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 II

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

Other Counsel of Record:

H. Stewart James, Esquire
Babb & Brown, P.C.
505 W. Butler Road
Greenville, South Carolina 29607
(864) 422-0022
Co-Counsel for Petitioner

M. Stokely Holder, Esquire
Holder Padgett Littlejohn + Prickett, LLC
1204 A East Washington Street
Greenville, South Carolina 29601
(864) 335-8808
Attorney for Respondent

Thomas A. Shook, Esquire
Finkel Law Firm, LLC
Post Office Box 71727
North Charleston, South Carolina 29417
(843) 577-5460
Attorney for Defendant Wells Fargo, N.A.

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 II

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

Other Counsel of Record:

H. Stewart James, Esquire
Babb & Brown, P.C.
505 W. Butler Road
Greenville, South Carolina 29607
(864) 422-0022
Co-Counsel for Petitioner

M. Stokely Holder, Esquire
Holder Padgett Littlejohn + Prickett, LLC
1204 A East Washington Street
Greenville, South Carolina 29601
(864) 335-8808
Attorney for Respondent

Thomas A. Shook, Esquire
Finkel Law Firm, LLC
Post Office Box 71727
North Charleston, South Carolina 29417
(843) 577-5460
Attorney for Defendant Wells Fargo, N.A.

INDEX

Decision of the Court of Appeals, Op. No. 2016-UP-184

(S.C. Ct. App. Filed April 20, 2016)..... 1

Petition for Rehearing..... 3

Order Denying Rehearing..... 19

Final Brief of Appellant..... 21

Final Brief of Respondent..... 73

Final Reply Brief of Appellant..... 100

Record on Appeal..... 123

Index..... 124

Order of Judge Edward W. Miller (Filed July 25, 2013)..... 128

Order of Judge Edward W. Miller (Filed July 16, 2013)..... 130

Notice and Certificate of Mechanic's Lien (Filed February 11, 2013)..... 134

Summons, Complaint and Lis Pendens (Filed April 1, 2013)..... 139

Defendant Wells Fargo Bank, N.A. Answer and Consent to Reference (Dated April 25, 2013)..... 147

Amended Lis Pendens (File May 8, 2013)..... 148

Defendant Richard M. Buckley's Motion to Dismiss (File May 15, 2013)..... 150

Defendant Richard M. Buckley's Answer, Counterclaims and Third-Party Claim (Filed May 15, 2013)..... 152

Motion to Disqualify Attorney and Law Firm (Filed June 19, 2013)..... 189

Affidavit of Scott Dodenhoff (Filed June 19, 2013)..... 192

Transcript of Record (Dated June 20, 2013)..... 197

Defendant Richard M. Buckley's Amended Answer, Counterclaims and Third-Party Claim (Filed July 8, 2013)..... 203

Affidavit of M. Stokely Holder, Esq. (Filed July 8, 2013)..... 233

Affidavit of Townes B. Johnson, III, Esq. (Filed July 8, 2013)..... 239

Affidavit of John T. Crawford, Jr., Esq. (Filed July 8, 2014)..... 242

Affidavit of John H. Heckman, Esq. (Filed July 8, 2014)..... 246

Affidavit of Pamela Burns-Byers Buckley (Filed July 8, 2014)..... 249

Transcript of Record (Dated July 8, 2013)..... 253

Motion to Reconsider, Clarify and Amend Order to Issue Injunction on Behalf of Plaintiff (Filed July 16, 2013)..... 279

Transcript of Record (Dated July 23, 2013)..... 298

Defendant Richard M. Buckley's First Interrogatories, Requests for Production of Documents, and Requests for Admission to Plaintiff (Dated May 16, 2013)..... 307

Third Party Plaintiff Richard M. Buckley's First Interrogatories, Requests for Production of Documents, and Requests for Admissions to Third-Party Defendant (Dated May 16, 2013)..... 324

Email from M. Stokely Holder, Esq. (Dated June 19, 2013 at 5:44 PM) 336

Email from Brian A. Martin, Esq. (Dated July 11, 2013 at 10:28 AM)..... 337

Letter to Hon. Edward W. Miller from Brian A. Martin, Esq. with Proposed Order (Dated July 11, 2013)..... 338

Email from M. Stokely Holder, Esq. with Proposed Order (Dated July 11, 2013 at 11:58 AM)..... 347

Email from Brian A. Martin, Esq. (Dated July 11, 2013 at 1:18 PM)..... 352

Email from Hon. Edward W. Miller (Dated July 15, 2013 at 4:54 PM)..... 355

Email Chain (Dated July 18, 2013)..... 357

Letter from M. Stokely Holder, Esq. (Dated July 18, 2013)..... 364

Notice of Appeal (Filed July 26, 2013)..... 367

D&C Builders, Inc. v. TMKG, Inc. – Lis Pendens; Summons and Complaint (Filed September 27, 2011)..... 371

D&C Builders, Inc. v. TMKG, Inc. – Plaintiff's Motion for Partial Summary Judgment (Filed September 27, 2011)..... 397

D&C Builders, Inc. v. TMKG, Inc. – Answer and Counterclaims by TMKG, Inc. (Filed November 22, 2011)..... 405

D&C Builders, Inc. v. TMKG, Inc. – Plaintiff's Reply to Counterclaim (Filed December 22, 2011)..... 419

D&C Builders, Inc. v. TMKG, Inc. – Defendant TMKG's Memorandum in opposition to Plaintiff's Motion for Partial Summary Judgment (Filed February 29, 2012)..... 430

D&C Builders, Inc. v. TMKG, Inc. – Affidavit of Gerald Koch (Filed February 29, 2012)..... 436

D&C Builders, Inc. v. TMKG, Inc. – Plaintiff's Motion to Compel Discovery from Defendant (Filed March 2, 2012)..... 440

D&C Builders, Inc. v. TMKG, Inc. – Defendant TMKG's Petition to Vacate Mechanic's Lien and Motion for Partial Summary Judgment (Filed March 5, 2012)..... 459

D&C Builders, Inc. v. TMKG, Inc. – Motion for Continuance of Motion Hearing (Filed March 15, 2012)..... 472

D&C Builders, Inc. v. TMKG, Inc. – Notice of Hearing (Filed March 28, 2012)..... 474

D&C Builders, Inc. v. TMKG, Inc. – Plaintiff's Offer of Settlement (Filed April 13, 2012)..... 475

D&C Builders, Inc. v. TMKG, Inc. – Affidavit of Scott Dodenhoff (Filed April 19, 2012)..... 477

D&C Builders, Inc. v. TMKG, Inc. – Order Denying Motions for Summary Judgment (Filed May 3, 2012)..... 497

D&C Builders, Inc. v. TMKG, Inc. – Stipulation of Dismissal with Prejudice (Filed July 20, 2012)..... 499

D&C Builders, Inc. v. TMKG, Inc. – Order of Dismissal
(Filed July 30, 2012)..... 500

Motion to Dismiss (Dated November 27, 2013)..... 503

APPENDIX VOLUME II

Memorandum of Respondent in Support of
Its Motion to Dismiss (Dated November 27, 2013)..... 505

Return to Motion to Dismiss (Dated December 9, 2013)..... 536

Memorandum of Appellant in Opposition to Respondent's
Motion to Dismiss (Dated December 9, 2013)..... 539

Order (Filed March 10, 2014)..... 676

Motion for Order Granting Partial Relief; and Motion to Dismiss
Appellant's Remaining Issue on Appeal (Dated April 10, 2014)..... 678

Memorandum of Respondent in Support of Its Motion for Order
Granting Partial Relief; and Motion to Dismiss Appellant's Remaining
Issue on Appeal (Dated April 10, 2014)..... 682

Return to Respondent's Motion For Order Granting Partial Relief and
Motion to Dismiss Appellant's Remaining Issue on Appeal (Filed May 2, 2014)..... 704

Memorandum of Appellant in Opposition to Respondent's Motion for Order
Granting Partial Relief and Motion to Dismiss Appellant's Remaining
Issue on Appeal (Filed May 2, 2014)..... 709

Respondent's Reply to Appellant's Return to Respondent's Motion for
Order Granting Partial Relief; and Motion to Dismiss Appellant's
Remaining Issue on Appeal (Dated May 9, 2014)..... 738

Order (Filed June 2, 2014)..... 747

Motion to Strike Matter From Respondent's Designation and Brief,
Or In the Alternative, Order Office of Disciplinary Counsel to Release
Entire File on Appellant's Ethics Commission Complaint Filed July 26, 2013
(Filed July 7, 2014)..... 749

Memorandum of Appellant in Support of Appellant's Motion to Strike Matter
From Respondent's Designation and Brief, Or in the Alternative, Order
Office of Disciplinary Counsel to Release Entire File on Appellant's Ethics
Commission Complaint filed July 26, 2013 (Filed July 7, 2014)..... 753

Initial Brief of Respondent (Dated June 19, 2014)..... 764

Designation of Matter to Be Included in the Record On Appeal
(Dated June 19, 2014)..... 797

Respondent's Return to Appellant's Motion to Strike Matter From
Respondent's Designation and Brief, or in the alternative, Order Office
Of Disciplinary Counsel to Release Entire File on Appellant's Ethics Commission
Complaint filed on July 26, 2013 (Dated July 22, 2014)..... 801

Order (Filed August 21, 2014)..... 809

Respondent's Motion to Strike Matter from Appellant's Designation
And Brief (Dated September 11, 2014)..... 811

Memorandum of Respondent In Support of Respondent's Motion to Strike
Matter from Appellant's Designation and Brief (Dated September 11, 2014)..... 813

Return to Respondent's Motion to Strike Matter From Appellant's
Designation and Brief (Filed October 10, 2014)..... 823

Memorandum of Appellant In Opposition to Respondent's Motion
To Strike Matter From Appellant's Designation and Brief (Filed October 10, 2014)..... 827

Reply of Respondent in Support of Respondent's Motion to Strike
Matter from Appellant's Designation and Brief (Dated October 16, 2014)..... 858

Reply Memorandum of Respondent in Support of Respondent's Motion
To Strike Matter from Appellant's Designation and Brief
(Dated October 16, 2014)..... 863

Order (Filed November 25, 2014)..... 922

EXHIBIT 1

All that certain piece, parcel or tract of land situate, lying and being in the State of South Carolina, in the County of South Carolina, adjacent to Brookshire Road, identified as Lot 1, containing 1.07 acres, more or less, as shown on a survey prepared for Douglas Thompson by Site Design, Inc., dated May 11, 2005, and recorded in the Spartanburg County Register of Deeds Office in Plat Book 158 at Page 159; reference to which is craved for a complete metes and bounds description thereof.

This being the same property conveyed unto TMKG, Inc., by deed of D. Martin Thompson and Valerie M. Thompson, dated August 6, 2009, and recorded on September 3, 2009 in Deed Book 94-M at Page 720 in the Spartanburg County Register of Deeds Office.

TMS 5-24-00-022.02

Physical Address: 527 Brookshire Rd.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 27 PM 4:06
M. HOPE BLACKLEY

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.	)	SUMMONS
	)	
TMKG, Inc.,	)	
	)	
Defendant(s).	)	
	)	

FILED
CLERK OF COURT
SPARTANBURG, S.C.
2011 SEP 27 PM 4:06
M. HOPE

TO THE ABOVE NAMED DEFENDANT(S):

YOU ARE HEREBY summoned and required to answer the Complaint in this action, which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their offices, 704 East McBee Avenue, Greenville, South Carolina, 29601, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court and judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted this 27 day of September, 2011,

John T. Crawford, Jr. Esq.
Townes B. Johnson, III (SC Bar# 75412)
KENISON, DUDLEY & CRAWFORD, LLC
704 E. McBee Avenue
Greenville, South Carolina 29601
PH: (864) 242-4899
FAX: (864) 242-4844

Attorney for Plaintiff

Greenville, South Carolina

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.	)	FORECLOSURE COMPLAINT
	)	
TMKG, Inc.,	)	
	)	
Defendant(s).	)	

COMES NOW, the plaintiff, D&C Builders, Inc. ("Plaintiff"), complaining of the defendant, TMKG, Inc. ("Defendant"), and would show the following:

1. Plaintiff is a South Carolina corporation duly licensed, organized and existing under the laws of the State of South Carolina and, at all times mentioned herein, was transacting business in Spartanburg County, South Carolina.

2. Defendant is a South Carolina corporation duly licensed, organized and existing under the laws of the State of South Carolina and, at all times mentioned herein, was transacting business in Spartanburg County, South Carolina.

3. Defendant is the owner of real property located at [illegible] Brookshire Rd., Greer, South Carolina in Spartanburg County, South Carolina ("Subject Property").

4. On May 5, 2010, Plaintiff and Defendant entered into agreement whereby Plaintiff would supply certain labor and materials for the improvement of the Subject Property ("Project").

5. Plaintiff provided its labor and materials as required by the agreement with Defendant for use in the construction of the Project and invoiced Defendant for all material and labor provided.

6. Plaintiff has performed all requirements associated with the agreement and has completed all of its contractual obligations pursuant to the agreement.

7. Defendant has no defenses to the payment obligations owed to Plaintiff.

8. Pursuant to *South Carolina Code Ann.* § 27-1-15, Plaintiff delivered, via certified mail, a demand letter dated July 13, 2011, to Mr. Gerald Koch, as the Registered Agent for Defendant. A true and correct copy of this letter is attached hereto as "**Exhibit A**" and is incorporated herein by reference.

9. On or about July 27, 2011, Plaintiff served its Notice and Certificate of Mechanics' Lien, Statement of Account, and Affidavit of Service upon Defendant for the Subject Property in the amount of Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40). On or about August 8, 2011, Plaintiff filed its Mechanics' Lien Statement of Account, and Affidavit of Service in the Office of the Register of Deed for Spartanburg County at Book 33, Page 775. A true and correct copy of the Notice and Certificate of Mechanic's Lien, Statement of Account, Verification and Affidavit of Service are attached hereto as "**Exhibit B**" and are incorporated herein by reference.

10. To date, Defendant has failed and refused to pay the account balance in excess of Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40).

11. Jurisdiction and venue are proper in this Court.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

12. Plaintiff realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

13. The agreement that Plaintiff and Defendant entered into, constitutes a valid contract, and Plaintiff has fully performed its obligations under that agreement with Defendant.

14. Defendant has wrongfully failed and refused to pay Plaintiff for labor and materials furnished in the amount of at least Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40) as set forth on Plaintiff's Statement of Account. *See Exhibit B.*

15. Plaintiff provided materials pursuant to its agreement with Defendant. Defendant has no defenses to its payment obligations under its agreement with Plaintiff.

16. Defendant's failure to pay Plaintiff constitutes a breach of the agreement between the parties. As a result of Defendant's breach of the agreement, Plaintiff has been damaged in excess of Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40), for which it hereby sues together with attorneys' fees, costs, and interest.

FILED
2011 SEP 7 P 4:56
COUNTY CLERK
ALLEGHENY COUNTY

FOR A SECOND CAUSE OF ACTION
(Quantum Meruit)

17. Plaintiff alleges its Second Cause of Action as an alternative claim to its First Cause of Action, and Plaintiff realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

18. Plaintiff furnished labor and materials for the benefit of Defendant, which labor and materials were accepted, used, and enjoyed by Defendant. At the time that the labor and materials were provided to Defendant, it was understood that Plaintiff was to be paid for the labor and materials; further, Defendant specifically requested the labor and

materials. The acceptance of the materials by Defendant created an implied agreement between Plaintiff and Defendant.

19. Such labor and materials were furnished under such circumstances that it was clear that Plaintiff expected to be paid for those labor and materials. Defendant will be unjustly enriched if Plaintiff is not paid for the labor and materials supplied by Plaintiff.

20. The reasonable market value of the materials furnished is at least Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40), for which Plaintiff hereby sues in quantum meruit or other equitable theory for the reasonable value of the labor and materials supplied.

ANDERSON COUNTY
2011 Sep 27 PM 4:06
CLERK OF COURT

FOR A THIRD CAUSE OF ACTION
(Violation of *South Carolina Code Ann.* § 27-1-15)

21. Plaintiff realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

22. Pursuant to *South Carolina Code Ann.* § 27-1-15, Plaintiff delivered a demand letter to Defendant dated July 13, 2011. *See Exhibit A.*

23. The demand letter required Defendant to perform a reasonable investigation within forty-five (45) days, and pay all undisputed amounts to Plaintiff.

