costs incurred by Plaintiff to construct the residence and by refusing to return to the Defendant's residence to complete the construction, all despite requests made by Defendant;

- (d) Plaintiff failed to construct the residence pursuant to applicable building codes, norms, customs, standards and laws, including, without limitation, Plaintiff's hiring and employment of unqualified, unskilled, and/or illegal laborers;
- (e) Despite requests by the Defendant and despite the inherent obligations of Plaintiff as a licensed contractor, Plaintiff failed to construct the residence free of defective and negligent labor and materials as evidenced by, without limitation, the following:
 - (i) improper, defective and/or inadequate waterproofing;
 - (ii) improper, defective and/or inadequate flooring;
 - (iii) improper, defective and/or inadequate cabinetry;
 - (iv) improper, defective and/or inadequate framing of structure;
 - (v) improper, defective and/or inadequate molding and trim work;
 - (vi) improper, defective and/or inadequate painting;
 - (vii) improper, defective and/or inadequate drywall;
 - (viii) improper, defective and/or inadequate electrical system(s);
 - (ix) improper, defective and/or inadequate doors;
 - (x) improper, defective and/or inadequate cleaning of interior and exterior of residence;
 - (xi) improper, defective and/or inadequate phone line(s);
 - (xii) improper, defective and/or inadequate HVAC system;
 - (xiii) improper, defective and/or inadequate doorframes;
 - (xiv) improper, defective and/or inadequate bathtubs;
 - (xv) improper, defective and/or inadequate toilets;

- (xvi) improper, defective and/or inadequate staining;
- (xvii) improper, defective and/or inadequate stairs;
- (xviii) improper, defective and/or inadequate insulation;
- (xix) improper, defective and/or inadequate windows.

75. Plaintiff's negligence, as alleged above, directly and proximately caused resulting damage to Defendant, including damage to materials and other work furnished outside the scope of Plaintiff's work that were supplied by other contractors, thus causing Defendant to incur damages.

76. Therefore, Defendant is entitled to an award of actual, consequential, special and punitive damages in an amount to be determined by a jury, which are hereby prayed for, together with interest, costs, and attorneys fees.

**FOR A THIRD COUNTERCLAIM
(Conversion)**

77. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

78. Upon information and belief, the money Defendant paid Plaintiff was placed in trust of Plaintiff to be used solely to satisfy the costs of the Project.

79. Upon information and belief, Plaintiff converted Defendant's accounts to his own use and exercised ownership of the accounts.

80. Plaintiff's use of the Defendant's payments was without express or implied permission from the Defendant and was a breach of Plaintiff's fiduciary obligation to Defendant.

81. Plaintiff's unauthorized exercise of dominion over the accounts was to the exclusion of the Defendant's rights of ownership of the accounts and violated the trust created by virtue of the representations and declarations that labor was completed and materials paid for as certified by payments processed and submitted by Plaintiff.

82. As a direct and proximate result of Plaintiff's conduct, Defendant has suffered actual, consequential and special injuries, including costs and attorneys' fees associated with prosecuting this litigation, for which Defendant hereby sues.

83. Upon information and belief, Plaintiff's conduct was willful and so outrageous as to warrant an award of punitive damages.

**FOR A FOURTH COUNTERCLAIM
(Fraud)**

84. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

85. Upon information and belief, Plaintiff knew or should have known of the false representations and statements to Defendant on several occasions including, but not limited to, the false affirmations and representations on pay applications, concerning the amount of Plaintiff's payables that were due and owing ("Fraudulent Payables").

These Fraudulent Payables misrepresented and falsely stated that certain labor and materials had been furnished for the Project.

86. Upon information and belief, Plaintiff also made representations and statements on several occasions concerning the amount of Plaintiff's payables that were due and owing which Plaintiff knew or should have known were false and misleading, thus being the direct and proximate cause of such Fraudulent Payables.

87. Upon information and belief, the Fraudulent Payables did not represent legitimate payables of Plaintiff and were material to the transactions between Plaintiff and the Defendant.

88. Upon information and belief, Plaintiff either knew or should have known of the fraudulent nature of the misrepresentations concerning the amount of Plaintiff's payables.

89. Upon information and belief, Plaintiff intended for the Defendant to act in response to the Fraudulent Payables and directed such Fraudulent Payables to his own personal use.

90. The Defendant were unaware of the fraudulent nature of the Fraudulent Payables and believed them to be legitimate payables of Plaintiff and did in fact rely upon Plaintiff's representations.

91. As a direct and proximate result of Plaintiff's conduct, the Defendant has suffered actual, consequential and special injuries, including, but not limited to costs

associated with bringing this action and attorney's fees, for which Defendant hereby sues.

92. Upon information and belief, Plaintiff's conduct was willful and so outrageous as to warrant an award of punitive damages.

**FOR A FIFTH COUNTERCLAIM
(Negligent Misrepresentation)**

93. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

94. Plaintiff was in the business of residential construction. In the course of performing such residential construction services on the Project, Plaintiff made implicit and/or explicit representations to Defendant with the intent that the Defendant would rely thereon.

95. Upon information and belief, Plaintiff knew or should have known of the numerous false representations concerning the status of accounts, payments made on accounts and the invalidity of payables charged to the Defendant. Such misrepresentations caused Plaintiff to breach its Fiduciary Duty to Defendant.

96. Upon information and belief, Plaintiff had a pecuniary interest in making these misrepresentations.

97. Plaintiff had a duty to see that truthful and accurate information was communicated to the Defendant.

98. Plaintiff breached its duty of care to the Defendant by failing to exercise due care.

99. The Defendant justifiably relied upon Plaintiff to communicate truthful information and justifiably relied upon Plaintiff's representations.

100. As a direct and proximate result of the Defendant's reliance upon Plaintiff's misrepresentations, Defendant has suffered a pecuniary loss in the form of actual, consequential and special injuries, including, but not limited to the costs associated with bringing this action and attorney's fees, for which the Defendant hereby sues.

101. Upon information and belief, Plaintiff's conduct was willful and so outrageous as to warrant an award of punitive damages.

**FOR A SIXTH COUNTERCLAIM
(Constructive Fraud)**

102. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

103. Plaintiff impliedly and/or expressly represented, or misrepresented, to the Defendant that certain labor and materials had been furnished for the Project and that Plaintiff incurred certain costs for the same.

104. Said misrepresentations were false in that construction of the Project was not completed to the same level represented by Plaintiff, that certain labor and materials

were not furnished by Plaintiff and that certain costs for the same were not incurred by Plaintiff.

105. Plaintiff knew or should have known of the falsity of the representations.

106. Said representations were material in that the representations induced the Defendant to disburse monies for labor and materials that were not provided to the Project and/or for costs not incurred by Plaintiff for the same.

107. Plaintiff fully intended that the false representations be acted upon by Defendant.

108. The Defendant was completely ignorant of the falsity of the representations.

109. The Defendant reasonably relied on these representations and had a right to rely on the representations.

110. As a direct and proximate result of the false representations made by Plaintiff, Defendant has suffered a pecuniary loss in the form of actual, consequential and special injuries, including, but not limited to the costs associated with bringing this action and attorney's fees, for which the Defendant hereby sues.

FOR A SEVENTH COUNTERCLAIM
(Slander of Title)

111. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

112. By the filing by Plaintiff in the public records of Greenville County of its purported Mechanics Lien together with the Plaintiff's filing in the public records of Greenville County of the underlying lawsuit to foreclose on its purported Mechanics Lien, the Plaintiff has published a statement affecting the Defendant's title to the Property.

113. Said statements published by the Plaintiff within its purported Mechanics Lien and its purported Mechanics Lien foreclosure lawsuit are false, derogatory to Defendant's title to the Property and were made with malice.

114. As a direct and proximate result of the false representations published by Plaintiff in the public records of Greenville County, Defendant has suffered a pecuniary loss in the form of actual, consequential and special injuries, including, but not limited to the costs associated with bringing this action and attorney's fees, for which the Defendant hereby sues.

**FOR AN EIGHTH COUNTERCLAIM
(Declaratory Judgment)**

115. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

116. Upon information and belief, Plaintiff 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.

117. Upon information and belief, Plaintiff was insolvent prior to, and/or during construction of the Project.

118. Upon information and belief, Plaintiff was grossly undercapitalized prior to and during construction of the Project.

119. Upon information and belief, Dodenhoff controlled Plaintiff at all pertinent times mentioned herein.

120. Upon information and belief, Dodenhoff treated the debts and assets of the Plaintiff as his personal debts and assets.

121. Upon information and belief, Dodenhoff had such control of Plaintiff that he completely dominated Plaintiff, not only completely dominating Plaintiff's finances, but also the policy and business practice of Plaintiff, so that Plaintiff operated merely as an instrumentality and facade for the operations of Dodenhoff.

122. Upon information and belief, Dodenhoff used such control to commit fraud, to perpetrate the violation of a positive legal duty owed to Defendant/Third-Party Plaintiff, and to engage in such dishonest, wrongful and unjust acts upon, and in contravention of, Defendant/Third-Party Plaintiff's legal rights.

123. Upon information and belief, Dodenhoff received and used monies from Defendant/Third-Party Plaintiff with full awareness as to the fraudulent and unjust nature of the transfer of the funds.

124. Upon information and belief, Dodenhoff knew that the monies obtained from Defendant/Third-Party Plaintiff were obtained fraudulently, but Dodenhoff allowed the monies to be obtained fraudulently so he could to continue to operate merely as a vehicle to fraudulently further his own interests to the detriment of Defendant/Third-Party Plaintiff.

125. Upon information and belief, Dodenhoff caused the commingling of the Plaintiff's finances with his personal finances, including the monies he fraudulently received from the Project, resulting in the siphoning, transferring and diversion of those monies of Plaintiff for the personal benefit of Dodenhoff and to Defendant/Third-Party Plaintiff's detriment.

126. Upon information and belief, Dodenhoff and the Plaintiff have shown a reckless disregard for those damages to Defendant/Third-Party Plaintiff that were proximately caused by, and are a result of, the Plaintiff's negligent construction of the Project.

127. Upon information and belief, Plaintiff and Dodenhoff were aware of Defendant/Third-Party Defendant's potential claims against the Plaintiff; yet, despite such awareness, the Plaintiff and Dodenhoff acted in a self-serving manner with regard to the property of the corporation, or lack thereof, and in disregard to the Defendant/Third-Party Plaintiff's claim in the property.

128. Upon information and belief, Dodenhoff breached his positive legal duty and this breach, coupled with his aforesaid control of Plaintiff, proximately caused damages to Defendant/Third-Party Plaintiff.

129. Based on the foregoing it would be inequitable, unjust and fundamentally unfair for Dodenhoff to use the corporate shield of another entity (Plaintiff) in order to hide from the normal consequences of his actions and to benefit personally from perpetrating the violation of his positive legal duties in contravention of Defendant/Third-Party Plaintiff's legal rights and in violation of Dodenhoff's obligations, including, without limitation, his fiduciary obligations, to Defendant/Third-Party Plaintiff.

130. A justiciable controversy exists as to whether Dodenhoff is estopped from asserting the defense of the corporate shield and is personally liable to Defendant/Third-Party Plaintiff.

FOR A FIRST THIRD-PARTY CLAIM (Fraud)

131. The Defendant/Third-Party Plaintiff incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

132. Upon information and belief, Dodenhoff knew or should have known of the false representations and statements to Defendant/Third-Party Plaintiff on several occasions including, but not limited to, the false affirmations and representations on pay

applications, concerning the amount of the payables that were purportedly due and owing on the Project ("Fraudulent Payables"). These Fraudulent Payables misrepresented and falsely stated that certain labor and materials had been furnished for the Project.

133. Upon information and belief, Dodenhoff also made representations and statements on several occasions concerning the amount of payables that were purportedly due and owing which Dodenhoff knew or should have known were false and misleading, thus being the direct and proximate cause of such Fraudulent Payables.

134. Upon information and belief, the Fraudulent Payables did not represent legitimate payables on the Project and were material to the transactions between Plaintiff and Defendant/Third-Party Plaintiff.

135. Upon information and belief, Dodenhoff either knew or should have known of the fraudulent nature of the misrepresentations concerning the amount of payables.

136. Upon information and belief, Dodenhoff intended for the Defendant/Third-Party Plaintiff to act in response to the Fraudulent Payables and Dodenhoff directed such Fraudulent Payables to his own personal use.

137. The Defendant/Third-Party Plaintiff was unaware of the fraudulent nature of the Fraudulent Payables and believed them to be legitimate payables and did in fact rely upon Dodenhoff's representations.

138. As a direct and proximate result of Dodenhoff's conduct, the Defendant/Third-Party Plaintiff has suffered actual, consequential and special injuries, including, but not limited to costs associated with bringing this action and attorney's fees, for which Defendant/Third-Party Plaintiff hereby sues.

139. Upon information and belief, Dodenhoff's conduct was willful and so outrageous as to warrant an award of punitive damages.

**FOR A SECOND THIRD-PARTY CLAIM
(Constructive Fraud)**

140. The Defendant/Third-Party Plaintiff incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

141. Dodenhoff impliedly and/or expressly represented, or misrepresented, to the Defendant/Third-Party Plaintiff that certain labor and materials had been furnished for the Project and that Dodenhoff incurred certain costs for the same.

142. Said misrepresentations were false in that construction of the Project was not completed to the same level represented by Dodenhoff, that certain labor and materials were not furnished by Dodenhoff and that certain costs for the same were not incurred by Dodenhoff.

143. Dodenhoff knew or should have known of the falsity of the representations.

144. Said representations were material in that the representations induced monies to be disbursed for labor and materials that were not provided to the Project and/or for costs not incurred by Dodenhoff for the same.

145. Dodenhoff fully intended that the false representations be acted upon by Defendant/Third-Party Plaintiff.

146. The Defendant/Third-Party Plaintiff was completely ignorant of the falsity of the representations.

147. The Defendant/Third-Party Plaintiff reasonably relied on these representations and had a right to rely on the representations.

148. As a direct and proximate result of the false representations made by Dodenhoff, the Defendant/Third-Party Plaintiff was damaged in that Dodenhoff received proceeds from the Defendant/Third-Party Plaintiff, including the proceeds obtained by Defendant/Third-Party Plaintiff from the aforesaid bank loan, that Dodenhoff was not due and that Defendant/Third-Party Plaintiff did not owe. As such, the Defendant/Third-Party Plaintiff is entitled to an award of actual, consequential, special and punitive damages in an amount to be determined by a jury.

FOR A THIRD THIRD-PARTY CLAIM
(Negligent Misrepresentation)

149. The Defendant/Third-Party Plaintiff incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

150. Dodenhoff was in the business of residential construction. In the course of performing such residential construction services on the Project, Dodenhoff made implicit and/or explicit representations to Defendant/Third-Party Plaintiff with the intent that the Defendant/Third-Party Plaintiff would rely thereon.

151. Upon information and belief, Dodenhoff knew or should have known of the numerous false representations concerning the status of accounts, payments made on accounts and the invalidity of payables charged to the Defendant/Third-Party Plaintiff. Such misrepresentations caused Defendant/Third-Party Plaintiff to breach his Fiduciary Duty to Defendant/Third-Party Plaintiff.

152. Upon information and belief, Dodenhoff had a pecuniary interest in making these misrepresentations.

153. Dodenhoff had a duty to see that truthful and accurate information was communicated to the Defendant/Third-Party Plaintiff.

154. Dodenhoff breached his duty of care to the Defendant/Third-Party Plaintiff by failing to exercise due care.

155. The Defendant/Third-Party Plaintiff justifiably relied upon Dodenhoff to communicate truthful information and justifiably relied upon Dodenhoff's representations.

156. As a direct and proximate result of the Defendant/Third-Party Plaintiff's reliance upon Dodenhoff's misrepresentations, Defendant/Third-Party Plaintiff has suffered a pecuniary loss in the form of actual, consequential and special injuries,

including, but not limited to the costs associated with bringing this action and attorney's fees, for which Defendant/Third-Party Plaintiff hereby sues.

157. Upon information and belief, Dodenhoff's conduct was willful and so outrageous as to warrant an award of punitive damages.

**FOR A FOURTH THIRD-PARTY CLAIM
(Breach of Fiduciary Duty)**

158. The Defendant/Third-Party Plaintiff incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

159. The payments described herein from Defendant/Third-Party Plaintiff were made for the express purpose of Dodenhoff placing same in trust to be used for the express purposes of paying for certain costs of labor and material provided on the Project upon the Plaintiff actually providing such labor and material and actually incurring the certain costs and to otherwise properly possess, account for, and maintain the funds.

160. The Defendant/Third-Party Plaintiff reposed special confidence in Dodenhoff to act in equity and in good conscience in properly using the monies paid by Defendant/Third-Party Plaintiff such that Dodenhoff was bound to act in good faith and with due regard to the interests of Defendant/Third-Party Plaintiff.

161. Dodenhoff accepted the special confidence placed in him by the Defendant/Third-Party Plaintiff such that he knew or should have know that he was bound to act in good faith as the fiduciary of Defendant/Third-Party Plaintiff.

162. Despite Dodenhoff accepting the fiduciary obligations to place the payments made from Defendant/Third-Party Plaintiff in trust to be used for the express purposes of paying for certain costs of labor and material provided on the Project upon the Plaintiff actually providing such labor and material and actually incurring the certain costs and to otherwise properly possess, account for, and maintain the funds, the Defendant breached its fiduciary obligations by not properly possessing, accounting, maintaining and/or applying the monies paid to him in trust by Defendant/Third-Party Plaintiff.

163. As a direct and proximate result of Dodenhoff's conduct, Defendant/Third-Party Plaintiff has suffered a pecuniary loss in the form of actual, consequential and special injuries, including, but not limited to the costs associated with bringing this action and attorney's fees, for which Defendant/Third-Party Plaintiff hereby sues.

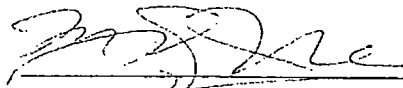
164. Upon information and belief, Dodenhoff's conduct was willful and so outrageous as to warrant an award of punitive damages.

WHEREFORE, the Defendant and Third-Party Plaintiff, Richard M. Buckley, prays for the following relief:

1. That the Plaintiff's Complaint be dismissed in its entirety, and award Richard M. Buckley his attorneys' fees, costs and such further relief as this Court deems just and proper;
2. On the First Counterclaim, for judgment against the Plaintiff in an amount to be determined by a jury, with interest, attorney's fees and costs as determined by this Court;
3. On the Second Counterclaim, for judgment against the Plaintiff in an amount to be determined by a jury, with interest, attorney's fees and costs as determined by this Court;
4. On the Third Counterclaim, for judgment against the Plaintiff in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
5. On the Fourth Counterclaim, for judgment against the Plaintiff in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
6. On the Fifth Counterclaim, for judgment against the Plaintiff in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
7. On the Sixth Counterclaim, for judgment against the Plaintiff in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
8. On the Seventh Counterclaim, for judgment against the Plaintiff in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
9. On the Eighth Counterclaim, a judicial declaration from this Court of the rights, legal status and obligations of the parties and a declaration of the legal rights of the Defendant concerning D&C Builders, Inc.;
10. On the First Third-Party Claim, for judgment against the Third-Party Defendant, Scott Dodenhoff, in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;

11. On the Second Third-Party Claim, for judgment against the Third-Party Defendant, Scott Dodenhoff, in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
12. On the Third Third-Party Claim, for judgment against the Third-Party Defendant, Scott Dodenhoff, in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
13. On the Fourth Third-Party Claim, for judgment against the Third-Party Defendant, Scott Dodenhoff, in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
14. For interest, attorney's fees and reasonable costs; and,
15. For such other and further relief and the Court deems just and proper.