24. The demand letter also required Defendant to pay any undisputed amounts due Plaintiff within forty-five (45) days of the date of the letter.

25. Defendant has not disputed any amounts claimed owed by Plaintiff nor has Defendant paid any amounts within the statutorily prescribed forty-five (45) day period.

26. To date, Defendant has failed and refused to pay the contract balance in excess of Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40).

27. As Defendant has failed and has refused to make said reasonable investigation or pay Plaintiff, pursuant to *South Carolina Code Ann.* § 27-1-15, Defendant is liable to Plaintiff for attorneys' fees and interest from the date of the demand letter.

FOR A FOURTH CAUSE OF ACTION
(Foreclosure of Mechanics' Lien)

28. Plaintiff realleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 27 PM 4:06
M. HUGHES BY DEPUTY

29. Pursuant to the terms of its agreement with Defendant, Plaintiff furnished labor and materials for the improvement of the Subject Property; more fully described in the property description contained in Plaintiff's Notice and Certificate of Mechanics' Lien. *See Exhibit B.*

30. The Subject Property, which is the subject of this Cause of Action, is situated and located in Spartanburg County, South Carolina.

31. On or about July 27, 2011, Plaintiff served its Notice and Certificate of Mechanics' Lien, Statement of Account, and Affidavit of Service upon Defendant for the Subject Property in the amount of Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40). *See Exhibit B.*

32. On or about August 8, 2011, Plaintiff filed its Mechanics' Lien Statement of Account, and Affidavit of Service in the Office of the Register of Deed for Spartanburg County at Book 33, Page 775. *See Exhibit B.*

33. Upon information and belief, at the time Plaintiff entered into its agreement with Defendant for furnishing labor and materials for the improvements to the Subject Property, Defendant was, and upon further information and belief, still is, the record owner of the Subject Property.

34. Defendant has failed and refused to pay Plaintiff the remainder due under the contact in the sum of at least Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40), and there is, as of the filing of this Complaint, still due and owing Plaintiff from Defendant a sum of Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40), which may be accounted for by the properly filed Mechanics' Lien.

35. Upon information and belief, by virtue of its duly perfected Mechanics' Lien and properly filed Lis Pendens, attached hereto and incorporated herein by reference as "**Exhibit C**", Plaintiff is entitled to foreclose on the Subject Property, have said property sold, and have its Mechanics' Lien, along with interest and attorneys' fees, satisfied from the proceeds thereof.

WHEREFORE, the plaintiff, D&C Builders, Inc., prays for the following relief:

(a) Judgment against TMKG, Inc. on the First Cause of Action in the principal amount of at least Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40), together with attorneys' fees and interest at the legal rate;

(b) Judgment against TMKG, Inc. on the Second Cause of Action in the principal amount of at least Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40), together with interest at the legal rate;

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 27 PM 4:06

(c) Judgment against TMKG, Inc. on the Third Cause of Action for attorneys' fees and interest at the judgment rate from the date of the demand letter pursuant to *South Carolina Code Ann.* § 27-1-15;

(d) Judgment against TMKG, Inc. on the Fourth Cause of Action and the foreclosure and sale of the subject property located at 527 Brookshire Rd., Greer, South Carolina in Spartanburg County, South Carolina, with the proceeds of the sale of the land being used to satisfy the amounts due and owing under Plaintiff's Mecahnics' Lien, plus attorneys' fees, interest, and costs;

(e) Attorneys' fees;

(f) Costs of this action;

(g) Such other and further relief that this Court deems just and proper.

Respectfully submitted this 27th day of September, 2011.

John T. Crawford, Jr. (SC Bar# 69682)
Townes B. Johnson, III (SC Bar# 75412)
KENISON, DUDLEY & CRAWFORD, LLC
704 E. McBee Avenue
Greenville, South Carolina 29601
PH: (864) 242-4899
FAX: (864) 242-4844

Attorneys for Plaintiff

Greenville, South Carolina

FILED
2011 SEP 27 PM 4:06
CLERK OF COURT
SPARTANBURG COUNTY
BY [illegible]

Exhibit A

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 27 PM 4:06
BY HOPE BLACKLEY

EXHIBIT
A

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
JAMES C. BLAKELY, JR.

July 13, 2011

Via Certified Mail 7010 0290 0001 5643 6149
TMKG, Inc.
c/o Mr. Gerald Koch, Registered Agent
527 B Brookshire Rd.
Greer, SC 29651

Via Regular Mail and Email
Mr. Wilfried Mengeler
527 B Brookshire Rd.
Greer, SC 29651

Via Regular Mail and Email
Mr. Peter Janisch
527 B Brookshire Rd.
Greer, SC 29651

2011 SEP 27 PM 4:

RE: Amounts Past Due and Owing D & C Builders, Inc.

Dear Sirs:

This firm represents D & C Builders, Inc. ("D&C") in regard to the labor and materials it has provided to TMKG, Inc. ("TMKG") for the improvement of real property located at 527-B Brookshire Drive, Greer, South Carolina 2651 ("Project") pursuant to its contract with TMKG.

We are in receipt of TMKG's termination notice for July 14, 2011. Please be advised that TMKG's is in breach of the agreement for its failure and refusal to remit payment to D&C for the work it has performed on the Project and that TMKG's payment to D&C for the work D&C has performed is a condition precedent to D&C's completion of its contractual obligation on the Project. Please be further advised that despite TMKG's non-payment, D&C has continued to perform all its contractual obligations on the Project within a reasonable time period. In accordance with the provisions of *South Carolina Code Ann.* §27-1-15, demand is made upon you for the immediate payment of the contract balance of Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40) which TMKG owes D&C on the Project.

The initial contract with D&C was in the amount of Four Hundred Twenty Thousand and 0/100ths Dollars ($420,000.00). Subsequently, the parties agreed to a change order which added Six Thousand, Four Hundred Fifty-Five and 0/100ths Dollars ($6,455.00) to the contract price and several deductive change orders which resulted in

101 East McBee Avenue • Greenville, South Carolina 29601
Phone: 864.242.6800 • Fax: 864.242.6811

551 D Grasso Ridge • Edisto Beach, South Carolina 29438
Phone: 843.869.1082

credits to TMKG in the amount of Fifty-Nine Thousand, Three Hundred Thirty-One and 60/100ths Dollars ($59,331.60); resulting in a net reduction to the contract amount of Fifty-Two Thousand, Eight Hundred Seventy-Six and 60/100ths ($52,876.60). The aforementioned change orders were for the following:

1.	Addition of firewall	$6,455.00
2.	Credit for actual amount of electrical	($2,161.00)
3.	Credit for nine (9) interior doors	($1,575.00)
4.	Credit for removing HVAC system from contract	($16,000.00)
5.	Credit for removing Flooring from contract	($8,000.00)
6.	Credit for Cabinets and Countertop	($3,854.00)
7.	Credit for paving expenses	($27,741.60)
	Net Change Order Amount:	($52,876.60)

In addition, to date, TMKG has made payments to D&C in the amount of Two Hundred Ninety-Three Thousand and 0/100ths Dollars ($293,000.00); resulting in a remaining contract balance of Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40).

It is D&C's understanding, however, that TMKG alleges it is entitled to the following additional or alternative change orders:

1.	Credit for twenty-three (23) uninstalled office lights	($1,870.00)
2.	Credit for TMKG's partial self performance of the electrical installation	($10,000.00)
3.	Credit for additional cost for the proposed HVAC system	($8,000.00)
4.	Credit for rework of windows and doors	($2,600.00)
5.	Credit for cleaning windows, window sills and front door	($880.00)
6.	Credit for cleaning the workshop	($1,1550.00)
7.	Credit for consultant fees	($18,000.00)

In regard to the above change orders TMKG alleges it is entitled to, D&C responds as follows:

1. Credit for twenty-three (23) uninstalled office lights ($1,870.00)

The entire electrical scope of work in the initial contract, including these twenty-three (23) uninstalled office lights, was in the amount of Seventeen Thousand, Five Hundred and 0/100ths Dollars ($17,500.00). The actual cost for the electrical D&C and its subcontractors installed, including the credit given for the return of these twenty-three (23) uninstalled office lights, was Fifteen Thousand, Three Hundred

FILED
CLERK OF COURT
STAR COUNTY
2011 JUL 22 PM 4:56
ASHLEY

Thirty-Nine and 0/100ths Dollars ($15,339.00), resulting in a credit to TMKG in the amount of Two Thousand, One Hundred Sixty-One and 0/100ths Dollars ($2,161.00). D&C has applied this credit against the amounts due and owing.

2. Credit for TMKG's partial self performance of the electrical installation ($10,000.00)

The entire electrical scope of work in the initial contract, including performance of the electrical installation in which TMKG self performed, was in the amount of Seventeen Thousand, Five Hundred and 0/100ths Dollars ($17,500.00). The actual cost for the electrical D&C and its subcontractors installed was Fifteen Thousand, Three Hundred Thirty-Nine and 0/100ths Dollars ($15,339.00), resulting in a credit to TMKG in the amount of Two Thousand, One Hundred Sixty-One and 0/100ths Dollars ($2,161.00). D&C has applied this credit against the amounts due and owing. D&C is not liable for any amounts TMKG spent in its self performance.

3. Credit for additional cost for the proposed HVAC system ($8,000.00)

The initial contract included an allowance of Sixteen Thousand 0/100ths Dollars ($16,000.00) for the HVAC system. Subsequently, TMKG decided to remove that scope of work from the contract and purchase a HVAC system on its own. D&C, accordingly, removed the Sixteen Thousand 0/100ths Dollars ($16,000.00) allowance from the contract. D&C is not liable for any amounts TMKG will spend in its purchase of a different HVAC system.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 27 PM 4:06

4. Credit for rework of windows and doors ($2,600.00)

D&C installed the windows and doors properly as instructed and as supervised by TMKG's representatives. D&C is not liable for any amounts TMKG spent reworking the windows and doors.

5. Credit for cleaning windows, window sills and front door ($880.00)

The contract between the parties specifies that the Project would be left in "broom clean condition". D&C is not liable for any amounts TMKG spent in additional cleaning.

6. Credit for cleaning the workshop ($1,1550.00)

The contract between the parties specifies that the Project would be left in "broom clean condition". D&C is not liable for any amounts TMKG spent in additional

cleaning.

7. Credit for consultant fees ($18,000.00)

Klaus Westerwelle ("Westerwelle") was an independent contractor of and consultant for TMKG. Likewise, any amounts owed to Westerwelle are due and owing by TMKG. D&C has no contract with Westerwelle and, likewise, is not liable for any amounts owed to Westerwelle pursuant to his agreement with TMKG. Furthermore, since the contract between D&C and TMKG did not have a completion date, there is no basis for TMKG's position that the Project took longer to complete than agreed. To the extent the Project did in fact take longer than expected, however, any such delay was the direct result of TMKG's failure to properly communicate and/or TMKG's continued change in the scope of the Project.

Pursuant to the aforementioned statute, *South Carolina Code Ann.* §27-1-15, you have forty-five (45) days from the date of this letter to make a fair and reasonable investigation of the merits of the claim and to pay such claim or whatever portion is determined to be valid, which, pursuant to an email dated June 8, 2011 from your Registered Agent, Gerald Koch, is at least Forty-One Thousand, Six Hundred Forty-Two and 40/100ths ($41,642.40). A true and correct copy of Koch's email is attached hereto as "Exhibit A". Should you fail to make an investigation, or if you otherwise unreasonably refuse to pay this claim or proper portion thereof, you may be held liable for the reasonable attorneys' fees and interest at the judgment rate from the date of this demand letter.

At a minimum, such investigation should include you providing this office with complete documentation of any evidence that the sums demanded are incorrect, as well as complete documentation of any claims you assert are properly offset from sums otherwise due D&C. This documentation should include, without limitation, documentation of costs incurred and compliance with legal and/or contractual notice requirements. Should you fail to properly investigate D&C's claim or otherwise unreasonably fail to pay sums due them, you may be held responsible for attorneys' fees and interest as provided in *South Carolina Code Ann.* §27-1-15.

Please be further advised that should you fail and refuse to the pay the aforementioned past due and owing sums to D&C within fourteen (14) days of the date of this letter D&C will have no choice but to file a mechanics' lien on the Project in accordance with *South Carolina Code Ann.* § 29-5-10 *et seq.* and initial a foreclosure and breach of contract action against you.

I appreciate your attention and assistance in this matter and look forward to hearing from you in the near future. If you have any questions or concerns regarding the foregoing, please do not hesitate to contact our Greenville, South Carolina office.

Sincerely,

John T. Crawford, Jr.

cc: Mr. Scott Dodenhoff

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 27 PM 4:06
M. HOPE BLACKLEY

Exhibit B

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 27 PM 4:07
M. HOPE BLACKLEY

EXHIBIT
B

MECHANICS LIEN
BOOK 33 PAGE 775

STATE OF SOUTH CAROLINA)	IN THE OFFICE OF THE
)	REGISTER OF DEEDS
COUNTY OF SPARTANBURG)	
)	
D&C Builders, Inc.,)	
)	
Petitioner,)	
)	NOTICE AND CERTIFICATE
v.)	OF MECHANICS' LIEN
)	
TMKG, Inc.,)	
)	
Respondents.)	

MEC-2011-27582
Recorded 7 Pages on 8/8/2011 9:38:02 AM
Recording Fee: $13.00 Documentary Stamps: $0.00
Office of Register of Deeds, Spartanburg, S.C.
Dorothy Earle, Register

TO: THE RESPONDENT ABOVE NAMED:

PLEASE TAKE NOTICE that the Petitioner, D&C Builders, Inc., by virtue of the attached Affidavit and Statement of Account, hereby claims and holds a Mechanics' Lien upon the building and structures and upon the interest of the owner as well as any leasehold or other interest thereof in the real property hereinafter described by virtue of its agreement with TMKG, Inc. This lien is in the amount of Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40), for services, materials and labor furnished and used in the construction of the improvements situated on the real estate commonly known as 527 Brookshire Rd., Greer, SC, Spartanburg County, South Carolina. Said real estate is also further described in "Exhibit A" which is attached hereto and incorporated herein by reference.

FILED
2011 SEP 7 PM 4:07
CLERK OF COURT
SPARTANBURG COUNTY

FURTHER NOTICE IS HEREBY GIVEN that the services, materials and labor were last furnished within ninety (90) days of the date hereof; that Petitioner has and claims a lien on the stated premises, structures, buildings and tract of land, pursuant to § 29-5-10, et seq. of the Code of Laws of South Carolina, 1976, as amended, to secure the payment of the debt, an itemized and verified statement of which is attached hereto and incorporated herein by reference; that the said Petitioner has a claim on said premises, structures, buildings and said tract of land to

secure payments of an additional sum to cover the costs and disbursements of any action to foreclose the aforementioned lien, including reasonable attorneys' fees, all pursuant to the provisions of the statutes applicable to such cases.

Respectfully submitted this the 27th day of July, 2011.

By: _____

John T. Crawford, Jr. (SC Bar# 69682)
Townes B. Johnson, III (SC Bar# 75412)
KENISON, DUDLEY & CRAWFORD, LLC
704 E. McBee Avenue
Greenville, South Carolina 29601
PH: (864) 242-4899
FAX: (864) 242-4844

Attorneys for Petitioner

Greenville, South Carolina

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 27 PM 4:07
H. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE OFFICE OF THE
	)	REGISTER OF DEEDS
COUNTY OF SPARTANBURG	)	
	)	
D&C Builders, Inc.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
TMKG, Inc.,	)	
	)	
Respondents.	)	
	)	

STATEMENT OF ACCOUNT

PERSONALLY APPEARED before me, Scott Dodenhoff, who first being duly sworn, deposes and says:

1. That I am the Vice-President of D&C Builders, Inc.

2. That the sum of Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40) is past due and owed to D&C Builders, Inc.

3. That the same sum is past due for services, materials and labor supplied by D&C Builders, Inc., in connection with the certain improvements located at the real estate commonly known as the 527 Brookshire Road, Greer, Spartanburg County, South Carolina, which is owned by Respondent TMKG, Inc. Said real estate is also further described in "Exhibit A" which is attached hereto and incorporated herein by reference.

FURTHER AFFIANT SAYETH NAUGHT.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 27 PM 4:17

Scott Dodenhoff

Scott Dodenhoff, Vice-President
D&C Builders, Inc.

Sworn to and subscribed before
me this 27 day of July, 2011

Notary Public, State of South Carolina
My Commission Expires: 4-15-2015

STATE OF SOUTH CAROLINA	)	IN THE OFFICE OF THE
	)	REGISTER OF DEEDS
COUNTY OF SPARTANBURG	)	
	)	
D&C Builders, Inc.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
TMKG, Inc.,	)	
	)	
Respondents.	)	
	)	

VERIFICATION

PERSONALLY APPEARED before me, Scott Dodenhoff, who first being duly sworn, deposes and says that he is the Vice-President of D&C Builders, Inc.; that he has read the foregoing Notice and Certificate of Mechanic's Lien and Statement of Account; that the materials set forth herein are true of his own knowledge, except those matters and things therein alleged on information and belief, and as to those he believes them to be true.

Further, D&C Builders, Inc. is duly licensed with the South Carolina Department of Labor, Licensing and Regulation under License No.: 12081 and proof of the same is attached hereto as **Exhibit B**.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 27 PM 4:07
HOPE BREAZEALE

Scott Dodenhoff
Scott Dodenhoff, Vice-President
D&C Builders, Inc.

Sworn to and subscribed before
me this 27 day of September, 2011

Notary Public, State of South Carolina
My Commission Expires: 4-5-2015

EXHIBIT A

All that certain piece, parcel or tract of land situate, lying and being in the State of South Carolina, in the County of South Carolina, adjacent to Brookshire Road, identified as Lot 1, containing 1.07 acres, more or less, as shown on a survey prepared for Douglas Thompson by Site Design, Inc., dated May 11, 2005, and recorded in the Spartanburg County Register of Deeds Office in Plat Book 158 at Page 159, reference to which is craved for a complete metes and bounds description thereof.

This being the same property conveyed unto TMKG, Inc., by deed of D. Martin Thompson and Valerie M. Thompson, dated August 6, 2009, and recorded on September 3, 2009 in Deed Book 94-M at Page 720 in the Spartanburg County Register of Deeds Office.

TMS 5-24-00-022.02

Physical Address: 527 Brookshire Rd.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 27 PM 4:07
M. HOPE BEASLEY

Exhibit A

PAGE 780

D & C BUILDERS INC
131 SANDPIPER LANE
GREENVILLE,, SC 29607
(864) 288-7960

License number: 12081
License type: GENERAL CONTRACTOR
Status: ACTIVE
Expiration: 10/31/2012
First Issuance Date: 01/01/1992
Classification: BD5 SP5

Supervises
SCOTT DODENHOFF - (COG)
JIM DODENHUFF JR - (COG)

Click here for classifications key

FILED IN CLERK OF COURT SPARTANBURG COUNTY
2011 SEP 27 PM 4:07
M. HOPE BLACKLEY

Exhibit B

ANTHONY PROIETTA & ASSOCIATES INVESTIGATIONS, INC.

AFFIDAVIT OF SERVICE PAGE 781

D&C Builders, Inc. Case No.

Court Register Of Deeds Spartanburg

(Plaintiff)
VS

TMKG, Inc.

(Defendant)

Personally appeared before me the undersigned, who being duly sworn, deposes and states that he/she served a copy of the following: Notice And Certificate of Mechanics' Lien (527 Brookshire Rd., Greer, SC), Statement of Account, Verification, Exhibit A, Exhibit B

UPON Gerald Koch As Registered Agent For TMKG, Inc.

by

delivering to him/her a copy of the same at 220 North Main Street, Greenville, SC

On the 27th day of July 2011 at 3:31 am/(pm) and that the above papers were served in compliance with all state and local laws.

CLERK OF COURT SPARTANBURG COUNTY 2011 SEP 27 P 1:00 M. HOPE BRACKEY

MANNER OF SERVICE-

XXX Personal: By personally delivering copies to the person being served.

____Substituted at Residence: By leaving copies at the dwelling house or usual place of abode of the person being served with a member of the household of suitable age and explaining the general nature of the papers

____Substituted at Business: By leaving, during office hours, copies at the office of the person/entity being served with the person apparently in charge thereof

____Non-Service: After due search, careful inquiry and diligent attempts at the address(es) listed below, I have been unable to effect process upon the person/entity being served because of the following reason(s): Service was also attempted at 527 B Brookshire Rd., Greer, SC 29651 on 7/27/2011 at 2:53 P.M.

SWORN to before me this 28 day of July 2011

Notary Public for SC

My Commission Expires 9-3-2012

EUGENE F. PROIETTA NOTARY PUBLIC FOR SOUTH CAROLINA

(process server)

code KD&C/Kelly

Exhibit C

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 27 PM 4:07
M. HOPE BLACKLEY

EXHIBIT
C
395

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-42-48 414
	)	
Plaintiff,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
TMKG, Inc.,	)	
	)	
Defendant(s).	)	
	)	

This is to certify that I have served a true copy of Plaintiff D&C Builders, Inc.'s **Lis Pendens, Summons, Complaint with accompanying exhibits, First Set of Interrogatories and Requests for Production, First Set of Requests for Admission, and Motion for Partial Summary Judgment** on this 27th day of September, 2011 by depositing a copy of same in the United States Mail, proper postage affixed, addressed as follows:

TMKG, Inc.
c/o Mr. Gerald Koch, Registered Agent
527 B Brookshire Rd.
Greer, SC 29651

KENISON, DUDLEY & CRAWFORD, LLC

Townes B. Johnson III

Greenville, SC

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.	)	
	)	
TMKG, Inc.,	)	
	)	
Defendant(s).	)	

FILED
CLERK OF COURT
SPARTANBURG, SC
2011 SEP 27 PM 4:08

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

TO: DEFENDANT TMKG, INC. AND ITS COUNSEL

PLEASE TAKE NOTICE THAT the Plaintiff D&C Builders, Inc. (hereinafter "Plaintiff") by and through its undersigned attorneys, will move before the presiding judge of the Spartanburg County Court of Common Pleas at such time and place as the Court may determine prior to the trial of this case, but not sooner than ten (10) days after service hereof, for an order pursuant to Rule 56 of the *South Carolina Rules of Civil Procedure* granting Plaintiff partial summary judgment in its favor against Defendant TMKG, Inc. (hereinafter "Defendant") on Plaintiff's entitlement to the undisputed contract balances due and owing Plaintiff and for Plaintiff's entitlement to attorneys' fees and interest for TMKG's failure to pay the undisputed portion of Plaintiff's claim, pursuant to *South Carolina Code Ann.* § 27-1-15. Summary Judgment is appropriate because there is no genuine issue of material fact, and the above-named moving Plaintiff is entitled to judgment on this cause of action as a matter of law.

This motion is based on the following grounds:

1. On May 5, 2010, Plaintiff and Defendant entered into agreement whereby Plaintiff would supply certain labor and materials for the improvement of real property located at 527 Brookshire Rd., Greer, South Carolina in Spartanburg County, South Carolina ("Project").

2. On July 13, 2011, Plaintiff made a demand for payment from Defendant, pursuant to *South Carolina Code Ann.* § 27-1-15, in the amount of Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40) for the labor and services it provided on the Project. *See Exhibit A: July 13, 2011 Demand Letter.*

3. Despite Defendant's admission that there is a contract balance due and owing Plaintiff, Defendant has failed and refused to remit those undisputed sums to Plaintiff.

4. In addition to being entitled to the undisputed amounts due and owing, Plaintiff is entitled to attorneys' fees and interest from the date of Plaintiff's demand, July 13, 2011, until the date of payment as this undisputed portion was not remitted within the forty-five (45) day statutory time limit from the date of Plaintiff's demand.

FILED
CLERK OF COURT
SPARTANBURG COUNTY, SC
2011 SEP 27 PM 1:08
M. HOPE BLACKLEY

This Motion is based upon the pleadings of record, the mechanics' liens of record, discovery, the applicable Rules of Civil Procedure and their related authority, and upon such supporting memorandum and affidavits as may submitted in connection herewith at a future time.

Respectfully submitted this 27th of September, 2011,

By: _____

John T. Crawford, Jr.
Townes B. Johnson, III (SC Bar# 75412)
KENISON, DUDLEY & CRAWFORD, LLC
704 E. McBee Avenue
Greenville, South Carolina 29601
PH: (864) 242-4899
FAX: (864) 242-4844

Attorneys for Plaintiff

Greenville, South Carolina

FILED IN OFFICE
CLERK OF COURT
GREENVILLE COUNTY
2011 SEP 27 PM 4:08
M. HOPE BLACKLEY

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
JAMES C. BLAKELY, JR.

July 13, 2011

Via Certified Mail 7010 0290 0001 5643 6149
TMKG, Inc.
c/o Mr. Gerald Koch, Registered Agent
527 B Brookshire Rd.
Greer, SC 29651

Via Regular Mail and Email
Mr. Wilfried Mengeler
527 B Brookshire Rd.
Greer, SC 29651

Via Regular Mail and Email
Mr. Peter Janisch
527 B Brookshire Rd.
Greer, SC 29651

RE: Amounts Past Due and Owing D & C Builders, Inc.

Dear Sirs:

This firm represents D & C Builders, Inc. ("D&C") in regard to the labor and materials it has provided to TMKG, Inc. ("TMKG") for the improvement of real property located at 527-B Brookshire Drive. Greer. South Carolina 2651 ("Project") pursuant to its contract with TMKG.

We are in receipt of TMKG's termination notice for July 14, 2011. Please be advised that TMKG's is in breach of the agreement for its failure and refusal to remit payment to D&C for the work it has performed on the Project and that TMKG's payment to D&C for the work D&C has performed is a condition precedent to D&C's completion of its contractual obligation on the Project. Please be further advised that despite TMKG's non-payment, D&C has continued to perform all its contractual obligations on the Project within a reasonable time period. In accordance with the provisions of *South Carolina Code Ann.* §27-1-15, demand is made upon you for the immediate payment of the contract balance of Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40) which TMKG owes D&C on the Project.

The initial contract with D&C was in the amount of Four Hundred Twenty Thousand and 0/100ths Dollars ($420,000.00). Subsequently, the parties agreed to a change order which added Six Thousand, Four Hundred Fifty-Five and 0/100ths Dollars ($6,455.00) to the contract price and several deductive change orders which resulted in

101 East McBee Avenue • Greenville, South Carolina 29601
Phone: 86
551 B Orrisco Ridge Pkwy

EXHIBIT
400
tabbies

credits to TMKG in the amount of Fifty-Nine Thousand, Three Hundred Thirty-One and 60/100ths Dollars ($59,331.60); resulting in a net reduction to the contract amount of Fifty-Two Thousand, Eight Hundred Seventy-Six and 60/100ths ($52,876.60). The aforementioned change orders were for the following:

1.	Addition of firewall	$6,455.00
2.	Credit for actual amount of electrical	($2,161.00)
3.	Credit for nine (9) interior doors	($1,575.00)
4.	Credit for removing HVAC system from contract	($16,000.00)
5.	Credit for removing Flooring from contract	($8,000.00)
6.	Credit for Cabinets and Countertop	($3,854.00)
7.	Credit for paving expenses	($27,741.60)
	Net Change Order Amount:	($52,876.60)

In addition, to date, TMKG has made payments to D&C in the amount of Two Hundred Ninety-Three Thousand and 0/100ths Dollars ($293,000.00); resulting in a remaining contract balance of Seventy-Four Thousand, One Hundred Twenty-Three and 40/100 Dollars ($74,123.40).

2011 SEP 27 PM 4:08
CLERK OF COURT

It is D&C's understanding, however, that TMKG alleges it is entitled to the following additional or alternative change orders:

1.	Credit for twenty-three (23) uninstalled office lights	($1,870.00)
2.	Credit for TMKG's partial self performance of the electrical installation	($10,000.00)
3.	Credit for additional cost for the proposed HVAC system	($8,000.00)
4.	Credit for rework of windows and doors	($2,600.00)
5.	Credit for cleaning windows, window sills and front door	($880.00)
6.	Credit for cleaning the workshop	($1,1550.00)
7.	Credit for consultant fees	($18,000.00)

In regard to the above change orders TMKG alleges it is entitled to, D&C responds as follows:

1. Credit for twenty-three (23) uninstalled office lights ($1,870.00)

The entire electrical scope of work in the initial contract, including these twenty-three (23) uninstalled office lights, was in the amount of Seventeen Thousand, Five Hundred and 0/100ths Dollars ($17,500.00). The actual cost for the electrical D&C and its subcontractors installed, including the credit given for the return of these twenty-three (23) uninstalled office lights, was Fifteen Thousand, Three Hundred

Thirty-Nine and 0/100ths Dollars ($15,339.00), resulting in a credit to TMKG in the amount of Two Thousand, One Hundred Sixty-One and 0/100ths Dollars ($2,161.00). D&C has applied this credit against the amounts due and owing.

2. Credit for TMKG's partial self performance of the electrical installation ($10,000.00)

The entire electrical scope of work in the initial contract, including performance of the electrical installation in which TMKG self performed, was in the amount of Seventeen Thousand, Five Hundred and 0/100ths Dollars ($17,500.00). The actual cost for the electrical D&C and its subcontractors installed was Fifteen Thousand, Three Hundred Thirty-Nine and 0/100ths Dollars ($15,339.00), resulting in a credit to TMKG in the amount of Two Thousand, One Hundred Sixty-One and 0/100ths Dollars ($2,161.00). D&C has applied this credit against the amounts due and owing. D&C is not liable for any amounts TMKG spent in its self performance.

3. Credit for additional cost for the proposed HVAC system ($8,000.00)

The initial contract included an allowance of Sixteen Thousand 0/100ths Dollars ($16,000.00) for the HVAC system. Subsequently, TMKG decided to remove that scope of work from the contract and purchase a HVAC system on its own. D&C, accordingly, removed the Sixteen Thousand 0/100ths Dollars ($16,000.00) allowance from the contract. D&C is not liable for any amounts TMKG will spend in its purchase of a different HVAC system.

4. Credit for rework of windows and doors ($2,600.00)

D&C installed the windows and doors properly as instructed and as supervised by TMKG's representatives. D&C is not liable for any amounts TMKG spent reworking the windows and doors.

5. Credit for cleaning windows, window sills and front door ($880.00)

The contract between the parties specifies that the Project would be left in "broom clean condition". D&C is not liable for any amounts TMKG spent in additional cleaning.

6. Credit for cleaning the workshop ($1,1550.00)

The contract between the parties specifies that the Project would be left in "broom clean condition". D&C is not liable for any amounts TMKG spent in additional

cleaning.

7. Credit for consultant fees ($18,000.00)

Klaus Westerwelle ("Westerwelle") was an independent contractor of and consultant for TMKG. Likewise, any amounts owed to Westerwelle are due and owing by TMKG. D&C has no contract with Westerwelle and, likewise, is not liable for any amounts owed to Westerwelle pursuant to his agreement with TMKG. Furthermore, since the contract between D&C and TMKG did not have a completion date, there is no basis for TMKG's position that the Project took longer to complete than agreed. To the extent the Project did in fact take longer than expected, however, any such delay was the direct result of TMKG's failure to properly communicate and/or TMKG's continued change in the scope of the Project.

2011 SEP 27 PM 4:08

Pursuant to the aforementioned statute, *South Carolina Code Ann.* §27-1-15, you have forty-five (45) days from the date of this letter to make a fair and reasonable investigation of the merits of the claim and to pay such claim or whatever portion is determined to be valid, which, pursuant to an email dated June 8, 2011 from your Registered Agent, Gerald Koch, is at least Forty-One Thousand, Six Hundred Forty-Two and 40/100ths ($41,642.40). A true and correct copy of Koch's email is attached hereto as "**Exhibit A**". Should you fail to make an investigation, or if you otherwise unreasonably refuse to pay this claim or proper portion thereof, you may be held liable for the reasonable attorneys' fees and interest at the judgment rate from the date of this demand letter.

At a minimum, such investigation should include you providing this office with complete documentation of any evidence that the sums demanded are incorrect, as well as complete documentation of any claims you assert are properly offset from sums otherwise due D&C. This documentation should include, without limitation, documentation of costs incurred and compliance with legal and/or contractual notice requirements. Should you fail to properly investigate D&C's claim or otherwise unreasonably fail to pay sums due them, you may be held responsible for attorneys' fees and interest as provided in *South Carolina Code Ann.* §27-1-15.

Please be further advised that should you fail and refuse to the pay the aforementioned past due and owing sums to D&C within fourteen (14) days of the date of this letter D&C will have no choice but to file a mechanics' lien on the Project in accordance with *South Carolina Code Ann.* § 29-5-10 *et seq.* and initial a foreclosure and breach of contract action against you.