Respectfully submitted,



M. Stokely Holder (SC Bar # 73892)
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Attorneys for Defendant and Third-Party Plaintiff,
Richard M. Buckley

May 15th, 2013
Greenville, SC

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
7th JUDICIAL CIRCUIT
C.A. NO.: 2013-CP-23-1833

D&C Builders, Inc.,
Plaintiff,
Vs.
Richard M. Buckley and
Wells Fargo National Association,
Defendants.

Richard M. Buckley,
Third-Party Plaintiff,
Vs.
Scott Dodenhoff,
Third-Party Defendant.

MOTION TO DISQUALIFY
ATTORNEY AND LAW FIRM

2013 JUN 19 PM 8:48
CLERK OF COURT
GREENVILLE CO SC
PAUL S. WICKENS

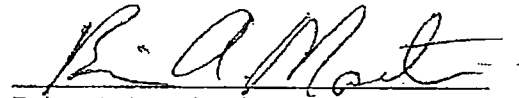
Now comes the Plaintiff, by and through its undersigned counsel, and moves this Court to disqualify attorney M. Stokely Holder and any attorney at the law firm of Kenison, Dudley & Crawford, LLC (hereinafter "Law Firm") from representing Defendant and Third-Party Plaintiff Richard M. Buckley (hereinafter "Defendant Buckley") in this matter based on a material conflict of interest. In support of this motion, Plaintiff offers the attached Affidavit of Scott Dodenhoff and the following information based on such Affidavit:

- (1) Law Firm previously represented Plaintiff extensively as their client from July 1, 2011 through July 31, 2012 in a similar foreclosure of mechanics' lien seeking to recover

\$74,123.40 owed by TMKG, Inc. in Spartanburg County Court of Common Pleas case number 2011-CP-42-414.

- (2) During the course of that representation, Scott Dodenhoff was Law Firm's primary contact for Plaintiff and Scott Dodenhoff on behalf of Plaintiff provided Law Firm information, some of which was confidential, regarding its corporate structure and financial status at that time, in particular the financial impact on Plaintiff of the outcome in that case.
- (3) Plaintiff and Defendant Buckley's interests are materially adverse in this matter.
- (4) Law Firm has filed an Answer, Counterclaims against Plaintiff and Third-Party Complaint against Scott Dodenhoff on behalf of Defendant Buckley alleging among other things, that:
 - a. Plaintiff had an inadequate corporate structure; and
 - b. Plaintiff was insolvent or grossly undercapitalized during Buckley's project; and
 - c. Scott Dodenhoff treated the debts and assets of Plaintiff as his own; and
 - d. Scott Dodenhoff dominated the finances, policies and practices of Plaintiff; and
 - e. Scott Dodenhoff used his control of Plaintiff to commit fraud against Buckley.
- (5) Plaintiff's worked on this project for Defendant Buckley between January 2012 and November 16, 2012 with a Certificate of Occupancy obtained July 31, 2012, the same date the case Law Firm was previously representing Plaintiff on was finally dismissed.
- (6) As a result of these circumstances, these two cases are substantially related in that there is a substantial risk that confidential factual information obtained or that reasonably would have been obtained by Law Firm in the prior representation of Plaintiff would materially advance Defendant Buckley's position in this matter to the disadvantage of Plaintiff.
- (7) Law Firm has undertaken the representation of Defendant Richard M. Buckley without the consent of Plaintiff or a waiver by Plaintiff of the conflict of interest.

For the reasons stated herein, Plaintiff requests this Motion be granted and an Order be issued by the Court disqualifying attorney M. Stokely Holder and any attorney at the law firm of Kenison, Dudley & Crawford, LLC from representing Defendant Richard M. Buckley in this matter.



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

June 19, 2013

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

C.A. NO.: 2013-CP-23-1833

D&C Builders, Inc.,

Plaintiff,

Vs.

Richard M. Buckley and
Wells Fargo National Association,

Defendants.

AFFIDAVIT OF
SCOTT DODENHOFF

2013 JUN 19 PM 8:42

FILED IN THE COURT OF COMMON PLEAS
GREENVILLE CO. S.C.
PAUL B. WILKINSON

Richard M. Buckley,

Third-Party Plaintiff,

Vs.

Scott Dodenhoff,

Third-Party Defendant.

PERSONALLY appeared before me, Scott Dodenhoff who, being duly sworn, deposes and states:

1. My name is Scott Dodenhoff and I am a citizen and resident of Greenville County, South Carolina.
2. I am a shareholder, director and Vice-President of the above named Plaintiff, D&C Builders, Inc. and am authorized to conduct business on behalf of the Company.
3. D&C Builders, Inc. objects to the attorney M. Stokely Holder and the law firm of Kenison, Dudley & Crawford, LLC representing the Defendant and Third-Party Plaintiff, Richard M. Buckley in this matter based on the following information in this Affidavit.
4. On July 1, 2011, I retained the law firm of Kenison, Dudley & Crawford, LLC to represent D&C Builders, Inc. with regard to an outstanding debt owed by TMKG, Inc. Attorneys John T. Crawford, Jr. and Townes Boyd Johnson were the attorneys from this firm that represented D&C Builders, Inc. in this matter.

5. The firm's representation of D&C Builders, Inc. against TMKG, Inc. involved filing a Summons & Complaint, a Reply to the Counterclaim asserted by TMKG, Inc., a Motion to Compel, a Motion for Summary Judgment, defending TMKG's Motion for Summary Judgment, two (2) Summary Judgment hearings and extensive settlement negotiations.
6. The case against TMKG, Inc. was finally settled and was dismissed on July 31, 2012.
7. I was the sole contact on behalf of D&C Builders, Inc. with Attorneys Crawford and/or Johnson during the entire representation by Kenison, Dudley & Crawford, LLC in this matter.
8. During this representation, I met with Attorneys Crawford and/or Johnson on multiple occasions at their office and engaged in extensive communications with them over the telephone and by e-mail.
9. As the matter against TMKG, Inc. involved a claim by D&C Builders, Inc. as a corporate entity, throughout the course of the representation, I provided information, some of which I believe to be confidential information not available to the public, to Attorneys Crawford and/or Johnson regarding the corporate structure of D&C Builders, Inc., including shareholders, directors, officers, as well as information about the ongoing operations of D&C Builders, Inc. and authorized representatives of D&C Builders, Inc..
10. As the matter against TMKG, Inc. specifically involved the collection of an outstanding debt as well as the additional legal fees being incurred in pursuit of that debt, the subject of the finances of D&C Builders, Inc. and the impact of the outcome of the case on those finances was a common topic of conversation between myself and the Attorneys Crawford and/or Johnson.
11. During those conversations with Attorneys Crawford and/or Johnson, I provided information which I believe to be confidential information, to Attorneys Crawford and/or Johnson about the finances of D&C Builders, Inc., the impact the outcome of the case would have on those finances as well as other existing ongoing projects unrelated to that case and the impact of those projects on the financial situation of D&C Builders, Inc.
12. In the course of this representation by Attorneys Crawford and/or Johnson, I provided them information, some of which I believe to be confidential information not available to the public, related to my authority as a representative of D&C Builders, Inc. as well as my actions as an authorized representative of D&C Builders, Inc. and my actions taken in that capacity regarding the existing case against TMKG, Inc. as well as other ongoing operations of D&C Builders, Inc. at that time.
13. The current case of D&C Builders, Inc. against Defendant Richard M. Buckley arises out of what was an ongoing operation of D&C Builders, Inc. during the representation by Attorneys Crawford and/or Johnson of D&C Builders, Inc. against TMKG, Inc.

14. I began discussions on behalf of D&C Builders, Inc. with Defendant Richard M. Buckley and his son Matt Buckley in December of 2011 and entered into an agreement with Defendant Buckley on or about January 4, 2012 to renovate Defendant Buckley's home located at 105 Cammer Ave., Greenville, South Carolina.
15. Construction of the renovations took place between February 5, 2012 and November 16, 2012. The Summary Judgment hearings against TMKG, Inc. took place on March 12, 2012 and April 19, 2012. Extensive settlement discussions took place between April 19, 2012 and the case being dismissed on July 31, 2012.
16. A Certificate of Occupancy for the renovations at Defendant Buckley's home was obtained on July 31, 2012, the same day that the matter against TMKG, Inc. was finally dismissed.
17. While working on the project for Defendant Buckley and in the course of casual conversations with Defendant Buckley and/or his son, I discussed the circumstances of the ongoing litigation against TMKG, Inc. and that the firm of Kenison, Dudley & Crawford, LLC was representing D&C Builders, Inc. in that matter.
18. When Defendant Buckley failed to pay the balance due for the renovations and D&C Builders, Inc. was forced to file this foreclosure action, Defendant Buckley apparently sought out the firm of Kenison, Dudley & Crawford, LLC to represent him in this matter.
19. Kenison, Dudley & Crawford, LLC by Attorney M. Stokely Holder have apparently undertaken the representation of Defendant Buckley in this matter.
20. On behalf of Defendant Buckley, Attorney Holder filed a thirty-seven (37) page Answer, Counterclaims and Third-Party Claim that includes thirteen (13) defenses and eight (8) counterclaims against D&C Builders, Inc. including Breach of Contract, Negligence, Conversion, Fraud, Negligent Misrepresentation, Constructive Fraud, Slander of Title and seeking a Declaratory Judgment:
 - a. That D&C Builders, Inc. "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."
 - b. That D&C Builders, Inc. "was insolvent prior to and/or during construction of the Project."
 - c. That D&C Builders, Inc. "was grossly undercapitalized prior to and during construction of the Project."
 - d. That I, Scott Dodenhoff, treated the debts and assets of D&C Builders, Inc. as my personal debts and assets.
 - e. That I, Scott Dodenhoff, have such control of D&C Builders, Inc. that I dominated the finances, policies and business practices such that D&C Builders, Inc. is operated as a façade for my own personal operations.
 - f. And that I, Scott Dodenhoff, used such control of D&C Builders, Inc. to commit fraud against Defendant Buckley.

21. On behalf of Defendant Buckley, Attorney Holder has filed a Motion to Dismiss and has submitted Interrogatories to D&C Builders, Inc., seeking among other things information about the corporate structure of D&C Builders, Inc., information about the financial status of D&C Builders, Inc. during the project, and all jobs D&C Builders, Inc. has provided construction related services since January 1, 2011.
22. On behalf of Defendant Buckley, Attorney Holder has submitted Requests for Production of Documents to D&C Builders, Inc., seeking among other things documents showing the authority and authorization for individuals to act on behalf of D&C Builders, Inc., documents related to the corporate structure of D&C Builders, Inc., documents related to the financial status of D&C Builders, Inc. during the period of the project and bank account records of D&C Builders, Inc. during the project.
23. On behalf of Defendant Buckley, Attorney Holder has submitted Requests for Admission, requesting D&C Builders, Inc. admit, among other things, that D&C Builders, Inc. does not have proper accounting records related to this project and does not have appropriate tax records related to this project.
24. On behalf of Defendant Buckley, Attorney Holder has submitted similar Interrogatories, Requests for Production of Documents and Requests for Admission to me individually.
25. Based on the financial aspects of both cases, the financial implications on D&C Builders, Inc. of both cases, the issues involved and the fact that the circumstances of the current case was developing and likely discussed with Attorneys Crawford and/or Johnson during the prior case, I believe that these two matters are substantially related to each other.
26. Defendant Buckley's interests in the current case are certainly adverse to those of the Plaintiff D&C Builders, Inc.
27. It appears to me that Attorney Holder is using, intends to use, or may be able to use information, including confidential information, obtained or provided to Attorneys Crawford and/or Johnson in their prior representation of D&C Builders, Inc. against and to the disadvantage of D&C Builders, Inc. in furthering the current representation of Defendant Buckley.
28. It appears to be very likely that Attorney Holder and/or other attorneys at the firm of Kenison, Dudley & Crawford, LLC have already provided, will provide, or may provide information, including confidential information, obtained in the prior representation of D&C Builders, Inc. to Defendant Buckley in furtherance of their representation of Defendant Buckley in this matter.
29. D&C Builders, Inc. was not requested to consent to Kenison, Dudley & Crawford, LLC representing Defendant Buckley in this matter and does not consent.

30. I believe that Kenison, Dudley & Crawford, LLC has a material conflict of interest in representing Defendant Buckley in this matter based on information they did obtain or reasonably could have obtained in the prior representation of D&C Builders, Inc. against TMKG, Inc..

31. I do not believe the attorneys at Kenison, Dudley & Crawford, LLC can maintain the confidence of information provided to them in the prior representation of D&C Builders, Inc. and pursue the interests of Defendant Buckley at the same time without using information obtained in the prior representation to the disadvantage of D&C Builders, Inc.

32. I have not been asked to waive this conflict, nor do I agree to waive this conflict.



Scott Dodenhoff

SWORN AND SUBSCRIBED to me this 12th day of June, 2013.



Notary Public

State of South Carolina

County of Greenville

My commission expires: 12/05/2015

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE FAMILY COURT

D & C BUILDERS, INC.
PLAINTIFFS.

Transcript of Record
2013-CP-23-1833

-VS-

RICHARD BUCKLEY, ET. AL.
DEFENDANT.

June 20, 2013
Greenville, South Carolina

B E F O R E:

HONORABLE LETITIA VERDIN, Judge.

A P P E A R A N C E S:

BRIAN MARTIN, ESQ
Attorney for the Plaintiffs

LEE PRICKET
Attorney for the Defendants

TRACY MCBRIDE
COURT REPORTER

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6 Certificate of the Reporter

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There were no exhibits.

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1 THE COURT: This is the D&C Builders versus Richard Buckley; is that correct?

2 MR. MARTIN: Yes.

3 THE COURT: And this is Defendant Buckley's motion to dismiss.

4 MR. MARTIN: Your Honor, I believe there is an issue of a conflict of interest
5 that needs to be addressed before you move forward with the motion to dismiss.

6 THE COURT: All right.

7 MR. MARTIN: I have, this morning, filed a motion to disqualify Stokely Holder
8 from the Dudley Law Firm from representing Mr. Buckley in the matter. This law firm
9 represented my client in another similar matter and was representing him in that matter
10 during the time that he was doing construction on Mr. Buckley's house; and their
11 representation--during that time my client provided them significant amount of
12 information in the course of the representation that he believes is capable of being used
13 against him in this matter and develops a conflict of interest. The answer that the law
14 firm has filed on behalf of Mr. Buckley includes allegations, counterclaims and third-
15 parties claims against the law office alleging that D&C Builders has an inadequate
16 corporate structure and was underfunded and under-capitalized during the time that he
17 was doing the construction for Mr. Buckley; that individually Mr. Dudley's law office
18 had such control over the company that he was acting in his own interest and converting
19 Mr. Buckley's money; all of these things I believe lead back to information-- that
20 financial status information related to the prior case that they were representing Mr.
21 Buckley on. May I hand a copy of the motion up?

22 THE COURT: Yes.

23 MR. MARTIN: I have also included a printout from the Spartanburg County
24 public index that shows the representation in that manner and the extent of that. The law
72 25 firm represented my client for over a year including filing mechanics liens, filing the

1 complaint, two summary judgment hearings and extensive settlement negotiations in
2 attempting to recover seventy-five thousand dollars (\$75,000) for the company at that
3 time; and again their representation of him in that matter specifically overlaps during the
4 time that he was working on and building the construction for Mr. Buckley's home. And
5 we believe there's a material conflict of interest that would disqualify them from moving
6 forward.

7 THE COURT: Thank you.

8 You've got notice of the motion today?

9 MR. PRICKET: Yes, Your Honor. And I would say to you if you would like to
10 continue this matter for you to be able to look into it a little bit further I don't have any
11 objection to doing that.

12 MR. MARTIN: I have no objection to that as well. I have spoken with Mr.
13 Holder about it and Mr. Crawford, who was the partners representing my client, and both
14 of them indicated to me that they did not believe that there was a conflict. I was
15 expecting Mr. Holder to be here this morning until I noticed Mr. Pricket. I understand he
16 probably has no information regarding this but I have no objection to continuing this
17 motion to dismiss until the hearing on the disqualification can be heard. I would ask that
18 if it is continued that the, Court, also enter an order extending the time to respond to
19 interrogatory requests to produce and request to admit that they have submitted for us to
20 answer in this case as well.

21 THE COURT: All right, yes, sir?

22 MR. PRICKET: Your Honor, he's correct; I have got very limited knowledge
23 about the prior representation. I wasn't really involved in that. From talking to the guys
24 though my understanding is this case was resolved well I think a year or so ago. It's
25 done; now there is no current act of representation with D&C and I guess there's no 200

1 conflict.

2 THE COURT: Well I tell you what. I'm going to continue this motion. Of
3 course the motion to disqualify your firm was not even before me today and I know you
4 didn't get any notice of that. So I have to continue that one for you to have adequate time
5 to respond; and I think it would be more productive if we heard both of those motions
6 together. We can set it fairly quickly; but I do want you to be able to look at your record
7 and maybe have some more solid dates about it.

8 MR. PRICKET: And that probably is the best path going forward. Like I said we
9 certainly like to get it set as soon as possible the next time.

10 THE COURT: Well maybe--we want to set it as soon as possible but it will not
11 be in front of me because I don't have non jury hearings for the rest of the year; but--so I
12 know it will not be in the front of me but it can be set fairly soon is what--early July; and
13 I'll extend the time to respond until after that hearing. We'll just say until after that
14 hearing because that would be about three weeks if it's in early July if my dates are right
15 in my head. So---

16 MR. MARTIN: I just want to be sure that the conflict of interest is addressed
17 before we moved forward with any of these actions.

18 THE COURT: I understand. We'll reset the hearing and y'all will get notice
19 fairly soon but be looking for that on email.

20 MR. PRICKET: Thank you, Your Honor.

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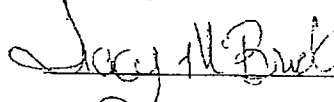
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1 I, Tracy McBride, Court Reporter for the 13th Judicial Circuit hereby certify that
2 the previous 5 pages are true accurate and complete to the best of my abilities including
3 all exhibits, if any, in the case that took place in Greenville County, South Carolina.