I appreciate your attention and assistance in this matter and look forward to hearing from you in the near future. If you have any questions or concerns regarding the foregoing, please do not hesitate to contact our Greenville, South Carolina office.

Sincerely,

John T. Crawford, Jr.

cc: Mr. Scott Dodenhoff

CLERK OF COURT
SPARTANBURG COUNTY
2011 SEP 27 PM 4:09
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

C.A. No. 2011-CP-42-4121

D&C Builders, Inc.,

Plaintiff,

v.

TMKG, Inc.,

Defendant.

ANSWER AND COUNTERCLAIMS BY TMKG, INC.
(JURY TRIAL DEMANDED)

Defendant TMKG, Inc. ("TMKG"), by and through its undersigned counsel, hereby answer the Summons and Complaint and asserts counterclaims against Plaintiff D&C Builders, Inc. ("Plaintiff").

The Complaint was served on TMKG on or about September 30, 2011, and D&C granted TMKG an extension to answer or otherwise respond until November 14, 2011.

TMKG generally denies any and all allegations not expressly admitted in whole or part and demands strict proof thereof.

1. As to paragraph 1, the allegations are admitted on information and belief.

2. As to paragraph 2, the allegations are admitted.

3. As to paragraph 3, the allegations are admitted.

4. As to paragraph 4, TMKG admits that it entered into a written contract with Plaintiff on or about May 5, 2010, with regard to certain improvements to property located at 527 Brookshire Road, Greer, South Carolina, and the referenced documents speak for themselves. To the extent the allegations are inconsistent with this response, they are denied.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 NOV 22 PM 2:27
M. HOPE BLACKLEY

5. As to paragraph 5, TMKG admits that Plaintiff provided certain labor and materials pursuant to the written contract dated May 5, 2010. The referenced documents speak for themselves. To the extent the allegations are inconsistent with this response, they are denied.

6. As to paragraph 6, the allegations are denied.

7. As to paragraph 7, the allegations are denied.

8. As to paragraph 8, TMKG admits only that Plaintiff sent TMKG a letter dated July 13, 2011, and that document speaks for itself. To the extent the allegations are inconsistent with this response, they are denied.

9. As to paragraph 9, TMKG admits only that Plaintiff, on information and belief, has filed or served the referenced documents described in the allegations, and that the documents speak for themselves. To the extent the allegations are inconsistent with this response, they are denied.

10. As to paragraph 10, TMKG admits only that there remains a dispute between the parties over the amount due Plaintiff. To the extent the allegations are inconsistent with this response, they are denied.

11. As to paragraph 11, the allegations are admitted.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 NOV 28 PM 2:21
A. HOPE BLACKLEY

FIRST CAUSE OF ACTION
(Breach of Contract)

12. As to paragraph 12, no response is required. To the extent any further response is required, the allegations are denied.

13. As to paragraph 13, TMKG admits only that the parties entered into a valid contract. To the extent the allegations are inconsistent with this response, they are denied.

14. As to paragraph 14, the allegations are denied.

15. As to paragraph 15, TMKG admits only that Plaintiff provided materials pursuant to the contract. To the extent the allegations are inconsistent with this response, they are denied.

16. As to paragraph 16, the allegations are denied.

SECOND CAUSE OF ACTION
(Quantum Meruit)

17. As to paragraph 17, no response is required. To the extent any further response is required, the allegations are denied.

18. As to paragraph 18, TMKG admits that Plaintiff furnished labor and materials pursuant to the contract and that Plaintiff was to be paid for the labor and materials according to the contract upon satisfactory completion of the work. To the extent the allegations are inconsistent with this response, they are denied.

19. As to paragraph 19, TMKG admits that Plaintiff furnished labor and materials pursuant to the contract and that Plaintiff was to be paid for the labor and materials according to the contract upon satisfactory completion of the work. To the extent the allegations are inconsistent with this response, they are denied.

20. As to paragraph 20, TMKG admits that Plaintiff furnished labor and materials pursuant to the contract and that Plaintiff was to be paid for the labor and materials according to the contract upon satisfactory completion of the work. To the extent the allegations are inconsistent with this response, they are denied.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 NOV 22 PM 2:27
M. HOPE BLACKLEY

THIRD CAUSE OF ACTION
(Violation of S.C. Code Ann. § 27-1-15)

21. As to paragraph 21, no response is required. To the extent any further response is required, the allegations are denied.

22. As to paragraph 22, TMKG admits only that Plaintiff sent TMKG a letter dated July 13, 2011, and that document speaks for itself. To the extent the allegations are inconsistent with this response, they are denied.

23. As to paragraph 23, TMKG admits only that Plaintiff sent TMKG a letter dated July 13, 2011, and that document speaks for itself. To the extent the allegations are inconsistent with this response, they are denied.

24. As to paragraph 24, TMKG admits only that Plaintiff sent TMKG a letter dated July 13, 2011, and that document speaks for itself. To the extent the allegations are inconsistent with this response, they are denied.

25. As to paragraph 25, the allegations are denied.

26. As to paragraph 26, the allegations are denied.

27. As to paragraph 27, the allegations are denied.

FOURTH CAUSE OF ACTION
(Foreclosure of Mechanic's Lien)

28. As to paragraph 28, no response is required. To the extent any further response is required, the allegations are denied.

29. As to paragraph 29, TMKG admits only that Plaintiff furnished labor and materials pursuant to the contract. To the extent the allegations are inconsistent with this response, they are denied.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 NOV 22 PM 2:27
MICHELE B. ACKLEY

30. As to paragraph 30, the allegations are admitted.

31. As to paragraph 31, TMKG admits only that Plaintiff, on information and belief, has filed or served the referenced documents described in the allegations, and that the documents speak for themselves. To the extent the allegations are inconsistent with this response, they are denied.

32. As to paragraph 32, TMKG admits only that Plaintiff, on information and belief, has filed or served the referenced documents described in the allegations, and that the documents speak for themselves. To the extent the allegations are inconsistent with this response, they are denied.

33. As to paragraph 33, the allegations are admitted.

34. As to paragraph 34, the allegations are denied.

35. As to paragraph 35, the allegations are denied.

36. As to Plaintiff's prayer for relief, the allegations are denied.

FOR A FIRST DEFENSE AND COUNTERCLAIM
(Counterclaim for Breach of Contract)

37. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

38. TMKG and Plaintiff entered into a written contract dated May 5, 2010, for the construction of a single building containing a two-story office and warehouse.

39. Plaintiff agreed to perform specified work and tasks pursuant to the contract within specified deadlines and in a specified manner and, as such, owed duties to TMKG under the contract. In return, TMKG agreed to pay Plaintiff pursuant to the terms and conditions set forth in the contract.

40. Plaintiff failed to timely and properly perform specified work and tasks pursuant to the contract.

41. Plaintiff has sought payment in violation of the terms and conditions of the contract.

42. As a result of its actions and omissions, Plaintiff has breached the contract.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2016 NOV 22 PM 2:27
MATHOPE BLACKLEY

43. TMKG has sustained actual and consequential damages as a result of Plaintiff's breach of the contract, including, but not limited to, investigating Plaintiff's nonperformance or inadequate performance of the contract, such as punch list items; paying or having to pay in the future TMKG's own employees or other persons or entities to complete work that Plaintiff was required to perform under the contract; investigating and addressing Plaintiff's unlawful and excessive demands for payment not allowed pursuant to the contract; payment of costs incurred because Plaintiff failed to complete or prohibited final inspections of the building so that TMKG could obtain a certificate of occupancy for the building; and payment of attorney's fees to defend and prosecute matters related to Plaintiff's nonperformance and inadequate performance of the contract.

44. TMKG is entitled to recover all actual and consequential damages it has sustained as a result of Plaintiff's actions and omissions in breaching the contract.

45. In addition to its actual and consequential damages, TMKG is entitled to recover from Plaintiff all reasonable attorney's fees and costs related to this matter pursuant to any applicable contract provision, statute or court rule.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2017 NOV 22 PM 2:27
M. JANE BLACKLEY

FOR A SECOND DEFENSE AND COUNTERCLAIM
(Counterclaim for Vacation of Mechanic's Lien and Related Damages)

46. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

47. On information and belief, Plaintiff has stated an inaccurate amount due for labor and materials, and has failed to provide a sufficient explanation and supporting documentation, and will be unable to do so, for the amount claimed in the recorded mechanic's lien.

48. On information and belief, Plaintiff has willfully and knowingly claimed more than is owed to TMKG pursuant to the contract.

49. Pursuant to S.C. Code Ann. § 29-5-100, TMKG petitions the Court to vacate the recorded mechanic's lien, strike it from the public record, enter judgment in favor of TMKG, and dismiss this case against TMKG in its entirety, with prejudice.

50. TMKG has sustained actual and consequential damages as a result of Plaintiff's breach of the contract, including, but not limited to, investigating Plaintiff's nonperformance or inadequate performance of the contract, such as punch list items; paying or having to pay in the future TMKG's own employees or other persons or entities to complete work that Plaintiff was required to perform under the contract; investigating and addressing Plaintiff's unlawful and excessive demands for payment not allowed pursuant to the contract; payment of costs incurred because Plaintiff failed to complete or prohibited final inspections of the building so that TMKG could obtain a certificate of occupancy for the building; and payment of attorney's fees to defend and prosecute matters related to Plaintiff's nonperformance and inadequate performance of the contract.

51. TMKG is entitled to recover all actual and consequential damages it has sustained as a result of Plaintiff's actions and omissions in breaching the contract.

52. In addition to its actual and consequential damages, TMKG is entitled to recover from Plaintiff all reasonable attorney's fees and costs related to this matter pursuant to any applicable contract provision, statute or court rule.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 NOV 22 PM 2:27
M. HOPE BLACKLEY

FOR A THIRD DEFENSE AND COUNTERCLAIM
(Counterclaim for Quantum Meruit)

53. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

54. Due to Plaintiff's failure to satisfactorily perform the contract and due to the parties' agreement to amend the original contract with regard to certain work, TMKG was

allowed or required to provide certain labor and materials on its own, all of which were within the scope of work to be performed by TMKG.

55. TMKG's furnishing of certain labor and materials provided a benefit to Plaintiff, which Plaintiff accepted, used and enjoyed. It was understood by the parties that Plaintiff would not be paid for certain labor or materials as originally agreed, and TMKG would absorb such costs itself. TMKG also has incurred additional costs because certain work was not satisfactorily performed or completed by TMKG. The parties entered into an implied agreement with regard to certain costs.

56. TMKG furnished such labor and materials under circumstances in which it was clear that TMKG expected to not to pay Plaintiff for those labor and materials. Defendant will be unjustly enriched if TMKG is required to pay for labor and materials which Plaintiff did not supply or work which Plaintiff did not satisfactorily perform or complete.

57. TMKG hereby sues in quantum meruit or other equitable theory for the reasonable value of the labor and materials supplied.

58. In addition to such equitable damages, TMKG is entitled to recover from Plaintiff all reasonable attorney's fees and costs related to this matter pursuant to any applicable contract provision, statute or court rule.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2022 MAY 22 PM 2:20
ANNE HOPE BLACKLEY

FOR A FOURTH DEFENSE AND MOTION TO DISMISS
(Statutes of Limitation)

59. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

60. To the extent Plaintiff failed to timely record its mechanic's lien and bring a lawsuit to enforce its lien pursuant to S.C. Code Ann. § 29-5-10, et seq., Plaintiff's Complaint is time-barred and should be dismissed by the Court.

61. To the extent Plaintiff failed to file and serve its Complaint within any applicable statute of limitation, the Complaint is time-barred and should be dismissed by the Court.

FOR A FIFTH DEFENSE
(Damages Caused by Actions of Third Party)

62. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

63. For a further defense and to the extent any damages suffered by Plaintiff are proximately caused by the actions of any third party, including any other contractor, subcontractor or tradesmen employed in the same project, that third party is solely responsible to Plaintiff, and Plaintiff's sole remedy is against the third party.

FOR A SIXTH DEFENSE
(Failure to Mitigate Damages)

64. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

65. For a further defense and to the extent that Plaintiff failed to mitigate its damages by taking any other action, or refraining from any action, which may have mitigated or reduced Plaintiff's damages, any recovery from TMKG is barred in whole or in part.

FOR A SEVENTH DEFENSE
(Failure to State Facts Sufficient to Constitute a Cause of Action)

66. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

67. For a further defense, the Complaint fails to state facts sufficient to constitute a cause of action and should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 NOV 22 PM 2:27
M. HOPE BLACKLEY

FOR AN EIGHTH DEFENSE
(No Remedy in Unjust Enrichment or Quantum Meruit)

68. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

69. For a further defense and to the extent Plaintiff's claims are grounded in unjust enrichment, quantum meruit or any implied contract cause of action, Plaintiff's claims are barred because the only proper cause of action is for breach of an express contract and any remedy is limited to express contractual remedies.

FOR A NINTH DEFENSE
(No Remedy in Negligence or Other Tortious Conduct)

70. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

71. For a further defense and to the extent Plaintiff's claims are grounded in negligence or any tortious cause of action, Plaintiff's claims are barred because the only proper cause of action is for breach of express contract and any remedy is limited to express contractual remedies.

FOR A TENTH DEFENSE
(Sole Negligence)

72. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

73. For a further defense and to the extent Plaintiff's claims sound in tort law or the law of negligence, Plaintiff's claims are barred because Plaintiff's own actions make it solely responsible for any damages Plaintiff allegedly has suffered.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2017 JUN 22 PM 2:25
M. HOPE BLACKLEY

FOR AN ELEVENTH DEFENSE
(Comparative Negligence)

74. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

75. For a further defense and to the extent Plaintiff's claims sound in tort law or the law of negligence, Plaintiff's claims are barred by the doctrine of comparative negligence.

FOR A TWELFTH DEFENSE
(Equitable Defenses)

76. Plaintiff's claims are barred or limited by all equitable doctrines or affirmative defenses available to TMKG, including, but not limited to, unclean hands, waiver, setoff, consent, condonation, ratification, estoppel, unjust enrichment, and laches.

FOR A THIRTEENTH DEFENSE
(No Duty Breached)

77. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

78. If TMKG did owe a duty to Plaintiff other than those duties expressly admitted by TMKG, which TMKG denies, no duty was breached.

FOR A FOURTEENTH DEFENSE
(No Causation)

79. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

80. TMKG's actions are not the legal or proximate cause of Plaintiff's injuries or damages.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 NOV 22 PM 2:27
M. HOPE BLACKLEY

FOR A FIFTEENTH DEFENSE
(No Damages)

81. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

82. Regardless of the existence of any duty, or whether any duty was breached, which TMKG denies except for any contractual duties it has expressly admitted, Plaintiff has not suffered any injury or damages proximately resulting from TMKG's actions or omissions.

FOR A SIXTEENTH DEFENSE
(Barred by Doctrines of Consent, Ratification, Accord and Satisfaction or Authorization)

83. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

84. On information and belief, Plaintiff's claims are barred in whole or in part based on the doctrines of consent, ratification, accord and satisfaction or authorization.

FOR A SEVENTEENTH DEFENSE
(Punitive Damages Not Allowed)

85. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

86. To the extent Plaintiff seeks punitive damages, which right is expressly denied, Plaintiff is not entitled to such an award. Any imposition of punitive damages in this case against TMKG is barred to the extent that the manner in which such punitive damages are calculated violates the Constitution of the United States or the Constitution of the State of South Carolina.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 NOV 22 PM 2:27
MS HOPE BLACKLEY

FOR AN EIGHTEENTH DEFENSE
(Right to Assert Additional Defenses)

87. Each and every admission, qualification, denial, and allegation of the paragraphs above is hereby re-alleged and restated as if fully set forth herein.

88. TMKG expressly reserves the right to amend its Answer by adding defenses, counterclaims, cross-claims or by instituting third-party actions which might come to its attention or might be developed during the pendency of this action as additional facts are obtained.

DEMAND FOR JURY TRIAL

TMKG demands a jury trial on all causes of action to which it is entitled by law to a trial by a jury of its peers.