4 I further certify that I am not related to any of the parties in this case nor am I
5 interested in the outcome of the hearing.

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12 Sincerely,

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14 Tracy McBride

15 Court Reporter
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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

D&C Builders, Inc.,)
)
Plaintiff,)

C.A. No.: 2013-CP-23-1833

vs.)

Richard M. Buckley and)
Wells Fargo National Association,)
)
Defendants;)

DEFENDANT RICHARD M. BUCKLEY'S
AMENDED
ANSWER, COUNTERCLAIMS AND
THIRD-PARTY CLAIM

Richard M. Buckley,)
)
Third-Party Plaintiff,)

vs.)

Scott Dodenhoff,)
)
Third-Party Defendant.)

TO: H. STEWART JAMES, ESQ., ATTORNEY FOR PLAINTIFF, D&C BUILDERS,
INC.:

Defendant and Third-Party Plaintiff, Richard M. Buckley ("Defendant" and/or
"Third-Party Plaintiff"), subject to his Motion to Dismiss filed contemporaneously
herewith, hereby answers the Complaint of Plaintiff, D&C Builders, Inc. ("Plaintiff"), by
denying each and every allegation not hereinafter specifically admitted, demanding
strict proof thereof, and further responds as follows:

1. Upon information and belief, Defendant admits the allegations in paragraph 1 of the Complaint.

2. Defendant admits the allegations of paragraph 2 of the Complaint.

3. Upon information and belief, the Defendant admits only so much of the allegations contained in paragraph 3 of the Complaint in that the Defendant owns property located at 105 Cammer Avenue in the County of Greenville, State of South Carolina, and has mortgaged such property to Wells Fargo Bank. The Defendant craves reference to the records in the Greenville County Register of Deeds Office regarding any further description thereof, such that any allegation contained in paragraph 3 of the Complaint that contradicts said records is hereby denied and strict proof demanded thereof.

4. Upon information and belief, the Defendant admits only so much of the allegations contained in paragraph 4 of the Complaint in that the Defendant owns property located at 105 Cammer Avenue in the County of Greenville, State of South Carolina. The Defendant craves reference to the records in the Greenville County Register of Deeds Office regarding any further description thereof, such that any allegation contained in paragraph 4 of the Complaint that contradicts said records is hereby denied and strict proof demanded thereof.

5. The Defendant denies the allegations of paragraph 5 of the Complaint and demands strict proof thereof. Further, certain allegations of paragraph 5 of the

Complaint contain a legal conclusion such that an answer thereto is not required of the Defendant; however, to the extent an answer is required of the Defendant, the Defendant hereby denies same and demands strict proof thereof.

6. The Defendant denies the allegations of paragraph 6 of the Complaint and demands strict proof thereof. Further, certain allegations of paragraph 6 of the Complaint contain a legal conclusion such that an answer thereto is not required of the Defendant; however, to the extent an answer is required of the Defendant, the Defendant hereby denies same and demands strict proof thereof. The Defendant craves reference to the records in the Greenville County Register of Deeds Office, such that any allegation contained in paragraph 6 of the Complaint that contradicts said records is hereby denied and strict proof demanded thereof.

7. The Defendant denies the allegations of paragraph 7 of the Complaint and demands strict proof thereof. Further, certain allegations of paragraph 7 of the Complaint contain a legal conclusion such that an answer thereto is not required of the Defendant; however, to the extent an answer is required of the Defendant, the Defendant hereby denies same and demands strict proof thereof.

8. The Defendant craves reference to the records in the Greenville County Register of Deeds Office, such that any allegation contained in paragraph 8 of the Complaint that contradicts said records is hereby denied and strict proof demanded thereof. Further, the Defendant denies the remaining allegations of paragraph 8 of the

Complaint and demands strict proof thereof. Further, certain allegations of paragraph 8 of the Complaint contain a legal conclusion such that an answer thereto is not required of the Defendant; however, to the extent an answer is required of the Defendant, the Defendant hereby denies same and demands strict proof thereof. Further still, upon information and belief, the sale of Plaintiff's Mechanic's Lien is not an appropriate remedy for any action brought pursuant to S.C. Code Ann. § 29-5-10, *et seq.*

9. The Defendant denies the allegations of paragraph 9 of the Complaint and demands strict proof thereof. Further, certain allegations of paragraph 9 of the Complaint contain a legal conclusion such that an answer thereto is not required of the Defendant; however, to the extent an answer is required of the Defendant, the Defendant hereby denies same and demands strict proof thereof.

10. The Defendant denies the allegations of paragraph 10 of the Complaint and demands strict proof thereof.

11. The Defendant denies the allegations and prayer(s) for relief found in the "WHEREFORE" section of Plaintiff's Complaint and demands strict proof thereof.

FOR A SECOND DEFENSE
(Failure to state a claim or cause of action)

12. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

13. The Defendant alleges that the complaint fails to sufficiently constitute a cause of action against this answering Defendant or fails to state facts upon which a claim can be based.

FOR A THIRD DEFENSE
(Unclean Hands)

14. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

15. The Defendant alleges that the Plaintiff's action is barred under the equitable doctrine of unclean hands.

FOR A FOURTH DEFENSE
(Plaintiff bad faith)

16. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

17. The Defendant alleges that the Plaintiff's bad faith bars its claims or that any damages must be reduced as a result of Plaintiff's comparative bad faith.

FOR A FIFTH DEFENSE
(Laches, Estoppel and/or Waiver)

18. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

19. The Defendant alleges that the Plaintiff's claims are barred by the doctrines of laches, waiver and/or estoppel.

FOR A SIXTH DEFENSE
(Intervening Factors and/or Acts)

20. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

21. The Defendant alleges that the Plaintiff's claims are barred by intervening factors and/or intervening acts and wrongdoing of parties other than Defendant, which were the actual and proximate cause of Plaintiffs' alleged damages.

FOR A SEVENTH DEFENSE
(Failure to Mitigate)

22. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

23. The Defendant alleges that Plaintiff's claims are barred due to the Plaintiff's failure to mitigate their damages.

FOR AN EIGHTH DEFENSE
(No Proximate Cause)

24. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

25. The Defendant alleges that Plaintiff's claims are barred due to the lack of proximate cause between Plaintiff's alleged damages and the actions/inactions of the Defendant.

FOR A NINTH DEFENSE
(Defendants obligations, if any, void or excused)

26. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

27. The Defendant would allege that, to the extent Plaintiff alleges Defendant had any obligation as to which full performance has not been rendered or excused, that obligation did not exist or was based upon acts or omissions that were void or otherwise extinguished.

FOR A TENTH DEFENSE
(Failure of condition precedent to performance)

28. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

29. The Defendant would allege that, to the extent Plaintiff alleges Defendant had any obligation or duty as to which full performance has not been rendered or excused, not all conditions precedent to said obligations or duties occurred.

FOR AN ELEVENTH DEFENSE
(Offset)

30. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

31. The Defendant would allege that, to the extent Plaintiff alleges Defendant had any obligation or duty as to which full performance has not been rendered or excused, the Defendant is due an offset equal to a portion of, all, or more of the debt alleged by the Plaintiff.

FOR AN ELEVENTH DEFENSE
(Plaintiff's Negligence)

32. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

33. The Defendant alleges that Plaintiff's claims are barred in whole or in part due to Plaintiff's negligent work.

FOR A TWELFTH DEFENSE
(Plaintiff's Breach of Contract)

34. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

35. The Defendant would allege that, to the extent Plaintiff alleges the existence of valid enforceable contract, Plaintiff's claims are barred in whole or in part due to Plaintiff's breach of the contract.

FOR A THIRTEENTH DEFENSE
(Right to add additional affirmative defenses)

36. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

37. The Defendant alleges that because the complaint is couched in conclusionary terms, answering Defendant cannot fully anticipate all affirmative defenses that may be applicable to the within action. Accordingly, the right to assert additional affirmative defenses, if and to the extent that such affirmative defenses are applicable, is hereby reserved.

FOR A FOURTEENTH DEFENSE
BY WAY OF COUNTERCLAIMS & THIRD-PARTY CLAIM

38. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

39. Defendant and Third-Party Plaintiff is a citizen and resident of the State of South Carolina, and owns property in Greenville County, State of South Carolina with an address of 105 Cammer Avenue (the "Property").

40. Upon information and belief, the Plaintiff is a corporation existing and doing business in Greenville County, State of South Carolina.

41. Upon information and belief, the Third-Party Defendant, Scott Dodenhoff ("Dodenhoff"), is a citizen and resident of the County of Greenville and State of South Carolina.

42. The Property which is at the center of this dispute is located in Greenville County, South Carolina.

43. Venue and jurisdiction are proper in this Court.

FACTUAL BACKGROUND

44. The Plaintiff was contacted in late 2011 by Matt Buckley, the son of Defendant, whereby the Plaintiff was informed of Defendant's desire to improve the residence on the Property.

45. Dodenhoff was the party who dealt primarily with the Defendant and the representatives of Defendant- Defendant's son, Matt Buckley, and Defendant's daughter-in-law, Pamela Burns-Byers Buckley, regarding all aspects of the Project at issue.

46. Prior to the facts giving rise to the claims herein, Scott Dodenhoff and Matt Buckley were lifelong friends.

47. Upon first contacting Scott Dodenhoff, Matt Buckley informed Dodenhoff of the facts giving rise to the Defendant's desire to improve the Property.

48. As communicated to Dodenhoff in late 2011, the facts giving rise to the Defendant's desire to improve the Property were as follows:

- (a) the Property had been the location of Defendant's and Defendant's wife's primary residence for the past forty-four (44) years at that time;
- (b) the Defendant was at that time, and remains so today, elderly and in declining health (82 years old);
- (c) the Defendant's wife ("Frances Buckley") was elderly and in poor health;
- (d) the Defendant was the sole caretaker for his elderly and sick wife;
- (e) the Defendant's wife desired to spend her remaining days with the Defendant at their residence on the Property;
- (f) the Defendant desired for his wife to spend her remaining days alongside him at their residence on the Property;
- (g) the Defendant felt he was no longer physically able to care for his wife by himself at their residence on the Property and he needed help in order to satisfy their joint desire to have her spend her remaining days at their residence together;
- (h) the Defendant contacted his son and daughter-in-law, Matt and Pamela Buckley, explained the above to them and reluctantly asked for their assistance;
- (i) the Defendant asked Matt and Pamela Buckley if they would agree to move their family of six (6) from Charleston, South Carolina to the residence on the Property in order to help the Defendant and Frances Buckley through the remaining days of their lives (the Defendant, his wife and the family of Matt and Pamela Buckley, collectively hereinafter: the "Buckleys");
- (j) the Defendant told Matt and Pamela Buckley that he would be willing to obtain a loan against the remaining equity in the Property in order to construct improvements thereon to allow the space necessary for Matt and Pamela Buckley's family to move in; and

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

49. In 2011, the Defendant initiated contact with his bank, Defendant Wells Fargo Bank ("Wells Fargo"), to determine the maximum loan amount he could obtain against the equity in the Property in order to use such loan monies for the construction of improvements thereon.

50. The Defendant received confirmation from Wells Fargo that Wells Fargo would lend \$78,000.00 to Defendant via a home equity line of credit.

51. Matt Buckley contacted Dodenhoff, Matt's childhood friend, to determine if Dodenhoff would agree to make certain improvements to the residence on the Property according to the plans and specifications of the Defendant and under the facts as aforesaid.

52. Matt Buckley explained to Dodenhoff that the maximum amount of money that could be spent for the improvements was the \$78,000.00 in loan funds that the Defendant had been approved for.

53. In late 2011, Dodenhoff told the Buckleys that Plaintiff could construct the Project for that maximum possible amount under a cost plus 10% basis.

54. In or about January 2012, Defendant entered into an agreement with Plaintiff via Dodenhoff (the "Contract") whereby the Plaintiff agreed as follows:

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

- b) to construct the Project on a cost-plus 10% basis with a guaranteed maximum possible amount of \$78,000.00; and
- c) to construct the Project by the end of July 2012.

55. Upon the Plaintiff's initiation of work on the Project in January 2012, Dodenhoff physically appeared on-site to supervise and coordinate the work on the Project pursuant to his obligations as the purported general contractor for the Project.

56. As construction on the Project progressed beyond January 2012, Dodenhoff repeatedly failed to physically appear on-site at the Project to supervise and/or coordinate the work on the Project.

57. Upon information and belief, the Plaintiff hired unqualified and unlicensed contractors to perform work on the Project.

58. After construction was initiated on the Project, the Plaintiff would not bill the Defendant for consistent periods of time.

59. As the deadline for the completion of the Project approached in the summer of 2012, the Plaintiff began to send more billing information to the Defendant.

60. The bills that Plaintiff ultimately sent to the Defendant were outdated, not truthful representations of the work completed and not in accordance with the Contract.

61. The cumulative amount of the alleged debt represented by Plaintiff in all of the bills ultimately produced by Plaintiff to Defendant was in excess of the Contract amount.

62. The Plaintiff and the Defendant did not agree to any amendment to the amount or nature of the Contract, such that any debt alleged by Plaintiff in excess of the guaranteed maximum possible amount of \$78,000.00 is unjustified.

63. After construction was initiated on the Project, and amid the Buckleys' concerns regarding the quality and oversight of the work being performed, together with the billing practices of Plaintiff, the Buckleys made attempts to contact Plaintiff to determine the status of construction and to discuss the Buckleys' issues with Plaintiff's construction of the Project, including the quality, conformity to the Defendant's design and specifications, evidence of costs, and timeliness of construction, many times to no avail as Dodenhoff was rarely in town and rarely on the Project site during the majority of Plaintiff's construction of the Project.

64. Despite being provided adequate notice and opportunity to cure the various construction defects plainly apparent on the Project, the Plaintiff has failed to do so.

65. Despite being provided adequate notice and opportunity to produce the backup information to support the costs Plaintiff has represented as being incurred for the Project, the Plaintiff has failed to do so.

66. Despite being provided adequate notice and opportunity to cure the various work of Plaintiff which is not in conformance with the plans and specifications for the Project, the Plaintiff has failed to do so.

- (d) Plaintiff failed to construct the residence pursuant to applicable building codes, norms, customs, standards and laws, including, without limitation, Plaintiff's hiring and employment of unqualified, unskilled, and/or illegal laborers;
- (e) Despite requests by the Defendant and despite the inherent obligations of Plaintiff as a licensed contractor, Plaintiff failed to construct the residence free of defective and negligent labor and materials as evidenced by, without limitation, the following:
 - (i) improper, defective and/or inadequate waterproofing;
 - (ii) improper, defective and/or inadequate flooring;
 - (iii) improper, defective and/or inadequate cabinetry;
 - (iv) improper, defective and/or inadequate framing of structure;
 - (v) improper, defective and/or inadequate molding and trim work;
 - (vi) improper, defective and/or inadequate painting;
 - (vii) improper, defective and/or inadequate drywall;
 - (viii) improper, defective and/or inadequate electrical system(s);
 - (ix) improper, defective and/or inadequate doors;
 - (x) improper, defective and/or inadequate cleaning of interior and exterior of residence;
 - (xi) improper, defective and/or inadequate phone line(s);
 - (xii) improper, defective and/or inadequate HVAC system;
 - (xiii) improper, defective and/or inadequate doorframes;
 - (xiv) improper, defective and/or inadequate bathtubs;
 - (xv) improper, defective and/or inadequate toilets;

- (xvi) improper, defective and/or inadequate staining;
- (xvii) improper, defective and/or inadequate stairs;
- (xviii) improper, defective and/or inadequate insulation;
- (xix) improper, defective and/or inadequate windows.

75. Plaintiff's negligence, as alleged above, directly and proximately caused resulting damage to Defendant, including damage to materials and other work furnished outside the scope of Plaintiff's work that were supplied by other contractors, thus causing Defendant to incur damages.

76. Therefore, Defendant is entitled to an award of actual, consequential, special and punitive damages in an amount to be determined by a jury, which are hereby prayed for, together with interest, costs, and attorneys fees.

FOR A THIRD COUNTERCLAIM
(Conversion)

77. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

78. Upon information and belief, the money Defendant paid Plaintiff was placed in trust of Plaintiff to be used solely to satisfy the costs of the Project.

79. Upon information and belief, Plaintiff converted Defendant's accounts to his own use and exercised ownership of the accounts.

80. Plaintiff's use of the Defendant's payments was without express or implied permission from the Defendant and was a breach of Plaintiff's fiduciary obligation to Defendant.

81. Plaintiff's unauthorized exercise of dominion over the accounts was to the exclusion of the Defendant's rights of ownership of the accounts and violated the trust created by virtue of the representations and declarations that labor was completed and materials paid for as certified by payments processed and submitted by Plaintiff.

82. As a direct and proximate result of Plaintiff's conduct, Defendant has suffered actual, consequential and special injuries, including costs and attorneys' fees associated with prosecuting this litigation, for which Defendant hereby sues.

83. Upon information and belief, Plaintiff's conduct was willful and so outrageous as to warrant an award of punitive damages.

FOR A FOURTH COUNTERCLAIM
(Fraud)

84. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

85. Upon information and belief, Plaintiff knew or should have known of the false representations and statements to Defendant on several occasions including, but not limited to, the false affirmations and representations on pay applications, concerning the amount of Plaintiff's payables that were due and owing ("Fraudulent Payables").

These Fraudulent Payables misrepresented and falsely stated that certain labor and materials had been furnished for the Project.

86. Upon information and belief, Plaintiff also made representations and statements on several occasions concerning the amount of Plaintiff's payables that were due and owing which Plaintiff knew or should have known were false and misleading, thus being the direct and proximate cause of such Fraudulent Payables.

87. Upon information and belief, the Fraudulent Payables did not represent legitimate payables of Plaintiff and were material to the transactions between Plaintiff and the Defendant.

88. Upon information and belief, Plaintiff either knew or should have known of the fraudulent nature of the misrepresentations concerning the amount of Plaintiff's payables.

89. Upon information and belief, Plaintiff intended for the Defendant to act in response to the Fraudulent Payables and directed such Fraudulent Payables to his own personal use.

90. The Defendant were unaware of the fraudulent nature of the Fraudulent Payables and believed them to be legitimate payables of Plaintiff and did in fact rely upon Plaintiff's representations.

91. As a direct and proximate result of Plaintiff's conduct, the Defendant has suffered actual, consequential and special injuries, including, but not limited to costs

associated with bringing this action and attorney's fees, for which Defendant hereby sues.

92. Upon information and belief, Plaintiff's conduct was willful and so outrageous as to warrant an award of punitive damages.

**FOR A FIFTH COUNTERCLAIM
(Negligent Misrepresentation)**

93. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

94. Plaintiff was in the business of residential construction. In the course of performing such residential construction services on the Project, Plaintiff made implicit and/or explicit representations to Defendant with the intent that the Defendant would rely thereon.

95. Upon information and belief, Plaintiff knew or should have known of the numerous false representations concerning the status of accounts, payments made on accounts and the invalidity of payables charged to the Defendant. Such misrepresentations caused Plaintiff to breach its Fiduciary Duty to Defendant.

96. Upon information and belief, Plaintiff had a pecuniary interest in making these misrepresentations.

97. Plaintiff had a duty to see that truthful and accurate information was communicated to the Defendant.

98. Plaintiff breached its duty of care to the Defendant by failing to exercise due care.

99. The Defendant justifiably relied upon Plaintiff to communicate truthful information and justifiably relied upon Plaintiff's representations.

100. As a direct and proximate result of the Defendant's reliance upon Plaintiff's misrepresentations, Defendant has suffered a pecuniary loss in the form of actual, consequential and special injuries, including, but not limited to the costs associated with bringing this action and attorney's fees, for which the Defendant hereby sues.

101. Upon information and belief, Plaintiff's conduct was willful and so outrageous as to warrant an award of punitive damages.

FOR A SIXTH COUNTERCLAIM
(Constructive Fraud)

102. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

103. Plaintiff impliedly and/or expressly represented, or misrepresented, to the Defendant that certain labor and materials had been furnished for the Project and that Plaintiff incurred certain costs for the same.

104. Said misrepresentations were false in that construction of the Project was not completed to the same level represented by Plaintiff, that certain labor and materials

were not furnished by Plaintiff and that certain costs for the same were not incurred by Plaintiff.

105. Plaintiff knew or should have known of the falsity of the representations.

106. Said representations were material in that the representations induced the Defendant to disburse monies for labor and materials that were not provided to the Project and/or for costs not incurred by Plaintiff for the same.

107. Plaintiff fully intended that the false representations be acted upon by Defendant.

108. The Defendant was completely ignorant of the falsity of the representations.

109. The Defendant reasonably relied on these representations and had a right to rely on the representations.

110. As a direct and proximate result of the false representations made by Plaintiff, Defendant has suffered a pecuniary loss in the form of actual, consequential and special injuries, including, but not limited to the costs associated with bringing this action and attorney's fees, for which the Defendant hereby sues.

FOR A SEVENTH COUNTERCLAIM
(Slander of Title)

111. The Defendant incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

112. By the filing by Plaintiff in the public records of Greenville County of its purported Mechanics Lien together with the Plaintiff's filing in the public records of Greenville County of the underlying lawsuit to foreclose on its purported Mechanics Lien, the Plaintiff has published a statement affecting the Defendant's title to the Property.

113. Said statements published by the Plaintiff within its purported Mechanics Lien and its purported Mechanics Lien foreclosure lawsuit are false, derogatory to Defendant's title to the Property and were made with malice.

114. As a direct and proximate result of the false representations published by Plaintiff in the public records of Greenville County, Defendant has suffered a pecuniary loss in the form of actual, consequential and special injuries, including, but not limited to the costs associated with bringing this action and attorney's fees, for which the Defendant hereby sues.

**FOR A FIRST THIRD-PARTY CLAIM
(Fraud)**

115. The Defendant/Third-Party Plaintiff incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

116. Upon information and belief, Dodenhoff knew or should have known of the false representations and statements to Defendant/Third-Party Plaintiff on several occasions including, but not limited to, the false affirmations and representations on pay

applications, concerning the amount of the payables that were purportedly due and owing on the Project ("Fraudulent Payables"). These Fraudulent Payables misrepresented and falsely stated that certain labor and materials had been furnished for the Project.

117. Upon information and belief, Dodenhoff also made representations and statements on several occasions concerning the amount of payables that were purportedly due and owing which Dodenhoff knew or should have known were false and misleading, thus being the direct and proximate cause of such Fraudulent Payables.

118. Upon information and belief, the Fraudulent Payables did not represent legitimate payables on the Project and were material to the transactions between Plaintiff and Defendant/Third-Party Plaintiff.

119. Upon information and belief, Dodenhoff either knew or should have known of the fraudulent nature of the misrepresentations concerning the amount of payables.

120. Upon information and belief, Dodenhoff intended for the Defendant/Third-Party Plaintiff to act in response to the Fraudulent Payables and Dodenhoff directed such Fraudulent Payables to his own personal use.

121. The Defendant/Third-Party Plaintiff was unaware of the fraudulent nature of the Fraudulent Payables and believed them to be legitimate payables and did in fact rely upon Dodenhoff's representations.

122. As a direct and proximate result of Dodenhoff's conduct, the Defendant/Third-Party Plaintiff has suffered actual, consequential and special injuries, including, but not limited to costs associated with bringing this action and attorney's fees, for which Defendant/Third-Party Plaintiff hereby sues.

123. Upon information and belief, Dodenhoff's conduct was willful and so outrageous as to warrant an award of punitive damages.

FOR A SECOND THIRD-PARTY CLAIM
(Constructive Fraud)

124. The Defendant/Third-Party Plaintiff incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

125. Dodenhoff impliedly and/or expressly represented, or misrepresented, to the Defendant/Third-Party Plaintiff that certain labor and materials had been furnished for the Project and that Dodenhoff incurred certain costs for the same.

126. Said misrepresentations were false in that construction of the Project was not completed to the same level represented by Dodenhoff, that certain labor and materials were not furnished by Dodenhoff and that certain costs for the same were not incurred by Dodenhoff.

127. Dodenhoff knew or should have known of the falsity of the representations.

128. Said representations were material in that the representations induced monies to be disbursed for labor and materials that were not provided to the Project and/or for costs not incurred by Dodenhoff for the same.

129. Dodenhoff fully intended that the false representations be acted upon by Defendant/Third-Party Plaintiff.

130. The Defendant/Third-Party Plaintiff was completely ignorant of the falsity of the representations.

131. The Defendant/Third-Party Plaintiff reasonably relied on these representations and had a right to rely on the representations.

132. As a direct and proximate result of the false representations made by Dodenhoff, the Defendant/Third-Party Plaintiff was damaged in that Dodenhoff received proceeds from the Defendant/Third-Party Plaintiff, including the proceeds obtained by Defendant/Third-Party Plaintiff from the aforesaid bank loan, that Dodenhoff was not due and that Defendant/Third-Party Plaintiff did not owe. As such, the Defendant/Third-Party Plaintiff is entitled to an award of actual, consequential, special and punitive damages in an amount to be determined by a jury.

FOR A THIRD THIRD-PARTY CLAIM
(Negligent Misrepresentation)

133. The Defendant/Third-Party Plaintiff incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

134. Dodenhoff was in the business of residential construction. In the course of performing such residential construction services on the Project, Dodenhoff made implicit and/or explicit representations to Defendant/Third-Party Plaintiff with the intent that the Defendant/Third-Party Plaintiff would rely thereon.

135. Upon information and belief, Dodenhoff knew or should have known of the numerous false representations concerning the status of accounts, payments made on accounts and the invalidity of payables charged to the Defendant/Third-Party Plaintiff. Such misrepresentations caused Defendant/Third-Party Plaintiff to breach his Fiduciary Duty to Defendant/Third-Party Plaintiff.

136. Upon information and belief, Dodenhoff had a pecuniary interest in making these misrepresentations.

137. Dodenhoff had a duty to see that truthful and accurate information was communicated to the Defendant/Third-Party Plaintiff.

138. Dodenhoff breached his duty of care to the Defendant/Third-Party Plaintiff by failing to exercise due care.

139. The Defendant/Third-Party Plaintiff justifiably relied upon Dodenhoff to communicate truthful information and justifiably relied upon Dodenhoff's representations.

140. As a direct and proximate result of the Defendant/Third-Party Plaintiff's reliance upon Dodenhoff's misrepresentations, Defendant/Third-Party Plaintiff has suffered a pecuniary loss in the form of actual, consequential and special injuries,

including, but not limited to the costs associated with bringing this action and attorney's fees, for which Defendant/Third-Party Plaintiff hereby sues.

141. Upon information and belief, Dodenhoff's conduct was willful and so outrageous as to warrant an award of punitive damages.

**FOR A FOURTH THIRD-PARTY CLAIM
(Breach of Fiduciary Duty)**

142. The Defendant/Third-Party Plaintiff incorporates herein by reference, and realleges, the allegations of the preceding paragraphs consistent herewith as if fully stated verbatim herein.

143. The payments described herein from Defendant/Third-Party Plaintiff were made for the express purpose of Dodenhoff placing same in trust to be used for the express purposes of paying for certain costs of labor and material provided on the Project upon the Plaintiff actually providing such labor and material and actually incurring the certain costs and to otherwise properly possess, account for, and maintain the funds.

144. The Defendant/Third-Party Plaintiff reposed special confidence in Dodenhoff to act in equity and in good conscience in properly using the monies paid by Defendant/Third-Party Plaintiff such that Dodenhoff was bound to act in good faith and with due regard to the interests of Defendant/Third-Party Plaintiff.

145. Dodenhoff accepted the special confidence placed in him by the Defendant/Third-Party Plaintiff such that he knew or should have know that he was bound to act in good faith as the fiduciary of Defendant/Third-Party Plaintiff.

146. Despite Dodenhoff accepting the fiduciary obligations to place the payments made from Defendant/Third-Party Plaintiff in trust to be used for the express purposes of paying for certain costs of labor and material provided on the Project upon the Plaintiff actually providing such labor and material and actually incurring the certain costs and to otherwise properly possess, account for, and maintain the funds, the Defendant breached its fiduciary obligations by not properly possessing, accounting, maintaining and/or applying the monies paid to him in trust by Defendant/Third-Party Plaintiff.

147. As a direct and proximate result of Dodenhoff's conduct, Defendant/Third-Party Plaintiff has suffered a pecuniary loss in the form of actual, consequential and special injuries, including, but not limited to the costs associated with bringing this action and attorney's fees, for which Defendant/Third-Party Plaintiff hereby sues.

148. Upon information and belief, Dodenhoff's conduct was willful and so outrageous as to warrant an award of punitive damages.

WHEREFORE, the Defendant and Third-Party Plaintiff, Richard M. Buckley, prays for the following relief:

1. That the Plaintiff's Complaint be dismissed in its entirety, and award Richard M. Buckley his attorneys' fees, costs and such further relief as this Court deems just and proper;
2. On the First Counterclaim, for judgment against the Plaintiff in an amount to be determined by a jury, with interest, attorney's fees and costs as determined by this Court;
3. On the Second Counterclaim, for judgment against the Plaintiff in an amount to be determined by a jury, with interest, attorney's fees and costs as determined by this Court;
4. On the Third Counterclaim, for judgment against the Plaintiff in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
5. On the Fourth Counterclaim, for judgment against the Plaintiff in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
6. On the Fifth Counterclaim, for judgment against the Plaintiff in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
7. On the Sixth Counterclaim, for judgment against the Plaintiff in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
8. On the Seventh Counterclaim, for judgment against the Plaintiff in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
9. On the First Third-Party Claim, for judgment against the Third-Party Defendant, Scott Dodenhoff, in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
10. On the Second Third-Party Claim, for judgment against the Third-Party Defendant, Scott Dodenhoff, in an amount to be determined by a jury, including

punitive damages, with interest, attorney's fees and costs as determined by this Court;

11. On the Third Third-Party Claim, for judgment against the Third-Party Defendant, Scott Dodenhoff, in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
12. On the Fourth Third-Party Claim, for judgment against the Third-Party Defendant, Scott Dodenhoff, in an amount to be determined by a jury, including punitive damages, with interest, attorney's fees and costs as determined by this Court;
13. For interest, attorney's fees and reasonable costs; and,
14. For such other and further relief and the Court deems just and proper.

Respectfully submitted,



M. Stokely Holder (SC Bar # 73892)

KENISON, DUDLEY & CRAWFORD, LLC

704 East McBee Avenue

Greenville, SC 29601

T: (864) 242-4899

F: (864) 242-4899

Attorneys for Defendant and Third-Party Plaintiff,

Richard M. Buckley

July 8, 2013
Greenville, SC

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

)IN THE COURT OF COMMON PLEAS

D&C Builders, Inc.,)

Plaintiff,)

vs.)

Richard M. Buckley and
Wells Fargo National Association,)

Defendants;)

C.A. No.: 2013-CP-23-1833

AFFIDAVIT OF

M. STOKELY HOLDER, ESQ.

Richard M. Buckley,)

Third-Party Plaintiff,)

vs.)

Scott Dodenhoff,)

Third-Party Defendant.)

PERSONALLY APPEARED before me, an officer duly authorized by law to
administer oaths, M. Stokely Holder, who after first being duly sworn, states:

1. My name is M. Stokely Holder, and I am competent in all respects to
testify regarding the matters set forth herein. I have personal knowledge of the facts
stated herein and know them to be true. I give this Affidavit voluntarily in opposition to
Plaintiff's Motion to Disqualify.

2. On or about March 19, 2013, attorney Jack Heckman called me and
explained to me that he had been contacted by Mr. Richard M. Buckley and his family to

see if Mr. Heckman would represent Mr. Buckley in the above captioned matter. Mr. Heckman explained to me that the Buckleys called him because of a mutual friend he shared with Matt Buckley, Defendant Richard Buckley's son. Mr. Heckman told me that he had explained to the Buckleys that he does not typically handle construction litigation matters but that he would refer them to me because he knew that I did handle these types of matters. Mr. Heckman asked me if I would be interested in representing Mr. Buckley, and I told him that I would be glad to speak with them once I was able to run a conflict check. Not once during my conversation with Mr. Heckman was I made aware by him or the Buckleys of any prior representation by my firm of D&C Builders, Inc.

3. Upon running a standard conflict check in my office, attorney Townes B. Johnson, III, and attorney John T. Crawford, Jr., both of my office, informed me that they had previously represented D&C Builders, Inc. on a mechanic's lien foreclosure matter whereby D&C Builders, Inc. had hired attorney Crawford to file a lien and foreclosure matter on behalf of D&C Builders, Inc. Attorney Johnson explained to me in very general terms that he assisted attorney Crawford with the litigation surrounding the claim and that it was resolved amicably. Attorney Johnson also explained to me that he knew nothing about either the Buckleys or any information regarding the claim that D&C Builders, Inc. had brought against Mr. Buckley, including the underlying project.

4. After speaking with attorney Johnson, I spoke with attorney Crawford regarding the exact same issue. Attorney Crawford did not tell me anything different than what attorney Johnson told me regarding the prior representation of D&C Builders, Inc. Attorney Crawford also explained to me that he knew nothing about either the Buckleys

or any information regarding the claim that D&C Builders, Inc. had brought against Mr. Buckley, including the underlying project.

5. Attorneys Crawford and Johnson told me that neither of them could remember any confidential information that was disclosed by D&C Builders, Inc. during their representation of them.

6. As I understand it, attorney Crawford sought separate, outside legal advice on the same issue from a reputable local attorney. As I understand it, the outside attorney agreed that there was no conflict. As I understand it, attorney Crawford then discussed the matter at length with attorney Brian A. Martin, counsel for D&C Builders, Inc., whereby attorney Crawford explained to attorney Martin that, despite our firm's determination that no conflict exists, our firm would be glad to discuss amending the pleadings at issue to specifically address any concerns of his client so that the efforts of the parties could be directed towards resolving the underlying claims. I was not part of any of the above discussions between attorneys Crawford and Martin.

7. Based on the conclusion reached by our law firm and outside counsel that no conflict of interest exists, I agreed to a consultation with Pamela Buckley, Richard Buckley's daughter-in-law and authorized agent. Prior to discussing anything with any of the Buckleys, I had never met them or spoken to any of them before about anything.

8. Upon first discussing the matter with Mrs. Buckley, I explained to her that my firm had previously represented D&C Builders, Inc. in a matter that I understood was completely separate and unrelated to the issue at hand. At that very time, Mrs. Buckley explained to me that Scott Dodenhoff had, without being prompted in any way, voluntarily talked at great lengths to the Buckleys during the project at issue about a

lawsuit that he was involved with at that time against who he described disparagingly to the Buckleys as "the Germans". Mrs. Buckley explained to me that Mr. Dodenhoff had spoken to the Buckleys in particular about how that lawsuit had impacted him and his company financially and how important the Buckley job was to him.

9. Mrs. Buckley further explained to me how Mr. Dodenhoff was her husband's childhood friend and, prior to the facts and circumstances giving rise to the underlying claims, her husband's lifelong friend. She explained to me that, as such, Mr. Dodenhoff spoke with her husband on a very frequent basis about a myriad of matters, including, without limitation, the ongoing business of D&C Builders, Inc. and Mr. Dodenhoff. Mrs. Buckley told me that Mr. Dodenhoff frequently shared detailed information with the Buckleys regarding the corporate structure and financial status of Mr. Dodenhoff and his company, which they did not think was very strange because of Mr. Dodenhoff's relationship with the Buckleys.

10. Mrs. Buckley also told me that the Buckleys were unaware that my office had previously assisted Mr. Dodenhoff with that prior lawsuit.

11. The only claim filed by Mr. Buckley that appears to be at issue here is the Declaratory Judgment/Veil Piercing claim. This claim was filed based only on information provided to me by the Buckleys, including the aforementioned information conveyed to them by Mr. Dodenhoff himself regarding the financial status and corporate structure of D&C Builders, Inc., together with the facts conveyed to me by the Buckleys surrounding the egregious acts alleged to have been committed by Mr. Dodenhoff and his company against them.

12. To my knowledge, I have never met or spoken with Scott Dodenhoff or anyone from D&C Builders, Inc. about anything.

13. As I understand it from the affidavits heretofore signed by attorneys Crawford and Johnson in connection with this issue, they were never made aware of any of the facts or circumstances giving rise to the claims in the above captioned matter. As I also understand, attorneys Crawford and Johnson are unaware of any confidential information provided by D&C Builders, Inc. to them in connection with their involvement with the prior lawsuit which has not already been made public record.

14. This matter and the prior matter appear to have no relation to one another.

15. The prior matter was dismissed with prejudice by consent of all parties, including D&C Builders, Inc., and was done so prior to my firm's involvement with this matter.

16. I do not believe that the duties required of my firm in representing the Buckleys in this matter conflict with the duties required of my firm in representing D&C Builders, Inc. in the prior matter. Furthermore, I do not believe that my firm's representation of the Buckleys now in forwarding their interests in this case will improperly injuriously affect D&C Builders, Inc. in this matter or in the prior matter.

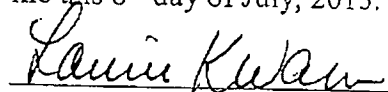
17. On the day prior to the last hearing, I left a message with attorney Martin reminding him of the change to the hearing time. I also explained to him that despite not having heard from him again regarding any conflict of interest issues we would still be glad to discuss with him any amendments to our pleadings should he still be of the opinion that a conflict exists. Hours later after the close of business, Mr. Martin simply wrote an email in response stating that: "I received your message but it has been a busy

day." Not once in the lengthy period of time between when attorney Martin spoke with attorney Crawford and prior to the hearing, even including the 15 minutes prior to the hearing when Mr. Martin spoke with the attorney representing my office at the hearing (attorney F. Lee Prickett, III), did Mr. Martin discuss the conflict of interest issue. Yet, as soon as the hearing on our Motion to Dismiss began, Mr. Martin presented to the court and my office for the first time his previously filed Motion to Disqualify together with an affidavit of Mr. Dodenhoff (both alleging improprieties against me and my firm) that had been prepared at least one week before the hearing.