WHEREFORE, having fully answered Plaintiff's Complaint, TMKG prays that the Court:

a. Dismiss the Complaint in its entirety, with prejudice, on one or more of the grounds set forth herein, and deny payment of any damages to Plaintiff;

b. Award actual and consequential damages to TMKG due to Plaintiff's breach of the contract;

c. Award damages to TMKG pursuant to quantum meruit or other equitable theory of law;

d. Award to TMKG all reasonable attorney's fees and costs related to this matter which are recoverable under any contract provision, statute or court rule;

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 NOV 22 PM 2:27
M. HOPE BLACKLEY

e. Pursuant to S.C. Code Ann. § 29-5-100, vacate the recorded mechanic's lien, strike it from the public record, enter judgment in favor of TMKG, and dismiss this case against TMKG in its entirety, with prejudice;

f. Award actual and consequential damages to TMKG due to Plaintiff's decision to willfully and knowingly claim more than is owed to Plaintiff pursuant to the contract; and

g. Award such other and further relief as the Court may deem appropriate.

Respectfully submitted,

PROFFITT & COX, LLP

David Proffitt
Ronald B. Cox
8910 Two Notch Rd. Suite 400
Columbia, S.C. 29223-6518
Telephone: (803) 834-7097
Fax: (888) 711-1057
Email: dproffitt@proffittcox.com
Email: rcox@proffittcox.com

Attorneys for Plaintiff TMKG, Inc.

November 21, 2011

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 NOV 22 PM 2:27
M. HOPE BLACKLEY

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,	)	
	)	PLAINTIFF'S REPLY TO
v.	)	COUNTERCLAIM
	)	
TMKG, Inc.,	)	
	)	
Defendant(s).	)	
	)	

TO: DAVID PROFFITT, ESQ., ATTORNEY FOR TMKG, INC.

COMES NOW, the plaintiff, D&C Builders, Inc. (hereinafter "Plaintiff"), by and through its undersigned counsel and hereby replies to the Counterclaims of Defendant TMKG, Inc. (hereinafter "Defendant"), by denying each and every allegation not hereinafter specifically admitted, demanding strict proof thereof, and further respond as follows:

FOR A FIRST DEFENSE

37. Paragraphs 1 through 37 of Defendant's Answer and Counterclaim (hereinafter "Counterclaim") do not require a response from this answering Plaintiff, but to the extent that they do, Plaintiff denies same and demands strict proof thereof.

38. Plaintiff admits that it entered into a written agreement with Defendant. The terms of that agreement speak for themselves; accordingly, Plaintiff denies any allegations of Paragraph 38 of Defendant's Counterclaim which are not consistent with the written agreement between the parties and demands strict proof thereof.

39. The terms of that agreement speak for themselves; accordingly, Plaintiff denies any allegations of Paragraph 39 of Defendant's Counterclaim which are not consistent with the written agreement between the parties and demands strict proof thereof.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 DEC 22 PM 1:19
M. LOPEZ BLACKLEY

40. Plaintiff denies the allegations of Paragraph 40 of Defendant's Counterclaim and demands strict proof thereof.

41. Plaintiff denies the allegations of Paragraph 41 of Defendant's Counterclaim and demands strict proof thereof.

42. Plaintiff denies the allegations of Paragraph 42 of Defendant's Counterclaim and demands strict proof thereof.

43. Plaintiff denies the allegations of Paragraph 43 of Defendant's Counterclaim and demands strict proof thereof.

44. Plaintiff denies the allegations of Paragraph 44 of Defendant's Counterclaim and demands strict proof thereof.

45. Plaintiff denies the allegations of Paragraph 45 of Defendant's Counterclaim and demands strict proof thereof.

46. Paragraph 46 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

47. Plaintiff denies the allegations of Paragraph 47 of Defendant's Counterclaim and demands strict proof thereof.

48. Plaintiff denies the allegations of Paragraph 48 of Defendant's Counterclaim and demands strict proof thereof.

49. Plaintiff denies the allegations of Paragraph 49 of Defendant's Counterclaim and demands strict proof thereof.

50. Plaintiff denies the allegations of Paragraph 50 of Defendant's Counterclaim and demands strict proof thereof.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 DEC 22 PM 1:19
M. HOPE BLACKLEY

51. Plaintiff denies the allegations of Paragraph 51 of Defendant's Counterclaim and demands strict proof thereof.

52. Plaintiff denies the allegations of Paragraph 52 of Defendant's Counterclaim and demands strict proof thereof.

53. Paragraph 53 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

54. Plaintiff admits that any work Defendant performed was within its own scope of work. Plaintiff denies the remaining allegations of Paragraph 54 of Defendant's Counterclaim and demands strict proof thereof.

55. Plaintiff admits that Defendant did not satisfactorily perform or complete certain work. Plaintiff denies the remaining allegations of Paragraph 55 of Defendant's Counterclaim and demands strict proof thereof.

56. Plaintiff admits that Defendant was unjustly enriched. Plaintiff denies the remaining allegations of Paragraph 56 of Defendant's Counterclaim and demands strict proof thereof.

57. Plaintiff denies the allegations of Paragraph 57 of Defendant's Counterclaim and demands strict proof thereof.

58. Plaintiff denies the allegations of Paragraph 58 of Defendant's Counterclaim and demands strict proof thereof.

59. Paragraph 59 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 DEC 22 PM 1:15
M. HOPE BLACKLEY

60. Plaintiff denies the allegations of Paragraph 60 of Defendant's Counterclaim and demands strict proof thereof.

61. Plaintiff denies the allegations of Paragraph 61 of Defendant's Counterclaim and demands strict proof thereof.

62. Paragraph 62 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

63. Plaintiff denies the allegations of Paragraph 63 of Defendant's Counterclaim and demands strict proof thereof.

64. Paragraph 64 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

65. Plaintiff denies the allegations of Paragraph 65 of Defendant's Counterclaim and demands strict proof thereof.

66. Paragraph 66 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

67. Plaintiff denies the allegations of Paragraph 67 of Defendant's Counterclaim and demands strict proof thereof.

68. Paragraph 68 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 DEC 22 PM 1:19
HOPE B. ACKERLEY

69. Plaintiff denies the allegations of Paragraph 69 of Defendant's Counterclaim and demands strict proof thereof.

70. Paragraph 70 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

71. Plaintiff denies the allegations of Paragraph 71 of Defendant's Counterclaim and demands strict proof thereof.

72. Paragraph 72 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

73. Plaintiff denies the allegations of Paragraph 73 of Defendant's Counterclaim and demands strict proof thereof.

74. Paragraph 74 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

75. Plaintiff denies the allegations of Paragraph 75 of Defendant's Counterclaim and demands strict proof thereof.

76. Plaintiff denies the allegations of Paragraph 76 of Defendant's Counterclaim and demands strict proof thereof.

77. Paragraph 77 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 DEC 12 PM 1:19
M. HOPE BLACKLEY

78. Plaintiff denies the allegations of Paragraph 78 of Defendant's Counterclaim and demands strict proof thereof.

79. Paragraph 79 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

80. Plaintiff denies the allegations of Paragraph 80 of Defendant's Counterclaim and demands strict proof thereof.

81. Paragraph 81 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

82. Plaintiff denies the allegations of Paragraph 82 of Defendant's Counterclaim and demands strict proof thereof.

83. Paragraph 83 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

84. Plaintiff denies the allegations of Paragraph 84 of Defendant's Counterclaim and demands strict proof thereof.

85. Paragraph 85 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

86. Plaintiff denies the allegations of Paragraph 86 of Defendant's Counterclaim and demands strict proof thereof.

FILED
CLERK OF COURT
SCHUYLKILL COUNTY
2021 DEC 22 PM 1:19
HOPE BLACKLEY

87. Paragraph 87 of Defendant's Counterclaim does not require a response from this answering Plaintiff, but to the extent that it does, Plaintiff denies same and demands strict proof thereof.

88. Plaintiff denies the allegations of Paragraph 88 of Defendant's Counterclaim and demands strict proof thereof.

89. Plaintiff denies the allegations of the WHEREFORE Paragraph of Defendant's Counterclaim and demands strict proof thereof.

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

90. This Plaintiff alleges that Defendant's Counterclaim fails to sufficiently constitute a cause of action against this answering Plaintiff or fails to state facts upon which a claim can be based.

FOR A THIRD DEFENSE
(Recovery reduced or eliminated by failure to mitigate)

91. This Plaintiff alleges that any recovery by Defendant is barred by its failure to mitigate damages, or that any recovery must be reduced by those damages that Defendant failed to mitigate.

FOR A FOURTH DEFENSE
(Damages claimed attributable to others)

92. This Plaintiff alleges that the damages suffered by Defendant, if any, were the result of the acts or omissions of other parties named and unnamed in this action, for which this answering Plaintiff bears no responsibility.

FOR A FIFTH DEFENSE
(Claim barred by unclean hands)

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 DEC 22 PM 1:19
M. HOPE BLACKLEY

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

FOR A SIXTH DEFENSE
(Recovery reduced by setoff)

94. This Plaintiff alleges that any recovery by Defendant must be set off or reduced, abated, or apportioned to the extent that any other party's actions caused or contributed to damages, if any there were.

FOR A SEVENTH DEFENSE
(Full performance by Plaintiff)

95. This Plaintiff alleges that it performed all of the actions required of it under the subject agreement and that the only additional action required to carry out the agreement was performance by others.

FOR AN EIGHTH DEFENSE
(No facts supporting exemplary damages)

96. This Plaintiff alleges that the Counterclaim fails to state a claim upon which exemplary damages may be awarded.

FOR A NINTH DEFENSE
(Failure of condition precedent to Plaintiff's performance)

97. This Plaintiff alleges that, to the extent Defendant alleges this Plaintiff has 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 A TENTH DEFENSE
(Plaintiff obligations void or excused)

98. This Plaintiff alleges that, to the extent Defendant alleges this Plaintiff 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.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 DEC 22 PM 1:11
M. HOPE BLACKLEY

FOR AN ELEVENTH DEFENSE
(Breach of contract by Defendant)

99. This Plaintiff alleges that to the extent Defendant seeks recovery in contract, Defendant materially breached the terms and conditions of said agreement and are entitled to no relief thereon.

FOR A TWELFTH DEFENSE
(Defendant's bad faith)

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

FOR A THIRTEENTH DEFENSE
(Claims of Defendant uncertain)

101. This Plaintiff alleges that the Counterclaim and each cause of action are uncertain.

FOR A FOURTEENTH DEFENSE
(Failure of consideration)

102. This Plaintiff alleges that, to the extent Defendant alleges this Plaintiff has any obligation as to which full performance has not been rendered or excused, there has been a failure of consideration.

FOR A FIFTEENTH DEFENSE
(Estoppel)

103. This Plaintiff alleges that Defendant's conduct, including, but not limited to, his/her failure to notify this Plaintiff of the occurrences complained of, operated as estoppel and waiver of any rights to file the action herein.

FOR A SIXTEENTH DEFENSE
(Lack of proximate cause)

104. This Plaintiff alleges that any alleged conduct or omission by this Plaintiff was not the cause in fact or proximate cause of any injury alleged by Defendant.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2021 DEC 22 PM 1:19
HOPE BLACKLEY

DM

FOR A SEVENTEENTH DEFENSE
(Recovery barred by parol evidence)

105. This Plaintiff alleges that Defendant cannot seek the recovery pleaded herein because such recovery is expressly contrary to the evidence that this court may consider under the parol evidence rule.

FOR AN EIGHTEENTH DEFENSE
(Recovery barred by novation)

106. This Plaintiff alleges that any recovery by Defendant is barred by the doctrine of novation.

FOR A NINETEENTH DEFENSE
(Statute of Frauds)

107. This Plaintiff alleges that to the extent Defendant is relying on contracts other than those that are written, its claims are barred by the statute of frauds and should be dismissed.

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

108. This Plaintiff alleges that because the Counterclaim herein is couched in conclusionary terms, answering Plaintiff 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.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 DEC 22 PM 1:19
M. HOPE BLACKLEY

WHEREFORE, having fully replied to Defendant's Counterclaims, Plaintiff prays that the same be dismissed, for costs of this action, and for such other and further relief as this Court may deem just and proper.

Respectfully submitted this 21st day of December, 2011,

John T. Crawford, Jr. (SC Bar# 69682)
Townes B. Johnson, III (SC Bar# 75412)
KENISON, DUDLEY & CRAWFORD, LLC
704 E. McBee Avenue
Greenville, South Carolina 29601
PH: (864) 242-4899
FAX: (864) 242-4844
Attorneys for Plaintiff

Greenville, South Carolina

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2011 DEC 22 PM 1:19
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

C.A. No. 2011-CP-42-4121

D&C Builders, Inc.,

Plaintiff,

v.

TMKG, Inc.,

Defendant.

DEFENDANT TMKG'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant TMKG, Inc. ("TMKG"), by and through its undersigned counsel, submits its Memorandum in Opposition to Plaintiff D&C Builders, Inc.'s ("D&C Builders") motion for partial summary judgment.

PROCEDURAL POSTURE

This case arises out of a construction dispute. TMKG signed a contract with D&C Builders on May 5, 2010, for the construction of a 12,000-square-foot office and warehouse at 527 Brookshire Road in Greer, S.C. D&C Builders on July 27, 2011, filed a mechanic's lien of $74,123.40 against the property, and on September 27, 2011, filed a lawsuit against TMKG.

D&C Builder's Complaint was served on TMKG on or about September 30, 2011, alleging it is owed $74,123.40 for breach of contract and seeking foreclosure of the mechanic's lien.

TMKG timely filed and served its Answer and Counterclaims, denying it owed the amount demanded, asserting setoffs and counterclaims for breach of contract, and moving to

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 FEB 29 PM 4:22
M. HOPE BLACKLEY

vacate the mechanic's lien because D&C Builders had willfully and knowingly claimed more than is owed.

The parties so far have unsuccessfully attempted to identify issues in dispute and resolve the various matters, and discovery is ongoing.

SUMMARY JUDGMENT STANDARD

A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988). A court considering summary judgment does not make factual determinations or consider the merits of competing testimony. David v. McLeod Regl. Med. Ctr., 367S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

"Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Doe ex rel. Doe v. Batson, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (2001) (citing Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009) (quoting Brockbank v. Best Capital Corp., 341 S.C. at 378, 534 S.E.2d at 692 (2000)). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). The nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005).

Summary judgment should not be granted until the opposing party has had a full and fair opportunity to complete discovery, and it is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. E.g. Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) ("Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery."); Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672 (2000) ("Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law."); Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery"); Schmidt v. Courtney, 357 S.C. 310, 592

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2017 FEB 9 PM 4:22
HOPE BLACKLEY

S.E.2d 326 (Ct. App. 2003) (citing several cases applying these principles).

ARGUMENT

The Court should deny D&C Builders motion for partial summary judgment made pursuant to S.C. Code Ann. § 27-1-15, in which D&C Builders asserts it is owed attorney's fees and interest because TMKG failed to make a reasonable investigation of the claim and pay the amount demanded within 45 days of a demand letter dated July 13, 2011.

Section 27-1-15 provides:

> Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

Thus, to recover attorney's fees and interest, D&C Builders must show (1) that it has made a due and just demand for payment by certified mail, and (2) that TMKG failed to make a reasonable and fair investigation of the merits of the claim and pay at least the portion that is undisputed within 45 days of the demand.

TMKG submits that D&C Builders has not made such a showing to prove either element and will not be able to do so. The Court should deny D&C Builder's motion for the following reasons:

FIRST, TMKG acted promptly to conduct a reasonable and fair investigation of the issues in dispute and amounts demanded, and responded to those demands by offering additional payments. TMKG has alleged that D&C Builders has breached the contract by failing to satisfactorily perform certain work, by failing to give sufficient credits or setoffs for work that it

FILED
CLERK OF COURT
GREENVILLE COUNTY
2012 FEB 29 PM 2:22
HOPE BLACKLEY

admittedly did not perform at all or did not perform adequately, by failing to account for payments made, and by demanding more than it was owed. Some examples of the various issues in dispute are set forth in the affidavit of Gerald Koch, attached as EXHIBIT 1. D&C Builders has rejected one additional payment from TMKG and accepted another, although it has failed to acknowledge the additional payment in suing to foreclose on the mechanic's lien.

Section 27-1-15 obviously is intended to allow a party to recover attorney's fees and interest when the amount due undisputed and the owing party ignores the demand entirely and makes no effort to resolve it. Such a situation is not presented under the facts and circumstances of this case, and summary judgment on the matter certainly would not be proper.

In any event, it is obvious that summary judgment is not appropriate because there are genuine issues of material fact on the matters in dispute.

SECOND, discovery is not complete. As shown in the authority cited above, summary judgment should not be granted until the opposing party has had a full and fair opportunity to complete discovery, and it is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law.