FURTHER AFFIANT SAYETH NAUGHT


M. Stokely Holder

Sworn to and subscribed before
me this 8th day of July, 2013.



Notary Public

My Commission Expires:

5/2/2023

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

D&C Builders, Inc.,) C.A. No.: 2013-CP-23-1833

Plaintiff,)

vs.)

Richard M. Buckley and)
Wells Fargo National Association,)

Defendants;)

AFFIDAVIT OF
TOWNES B. JOHNSON III, ESQ.

Richard M. Buckley,)

Third-Party Plaintiff,)

vs.)

Scott Dodenhoff,)

Third-Party Defendant.)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENHISMER
2013 JUL - 8 A 9:06

PERSONALLY APPEARED before me, an officer duly authorized by law to administer oaths, Townes B. Johnson III, who after first being duly sworn, states:

1. My name is Townes B. Johnson III, and I am competent in all respects to testify regarding the matters set forth herein. I have personal knowledge of the facts stated herein and know them to be true. I give this Affidavit voluntarily in opposition to Plaintiff's Motion to Disqualify, which I have reviewed.

2. Upon receiving a standard conflict check in my office regarding the above captioned matter, I informed Mr. Holder that our firm had previously represented D&C

Builders, Inc. on a mechanic's lien foreclosure matter whereby D&C Builders, Inc. had hired our firm to file a lien and foreclosure action on its behalf (hereinafter "the TMKG matter"). I explained to Mr. Holder in very general terms that I assisted attorney John T. Crawford, Jr. with the litigation surrounding the claim and that it was amicably resolved.

3. During my involvement with the TMKG matter, I was never made aware of the Buckleys, the Buckley project, any information regarding D&C Builders, Inc.'s claim against Mr. Buckley or any other facts or circumstances regarding this matter. The first time I became aware of this matter was in my conversation with Mr. Holder after the conflict check.

4. After speaking with Mr. Holder, I spoke with Mr. Crawford regarding our representation of D&C Builders, Inc. Neither of us could remember any confidential information that was disclosed by D&C Builders, Inc. during our prior representation of them.

5. The extent of the information made available to my firm during the TMKG matter regarding D&C Builders, Inc.'s financial status was that D&C Builders, Inc. was owed the money they hired our firm to recover, which included, as a matter of public record, attorneys' fees. I never had any substantive discussions regarding any specific impact the outcome of that case would have on the financial status of the company, and I remain unaware of any such specific impact outside of the obvious debt owed that is inherent in debt collection matters.

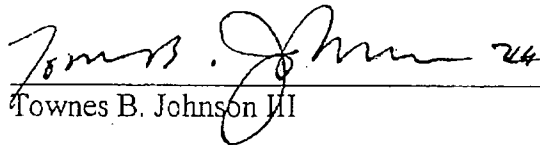
6. The TMKG matter was dismissed with prejudice by consent of all parties, including D&C Builders, Inc., and was done so long before my receipt of the aforementioned conflict check.

7. From reviewing the Plaintiff's Motion to Disqualify together with the other pleadings related to this matter, I have learned more about D&C Builders, Inc. than I had learned during the TMKG matter as it relates to specifics about the "ongoing operations of D&C Builders, Inc.", the "finances of the company", "the impact the outcome of the [prior] case would have on those finances", and "other existing ongoing projects unrelated to that case and the impacts of those projects on the financial situation of D&C Builders, Inc."

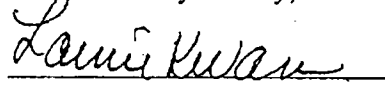
8. It is my opinion that the TMKG matter and this matter have no relation to one another.

9. I do not believe that the duties required of my firm in representing the Buckleys in this matter conflict with the duties required of my firm in representing D&C Builders, Inc. in the TMKG matter. Furthermore, I do not believe that my firm's representation of the Buckleys now, in forwarding their interests in this case, will improperly injuriously affect D&C Builders, Inc. in this matter or in the TKMG matter.

FURTHER AFFIANT SAYETH NAUGHT


Townes B. Johnson III

Sworn to and subscribed before
me this 8th day of July, 2013.


Notary Public
My Commission Expires:
5/2/2023

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

)IN THE COURT OF COMMON PLEAS

D&C Builders, Inc.,)

C.A. No.: 2013-CP-23-1833

Plaintiff,)

vs.)

Richard M. Buckley and
Wells Fargo National Association,)

Defendants;)

AFFIDAVIT OF

JOHN T. CRAWFORD, JR., ESQ.

Richard M. Buckley,)

Third-Party Plaintiff,)

vs.)

Scott Dodenhoff,)

Third-Party Defendant.)

PERSONALLY APPEARED before me, an officer duly authorized by law to administer oaths, John T. Crawford, Jr., who after first being duly sworn, states:

1. My name is John T. Crawford, Jr., and I am competent in all respects to testify regarding the matters set forth herein. I have personal knowledge of the facts stated herein and know them to be true. I give this Affidavit voluntarily in opposition to Plaintiff's Motion to Disqualify, which I have reviewed.

2. Upon receiving a standard conflict check in my office regarding the above captioned matter, I informed Mr. Holder that our firm had previously represented D&C

Builders, Inc. on a mechanic's lien foreclosure action whereby D&C Builders, Inc. had hired our firm to file a lien and foreclosure action on its behalf (hereinafter "the TMKG matter"). I explained to Mr. Holder in very general terms that I worked with attorney Townes B. Johnson, III with the litigation surrounding the claim and that it was amicably resolved.

3. During my involvement with the TMKG matter, I was never made aware of the Buckleys, the Buckley project, any information regarding D&C Builders, Inc.'s claim against Mr. Buckley or any other facts or circumstances regarding this matter. The first time I became aware of this matter was in my conversation with Mr. Holder after the conflict check.

4. After speaking with Mr. Holder, I spoke with Mr. Johnson regarding our representation of D&C Builders, Inc. Neither of us could remember any confidential information that was disclosed by D&C Builders, Inc. during our prior representation of them.

5. The extent of the information made available to my firm during the TMKG matter regarding D&C Builders, Inc.'s financial status was that D&C Builders, Inc. was owed the money they hired our firm to recover, which included, as a matter of public record, attorneys' fees. I never had any substantive discussions regarding any specific impact the outcome of that case would have on the financial status of the company, and I remain unaware of any such specific impact outside of the obvious debt owed that is inherent in debt collection matters.

6. After speaking with Mr. Johnson, I also spoke with attorney Keven Kenison in our office, attorney Thomas E. Dudley, III in our office and I also sought the

advice of outside legal counsel regarding our representation of D&C Builders, Inc. and whether our current representation of Mr. Buckley would create a conflict of interest. It was determined by all that a conflict of interest does not exist due to the nature of the prior claim, the nature of the present claim, the obvious difference in facts and circumstances giving rise to the separate claims, and the fact that D&C Builders, Inc. had not disclosed any confidential information to our firm that would create a conflict of interest.

7. The TMKG matter was dismissed with prejudice by consent of all parties, including D&C Builders, Inc., and was done so long before my receipt of the aforementioned conflict check.

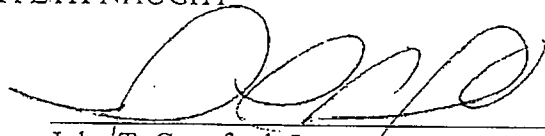
8. From reviewing the Plaintiff's Motion to Disqualify together with the other pleadings related to this matter, I have learned more about D&C Builders, Inc. than I had learned during the TMKG matter as it relates to specifics about the "ongoing operations of D&C Builders, Inc.", the "finances of the company", "the impact the outcome of the [prior] case would have on those finances", and "other existing ongoing projects unrelated to that case and the impacts of those projects on the financial situation of D&C Builders, Inc.".

9. It is my opinion that the TMKG matter and this matter have no relation to one another.

10. I do not believe that the duties required of my firm in representing the Buckleys in this matter conflict with the duties required of my firm in representing D&C Builders, Inc. in the TMKG matter. Furthermore, I do not believe that my firm's

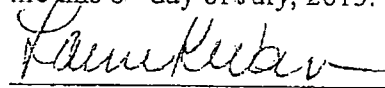
representation of the Buckleys now in forwarding their interests in this case will improperly injuriously affect D&C Builders, Inc. in this matter or in the TMKG matter.

FURTHER AFFIANT SAYETH NAUGHT



John T. Crawford, Jr.

Sworn to and subscribed before
me this 8th day of July, 2013.



Notary Public

My Commission Expires:

5/2/2023

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

) IN THE COURT OF COMMON PLEAS

D&C Builders, Inc.,)

Plaintiff,)

vs.)

Richard M. Buckley and
Wells Fargo National Association,)

Defendants;)

C.A. No.: 2013-CP-23-1833

AFFIDAVIT OF
JOHN H. HECKMAN, ESQ.

Richard M. Buckley,)

Third-Party Plaintiff,)

vs.)

Scott Dodenhoff,)

Third-Party Defendant.)

PERSONALLY APPEARED before me, an officer duly authorized by law to administer oaths, John H. Heckman, who after first being duly sworn, states:

1. My name is John H. Heckman, and I am competent in all respects to testify regarding the matters set forth herein. I have personal knowledge of the facts stated herein and know them to be true. I give this Affidavit voluntarily.

2. On or about March 19, 2013, I was contacted by Pam Buckley, an authorized representative of her father-in-law, Defendant Richard M. Buckley. I share a mutual friend with

Richard Buckley's son, Matt Buckley (Pam's husband). Our mutual friend apparently told the Buckleys to contact me for legal representation regarding the above captioned matter.

3. In speaking with Mrs. Buckley upon her request for me to represent Mr. Buckley in this matter, I explained to her that I do not typically handle construction litigation matters; but that I would refer them to Stokely Holder because I knew he does handle these types of matters.

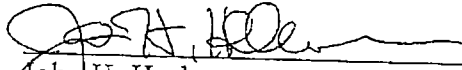
4. On or about March 19, 2013, I called Mr. Holder and asked him if he would be interested in representing Mr. Buckley. He said that he would be glad to speak with the Buckleys once he was able to run a conflict check. Thereafter, we proceeded to schedule a time for the Buckleys to meet with Mr. Holder.

5. I have had an opportunity to review the Plaintiff's Motion to Disqualify and the accompanying affidavit submitted by the Plaintiff in support thereof. These filings imply that the Buckleys sought out Mr. Holder's representation based upon the Buckley's alleged prior knowledge of his firm's previous representation of the Plaintiff. I know this to be untrue. Based upon my correspondence with the Buckleys, it appeared fairly clear to me that they had no prior knowledge of Mr. Holder's firm being involved with any prior lawsuit involving the Plaintiff. And to be clear, prior to referring the Buckleys to Mr. Holder, I have never had occasion to know the Plaintiff or Scott Dodenhoff or any previous involvement they may have had with Mr. Holder's firm or anyone else.

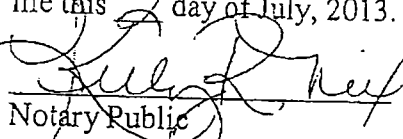
6. In my experience in dealing with Mr. Holder and his firm on this matter and others, including a separate matter involving unique attorney-client relationship elements, I have never questioned the character or ethics displayed by them. In fact, through the various matters in which I have had the pleasure of working with them, I have always been impressed with their

attention to, the emphasis they place upon, and their conformance with, the rules of ethics to which we are bound.

FURTHER, AFFIANT SAYETH NAUGHT


John H. Heckman

Sworn to and subscribed before
me this 2 day of July, 2013.


Notary Public

My Commission Expires:

4-15-2015

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

D&C Builders, Inc.,) C.A. No.: 2013-CP-23-1833

Plaintiff,)

vs.)

Richard M. Buckley and
Wells Fargo National Association,)

Defendants;)

**AFFIDAVIT OF
PAMELA BURNS-BYERS BUCKLEY**

Richard M. Buckley,)

Third-Party Plaintiff,)

vs.)

Scott Dodenhoff,)

Third-Party Defendant.)

PERSONALLY APPEARED before me, an officer duly authorized by law to administer oaths, Pamela Burns-Byers Buckley, who after first being duly sworn, states:

1. My name is Pamela Burns-Byers Buckley, and I am competent in all respects to testify regarding the matters set forth herein. I have personal knowledge of the facts stated herein and know them to be true. I give this Affidavit voluntarily in opposition to Plaintiff's Motion to Disqualify.

2. On or about March 19, 2013, I called attorney Jack Heckman on behalf of my father-in-law, Defendant Richard M. Buckley, to see if Mr. Heckman would represent

Mr. Buckley in the above captioned matter. I explained to Mr. Heckman that we were referred to him through a mutual friend he shared with my husband Matt Buckley, Defendant Richard Buckley's son. Mr. Heckman told me that he does not typically handle construction litigation matters but that he would refer us to attorney Stokely Holder because he knew that Mr. Holder did handle these types of matters. Thereafter, Mr. Heckman scheduled a time for us to meet with Mr. Holder.

3. Prior to meeting Mr. Holder, neither I, Mr. Buckley nor my husband were ever aware of the fact that Mr. Holder's firm had previously represented D&C Builders, Inc. Likewise, Mr. Heckman never told us that Mr. Holder's firm had previously represented D&C Builders, Inc. In fact, we had never met, knew or otherwise conversed with Mr. Holder or anyone at his firm prior to our meeting with Mr. Holder.

4. At the outset of my consultation with Mr. Holder, he informed me that his firm had previously represented D&C Builders, Inc. on a separate mechanic's lien foreclosure matter whereby D&C Builders, Inc. had hired a separate attorney in his office to file a lien and foreclosure matter on behalf of D&C Builders, Inc. He informed me that it was his firm's position that no conflict of interest existed. I explained to Mr. Holder that Scott Dodenhoff had, without being prompted in any way, voluntarily talked at great lengths to me and my family during the project at issue about a lawsuit that he was involved with at that time with what he described as "the Germans". He talked to us on multiple occasions about the substance of that case, including details regarding the efforts he was undertaking to collect on the debts due him and the impact that case and its outcome was having on the company and him personally. Mr. Dodenhoff had spoken to me and my family in particular about the existing ongoing projects that he and his

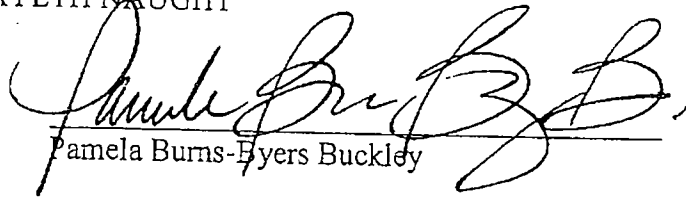
company were involved with, or lack thereof; how that lawsuit had impacted him and his company financially; and how important our project was to him and D&C Builders, Inc.

5. I also explained to Mr. Holder how Mr. Dodenhoff also shared information with me and my family regarding the corporate structure and financial status of Mr. Dodenhoff and his company, including, without limitation, the roles that he and his father played in the company, the ongoing operations and control of the company, his specific authority as a representative of the company, his Dad's specific authority as a representative of the company, and Scott's role regarding the pending case against "the Germans".

6. Scott Dodenhoff had been a childhood friend and, at the time, a lifelong friend of my husband's. So, at the time Scott was providing us with these extensive details regarding his company and its ongoing legal matters, we did not think it was very strange for Mr. Dodenhoff to be telling us so much, so often.

7. All of the claims that have been filed on behalf of Mr. Buckley against Scott Dodenhoff and D&C Builders, Inc. are based on the knowledge we gained solely through our own (unfortunate) personal, first-person dealings with Mr. Dodenhoff and D&C Builders, Inc.; and not through any information from Mr. Holder or his office (as we have not received any of the information outlined herein regarding Mr. Dodenhoff and D&C Builders, Inc. through Mr. Holder or his office).

FURTHER AFFIANT SAYETH NAUGHT


Pamela Burns-Eyers Buckley

Sworn to and subscribed before
me this 8th day of July, 2013.


Notary Public
My Commission Expires:
1-29-2017

1 STATE OF SOUTH CAROLINA

) COURT OF COMMON PLEAS
) 2013-1833

2 COUNTY OF GREENVILLE

3
4 D&C Builders

) TRANSCRIPT RECORD
)

5
6 -vs-

7 Richard M. Buckley

8
9 July 8, 2013
Greenville, South Carolina

10 B E F O R E:

11 THE HONORABLE EDWARD MILLER, Judge.

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

13 Brian A. Martin, Esquire
14 Attorney for Plaintiff

15 Stokely Holder, Esquire
16 Attorney for the Defendant

17
18 CAROLINE HISKELL
Thirteenth Circuit Court Reporter

D&C Builders vs. Buckley

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I N D E X

2

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(There were no exhibits or witnesses presented).

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D&C Builders vs. Buckley

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

D&C Builders vs. Buckley

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

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

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

25 A dispute arose after the construction was

D&C Builders vs. Buckley

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

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

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

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

D&C Builders vs. Buckley

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

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

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

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

D&C Builders vs. Buckley

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

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

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

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

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

D&C Builders vs. Buckley

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

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

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

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

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

D&C Builders vs. Buckley

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

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

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

D&C Builders vs. Buckley

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

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

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

15 THE COURT: Thank you.

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

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

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

D&C Builders vs. Buckley

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

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

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

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

D&C Builders vs. Buckley

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

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

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

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

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

D&C Builders vs. Buckley

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

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

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

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

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

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

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

D&C Builders vs. Buckley

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

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

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

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

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1 by D&C Builders.

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

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

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

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

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

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

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

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

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

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

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

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

22 Thank you.

23 THE COURT: Thank you.

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

D&C Builders vs. Buckley

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 THE COURT: Okay.

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

9 THE COURT: They're friends.

10 MR. MARTIN: They were friends.

11 THE COURT: Okay.

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

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

22 THE COURT: That's all public record.

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

25 THE COURT: Who did they represent in the

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1 former?

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

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

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

20 MR. MARTIN: No, sir.

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

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

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

5 THE COURT: Put together a privilege log.

6 MR. MARTIN: Yes.

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

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

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

18 MR. MARTIN: Yes, sir.

19 MR. HOLDER: Thank you.

20 ---END OF TRANSCRIPT RECORD---

D&C Builders vs. Buckley

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

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

11
12
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14 Caroline Hiskell
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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
7th JUDICIAL CIRCUIT
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.

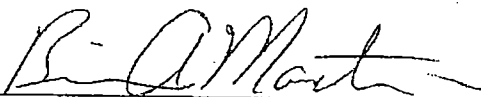
13. In the event the Court does not revise its Order, based on Rule 1.9 of the Rules of Professional Conduct, the Comments thereto and the Supreme Court's interpretation of this specific requirement of Rule 1.9 in *Townsend v. Townsend*, Plaintiff will likely succeed in challenging this requirement of 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
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(864) 879-7779
Attorney for Plaintiff

Greenville, South Carolina
July 16th, 2013

"EXHIBIT A"

BRIAN A. MARTINLLC

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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,

A handwritten signature in cursive script, appearing to read "B. A. Martin".

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

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
13th JUDICIAL CIRCUIT
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 Action. 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!

July __, 2013
Greenville, South Carolina

Edward W. Miller
Judge, 13th Judicial Circuit

IN THE COURT OF COMMON PLEAS
7th JUDICIAL CIRCUIT
C.A. NO.: 2013-CP-23-1833

Ys.

Defendants.

Third-Party Plaintiff,

Vs.

Third-Party Defendant.

CERTIFICATE OF SERVICE

Attorney for the Plaintiff

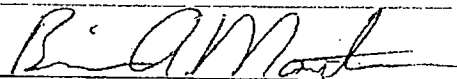
H. Stewart James, Esq.
Babb & Brown, P.C.
505 W. Butler Rd.
Greenville, South Carolina 29607

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



Brian A. Martin (SC Bar #: 9791)
Brian A. Martin, LLC
212 Trade Street
Greer, SC 29651
(864) 879-7779
brian@martinlawsc.com

July 16, 2013
Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

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

2013-CP-23-01833

TRANSCRIPT OF RECORD

JULY 23, 2013
GREENVILLE, SOUTH CAROLINA

BEFORE:

THE HONORABLE EDWARD W. MILLER

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

BRIAN A. MARTIN, ESQUIRE

ATTORNEY FOR DEFENDANT:

M. STOKELY HOLDER, ESQUIRE

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

INDEXWITNESSPAGE NO.

CERTIFICATE OF REPORTER

9

EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>

(No exhibits were presented during this hearing)

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

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

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

8 MR. MARTIN: Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

8 MR. MARTIN: Yes, Your Honor.

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

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

16 MR. MARTIN: Yes, sir.

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

22 MR. MARTIN: Yes, sir.

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

1 MR. MARTIN: Yes, sir. I do still have the problem of
2 understanding how if I provide information to them because of
3 this circumstances, and again, this is -- I understand the
4 quandary, that if I provide the information that I contend is
5 confidential information that they have and obtained in the
6 prior case, and I give that information to them, and --
7 pursuant to this privileged log, and then the -- they contend
8 that information is not confidential or that that information
9 is not privileged and the motion to disqualify is denied, and
10 they continue to represent the Defendants, then I have handed
11 over significant information for them to use ---

12 THE 'COURT: That they already know.

13 MR. MARTIN: I guess what I'm saying is is ---

14 THE COURT: Where's the problem? I have made -- let me
15 just put it this way. I've made the ruling and argument is
16 over. Okay? I normally don't like to do that, but I've heard
17 all this, I've examined it, read your motion, read everything.
18 Turn over the privileged log.

19 I can't make a determination if they're disqualified or
20 not without knowing about it. And I'm not going to know if
21 the information is privileged unless they can show me -- you
22 could claim anything, that this -- you could claim this is a
23 secret and the other side doesn't know about it. How can they
24 respond? It's called due process.

25 If they have violated some confidential information, some

1 part of Rule 1.9, they're going to get disqualified. It's as
2 simple as that. And they'll be under their attorney's oath
3 not to disclose confidential information as they currently
4 are. So produce the log. Okay?

5 MR. MARTIN: Yes, sir.

6 THE COURT: Mr. Holder, do you want to say anything?

7 MR. HOLDER: No. That's it. Thank you, Your Honor.

8 THE COURT: All right. Thank you.

9 (Hearing ended at 10:44 am)

10 (End of requested transcript of record)

Certificate of Reporter

I, the undersigned, Susan W. Hudgins, 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/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenville County, South Carolina, on the 23rd day of July 2013.

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

October 4, 2013

Susan W. Higgins

Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
D&C Builders, Inc.,	)	C.A. No.: 2013-CP-23-1833
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Richard M. Buckley and	)	
Wells Fargo National Association,	)	DEFENDANT RICHARD M. BUCKLEY'S
	)	FIRST INTERROGATORIES,
Defendants;	)	REQUESTS FOR PRODUCTION OF
	)	DOCUMENTS, and REQUESTS FOR
	)	ADMISSION TO PLAINTIFF
Richard M. Buckley,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Scott Dodenhoff,	)	
	)	
Third-Party Defendant.	)	
	)	

Pursuant to S.C.R.Civ.P. 26, 33, 34, and 36, Defendant, Richard M. Buckley, propounds the following Requests to be answered by Plaintiff D&C Builders, Inc. (hereinafter, Plaintiff) separately and fully in writing and under oath, and in accordance with the above-cited rules.

These Requests are addressed to the knowledge of Plaintiff and the agents, representatives and attorneys of same. If the answer to the entire question is not known, so state and answer the part known. If an exact date is not known, state the closest approximate date.

These Requests are deemed continuing in nature and call for prompt supplemental production whenever Plaintiff shall receive or discover information covered by the provisions of S.C.R.Civ.P. 26(e), including, *inter alia*, the ongoing duty of Plaintiff to supplement promptly the responses to these Requests should Plaintiff obtain information upon the basis of which Plaintiff know(s) a prior response was incorrect or incomplete when made, or that a response, thought correct and complete when made, is no longer true and complete.

INSTRUCTIONS AND DEFINITIONS

For the purposes of these Requests the following definitions and instructions shall apply:

A. For purposes of these requests, "document" or "documents" is used in its broadest sense, and means all tangible and electronic items and all written, printed, typed, recorded, transcribed, punched, taped, or graphic matter of every type and description, however and by whomever prepared, produced, reproduced, disseminated, or made, including, but not limited to, writings, e-mails, records, correspondence, communications, letters, diaries, diary entries, logs, log books, schedules, change orders, contracts, purchase orders, delivery tickets, cost reports, payroll ledgers, telegrams, telexes, memoranda, notes, reports, bulletins, summaries, or other records of telephone or personal conversations, minutes or summaries of telephone or personal meetings and conferences, instructions, literature, work assignments, agreements, subcontracts, interoffice or intra office communications, electronic mail, microfilm, notebooks, calendars, appointment books, circulars, pamphlets, projections, studies, estimates, charts, lists, tables, computer runs, tabulations, printouts, notices, books, checks, credit card vouchers, statements of account, receipts, invoices, graphs, photographs, photocopies, drafts, data sheets, data compilations, computer data compilations, statistics, worksheets, speeches or other writings, and tape recordings, and means the original, copy, or any non-identical copy or draft version, regardless of origin or location, which is within the scope of S.C.R.Civ.P. 34.

B. "You" or "your" means Plaintiff, D&C Builders, Inc., and the attorneys, representatives, and agents of same.

C. "Identify" or "identity" as used in these Requests in connection with any person or persons requires the following information for each person:

- (1) the person's full name;
- (2) the person's last known business address and telephone number;
- (3) the person's last known home address and telephone number;
- (4) the person's last known employer; and
- (5) the person's last known title, position, or business.

D. "Identify" or "identity" as used in these Requests in connection with any tangible item or thing requires the following information for each:

- (1) a detailed description of the item or thing; and
- (2) the present location of the item or thing.

E. "Describe" as used in these Requests in connection with any act, occurrence, omission, or series of acts, occurrences or omissions requires the following information:

- (1) the identity of each and every person involved in the act, occurrence, omission or series of acts, occurrences or omissions as provided in the definition of "identify,"
- (2) the date or dates of each and every act, occurrence or omission;
- (3) a brief description of the act, occurrence, omission, or series of acts, occurrences or omissions and the substance of any contact or communication in connection therewith; and
- (4) a description of each and every document involved in the act, occurrence, omission or series of acts, occurrences or omissions.

F. "Specify" or "identify" as used in these Requests in connection with any document requires the following information for each document:

- (1) the title of the document with sufficient particularity to permit its identification;
- (2) the name, position of employment or title and business address of each person who prepared or participated in the preparation of each document;
- (3) the date on which each document was prepared;
- (4) the identity of each person who received or obtained a copy

of each document; and

- (5) if all copies of the document have been destroyed, identify the person or persons authorizing the destruction of the document and the date of the destruction of the document.

In lieu of specifying documents, Plaintiff may, at its option, attach such documents to the answers to these Requests.

G. "Relative to" as used in these Requests means referring to, concerning, addressing, alluding to, responding to, connected with, arising from, or in any way relating to, commenting on, in respect of, about, regarding, discussing, summarizing, showing, describing, reflecting, analyzing, constituting, or in any way relevant to the specified subject.

H. "Person" and "persons" as used in these Requests means any individual or natural person, firm, partnership, corporation, committee, association, governmental body, agency or subdivision, political action group or any other organization or entity.

I. "Contact" or "communication" shall mean all modes of conveying meaning or information including, without limitation, telephone, telegraph, written or spoken language between two persons.

J. "Complaint" shall mean the complaint filed by the Plaintiff in this action.

K. "Answer" shall mean the answer filed by the Defendant in this action.

L. "Counterclaims" shall mean the counterclaims filed by the Defendant in this action.

M. "Third-Party Claims" shall mean the third-party claims filed by the Third-Party Plaintiff in this action.

N. "Pleadings" shall mean the Complaint, Answer, Counterclaims, Third-Party Claims and all other Motions and Petitions filed by the parties in this action.

O. "Project" shall mean the "Project" as defined in the Answer, Counterclaims and Third-Party Claims filed in this matter.

INTERROGATORIES

1. Give the names, addresses, and phone numbers of all persons known to you or your counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the

witnesses and indicate who has possession of such statements.

2. For each person known to you or your counsel to be witnesses concerning the facts of the case, set forth a summary sufficient to inform Defendant of the important facts known to or observed by such witness, and list all written or recorded statements taken from such witness.
3. Set forth a list of photographs, plats, sketches or other prepared documents in your or your counsel's possession or control that relate to your claims and defenses in the case.
4. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claims in the case and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.
5. Set forth an itemized statement of all damages claimed to have been sustained by you and identify all documents, witnesses, and facts to support your claimed damages.
6. Identify each person whom you expect to call as an expert witness at any hearing or the trial of this case, and with respect to each such person, please state:
 - a. The substance of the facts and opinions to which such person is expected

to testify;

- b. The grounds and bases for each such opinion;
 - c. All publications authored in any part by such person which relates in substance to such person's opinion(s) in this case; and
 - d. The home and business address and telephone number, education, training, and licenses of such person;
 - e. The subject matter and the particular questions or investigations on which such person has been consulted, but which is not expected to testify; and Each case, giving the court, style and case number, in which the individual has previously testified, either by deposition, affidavit, or in person, giving the dates of testimony, identification of a person known to have a transcript of each testimony, the name of the party upon whose behalf testimony was given and a summary of the testimony.
7. Please identify each person you retained or specially employed in anticipation of litigation or preparation for trial whom you do not expect to call as a witness at the trial of the case.
8. If you contend that you do not owe the amounts Defendant claims in the Counterclaims, state all facts, identify all persons, and list all documents which support your contention.

9. If you assert any Affirmative Defenses in your Reply to the Counterclaims, state all facts, identify all persons, and list all documents which support your contentions set forth in each and every Affirmative Defense.
10. Identify and describe in detail all documents you or your counsel are withholding, or intend to withhold, from production to Defendant based on a claim of privilege or work product and state the bases of each such claim of privilege or work product.
11. Identify all persons involved in responding to these interrogatories.
12. If you have ever been a party to any civil action (other than this civil action) in the last five (5) years, please list the basis thereof, the date and title of each such civil action, the Court in which it was brought and the civil action number.
13. Identify any and all documentation that supports the work you performed on the Project and the costs you incurred for the same, including, without limitation, all contracts, invoices, purchase orders, receipts, cancelled checks, credit accounts, credit card accounts, accounts receivables, accounts payables, all check registers, all bank records, all lien waivers, job history reports, account history reports, labor payrolls, bank accounts, bank statements, accounting records, bookkeeping records, time sheets, subcontracts,

agreements, all construction progress photographs and dates of same, all documents evidencing any inspection of any portion of work on the project, all documents evidencing any test or study conducted for any portion of the Project or subject property, all correspondence such as emails, letters, and facsimiles, notes, progress reports, schedules, cancelled pay checks, pay stubs, bills of lading, and material lists.

14. Identify all persons who have possessed and the person(s) that is currently in possession of the accounting books of Plaintiff.
15. Identify all personnel of Plaintiff performing any services relating to the Project, and as to each, state his or her title, position, scope of responsibility and dates of such service.
16. Identify all documentation relating to your corporate, company or business financial status during the period of Project until the present.

17. Identify all bank accounts and banking records of Plaintiff during the Project until the present.
18. Identify any and all documentation concerning the persons or entities that represented you in an administrative, official, executive, shareholder, ownership and/or agency capacity during the project, including but not limited to, a detailed description of the responsibilities, powers and/or scope of employment of the said persons or entities, including a description of any limitation or expansion of powers during the Project and a description of all promotions and demotions during the Project.
19. Identify all state and federal tax records and documents of D&C Builders, Inc. for the tax years 2010, 2011 and 2012, including all tax returns, IRS Schedule K-1, 1099 and W2 forms.
20. Identify all real estate You have owned, leased, operated, managed, bought, or sold since January 1, 2011, regardless of location.
21. Identify all motor vehicles You have owned, leased, operated, managed, bought, or sold since January 1, 2011, regardless of location.
22. Identify all jobs, projects, and properties that Plaintiff has been employed to provide construction related services since January 1, 2011.

REQUEST FOR PRODUCTION OF DOCUMENTS

1. All documents identified, used or referenced in your Responses to the foregoing Interrogatories or any Request for Admissions.
2. All correspondence concerning the Project, including, but not limited to emails, letters, text messages, phone messages of any type, voicemails, notes, faxes, reports, minutes, logs, and transcripts of any audio recordings, such as voicemails and dictation.
3. All contracts between you and any other party concerning any aspect of the Project.
4. All insurance agreements, policies, umbrella policies, re-insurance agreements, indemnity agreements and excess liability policies under which any person or corporation carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the above named action or to indemnify or reimburse for payments made to satisfy judgment.
5. Copies of all statements, whether written or oral, relating to the subject of this suit which are in your possession or the possession of your agents.
6. Copies of any documents relied upon by you in drafting your Complaint and/or Reply to Counterclaims and that you claim supports your claims and

defenses and contradicts the assertions and/or defenses in Defendant's Answer and Counterclaims.

7. Copies of all documents you or your counsel intend to present at trial or that you or your counsel rely upon in preparing for hearings or the trial of this case.
8. For each expert you have contacted, whether or not employed by you or your counsel, please produce for each:
 - (a) A copy of such person's most recent curriculum vitae or resume outlining such person's address, phone number, current occupation, expertise, educational background, and such person's current and former employers for the past ten (10) years;
 - (b) Any documents reviewed by such person related to this case;
 - (c) Any reports or notes created or generated by such person;
 - (d) Any documents that you, your counsel, or such person contends supports such person's position; and
 - (e) Any documents that you, your counsel, or such person contends supports such person being qualified as an expert in this case.
9. All notes, lists of discrepancies, checklists, and all other documents used, created, or otherwise made or maintained which relate to the Plaintiff's work on the Project.

10. Copies of any and all drawings, shop drawings, logs, plans, specifications, addenda, photographs, plats, sketches, or diagrams which you or your attorney may have which relate to the matters at issue in this action, including, without limitation, the documents listed in your response to Defendant's Interrogatories.
11. Copies of any and all documentation that supports the work you performed on the Project and the costs you incurred for the same, including, without limitation, all contracts, invoices, purchase orders, receipts, cancelled checks, credit accounts, credit card accounts, accounts receivables, accounts payables, all check registers, all bank records, all lien waivers, job history reports, account history reports, labor payrolls, accounting records, bookkeeping records, bank accounts, bank statements, time sheets, subcontracts, agreements, all construction progress photographs and dates of same, all documents evidencing any inspection of any portion of work on the project, all documents evidencing any test or study conducted for any portion of the project or subject property, all correspondence such as mails, letters, and facsimiles, notes, progress reports, schedules, cancelled pay checks, pay stubs, bills of lading, and material lists. Copies of any and all financial records relating to the project including all cancelled checks, all check registers, all bank records, all lien waivers, accounting documents, credit agreements, invoices, accounts receivable reports, job history reports, account history reports, and any financial statements regarding the project, including but not limited to, your costs, markup, billings, payments received, and/or profits on

the project.

12. All records of labor payrolls for all your employees.
13. Any and all documents to be submitted into evidence at trial or to be relied upon as demonstrative evidence at trial.
14. All construction progress photographs.
15. All documents regarding any inspection made of any portion of the work involved on the Project, including but not limited to any inspection made of any portion of the Plaintiff's work and all other subcontractors' work.
16. All documents related to any test or study conducted relating to the Project and any work done on the Project.
17. All documentation relating to the corporate or business structure and organization of Plaintiff, including but not limited to:
 - (a) Any and all corporate, partnership or other business meeting minutes of Plaintiff;
 - (b) Any and all stock certificates, if any, that have been issued in reference to Plaintiff;
 - (c) Any and all corporate documentation associated with the formation of

Plaintiff, including but not limited to, Plaintiff's Articles of Incorporation and all S.C. Department of Revenue CL-1 forms.

18. All documentation relating to your corporate, company or business financial status during the period of Project until the present.
19. All bank account and banking records of Plaintiff during the period of the Project until the present.
20. Any and all documentation concerning the persons or entities that represented you in an administrative, official, executive, shareholder, ownership and/or agency capacity during the Project, including but not limited to, a detailed description of the responsibilities, powers and/or scope of employment of the said persons or entities, including a description of any limitation or expansion of powers during the Project and a description of all promotions and demotions during the Project,

REQUESTS FOR ADMISSION

INSTRUCTIONS

Pursuant to S.C.R.Civ.P. 36(a)(2), if you make an objection to any of these

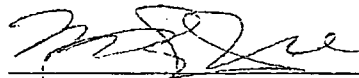
Requests of Admission, your reasons therefore must be stated. Your answer to the request for admission shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission; and, when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, you shall specify so much of it as is true and qualify or deny the remainder. You may not give lack of information or knowledge as a reason for failure to admit or deny unless you state that you have made reasonable inquiry and that the information known or readily obtainable by you is insufficient to enable you to admit or deny.

1. Each and every allegation contained in the Defendants' Answer and Counterclaims is true and accurate.
2. The Plaintiff does not have a receipt for every penny of material costs it incurred on the Project.
3. The Plaintiff has failed to provide the Defendant with any receipts for the costs Plaintiff alleges it incurred on the Project.
4. The Plaintiff does not have time sheets showing the exact amount of time it spent providing labor on the Project.
5. The Plaintiff does not have accounting records showing the exact amount of

costs to Plaintiff for the labor it provided on the Project.