CONCLUSION

For the foregoing reasons, TMKG requests that the Court deny D&C Builder's motion for partial summary judgment.

Respectfully submitted,

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 FEB 29 PM 4:22
M. HOPE BLACKLEY

PROFFITT & COX, LLP

David Proffitt
Ronald B. Cox
8910 Two Notch Rd. Suite 400
Columbia, S.C. 29223-6518
Telephone: (803) 834-7097
Fax: (888) 711-1057
Email: dproffitt@proffittcox.com
Email: rcox@proffittcox.com
Attorneys for TMKG, Inc.

February 27, 2012

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 FEB 29 PM 4:22
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

C.A. No. 2011-CP-42-4121

D&C Builders, Inc.,

Plaintiff,

v.

TMKG, Inc.,

Defendant.

CERTIFICATE OF SERVICE

I. the undersigned lawyer in the offices of Proffitt & Cox, LLP, attorneys for Defendant TMKG, Inc. do hereby certify that I have served the counsel or parties specified below in this action with a copy of the specified pleadings by causing a copy of the same to be mailed by United States Mail, postage prepaid, to the following address:

Pleading: Defendant TMKG's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment

Counsel / Parties Served:

John T. Crawford, Jr.
Townes B. Johnson, III
Kenison, Dudley & Crawford, LLC
704 E. McBee Ave.
Greenville, SC 29601
johnson@conlaw.com
Crawford@conlaw.com

Attorneys for D&C Builders, Inc.

David Proffitt

February 27, 2012

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 FEB 29 PM 4:22
M. HOPE BLACKLEY

16

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

C.A. No. 2011-CP-42-4121

D&C Builders, Inc.,

Plaintiff,

v.

TMKG, Inc.,

Defendant.

AFFIDAVIT OF GERALD KOCH

I, the undersigned, Gerald Koch, being duly sworn, state under oath as follows:

1. I am the general manager of TMKG, Inc., and am over the age of eighteen years.

2. I have personal knowledge of the facts set forth in this affidavit to the extent specified herein and, if called as a witness, I could competently testify to these facts.

3. My address is 527 Brookshire Road, Greer, S.C.

4. I am familiar with the contract dispute at issue between TMKG and D&C Builders, Inc., the investigation of D&C Builders' demands and the parties' efforts to resolve the matter.

5. D&C Builders has breached the contract by failing to satisfactorily perform certain work, by failing to give sufficient credits or setoffs for work that it admittedly did not perform at all or did not perform adequately, by failing to account for payments made, and by demanding more than it was owed.

6. For example, D&C Builders in its July 13 letter alleges it spent $15,339.00 of $17,500.00 allocated for electrical work, including work which TMKG self-performed. That

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 FEB 29 PM 4:22
M. HOPE BLACKLEY

317

resulted in a credit of $2,161.00 to TMKG. However, the electrical installation for the warehouse and exterior lighting was not done by D&C Builders, although it was included in the scope of the contract. The only labor or material provided by D&C Builders on the warehouse and exterior lighting was eight lights. TMKG provided all other materials and did all this work itself. TMKG believes that $15,339.00 just for the office area is high, particularly since the amount allocated for electrical in the contract for the entire building was only $17,500.00. TMKG believes a fair and likely low estimate of the work it self-performed is $10,000.00. Therefore, TMKG has requested a credit of $7,839.00 more than the credit offered by D&C Builders.

7. As another example, the contract included $5,000.00 for landscaping, which included temporary and permanent seeding of lawn areas. D&C Builders assured TMKG that the lawn areas would be properly graded and seeded, and would include all areas around the parking lot and driveway, just like the neighboring property. D&C Builders did not properly grade the areas and, when questioned about it, said the landscaping contractor would do it later. When the landscaper began his work, he told TMKG that no such grading was included in his work. When TMKG again discussed the issue with D&C Builders, it was told that the allowance was only $5,000.00 and no more work would be done. Furthermore, two different types of grass seed were used. The result is unsightly and patchy. In fact, the City of Greer has notified TMKG that the landscaping is not acceptable. The City has required TMKG to post a $[illegible],000.00 cash bond because the grass is very patchy and does not cover the dirt areas. TMKG has an estimate to redo the lawn areas at a cost of $5,000.00 and has requested a credit in that amount because D&C Builders did not deliver what it promised.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
12 FEB 29 PM 4:22
H. HOPE BLACKLEY

8. As another example, D&C Builders and its metal building subcontractor, Berry, insisted on installing the windows, which were made and delivered from Germany. D&C Builders and its subcontractor did not know how to properly install the windows. They did not install the windows level and plumb, and they did not correctly secure the windows to the building framing. TMKG tried to show the subcontractor how to do the work, but it was still done improperly. One or more TMKG employees has spent at least 34 hours reworking the 12 windows so that they would open and close properly. TMKG has requested a credit of only $2,600.00, but D&C Builders has refused it.

9. In addition, D&C Builders or its subcontractor caused the exterior insulation to be pushed up against the window sills, which made the sills slope inward instead of outward. When it rained, water entered the walls and interior of the building. D&C Builders attempted to solve the problem with caulk or sealant, but that did not work and water infiltrated in the next rain. Next, D&C Builders removed the sills and tried to reinstall them correctly, but failed to do so. Water continued to infiltrate. D&C finally claimed that the windows were defective or leaky, which is not true. One or more TMKG employees spent at least 18 hours reworking the window sills to properly install them, so that water now drains outward instead of inward. TMKG has requested a credit of only $1,350.00, but D&C Builders has refused it.

10. TMKG made a reasonable and fair investigation of the issues in dispute to determine what was owed before and after receiving D&C Builders' demand for payment in July 13, 2011. TMKG corresponded with D&C Builders in writing and verbally in an effort to determine what was owed.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 FEB 29 PM 4:22
M. HOPE BLACKLEY

11. TMKG also offered additional payments. On August 10, 2011, TMKG sent a check for $41,000.00 to D&C Builders, at the time believing that was the amount owed based on its investigation. D&C Builders rejected the check.

12. On September 15, 2011, after further investigation, review and discussion of the issues in dispute, TMKG sent another check for $29,433.40 to D&C Builders, along with a detailed explanation of what TMKG believed was owed. D&C Builders accepted and cashed the check.

13. On September 27, 2011, despite accepting the additional payment which should have reduced the amount allegedly owed, D&C Builders filed a lawsuit asserting that it was still owed $74,123.40.

14. TMKG repeatedly has discussed the various issues with D&C Builders, and made a reasonable and fair investigation of the demands. TMKG has offered what it believes to be owed to D&C Builders. TMKG has continued its efforts to investigate and resolve these matters after the lawsuit was filed.

Further affiant sayeth not.

WITNESS my hand this ___ day of February, 2012, at Greer, South Carolina.

Gerald Koch

SWORN TO and subscribed before me this
27 day of February, 2012.

Crystal Knight-Peterson
Notary Public for the State of South Carolina
My commission expires December 4, 2018

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 FEB 29 PM 4:22
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
D&C Builders, Inc.,	)	C. A. No. ~~2012~~-CP-42-4121
	)	
Plaintiff,	)	
	)	
v.	)	PLAINTIFF'S MOTION TO COMPEL DISCOVERY FROM DEFENDANT
	)	
TMKG, Inc.,	)	
	)	
Defendant.	)	

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR -2 AM 10:26
M. HOPE BLACKLEY

TO: DAVID PROFFITT, ESQ., ATTORNEY FOR TMKG, INC.

WILL YOU PLEASE NOTICE that the plaintiff, D&C Builders, Inc. ("Plaintiff"), by and through its undersigned counsel, hereby move this honorable Court on the tenth (10th) day hereafter, or as soon thereafter as counsel might be heard, for an Order compelling Defendant TMKG, Inc. ("Defendant") to provide answers to discovery pursuant to South Carolina Rules of Civil Procedure Rules 33 and 34. In support their Motion to Compel, Plaintiff would show the following:

1. Plaintiff filed this action on September 27, 2011 and served it, along with Plaintiff's First Interrogatories and Requests for Production ("Discovery"), upon Defendant on or about September 29, 2011. A true and correct copy of the Discovery is attached hereto as "Exhibit A".

2. On numerous occasions, Plaintiff has made a request on Defendant for date in which to expect answers to Plaintiff's Discovery.

3. On January 30, 2012, Plaintiff requested that Defendant provide discovery responses no later than February 10, 2012; One Hundred Fifteen (115) days after David

Proffitt, Esq. appeared in the matter and One Hundred Thirty-Five (135) days after Defendant had been served with Plaintiff's Discovery. A true and correct copy of the Plaintiff's requests are attached hereto as "**Exhibit B**".

4. On February 13, 2012, having not received answers to Plaintiff's Discovery, Plaintiff once again requested that Defendant provide discovery responses, giving Defendant an additional seven (7) days (February 20, 2012). *See Exhibit B.*

5. To date, Defendant has failed and refused to provide answers to Plaintiff's Discovery.

6. Accordingly, pursuant to Rules 33 and 34 of the South Carolina Rules of Civil Procedure, Plaintiff hereby moves for an Order compelling the Defendant to properly and fully respond to the discovery requests attached hereto as "Exhibit A".

7. Plaintiff respectfully request that Defendant be assessed all fees and costs associated with its failure to answer or otherwise respond to Plaintiff's discovery requests, necessitating this Motion to Compel.

8. Pursuant to South Carolina Rules of Civil Procedure Rule 11(a), I hereby certify that this Motion is meritorious and not intended for delay. I further certify that, as described above, I contacted opposing counsel and attempted to obviate and thereby resolve this Motion, but was unable to do so.

FILED
CLERK OF COURT
2012 MAR -2 AM 10:26

Respectfully submitted this 15th day of March, 2012.

KENISON, DUDLEY & CRAWFORD, LLC

John T. Crawford, Jr., Esq.
Townes B. Johnson, III (SC Bar# 75412)
704 E. McBee Avenue
Greenville, South Carolina 29601
PH: (864) 242-4899
FAX: (864) 242-4844
Attorneys for Plaintiff

March 1, 2012
Greenville, South Carolina

FILED
CLERK OF COURT
GREENVILLE COUNTY
2012 MAR -2 AM 10: 26
M. RUTH BLACKLEY

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.	)	
	)	
TMKG, Inc.,	)	
	)	
Defendant(s).	)	

FILED
CLERK OF COURT
SPARTANBURG, S.C.
2012 MAR -2 AM 10:26
MICHELE BLACKLEY

PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION TO DEFENDANT

TO: DEFENDANT TMKG, INC. AND ITS COUNSEL

D&C Builders, Inc. ("Plaintiff") now propounds the following First Interrogatories and Requests to Produce pursuant to the Rules 33 and 34 of the *South Carolina Rules of Civil Procedure* and requests that the above named defendant serve its written responses thereto within forty-five (45) days after the service hereof, and within the same time, provide responsive documents at the offices of Kenison, Dudley & Crawford, LLC at 704 East McBee Avenue, Greenville, South Carolina 29601.

The following Interrogatories and Requests for Production shall be deemed to continue from the date of service until the conclusion of the trial in this case so that information sought, which comes to the knowledge of said party, its representative or attorney, after answers to these Interrogatories have been submitted or documents in responses to these Requests for Production have been produced, shall be transmitted to the undersigned.

PLAINTIFF'S EXHIBIT 443

INSTRUCTIONS AND DEFINITIONS

For the purposes of these Interrogatories and Requests the following definitions and instructions shall apply:

A. For purposes of theses Interrogatories and Requests, "document" or "documents" is used in its broadest sense, and means all tangible 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, 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.

B. "You" or "your" means the above named defendant, and the attorneys, representatives, and agents of same.

C. "Identify" or "identity" as used in these Interrogatories and Requests in connection with any person or persons requires the following information for each person:

FILED
CLERK OF COURT
2022 MAR -2 AM 10:26
BY: E. MACKLEY

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 Interrogatories and 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 Interrogatories and 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 Interrogatories and 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;

FILED
CLERK OF COURT
2012 MAR -2 AM 10: 26
BY: LISA BLACKLEY

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, you may, at your option, attach such documents to the answers to these Requests.

FILED
CLERK OF COURT
2012 MAR -2 AM 10:26
BERKELEY

G. "**Relative to**" as used in these Interrogatories and 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 Interrogatories and 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. "**Pleadings**" shall mean any those items defined by Rule 7 of the *South Carolina Rules of Civil Procedure*.

L. "**Counterclaim**" shall mean a counterclaim you file against the Plaintiff in this action.

M. "Request For Admission" shall mean any Request For Admission the Plaintiff serves upon you pursuant to Rule 36 of the *South Carolina Rules of Civil Procedure*.

N. "Subject Property" shall mean the real property located in Spartanburg County, South Carolina at 527 Brookshire Rd., Greer, South Carolina.

INTERROGATORIES

1. Give the names and addresses of 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.

FILED
CLERK OF COURT
2017 MAR -2 AM 10:26
BLACKLEY

2. For each person known to you or your counsel to be a witness concerning the facts of this case, set forth either a summary sufficient to inform Plaintiff of the important facts known to or observed by such witness, and provide a copy of any written or recorded statements taken from such witnesses.

3. 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

f. 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.

4. 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.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR 12 A 10: 26
M. THERESA BARKLEY

5. If you contend that Plaintiff is not entitled to the recovery sought in its Complaint, please explain in detail why you so contend, and describe and list in detail all documents which support your contention.

6. Set forth an itemized statement of all damages, if any, claimed to have been sustained by you; including, but not limited to damages you allege in a counterclaim or as an off set to Plaintiff's claims.

7. Please state all relevant facts and identify all persons and documents which support the specific allegations and defenses contained in your pleadings.

8. Identify and describe in detail all documents you or your counsel are withholding, or intend to withhold, from production to Plaintiff based on a claim of privilege or work product and state the bases of each such claim of privilege or work product.

9. 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.

10. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claims in this case and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

11. If you have ever been a party to any civil action (other than this civil action), 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.

FILED
CLERK OF COURT
2012 MAR -2 AM 10:26
BLANCHEY

12. If you deny any Request for Admission, whether in whole or in part, please explain in detail which portion of the Request for Admission you deny, why you so contend, and describe and list in detail all documents which support your contention.

13. Identify all persons involved in responding to these interrogatories.

REQUEST FOR PRODUCTION OF DOCUMENTS

1. All documents used, identified or referred to in responding to the foregoing Interrogatories or any Request for Admission.

2. All agreements between you and Plaintiff.

3. All statements whether written or oral, relating to the subject of this suit or the Subject Property, which were made by you or your agents to any agents, adjusters, experts or

investigators.

4. Each and every document relating to the subject of this suit or the Subject Property, which was created by you or your agents to any agents, adjusters, experts or investigators.

5. Each and every document relating to the subject of this suit or the Subject Property, which was received by you or your agents from any agents, adjusters, experts or investigators.

6. Each and every document you received from Plaintiff, including, but not limited to correspondence, from the inception of any agreements you have with Plaintiff through the date of your responses to these discovery requests.

FILED
CLERK OF COURT
2012 MAR 2 AM 10: 26
BY: JULIE BLACKLEY

7. Each and every document you sent to Plaintiff, including, but not limited to correspondence, from the inception of any agreements you have with Plaintiff through the date of your responses to these discovery requests.

8. Each and every recording (whether audio or video) you have of Plaintiff.

9. 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.

10. All statements made by you in writing to any insurance carrier, insurance investigator, expert, or other non-lawyer.

11. Copies of any documents relied upon by you in drafting your pleading and that you claim supports your claims and defenses and contradicts the assertions in Plaintiff's pleadings.

12. Copies of all documents you or your counsel intend to present at trial or that you or your counsel will rely upon in preparing for hearings or the trial of this case.

Respectfully submitted this 27th day of September, 2011,

John T. Crawford, Jr., Esq.
Townes B. Johnson, III (SC Bar# 75412)
KENISON, DUDLEY & CRAWFORD, LLC
704 E. McBee Avenue
Greenville, South Carolina 29601
PH: (864) 242-4899
FAX: (864) 242-4844

Attorney for Plaintiff

Greenville, South Carolina

FILED
CLERK OF COURT
2011 MAR -2 AM 10:26
LITTLE BLACKLEY

Townes Johnson

From: Townes Johnson
Sent: Monday, January 30, 2012 5:34 PM
To: 'David Proffitt'
Cc: John Crawford
Subject: RE: D&C Builders v. TMKG

Thanks for the update, David. If we can't settle the case before then, please provide the discovery responses no later than February 10th.