6. The Plaintiff does not have tax records showing the exact amount of profit it made on the Project.
7. The Plaintiff does not have accounting records showing the exact amount of costs incurred on the Project.
8. The Plaintiff does not have accounting records showing the exact amount of profit it made on the Project.
9. The contract entered into between the Plaintiff and the Defendant was on the basis of a cost-plus guaranteed maximum possible amount.
10. The Plaintiff was required to account for each and every cost it incurred on the Project.
11. The Plaintiff was required to provide Defendant with an accurate representation of all the costs the Plaintiff incurred on the Project.
12. Other than billing statements, the Plaintiff has never provided the Defendant with any other evidence of all of the costs allegedly incurred by Plaintiff on the Project.
13. All of the laborers employed by Plaintiff to perform work on the Project were properly licensed.

Respectfully Submitted,



M. Stokely Holder (SC Bar # 73892)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601

T: (864) 242-4899

F: (864) 242-4899

Attorneys for Defendant and Third-Party
Plaintiff, Richard M. Buckley

May 16th 2013
Greenville, SC

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON
PLEAS		
COUNTY OF GREENVILLE	)	
D&C Builders, Inc.,	)	C.A. No.: 2013-CP-23-1833
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Richard M. Buckley and	)	THIRD-PARTY PLAINTIFF
Wells Fargo National Association,	)	RICHARD M. BUCKLEY'S
	)	FIRST INTERROGATORIES,
Defendants;	)	REQUESTS FOR PRODUCTION OF
	)	DOCUMENTS, and REQUESTS FOR
	)	ADMISSION TO THIRD-PARTY
Richard M. Buckley,	)	DEFENDANT
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Scott Dodenhoff,	)	
	)	
Third-Party Defendant.	)	
	)	

Pursuant to S.C.R.Civ.P. 26, 33, 34, and 36, Third-Party Plaintiff, Richard M. Buckley, propounds the following Requests to be answered by Third-Party Defendant Scott Dodenhoff (hereinafter, Third-Party Defendant) separately and fully in writing and under oath, and in accordance with the above-cited rules.

These Requests are addressed to the knowledge of Third-Party Defendant and the agents, representatives and attorneys of same. If the answer to the entire question

is not known, so state and answer the part known. If an exact date is not known, state the closest approximate date.

These Requests are deemed continuing in nature and call for prompt supplemental production whenever Third-Party Defendant shall receive or discover information covered by the provisions of S.C.R.Civ.P. 26(e), including, *inter alia*, the ongoing duty of Third-Party Defendant to supplement promptly the responses to these Requests should Third-Party Defendant obtain information upon the basis of which Third-Party Defendant know(s) a prior response was incorrect or incomplete when made, or that a response, thought correct and complete when made, is no longer true and complete.

INSTRUCTIONS AND DEFINITIONS

For the purposes of these Requests the following definitions and instructions shall apply:

A. For purposes of these requests, "document" or "documents" is used in its broadest sense, and means all tangible and electronic items and all written, printed, typed, recorded, transcribed, punched, taped, or graphic matter of every type and description, however and by whomever prepared, produced, reproduced, disseminated, or made, including, but not limited to, writings, e-mails, records, correspondence, communications, letters, diaries, diary entries, logs, log books, schedules, change orders, contracts, purchase orders, delivery tickets, cost reports, payroll ledgers, telegrams, telexes, memoranda, notes, reports, bulletins, summaries, or other records of telephone or personal conversations, minutes or summaries of telephone or personal meetings and conferences, instructions, literature, work assignments, agreements, subcontracts, interoffice or intra office communications, electronic mail, microfilm, notebooks, calendars, appointment books, circulars, pamphlets, projections, studies, estimates, charts, lists, tables, computer runs, tabulations, printouts, notices, books, checks, credit card vouchers, statements of account, receipts, invoices, graphs, photographs, photocopies, drafts, data sheets, data compilations, computer data compilations, statistics, worksheets, speeches or other writings, and tape recordings, and means the original, copy, or any non-identical copy or draft version, regardless of origin or location, which is within the scope of S.C.R.Civ.P. 34.

B. "You" or "your" means Third-Party Defendant, Scott Dodenhoff, and the attorneys, representatives, and agents of same.

C. "Identify" or "identity" as used in these Requests in connection with any person or persons requires the following information for each person:

- (1) the person's full name;
- (2) the person's last known business address and telephone number;
- (3) the person's last known home address and telephone number;
- (4) the person's last known employer; and
- (5) the person's last known title, position, or business.

D. "Identify" or "identity" as used in these Requests in connection with any tangible item or thing requires the following information for each:

- (1) a detailed description of the item or thing; and
- (2) the present location of the item or thing.

E. "Describe" as used in these Requests in connection with any act, occurrence, omission, or series of acts, occurrences or omissions requires the following information:

- (1) the identity of each and every person involved in the act, occurrence, omission or series of acts, occurrences or omissions as provided in the definition of "identify;"
- (2) the date or dates of each and every act, occurrence or omission;
- (3) a brief description of the act, occurrence, omission, or series of acts, occurrences or omissions and the substance of any contact or communication in connection therewith; and
- (4) a description of each and every document involved in the act, occurrence, omission or series of acts, occurrences or omissions.

F. "Specify" or "identify" as used in these Requests in connection with any document requires the following information for each document:

- (1) the title of the document with sufficient particularity to permit its identification;

by you and identify all documents, witnesses, and facts to support your claimed damages.

6. Identify each person whom you expect to call as an expert witness at any hearing or the trial of this case, and with respect to each such person, please state:
 - a. The substance of the facts and opinions to which such person is expected to testify;
 - b. The grounds and bases for each such opinion;
 - c. All publications authored in any part by such person which relates in substance to such person's opinion(s) in this case; and
 - d. The home and business address and telephone number, education, training, and licenses of such person;
 - e. The subject matter and the particular questions or investigations on which such person has been consulted, but which is not expected to testify; and Each case, giving the court, style and case number, in which the individual has previously testified, either by deposition, affidavit, or in person, giving the dates of testimony, identification of a person known to have a transcript of each testimony, the name of the party upon whose behalf testimony was given and a summary of the testimony.
7. Please identify each person you retained or specially employed in anticipation

of litigation or preparation for trial whom you do not expect to call as a witness at the trial of the case.

8. If you contend that you do not owe the amounts Third-Party Plaintiff claims in the Third-Party Claims, state all facts, identify all persons, and list all documents which support your contention.
9. If you assert any Affirmative Defenses in your Answer to the Third-Party Claims, state all facts, identify all persons, and list all documents which support your contentions set forth in each and every Affirmative Defense.
10. Identify and describe in detail all documents you or your counsel are withholding, or intend to withhold, from production to Third-Party Plaintiff based on a claim of privilege or work product and state the bases of each such claim of privilege or work product.
11. Identify all persons involved in responding to these interrogatories.
12. If you have ever been a party to any civil action (other than this civil action) in the last five (5) years, please list the basis thereof, the date and title of each such civil action, the Court in which it was brought and the civil action number.
13. Identify any and all documentation that supports the work you performed on

the Project, any costs you incurred for the same, and any payments made to you for the same, including, without limitation, all contracts, invoices, purchase orders, receipts, cancelled checks, credit accounts, credit card accounts, accounts receivables, accounts payables, all check registers, all bank records, all lien waivers, job history reports, account history reports, labor payrolls, bank accounts, bank statements, accounting records, bookkeeping records, time sheets, subcontracts, agreements, all construction progress photographs and dates of same, all documents evidencing any inspection of any portion of work on the project, all documents evidencing any test or study conducted for any portion of the Project or subject property, all correspondence such as emails, letters, and facsimiles, notes, progress reports, schedules, cancelled pay checks, pay stubs, bills of lading, and material lists.

14. Identify all persons who have possessed and the person(s) that is currently in possession of your accounting books.
15. If you were performing any services or function relating to the Project, describe in detail such services or function and as to each, state the title, position, scope of responsibility and dates of such service or function.
16. Identify all documentation relating to your personal financial status during the time period of December 2011 until the present.

17. Identify all bank accounts and banking records of Third-Party Defendant during the time period of December 2011 until the present.
18. Identify any and all documentation concerning the persons or entities that represented you in an administrative, official, executive, shareholder, ownership and/or agency capacity during the project, including but not limited to, a detailed description of the responsibilities, powers and/or scope of employment of the said persons or entities, including a description of any limitation or expansion of powers during the Project and a description of all promotions and demotions during the Project.
19. Identify all state and federal tax records and documents of Third-Party Defendant for the tax years 2010, 2011 and 2012, including all tax returns, IRS Schedule K-1, 1099 and W2 forms.
20. Identify all real estate You have owned, leased, operated, managed, bought, or sold since January 1, 2011, regardless of location.
21. Identify all motor vehicles You have owned, leased, operated, managed, bought, or sold since January 1, 2011, regardless of location.

22. Identify all watercraft You have owned, leased, operated, managed, bought and/or sold since January 1, 2011.
23. Identify all jobs, projects, and properties that You have been employed to provide construction related services on since January 1, 2011.
24. Identify all sources of your income during the time period of January 1, 2011 to the present.
25. Identify all companies and/or persons for whom you have provided services as an employee, employer, officer, owner, agent, and/or consultant during the time period of January 1, 2011 to the present.

REQUEST FOR PRODUCTION OF DOCUMENTS

1. All documents identified, used or referenced in your Responses to the foregoing Interrogatories or any Request for Admissions.
2. All correspondence concerning the Project, including, but not limited to emails, letters, text messages, phone messages of any type, voicemails, notes, faxes, reports, minutes, logs, and transcripts of any audio recordings, such as voicemails and dictation.
3. All contracts between you and any other party concerning any aspect of the

Project.

4. All insurance agreements, policies, umbrella policies, re-insurance agreements, indemnity agreements and excess liability policies under which any person or corporation carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the above named action or to indemnify or reimburse for payments made to satisfy judgment.
5. Copies of all statements, whether written or oral, relating to the subject of this suit which are in your possession or the possession of your agents.
6. Copies of any documents relied upon by you in drafting your Answer to the Third-Party Claims and that you claim supports your claims and defenses and contradicts the assertions and/or defenses in Third-Party Plaintiff's Claims.
7. Copies of all documents you or your counsel intend to present at trial or that you or your counsel rely upon in preparing for hearings or the trial of this case.
8. For each expert you have contacted, whether or not employed by you or your counsel, please produce for each:

- (a) A copy of such person's most recent curriculum vitae or resume outlining such person's address, phone number, current occupation, expertise, educational background, and such person's current and former employers for the past ten (10) years;
 - (b) Any documents reviewed by such person related to this case;
 - (c) Any reports or notes created or generated by such person;
 - (d) Any documents that you, your counsel, or such person contends supports such person's position; and
 - (e) Any documents that you, your counsel, or such person contends supports such person being qualified as an expert in this case.
9. All notes, lists of discrepancies, checklists, and all other documents used, created, or otherwise made or maintained which relate to your work on the Project.
10. Copies of any and all drawings, shop drawings, logs, plans, specifications, addenda, photographs, plats, sketches, or diagrams which you or your attorney may have which relate to the matters at issue in this action, including, without limitation, the documents listed in your response to Third-Party Plaintiff's Interrogatories.
11. Copies of any and all documentation that supports the work you performed on the Project, the costs you incurred for the same, and/or the payments your received for the same, including, without limitation, all contracts, invoices, purchase orders, receipts, cancelled checks, credit accounts, credit card accounts,

accounts receivables, accounts payables, all check registers, all bank records, all lien waivers, job history reports, account history reports, labor payrolls, accounting records, bookkeeping records, bank accounts, bank statements, time sheets, subcontracts, agreements, all construction progress photographs and dates of same, all documents evidencing any inspection of any portion of work on the project, all documents evidencing any test or study conducted for any portion of the project or subject property, all correspondence such as mails, letters, and facsimiles, notes, progress reports, schedules, cancelled pay checks, pay stubs, bills of lading, and material lists. Copies of any and all financial records relating to the project including all cancelled checks, all check registers, all bank records, all lien waivers, accounting documents, credit agreements, invoices, accounts receivable reports, job history reports, account history reports, and any financial statements regarding the project, including but not limited to, your costs, markup, billings, payments received, and/or profits on the project.

12. A detailed list of the days and times you spent providing services on the Project, to include, without limitation, the specific activities, responsibilities and/or duties performed during each such date and time provided and the location in which you provided each such activity, responsibility and/or duty.

13. Any and all documents to be submitted into evidence at trial or to be relied upon as demonstrative evidence at trial.
14. All documentation relating to your involvement with any corporation or business during the time period of January 1, 2011 until the present, including but not limited to, any all contracts for same, any and all corporate records reflecting same.
15. All documentation relating to your financial status during the period of January 1, 2011 until the present, including, without limitation, all state and federal tax records and documents of Third-Party Defendant for the tax years 2010, 2011 and 2012, including all tax returns, IRS Schedule K-1, 1099 and W2 forms.
16. All bank account and banking records of Third-Party Defendant during the period of January 1, 2011 until the present.
17. All investment and retirement accounts and records of Third-Party Defendant during the period of January 1, 2011 until the present.
19. Any and all documentation concerning your role and capacity on the Project throughout the entire period of the Project, including but not limited to, a detailed description of the responsibilities, powers and/or scope of your responsibilities on

the Project, including a description of any limitation or expansion of powers during the Project and a description of all promotions and demotions during the Project.

REQUESTS FOR ADMISSION

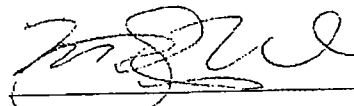
INSTRUCTIONS

Pursuant to S.C.R.Civ.P. 36(a)(2), if you make an objection to any of these Requests of Admission, your reasons therefore must be stated. Your answer to the request for admission shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission; and, when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, you shall specify so much of it as is true and qualify or deny the remainder. You may not give lack of information or knowledge as a reason for failure to admit or deny unless you state that you have made reasonable inquiry and that the information known or readily obtainable by you is insufficient to enable you to admit or deny.

1. Each and every allegation contained in the Third-Party Plaintiff's Claims is true and accurate.
2. The Third-Party Defendant was the party primarily responsible for the billing on the Project.

3. The Third-Party Defendant authorized the cost information represented on the bills that were delivered to Third-Party Plaintiff for the work allegedly performed by Plaintiff on the Project.
4. The Third-Party Defendant authorized the delivery of those bills that were delivered to the Third-Party Plaintiff for the work allegedly performed by Plaintiff on the Project.
5. The representations that were contained on each of the Plaintiff's bills to Plaintiff regarding costs incurred on the Project were not truthful.
6. The Third-Party Defendant received the monies paid by Third-Party Plaintiff on the Project with knowledge that some of the costs representations on the bills were not truthful.
7. The Third-Party Defendant never informed Third-Party Plaintiff that some of the representations on the bills were not truthful.

Respectfully Submitted,



M. Stokely Holder (SC Bar # 73892)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601

T: (864) 242-4899

F: (864) 242-4899

Attorneys for Defendant and Third-Party
Plaintiff, Richard M. Buckley

May 16th 2013
Greenville, SC

Brian A. Martin

From: Stewart James <sjames@babbandbrown.com>
Sent: Wednesday, June 19, 2013 5:44 PM
To: brian@martinlawsc.com
Subject: FW: DC Builders vs. Richard M. Buckley

From: Stokely Holder [<mailto:holder@conlaw.com>]
Sent: Wednesday, June 19, 2013 3:56 PM
To: Stewart James
Cc: Laurie Warren; Lee Prickett
Subject: RE: DC Builders vs. Richard M. Buckley

Stewart,

It's my understanding that Brian Martin is now representing D&C Builders and Dodenhoff. I haven't received a substitution of counsel or a notice of appearance from Brian.

Also, I've noticed in my file that I don't have the acceptance of service that we provided you along with service of our pleadings. Could you please send that to me when you get a minute or let me know the status of it.

Lastly, I presume the motion hearing notices that you received prior to Brian Martin's involvement were forwarded to Brian. I've tried calling Brian to confirm, but have been unable to reach him.

Thanks

Stokely

From: Stewart James [<mailto:sjames@babbandbrown.com>]
Sent: Tuesday, May 21, 2013 3:07 PM
To: Stokely Holder
Subject: DC Builders vs. Richard M. Buckley

Stokely: I spoke with my client this morning and he is going to attempt to get his insurance carrier to defend him in the counter claim. I also informed him that I was not a construction lawyer so if his insurance doesn't defend him he may be seeking other counsel. I see there is a motion scheduled but I am assuming he will have someone by that time. Once I know who it is, I will let you know.

From: Brian A. Martin [<mailto:brian@martinlawsc.com>]
Sent: Thursday, July 11, 2013 10:28 AM
To: emillerj@sccourts.org
Cc: 'Stewart James'; Stokely Holder; ashook@finkellaw.com
Subject: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Dear Judge Miller,

Please review the attached letter and Draft Order regarding your instructions at the hearing in the above referenced matter held before you on July 8, 2013. By copy of this e-mail and by U.S. Mail, I am providing all counsel of record of copy of this same information. Please let me know if you have any questions or need any further information from me.

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.

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BRIAN A. MARTIN_{LLC}

ATTORNEY AT LAW

LICENSED IN SC & NC

212 TRADE STREET
GREER, SOUTH CAROLINA 29651

T(864) 879-7779 • F(864) 879-7171
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 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,

A handwritten signature in dark ink, appearing to read "B. A. Martin", with a horizontal line extending to the right.

Brian A. Martin

Enclosure

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

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
13th JUDICIAL CIRCUIT
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.

This matter came before me upon motion of the attorney for Plaintiff to disqualify attorney M. Stokely Holder and any attorney at the law firm of Kenison, Dudley & Crawford, LLC (hereinafter "Law Firm") from representing Defendant and Third-Party Plaintiff Richard M. Buckley (hereinafter "Defendant Buckley") in this matter based on a material conflict of interest.

A hearing was held on July 8, 2013 wherein Plaintiff presented arguments in support of granting the motion for disqualification and Defendant presented arguments in support of denial of the motion for disqualification.

There being information that the Court requested of Plaintiff relative to the motion, to which Plaintiff objected presenting in open Court, the hearing was temporarily halted so that Plaintiff can provide such information in the form of a Privilege Log to the Court.

THEREFORE IT IS ORDERED that the Plaintiff prepare and submit to the Court for its review, a Privilege Log containing the following information:

1.

IT IS ALSO ORDERED that the hearing on the Motion to Disqualify is continued until such time that the Court has reviewed the Privilege Log, at which time the hearing shall be reset to resume.

IT IS SO ORDERED.

Honorable Edward W. Miller, Judge
Thirteenth Judicial Circuit

_____, 2013
Greenville, South Carolina

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.

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Dear Judge Miller,

Please review the attached letter and Draft Order regarding your instructions at the hearing in the above referenced matter held before you on July 8, 2013. By copy of this e-mail and by U.S. Mail, I am providing all counsel of record of copy of this same information. Please let me know if you have any questions or need any further information from me.

Sincerely, Brian A. Martin

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

D&C Builders, Inc.,

Plaintiff,

vs.

Richard M. Buckley and
Wells Fargo National Association,

Defendants;

Richard M. Buckley,

Third-Party Plaintiff,

vs.

Scott Dodenhoff,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2013-CP-23-1833

ORDER

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.

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"). Through a referral from another law firm, Defendant Buckley hired KDC in March 2013 to represent his interests in this 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 Action. More specifically, the Plaintiff contends that KDC's representation of Defendant Buckley, in forwarding his interest in this 2013 Action, will injuriously affect the Plaintiff because KDC will be called on in this 2013 Action to use against the Plaintiff knowledge and information acquired by KDC 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 19, 2013 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. This information shall include, without limitation, copies of any and all documents evidencing same, together with dates, times, witnesses and

names of all parties alleged to be a part thereof. The Plaintiff shall provide a copy of its submission to counsel for Defendant Buckley.

Within ten (10) days from the receipt by the Court and KDC of Plaintiff's full submission, KDC shall be given ten (10) days from the date thereof to submit any response to the Court with copy to Plaintiff's counsel.

The submission by Plaintiff and any response provided by KDC shall be subject to this order of protection of the Court: The information submitted shall only be accessed by the office of Defendant's counsel, Plaintiff, and the office of Plaintiff's counsel. None of the information submitted shall be disseminated in any form or fashion at any time to anyone outside of the above named without the prior written consent of the Court.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Disqualify is hereby held in abeyance subject to the terms herein, and the information produced by the parties in accordance with the terms herein shall be subject to the order of protection outlined above.

IT IS SO ORDERED!

Edward W. Miller
Judge, 13th Judicial Circuit

July __, 2013
Greenville, South Carolina

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

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

To: 'Stokely Holder'; Miller, Edward W.

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

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Sent: Thursday, July 11, 2013 10:28 AM
To: emillerj@sccourts.org
Cc: 'Stewart James'; Stokely Holder; ashook@finkellaw.com
Subject: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Dear Judge Miller,

Please review the attached letter and Draft Order regarding your instructions at the hearing in the above referenced matter held before you on July 8, 2013. By copy of this e-mail and by U.S. Mail, I am providing all counsel of record of copy of this same information. Please let me know if you have any questions or need any further information from me.

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

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From: Miller, Edward W. <emillerj@sccourts.org>
Sent: Monday, July 15, 2013 4:54 PM
To: Stokely Holder; Brian A. Martin
Cc: 'Stewart James'; ashook@finkellaw.com
Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Mr. Holder's proposed Order has been signed and is being filed with the Clerk of Court's office this afternoon. Plaintiff's due date for the submission is July 25, 2013.

Ned Miller

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

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.

From: Brian A. Martin [<mailto:brian@martinlawsc.com>]
Sent: Thursday, July 11, 2013 10:28 AM
To: emillerj@sccourts.org
Cc: 'Stewart James'; Stokely Holder; ashook@finkellaw.com
Subject: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Dear Judge Miller,

Please review the attached letter and Draft Order regarding your instructions at the hearing in the above referenced matter held before you on July 8, 2013. By copy of this e-mail and by U.S. Mail, I am providing all counsel of record of copy of this same information. Please let me know if you have any questions or need any further information from me.

Sincerely, Brian A. Martin

Brian A. Martin, LLC
Attorney at Law
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(864) 879-7779
(864) 879-7171 Fax
brian@martinlawsc.com

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From: Miller, Edward W. Law Clerk (Courtney S. Camferdam) <emillerlc@sccourts.org>
Sent: Thursday, July 18, 2013 2:06 PM
To: Stokely Holder
Cc: 'Stewart James'; ashook@finkellaw.com; Brian A. Martin
Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Judge Miller would like to set a hearing for next week for the motion to reconsider and to resolve this matter. Next Tuesday 23rd at 10 am is available. If this time does not work or any of you have a conflict please let me know and we can schedule it at what time works best for all of you next week.

Thanks,

Courtney Camferdam
Law Clerk to the Honorable Edward W. Miller
305 E. North Street, Suite 219
Greenville, South Carolina 29601
(864) 467-8558
(864) 233-4173 Fax
emillerlc@sccourts.org

From: Stokely Holder [mailto:holder@conlaw.com]
Sent: Thursday, July 18, 2013 10:46 AM
To: Miller, Edward W. Law Clerk (Courtney S. Camferdam); Miller, Edward W.
Cc: 'Stewart James'; ashook@finkellaw.com; Brian A. Martin
Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Dear Judge Miller,

If I may interject in hopes of narrowing this issue – and not making any more out of it than it has become.

First, in addressing what appears to be one of the main concerns expressed by Mr. Martin below, I remain confident in the abilities of this Court, and every court of this State, to resolve any disagreements over whether information is confidential or not.

As far as the substance of the issue, please see the attached letter.

Should you have any questions or concerns, we will be glad to discuss this matter in any forum of your choosing.

Respectfully,

Stokely Holder

From: Brian A. Martin [mailto:brian@martinlawsc.com]
Sent: Thursday, July 18, 2013 9:22 AM
To: 'Miller, Edward W. Law Clerk (Courtney S. Camferdam)'; Stokely Holder

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

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

Your Honor,

Respectfully, although you are correct that defense counsel would already know of such information, given their statement that they aren't aware of any, it is possible they may not remember such information, may not remember the confidential part of such information, or may not remember that such information was not shared in the prior case and is therefore still confidential. For example, hypothetically, in providing information to counsel in the prior case to respond to interrogatories, my client revealed that a few years earlier he had knowingly used defective building materials in a project to save money, but he's never told anyone about it and no one ever discovered it. Assume that information was never revealed to the other side or the case settled before the answers to interrogatories were provided to the other side.

Knowledge of that confidential information would surely disqualify KDC from representing the other side in this case which involves allegations of fraud and poor construction against my client. What happens if defense counsel doesn't remember being told this, but the privilege log refreshes the memory? What happens if my client was mistaken and only thought he had provided this information in the prior case but had not actually provided it until the privilege log? What if my client doesn't remember whether he told KDC about it previously or not and he wasn't planning on telling me about it? Does he tell me and we include it in the privilege log or keep it to himself and hope he did not tell KDC and if he did that KDC continues to not remember that he told them? I am very worried in all of these situations, that if my client did not in fact share the information with KDC previously, that I would be violating the Rules of Professional Conduct by providing it in the privilege log.

Defense counsel's suggestion and your order require that we provide this information to defense counsel for them to determine whether it is confidential or not? How exactly are they going to do that? Clearly KDC has a vested interest in claiming any information my client says was confidential was in fact not confidential just as my client has an interest in claiming the information was confidential. If the information is submitted under the privilege log with the order of protection, how does that disagreement on the confidentiality get resolved? Will an affidavit from KDC that they don't believe it's confidential be enough? And if my client provides an affidavit that it was confidential? If the information was conveyed to KDC verbally and they have no record in their existing file about it, how can KDC determine whether it was and remains confidential without consulting with another third party to see if someone else knows about it? If that third party actually wasn't aware of the information then sharing the information to ask if they were aware would actually constitute the sharing of confidential information in violation of the Rules.

If my client did not in fact tell KDC about the hypothetical information above, but believes that he may have so he tells me about it to put in the privilege log and I do. If it turns out that he didn't actually give that information to KDC but he did just give it to me, then I do believe I am disclosing confidential information that my client has only disclosed to me, albeit as required to comply with the Court's order, and I think I have now violated Rule 1.6.

I certainly respect your view of this being a simple issue, but I cannot see a path of compliance with your order that does not put me at risk of violating my own ethical obligations to my client. In light of these concerns, would the Court consider staying any further action or proceedings in this matter for a period of time to allow me to request and obtain an advisory opinion from the Ethics Commission on the situation? I believe that obtaining such guidance in light of the ethical complexities would be very beneficial and potentially prevent me from inadvertently violating the Rules of Professional Conduct. I would be glad to provide the proposed fact scenario to defense counsel and the Court for review and suggested changes prior to submission to the Ethics Commission.

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

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From: Miller, Edward W. Law Clerk (Courtney S. Camferdam) [<mailto:emillerlc@sccourts.org>]
Sent: Wednesday, July 17, 2013 4:28 PM
To: Brian A. Martin; 'Stokely Holder'
Cc: 'Stewart James'; ashook@finkellaw.com
Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Mr. Martin:

If there is confidential information which would preclude the representation in this case by defense counsel, the defense attorneys would already know what it is. Disclosure of this information in a privilege log allows defense counsel to determine whether it is in fact confidential. I have not ordered your client to disclose new information which has not previously been disclosed to defense counsel. This is a simple issue. Your client is not required to disclose confidential information that he has disclosed to you, only information which he claims is confidential which he has previously disclosed to defense counsel.

Edward W. Miller

From: Brian A. Martin [<mailto:brian@martinlawsc.com>]
Sent: Tuesday, July 16, 2013 3:49 PM
To: 'Stokely Holder'; Miller, Edward W. Law Clerk (Courtney S. Camferdam)
Cc: 'Stewart James'; ashook@finkellaw.com
Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Ms. Camferdam,

Having now obtained an executed and filed copy from the Clerk of Court of the Order entered by Judge Miller to which Mr. Holder refers, I would respectfully disagree with Mr. Holder's position below. I have continually requested at each opportunity on this issue that the Court not allow the Defendant and his attorneys to have access to confidential information, particularly that information provided in the course of confidential attorney/client communications. I firmly believe that I have shown that providing this information to Mr. Holder will cause irreparable harm to my client, that the Rules of Professional Conduct and the case law clearly demonstrate the Plaintiff is not required to provide that information, and if the Court will not restrict Defendant's attorney from reviewing this information, Plaintiff has no other way to protect his confidential information conveyed in confidential attorney/client communications. Since the restraint

that I requested has not been addressed in the filed Order, I do believe a ruling is necessary on this request for an injunction.

In addition to the Judge addressing the outstanding injunction issue, I have also filed the attached Motion to Reconsider, Clarify and Amend the Order to request that Judge Miller reconsider all the arguments and evidence submitted, revise the Order to clarify exactly what he wants to see and to issue an injunction that the Defendant or his Counsel be prohibited from seeing whatever the Judge is requesting that we provide, so that client confidences are not compromised. By copy of this e-mail, I am providing all counsel with a copy of this Motion and the Proposed Order I have prepared for Judge Miller's convenience. Hard copies of these are also going out to all Counsel by mail today.

I would ask that you pass the attached Motion and Order along to Judge Miller for his review, along with my position that I do believe the issue of a temporary injunction needs to be ruled on. Thank you in advance for your assistance. Should you or Judge Miller need any further information from me, please do not hesitate to give me a call.

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

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From: Stokely Holder [<mailto:holder@conlaw.com>]
Sent: Monday, July 15, 2013 5:21 PM
To: Miller, Edward W. Law Clerk (Courtney S. Camferdam); brian@martinlawsc.com
Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Ms. Camferdam,

Thank you for the email. I noticed you weren't copied on the prior email we received from Judge Miller (attached). From his email, it sounds like he has already signed an order that I believe takes care of the issue at hand. Although, if there is something further he would like to discuss with counsel, we will of course be glad to oblige.

Thank you,

Stokely Holder

From: Miller, Edward W. Law Clerk (Courtney S. Camferdam) [<mailto:emillerlc@sccourts.org>]
Sent: Monday, July 15, 2013 5:04 PM
To: brian@martinlawsc.com; Stokely Holder
Subject: FW: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Judge Miller has asked me to check on the status of this case and whether a ruling is necessary for temporary injunction. If you could please let me know that would be great.

Thanks,

Courtney Camferdam
Law Clerk to the Honorable Edward W. Miller
305 E. North Street, Suite 219
Greenville, South Carolina 29601
(864) 467-8558
(864) 233-4173 Fax
emillerlc@sccourts.org

From: Miller, Edward W.
Sent: Monday, July 15, 2013 9:28 AM
To: Miller, Edward W. Law Clerk (Courtney S. Camferdam)
Subject: FW: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

From: Brian A. Martin [<mailto:brian@martinlawsc.com>]
Sent: Thursday, July 11, 2013 1:18 PM
To: 'Stokely Holder'; Miller, Edward W.
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
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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

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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.

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Cc: 'Stewart James'; Stokely Holder; ashook@finkellaw.com
Subject: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

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Sincerely, Brian A. Martin

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KENISON DUDLEY & CRAWFORD LLC
ATTORNEYS AT LAW

KEVEN K. KENISON

THOMAS E. DUDLEY, III

JOHN T. CRAWFORD, JR.

M. STOKELY HOLDER

TOWNES B. JOHNSON, III

F. LEE PRICKETT, III

July 18, 2013

VIA EMAIL

The Honorable Edward W. Miller
305 E. North Street, Suite 219
Greenville, SC 29601

RE: *D&C Builders, Inc. v. Richard M. Buckley*
C.A. No.: 2013-CP-23-1833

Dear Judge Miller,

I write in response to the correspondence directed to your office by Mr. Brian Martin and the Motion to Reconsider that he has filed on behalf of his client, D&C Builders, Inc.

The opinion rendered by the South Carolina Supreme Court in the *Townsend* case referenced by Mr. Martin specifically states that the Supreme Court's discussion in that case on the issue of Conflict of Interest "applies only to attorney guardians ad litem in child custody and support actions." *Townsend v. Townsend*, 323 S.C. 309, 315, 474 S.E.2d 424, 428 (1996). This is not such an action.

Further, notwithstanding our position that Rule 1.9(a) of the South Carolina Rules of Professional Conduct is inapplicable here due to, *inter alia*, the failure of the Plaintiff to prove the two matters are "substantially related", Rule 1.9(c) provides, in pertinent part:

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

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1201 Main Street Suite 1989 Columbia, South Carolina 29201
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554 B Oristo Ridge Edisto Beach, South Carolina 29928
Phone 843.869.1090

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

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

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

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

It remains our position that the 2 cases at issue are entirely separate and distinct situations/transactions with entirely distinct facts. The only similarity is that they both involve mechanic's liens - albeit on different properties, against different owners, securing different alleged debts and arising from completely unrelated facts. Moreover, no confidential information was gained by my firm in its prior representation of Plaintiff. What is also clear is that the Plaintiff allowed the information he is complaining about to be generally known - to (at a minimum) *the Defendant in this action*. And, he has yet to provide any proof whatsoever to the contrary. The Plaintiff has failed to provide any "specific" confidential facts to counter this position, despite its right to do just that.

Mr. Martin cites that portion of comment 3 to Rule 1.9 of the South Carolina Rules of Professional Conduct which states that a former client *is not required* to reveal the purported confidential information. In support of his Motion to Reconsider, Mr. Martin states that his client "will be forced to disclose confidential information to Defense Counsel *that may not have been previously disclosed to Defense Counsel in the*

prior representation".¹ This admission coupled with the clear desire of Plaintiff to not provide any of the purported confidential information all the while crying the (*potential*) existence of confidential information, presents the troubling scenario where the Plaintiff is attempting to use Rule 1.9 not as a shield but as a sword. This was surely not the intention behind the Rule.

It remains our position that the arguments and facts presented to the court show: (1) the two cases are not substantially related; (2) the existence of absolutely no specific confidential information learned in the first case such that there is no confidential information in the possession of Defendant's counsel that would be, or could be, of significance in the second case; and (3) Defendant's counsel will not be called on in this case to use against the Plaintiff any knowledge or information acquired by Defendant's counsel in the prior case that would injuriously affect the Plaintiff. Despite this clarity and despite the Court giving the Plaintiff the opportunity to produce anything to counter it, the Plaintiff has made it abundantly clear to the Court that it would rather assert what it argues is his right not to produce anything, including what he is alleging is *possibly* confidential information. Therefore, it is respectfully requested that the Court partially grant the Plaintiff's Motion to Reconsider by simply rescinding its original order and then enter an Order denying the Plaintiff's Motion to Disqualify.

Respectfully,

KENISON, DUDLEY & CRAWFORD, LLC



M. Stokely Holder

MSH/lw

cc: Brian A. Martin, Esq. (via e-mail)
H. Stewart James, Esq. (via e-mail)
Thomas A. Shook, Esq. (via e-mail)

¹ In paragraph 13 of Mr. Martin's Motion to Reconsider, he appears to go so far as to take the liberty of pontificating to the Court about how likely it is that an appellate court will consider the prior order to be in error.

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case Number: 2013-CP-23-1833

RECEIVED
JUL 26 2013
SC Court of Appeals

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

v.

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

v.

Scott Dodenhoff, Third-Party Defendant

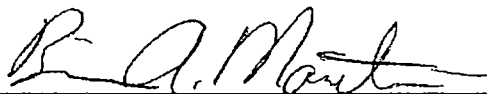
of whom:

Richard M. Buckley.....Respondent,

NOTICE OF APPEAL

D&C Builders, Inc. appeals the Order of the Honorable Edward W. Miller dated July 15, 2013 and filed July 16, 2013, requiring Appellant to provide specific confidential information to Counsel for Respondent in support of Appellant's pending Motion to Disqualify Counsel for Respondent and the Order of the Honorable Edward W. Miller issued at hearing on July 23, 2013 denying Appellant's Motion for Injunction. Appellant received written notice of the order filed July 16, 2013 on July 16, 2013 and notice of the order issued July 23, 2013 on July 23, 2013 at hearing.

July 25, 2013



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

Other Counsel of Record:

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

CO-COUNSEL FOR APPELLANT

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

ATTORNEY FOR RESPONDENT

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

ATTORNEY FOR DEFENDANT WELLS FARGO, N.A.

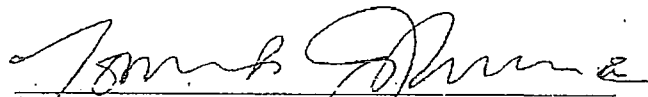
2011LP 421370

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT
D&C Builders, Inc.,) C. A. No. 2011-CP-42- 4121
Plaintiff,)
v.) LIS PENDENS
TMKG, Inc.,)
Defendant(s).)

TO THE ABOVE NAMED DEFENDANT(S):

NOTICE IS HEREBY GIVEN, pursuant to *South Carolina Code Ann.* §15-11-10, that not more than 20 days from the filing of this Notice of Lis Pendens, an action will be commenced by the above-named Plaintiff against the above-named Defendants for the purpose of foreclosing the Mechanics' Lien filed with the Register of Deeds Office for Spartanburg County, South Carolina on August 8, 2011, at Book 33 at Pages 775 against the real property located in the State of South Carolina, County of Spartanburg at the physical address of 527 Brookshire Rd., Greer, South Carolina and more fully described in "Exhibit 1" attached hereto and incorporated by reference.

Respectfully submitted this 27th day of September, 2011.



John T. Crawford, Jr. (SC Bar# 69682)
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Attorneys for Plaintiff

Greenville, South Carolina

CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 27 PM 4:06
M. HOPE BLAUGLEY