Thanks,

Townes

--
TOWNES B. JOHNSON III
KENISON, DUDLEY & CRAWFORD, LLC
704 E. MCBEE AVENUE
GREENVILLE, SOUTH CAROLINA 29601
PH 864-242-4899
FAX 864-242-4844
CELL 864-757-4899
EMAIL johnson@conlaw.com
www.conlaw.com

FILED
CLERK OF COURT
2012 MAR -2 AM 10: 26
M. HUNTE BLACKLEY

From: David Proffitt [mailto:dproffitt@proffittcox.com]
Sent: Monday, January 30, 2012 4:28 PM
To: Townes Johnson
Subject: RE: D&C Builders v. TMKG

Townes,
I am still waiting on the final word from TMKG, but expect to have something to you soon.
Thanks.
David

David Proffitt
Proffitt & Cox, LLP
8910 Two Notch Rd. Suite 400
Columbia, SC 29223
(803) 834-7097
FAX: (888) 711-1057
Email: dproffitt@proffittcox.com
Website: www.proffittcox.com

CONFIDENTIAL: The information contained in this message may contain legally privileged and confidential information intended only for use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or duplication of this transmission is strictly prohibited. If you have received this communication in error, please notify us by telephone or email immediately and return the original message to us or destroy all printed and electronic copies.

From: Townes Johnson [mailto:Johnson@conlaw.com]
Sent: Monday, January 23, 2012 6:25 PM

PLAINTIFF'S EXHIBIT 452

To: David Proffitt
Subject: RE: D&C Builders v. TMKG

Thanks, David. I'll look forward to either a settlement offer or a timeline from you on discovery responses in the next few days.

Townes

--

TOWNES B. JOHNSON III
KENISON, DUDLEY & CRAWFORD, LLC
704 E. MCBEE AVENUE
GREENVILLE, SOUTH CAROLINA 29601
PH 864-242-4899
FAX 864-242-4844
CELL 864-757-4899
EMAIL johnson@conlaw.com
www.conlaw.com

FILED
CLERK OF COURT
2012 MAR -2 AM 10:26
RUTH BLACKLEY

From: David Proffitt [mailto:dproffitt@proffittcox.com]
Sent: Monday, January 23, 2012 3:31 PM
To: Townes Johnson
Subject: RE: D&C Builders v. TMKG

Townes,
Hope you're doing well, too.
I know we owe you some discovery. I have reviewed the file and it may be that this case could be worked out without extensive discovery or litigation by the parties. TMKG is considering how to proceed and I am awaiting instructions from them. I expect to have an answer in the next few days.
Thanks.
David

David Proffitt
Proffitt & Cox, LLP
8910 Two Notch Rd. Suite 400
Columbia, SC 29223
(803) 834-7097
FAX: (888) 711-1057
Email: dproffitt@proffittcox.com
Website: www.proffittcox.com

CONFIDENTIAL: The information contained in this message may contain legally privileged and confidential information intended only for use of the individual or entity named above. If the reader of this message is not the intended recipient; you are hereby notified that any dissemination, distribution or duplication of this transmission is strictly prohibited. If you have received this communication in error, please notify us by telephone or email immediately and return the original message to us or destroy all printed and electronic copies.

From: Townes Johnson [mailto:Johnson@conlaw.com]
Sent: Monday, January 23, 2012 11:20 AM
To: David Proffitt
Subject: RE: D&C Builders v. TMKG

David –

I hope you are well. I am writing to see when I can expect answers to D&C's pending First Set of Interrogatories

and First Set of Requests for Production.

Thanks,

Townes

--

TOWNES B. JOHNSON III
KENISON, DUDLEY & CRAWFORD, LLC
704 E. MCBEE AVENUE
GREENVILLE, SOUTH CAROLINA 29601
PH 864-242-4899
FAX 864-242-4844
CELL 864-757-4899
EMAIL johnson@conlaw.com
www.conlaw.com

FILED
CLERK OF COURT
2012 MAR -2 AM 10: 26
H. HOLT BLACKLEY

From: Townes Johnson
Sent: Wednesday, December 21, 2011 5:09 PM
To: 'David Proffitt'
Cc: John Crawford; Erica Hawthorne
Subject: RE: D&C Builders v. TMKG

David –

Attached, please find D&C's reply to TMKG's Counterclaims in the above action. A copy was placed in the mail to your attention today as well.

Additionally, when you get a chance, will you let us know when we can expect answers to our other pending discovery.

Thanks,

Townes

--

TOWNES B. JOHNSON III
KENISON, DUDLEY & CRAWFORD, LLC
704 E. MCBEE AVENUE
GREENVILLE, SOUTH CAROLINA 29601
PH 864-242-4899
FAX 864-242-4844
CELL 864-757-4899
EMAIL johnson@conlaw.com
www.conlaw.com

From: David Proffitt [mailto:dproffitt@proffittcox.com]
Sent: Friday, November 11, 2011 9:57 AM
To: Townes Johnson
Cc: John Crawford
Subject: RE: D&C Builders v. TMKG

Townes and John:

My client is continuing to gather information. We have a draft Answer and responses to the RFAs, but I

would like to review the additional information before responding. Would you be willing to grant us another week to Nov. 21 to answer the Complaint and RFAs?

Thanks.
David

David Proffitt
Proffitt & Cox, LLP
8910 Two Notch Rd. Suite 400
Columbia, SC 29223
(803) 834-7097
FAX: (888) 711-1057
Email: dproffitt@proffittcox.com
Website: www.proffittcox.com

CONFIDENTIAL: The information contained in this message may contain legally privileged and confidential information intended only for use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or duplication of this transmission is strictly prohibited. If you have received this communication in error, please notify us by telephone or email immediately and return the original message to us or destroy all printed and electronic copies.

FILED
CLERK OF COURT
SPARTANBURG, SC
2012 MAR -6 P 2:26
M. HOPE BAILEY

From: Townes Johnson [mailto:Johnson@conlaw.com]
Sent: Wednesday, October 19, 2011 2:27 PM
To: David Proffitt
Cc: John Crawford
Subject: RE: D&C Builders v. TMKG

David –

John Crawford and I are glad to agree to an extension – should you need additional time, please let us know. We look forward to working with you and to an amicable resolution to this matter.

Townes

–

TOWNES B. JOHNSON III
KENISON, DUDLEY & CRAWFORD, LLC
704 E. McBEE AVENUE
GREENVILLE, SOUTH CAROLINA 29601
PH 864-242-4899
FAX 864-242-4844
CELL 864-757-4899
EMAIL johnson@conlaw.com
www.conlaw.com

From: David Proffitt [mailto:dproffitt@proffittcox.com]
Sent: Wednesday, October 19, 2011 2:17 PM
To: Townes Johnson
Subject: D&C Builders v. TMKG

RE: D&C Builders, Inc. v. TMKG, Inc.
C.A. No. 2011-CP-42-4121
PC File No. 1140.03

Townes,

I represent Defendant TMKG, Inc. in this case. As we just discussed by phone, Plaintiff has agreed to grant an extension until Nov. 14, 2011, for Defendant to serve its Answer or otherwise respond to the Complaint, and for Defendant to respond to Plaintiff's Requests for Admission dated Sept. 27, 2011.

Thanks for agreeing to the extension. Please reply by email to confirm.
David

David Proffitt
Proffitt & Cox, LLP
8910 Two Notch Rd. Suite 400
Columbia, SC 29223
(803) 834-7097
FAX: (888) 711-1057
Email: dproffitt@proffittcox.com
Website: www.proffittcox.com

CONFIDENTIAL: The information contained in this message may contain legally privileged and confidential information intended only for use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or duplication of this transmission is strictly prohibited. If you have received this communication in error, please notify us by telephone or email immediately and return the original message to us or destroy all printed and electronic copies.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR - 2 P 2:26
M. HOPE BAILEY

Townes Johnson

From: Townes Johnson
Sent: Monday, February 13, 2012 12:30 PM
To: 'David Proffitt'
Cc: John Crawford
Subject: RE: D&C Builders v. TMKG

David –

D&C hereby rejects TMKG's February 9th offer. Please provide your client's responses to discovery within the next 7 days.

Townes

--

TOWNES B. JOHNSON III
KENISON, DUDLEY & CRAWFORD, LLC
704 E. MCBEE AVENUE
GREENVILLE, SOUTH CAROLINA 29601
PH 864-242-4899
FAX 864-242-4844
CELL 864-757-4899
EMAIL johnson@conlaw.com
www.conlaw.com

FILED
CLERK OF COURT
2012 MAR -2 AM 10: 26
M. HOPE BLACKLEY

From: Townes Johnson
Sent: Thursday, February 09, 2012 5:06 PM
To: 'David Proffitt'
Cc: John Crawford
Subject: RE: D&C Builders v. TMKG

David –

Thanks for the letter. I will take the offer to our client. That said, I'm 99.9% sure that D&C will reject it as TMKG has made similar offers before seeking set offs for almost identical items which our clients obviously have very differing perspectives on.

Accordingly, please go ahead and plan on preparing responses to our pending discovery and I will get an official response from D&C in the next day or 2.

Townes

--

TOWNES B. JOHNSON III
KENISON, DUDLEY & CRAWFORD, LLC
704 E. MCBEE AVENUE
GREENVILLE, SOUTH CAROLINA 29601
PH 864-242-4899
FAX 864-242-4844
CELL 864-757-4899
EMAIL johnson@conlaw.com
www.conlaw.com

From: David Proffitt [mailto:dproffitt@proffittcox:com]
Sent: Thursday, February 09, 2012 3:14 PM
To: Townes Johnson

Subject: D&C Builders v. TMKG

Townes,
Please see attached letter that we mailed to you today.
Thanks.
David

David Proffitt
Proffitt & Cox, LLP
8910 Two Notch Rd. Suite 400
Columbia, SC 29223
(803) 834-7097
FAX: (888) 711-1057
Email: dproffitt@proffittcox.com
Website: www.proffittcox.com

CONFIDENTIAL: The information contained in this message may contain legally privileged and confidential information intended only for use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or duplication of this transmission is strictly prohibited. If you have received this communication in error, please notify us by telephone or email immediately and return the original message to us or destroy all printed and electronic copies.

FILED
CLERK OF COURT
2012 MAR 12 A 10:27
M. HOUSTON OXLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

C.A. No. 2011-CP-42-4121

D&C Builders, Inc.,

Plaintiff,

v.

TMKG, Inc.,

Defendant.

DEFENDANT TMKG'S PETITION TO VACATE MECHANIC'S LIEN AND MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant TMKG, Inc. ("TMKG"), by and through its undersigned counsel, petitions this Court to vacate the mechanic's lien, as previously set forth in its Answer and Counterclaims, and moves for partial summary judgment on this ground.

PROCEDURAL POSTURE

This case arises out of a construction dispute. TMKG signed a contract with Plaintiff D&C Builders, Inc. ("D&C Builders") on May 5, 2010, for the construction of a 12,000-square-foot office and warehouse at 527 Brookshire Road in Greer, S.C. D&C Builders on July 27, 2011, filed a mechanic's lien of $74,123.40 against the property, and on September 27, 2011, filed a lawsuit against TMKG.

D&C Builder's Complaint was served on TMKG on or about September 30, 2011, alleging it is owed $74,123.40 for breach of contract and seeking foreclosure of the mechanic's lien.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR -5 PM 3:04
M. HOPE BLACKLEY

TMKG timely filed and served its Answer and Counterclaims, denying it owed the amount demanded, asserting setoffs and counterclaims for breach of contract, and moving to

vacate the mechanic's lien because D&C Builders had willfully and knowingly claimed more than is owed.

SUMMARY JUDGMENT STANDARD

A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); Manning v. Quinn, 294 S.C. 383, 365 S.E.2d 24 (1988). A court considering summary judgment does not make factual determinations or consider the merits of competing testimony. David v. McLeod Regl. Med. Ctr., 367S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

"Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Doe ex rel. Doe v. Batson, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (2001) (citing Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009) (quoting Brockbank v. Best Capital Corp., 341 S.C. at 378, 534 S.E.2d at 692 (2000)). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). The nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005).

PETITION TO VACATE LIEN

Pursuant to South Carolina Code Ann. §§ 29-5-90 and 29-5-100 and as previously set forth in its Answer and Counterclaims, TMKG petitions this Court to vacate the mechanic's lien in the amount of $74,123.40 filed by D&C Builders on the ground that D&C Builders has willfully and knowingly claimed more than it is owed. D&C Builders has willfully and knowingly stated an inaccurate amount due for labor and materials, and has failed to provide a sufficient explanation and supporting documentation for the amount claimed in the recorded

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR -5 PM 3:03
HOPE BLACKLEY

mechanic's lien. TMKG moves for partial summary judgment on this ground. TMKG moves the Court to vacate the recorded mechanic's lien, strike it from the public record, enter judgment in favor of TMKG and dismiss this case against TMKG in its entirety, with prejudice.

On September 15, 2011, after further investigation, review and discussion of the issues in dispute between the parties, TMKG sent a check for $29,433.40 to D&C Builders, along with a detailed explanation of what TMKG believed was owed. D&C Builders accepted and cashed the check. (Aff. of Gerald Koch, ¶ 12, attached as EXHIBIT 1; Copy of check attached as EXHBIT 2.)

On September 27, 2011, despite accepting the additional payment which should have reduced the amount allegedly owed, D&C Builders filed a lawsuit asserting that it was still owed $74,123.40. (Aff. of Koch, ¶ 13; D&C Builders' Complaint, ¶¶ 9-10.)

Section 29-5-90 requires that a person who wishes to file a mechanic's lien must do so within the required period and must file and serve on the owner "a statement of a just and true account of the money due him, with all just credits given. . . ."[1] Section 29-5-100 provides that

---

[1] Section 29-5-90 provides:

> Such a lien shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, serves upon the owner or, in the event the owner cannot be found, upon the person in possession and files in the office of the register of deeds or clerk of court of the county in which the building or structure is situated a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien sufficiently accurate for identification with the name of the owner of the property, if known, which certificate shall be subscribed and sworn to by the person claiming the lien or by someone in his behalf and shall be recorded in a book kept for the purpose by the register or clerk who shall be entitled to the same fees therefor as for recording mortgages of equal length. Provided, that in the event neither the owner nor the person in possession can be located after diligent search, and this fact is verified by affidavit of the sheriff or his deputy, the lien may be preserved by filing the statement together with the affidavit. The delivery on the register or clerk for

continued . . .

FILED
CLERK OF COURT
SANTA ROSA COUNTY, FLORIDA
2012 MAR 15 PM 2:52

"[n]o inaccuracy in such statement relating to the property to be covered by the lien, if the property can be reasonably recognized, or in stating the amount due for labor or materials shall invalidate the proceedings, *unless it appear that the person filing the certificate has wilfully and knowingly claimed more than is his due.* (Emphasis added.)

The court should not grant summary judgment on the issue and vacate a mechanic's lien when there are genuine issues of material fact with regard to the amount owed. In Black v. Haile, 270 S.C. 93, 240 S.E.2d 646 (1978), the Supreme Court stated that the "trial judge has the authority to vacate a mechanic's lien. . . . [T]his authority may be somewhat likened to the judge's authority to grant a summary judgment if there is no genuine issue of material fact to be determined, or his authority to direct a verdict when the evidence is susceptible of only one reasonable inference. However, the judge to whom application for relief is made may not try disputed facts. These are reserved, under . . . S.C. Code § 29-5-230 (1976), for the jury." Id. (citing Sea Pines Co. v. Kiawah Island Co., Inc., 268 S.C. 153, 232 S.E.2d 501 (1977); accord A.V.A. Const. Corp. v. Santee Wando Const., 303 S.C. 333, 400 S.E.2d 498 (Ct. App. 1990) (applying same principle); Cobb v. Maccaro, 310 S.C. 303, 423 S.E.2d 156 (Ct. App. 1992) (stating same principle).

Under the above authority, the general rule is that a person asserting a mechanic's lien must file and serve a true and accurate account of what he is owed, and the court will not vacate the lien or dismiss a case simply because the amount demanded is in dispute, as is usually the case. *However*, if a person asserting a mechanic's lien willfully and knowingly claims more than

---

filing, as provided in this section, shall be and constitute the delivery contemplated with regard to such liens in Title 30 of this Code.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR -4 PM 3:03
M. HOPE BLACKLEY

he is owed in the mechanic's lien and subsequent lawsuit, and that fact is not disputed, then the court may vacate the mechanic's lien and dismiss the case.

In the present case, D&C Builders recorded a mechanic's lien in the amount of $74,123.40 on July 27, 2011. D&C Builders then accepted an additional payment of $29,433.40 from TMKG on or about September 15, 2011. Two weeks after accepting the payment, D&C Builders filed a lawsuit seeking the original amount despite the fact it already had been paid about 40 percent of that amount it alleges it was still owed. It is obvious that D&C Builders has knowingly and willfully claimed more than it was due. All of the pertinent facts are undisputed and no additional discovery is necessary, unlike the reported cases in which there was a genuine issue about the amount due.

CONCLUSION

For the foregoing reasons, TMKG petitions this Court to vacate the mechanic's lien, as previously set forth in its Answer and Counterclaims, and moves for partial summary judgment on this ground. In the alternative, TMKG moves the Court for partial summary judgment and for an order requiring D&C Builders to amend its mechanic's lien and pleadings to allege that it is owed no more than $44,690.00 ($74,123.40 mi[illegible]9,433.40).

Respectfully submitted,

PROFFITT & COX, LLP

David Proffitt
Ronald B. Cox
8910 Two Notch Rd. Suite 400
Columbia, S.C. 29223-6518
Telephone: (803) 834-7097
Fax: (888) 711-1057
Email: dproffitt@proffittcox.com
Email: rcox@proffittcox.com
Attorneys for TMKG, Inc.

February 29, 2012

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR -5 PM 3:04
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

C.A. No. 2011-CP-42-4121

D&C Builders, Inc.,

Plaintiff,

v.

TMKG, Inc.,

Defendant.

CERTIFICATE OF SERVICE

I. the undersigned lawyer in the offices of Proffitt & Cox, LLP, attorneys for Defendant TMKG, Inc. do hereby certify that I have served the counsel or parties specified below in this action with a copy of the specified pleadings by causing a copy of the same to be mailed by United States Mail, postage prepaid, and by email, to the following address:

Pleading: Defendant TMKG's Petition to Vacate Mechanic's Lien and Motion for Partial Summary Judgment

Counsel / Parties Served:

John T. Crawford, Jr.
Townes B. Johnson, III
Kenison, Dudley & Crawford, LLC
704 E. McBee Ave.
Greenville, SC 29601
johnson@conlaw.com
Crawford@conlaw.com

Attorneys for D&C Builders, Inc.

David Proffitt

February 29, 2012

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR -5 PM 3:04
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

C.A. No. 2011-CP-42-4121

D&C Builders, Inc.,

Plaintiff,

v.

TMKG, Inc.,

Defendant.

AFFIDAVIT OF GERALD KOCH

I, the undersigned, Gerald Koch, being duly sworn, state under oath as follows:

1. I am the general manager of TMKG, Inc., and am over the age of eighteen years.

2. I have personal knowledge of the facts set forth in this affidavit to the extent specified herein and, if called as a witness, I could competently testify to these facts.

3. My address is 527 Brookshire Road, Greer, S.C.

4. I am familiar with the contract dispute at issue between TMKG and D&C Builders, Inc., the investigation of D&C Builders' demands and the parties' efforts to resolve the matter.

5. D&C Builders has breached the contract by failing to satisfactorily perform certain work, by failing to give sufficient credits or setoffs for work that it admittedly did not perform at all or did not perform adequately, by failing to account for payments made, and by demanding more than it was owed.

6. For example, D&C Builders in its July 13 letter alleges it spent $15,339.00 of $17,500.00 allocated for electrical work, including work which TMKG self-performed. That

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR -5 PM 3:04
M. HOPE BLACKLEY

EXHIBIT 1

resulted in a credit of $2,161.00 to TMKG. However, the electrical installation for the warehouse and exterior lighting was not done by D&C Builders, although it was included in the scope of the contract. The only labor or material provided by D&C Builders on the warehouse and exterior lighting was eight lights. TMKG provided all other materials and did all this work itself. TMKG believes that $15,339.00 just for the office area is high, particularly since the amount allocated for electrical in the contract for the entire building was only $17,500.00. TMKG believes a fair and likely low estimate of the work it self-performed is $10,000.00. Therefore, TMKG has requested a credit of $7,839.00 more than the credit offered by D&C Builders.

7. As another example, the contract included $5,000.00 for landscaping, which included temporary and permanent seeding of lawn areas. D&C Builders assured TMKG that the lawn areas would be properly graded and seeded, and would include all areas around the parking lot and driveway, just like the neighboring property. D&C Builders did not properly grade the areas and, when questioned about it, said the landscaping contractor would do it later. When the landscaper began his work, he told TMKG that no such grading was included in his work. When TMKG again discussed the issue with D&C Builders, it was told that the allowance was only $5,000.00 and no more work would be done. Furthermore, two different types of grass seed were used. The result is unsightly and patchy. In fact, the City of Greer has notified TMKG that the landscaping is not acceptable. The City has required TMKG to post a $5,000.00 cash bond because the grass is very patchy and does not cover the dirt areas. TMKG has an estimate to redo the lawn areas at a cost of $5,000.00 and has requested a credit in that amount because D&C Builders did not deliver what it promised.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR 5 PM 3:04
J. HOPE BLACKLEY

8. As another example, D&C Builders and its metal building subcontractor, Berry, insisted on installing the windows, which were made and delivered from Germany. D&C Builders and its subcontractor did not know how to properly install the windows. They did not install the windows level and plumb, and they did not correctly secure the windows to the building framing. TMKG tried to show the subcontractor how to do the work, but it was still done improperly. One or more TMKG employees has spent at least 34 hours reworking the 12 windows so that they would open and close properly. TMKG has requested a credit of only $2,600.00, but D&C Builders has refused it.

9. In addition, D&C Builders or its subcontractor caused the exterior insulation to be pushed up against the window sills, which made the sills slope inward instead of outward. When it rained, water entered the walls and interior of the building. D&C Builders attempted to solve the problem with caulk or sealant, but that did not work and water infiltrated in the next rain. Next, D&C Builders removed the sills and tried to reinstall them correctly, but failed to do so. Water continued to infiltrate. D&C finally claimed that the windows were defective or leaky, which is not true. One or more TMKG employees spent at least 18 hours reworking the window sills to properly install them, so that water now drains outward instead of inward. TMKG has requested a credit of only $1,350.00, but D&C Builders has refused it.

10. TMKG made a reasonable and fair investigation of the issues in dispute to determine what was owed before and after receiving D&C Builders' demand for payment in its July 13, 2011. TMKG corresponded with D&C Builders in writing and verbally in an effort to determine what was owed.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR -5 PM 3:04
M. HOPE BLACKLEY

11. TMKG also offered additional payments. On August 10, 2011, TMKG sent a check for $41,000.00 to D&C Builders, at the time believing that was the amount owed based on its investigation. D&C Builders rejected the check.

12. On September 15, 2011, after further investigation, review and discussion of the issues in dispute, TMKG sent another check for $29,433.40 to D&C Builders, along with a detailed explanation of what TMKG believed was owed. D&C Builders accepted and cashed the check.

13. On September 27, 2011, despite accepting the additional payment which should have reduced the amount allegedly owed, D&C Builders filed a lawsuit asserting that it was still owed $74,123.40.

14. TMKG repeatedly has discussed the various issues with D&C Builders, and made a reasonable and fair investigation of the demands. TMKG has offered what it believes to be owed to D&C Builders. TMKG has continued its efforts to investigate and resolve these matters after the lawsuit was filed.

Further affiant sayeth not.

WITNESS my hand this ___ day of February, 2012, at Greer, South Carolina.

Gerald Koch

SWORN TO and subscribed before me this
27 day of February, 2012.

Crystal Knight-Peterson
Notary Public for the State of South Carolina
My commission expires November 4, 2018

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR -5 PM 3:04
M. HOPE BLACKLEY

David Proffitt

From: geraldkoch@charter.net
Sent: Monday, November 14, 2011 3:23 PM
To: david proffitt
Cc: Peter Janisch
Subject: FW: Certified Check
Attachments: RE2.pdf; Certified Check.pdf

-------- Begin forwarded message --------
Subject: Certified Check
Date: 9/19/11 8:49:43 AM
From: geraldkoch@charter.net
To: "scott dodenhoff"
Cc: "Peter Janisch"

From:
TMKG Inc.
527B Brookshire Rd
Greer, SC 29651
864 991 7069

To:
D&C Builders, Inc.
131 Sandpiper Lane
Greenville SC, 29607
864 303 2876

Certified Check from TMKG Inc to D&C Builders in the amount of $29,433.40.

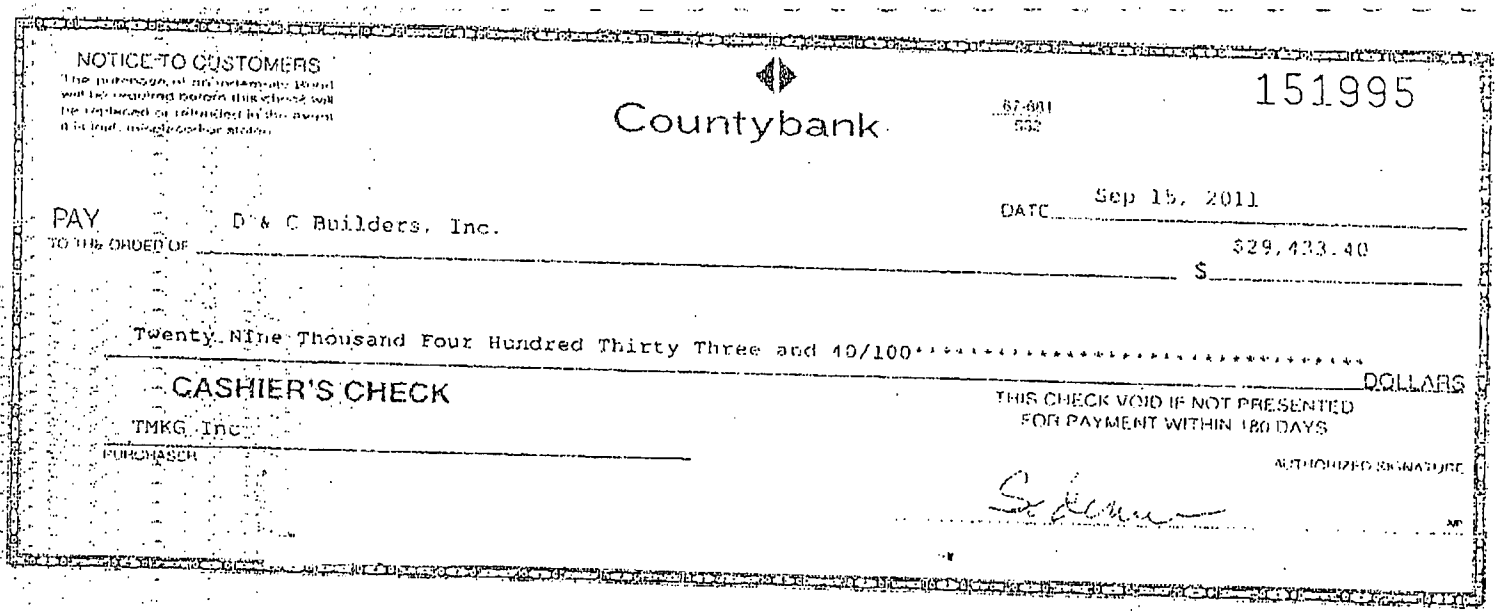
Peter and Wilfreid have asked me to inform you of the following:

Please refer to Invoice No: 0018.

Thank you

Gerald Koch Peter Janisch Wilfried Mengeler

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR -5 PM 3:04
M. HOPE BLACKLEY



NOTICE TO CUSTOMERS

Countybank

67-601
532

151995

DATE Sep 15, 2011

PAY TO THE ORDER OF D & C Builders, Inc.

$ 29,433.40

Twenty Nine Thousand Four Hundred Thirty Three and 40/100********** DOLLARS

CASHIER'S CHECK

THIS CHECK VOID IF NOT PRESENTED FOR PAYMENT WITHIN 180 DAYS

TMKG, Inc.

PURCHASER

AUTHORIZED SIGNATURE

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR -5 PM 3:04
M. HOPE BLACKLEY

470

351

352

NOTICE TO CUSTOMERS

Countybank

151995

52-681
552

PAY TO THE ORDER OF D & C Builders, Inc.

DATE Sep 15, 2011

$ 29,433.40

Twenty Nine Thousand Four Hundred Thirty Three and 40/100********** DOLLARS

CASHIER'S CHECK

TMKG Inc

PURCHASER

THIS CHECK VOID IF NOT PRESENTED FOR PAYMENT WITHIN 180 DAYS

AUTHORIZED SIGNATURE

EXHIBIT 2

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR -5 PM 3:04
M. HOPE BLACKLEY

471

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

C.A. No. 2011-CP-42-4121

D&C Builders, Inc.,

Plaintiff,

v.

TMKG, Inc.,

Defendant.

MOTION FOR CONTINUANCE OF MOTION HEARING

Counsel for Defendant TMKG, Inc., David Proffitt, respectfully moves for a continuance of the motion hearing set to be heard before the Court at 4:00 p.m. on March 12, 2012. Attorney Proffitt is involved in a case for another client which appeared on the trial roster in Lexington County this week, behind a two day date certain trial. The date certain trial did not go forward. As a result, the other case involving attorney Proffitt became number one for trial in Lexington County and is proceeding to jury selection and commencement of trial. Defendant TMKG accordingly requests a continuance of the motion hearing scheduled in the above-captioned matter due to the unavailability of its counsel.

[Signature on Following Page]

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR 15 AM 8:29
M. HOPE BLACKLEY

Respectfully submitted,

PROFFITT & COX, LLP
David Proffitt By RBC
David Proffitt
Ronald B. Cox
8910 Two Notch Rd. Suite 400
Columbia, S.C. 29223-6518
Telephone: (803) 834-7097
Fax: (888) 711-1057
Email: dproffitt@proffittcox.com
Email: rcox@proffittcox.com
Attorneys for TMKG, Inc.

March 12, 2012

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR 15 AM 8:29
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
D&C Builders, Inc.,	)	C. A. No. ~~2012~~-CP-42-4121
	)	2011
Plaintiff,	)	
	)	
v.	)	NOTICE OF HEARING
	)	
TMKG, Inc.,	)	
	)	
Defendant.	)	

TO: DAVID PROFFITT, ESQ., ATTORNEY FOR TMKG, INC.

WILL YOU PLEASE NOTICE that on the 19th day of April, 2012 at 2:30 PM at the Spartanburg County Courthouse, Spartanburg, South Carolina, pursuant to South Carolina Rules of Civil Procedure, the Plaintiff, by and through its undersigned counsel, will bring its Motion for Partial Summary Judgment which has been previously served upon you.

This 23 of March, 2012.

John T. Crawford, Jr., Esq. (SC Bar #69682)
Townes B. Johnson, III (SC Bar# 75412)
KENISON, DUDLEY & CRAWFORD, LLC
704 E. McBee Avenue
Greenville, South Carolina 29601
PH: (864) 242-4899
FAX: (864) 242-4844

Attorneys for Plaintiff

Greenville, South Carolina

CLERK OF COURT
SPARTANBURG COUNTY
2012 MAR 28 AM 9:34
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
D&C Builders, Inc.,	)	C. A. No. 2012-CP-42-4121
Plaintiff,	)	
v.	)	PLAINTIFF'S OFFER OF SETTLEMENT
TMKG, Inc.,	)	
Defendant.	)	

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 13 PM 2:31
M. HOPE BLACKLEY

TO: DAVID PROFFITT, ESQ., ATTORNEY FOR TMKG, INC.

The Plaintiff, above named, by and through its undersigned attorney and pursuant to *South Carolina Code Ann.* § 29-5-10, hereby offers settlement to Defendant in the above-styled action for the payment to Plaintiff of Forty-Four Thousand, Six Hundred Ninety and 0/100ths Dollars ($44,690.00).

Pursuant to *South Carolina Code Ann.* § 29-5-10, acceptance of this Offer of Settlement by the Defendant must be served in writing within ten (10) days before the call of this case to trial. Should the Defendant refuse this Offer of Settlement and Plaintiff is determined to be the prevailing party in this action, the Defendant will be liable to the Plaintiff for costs and attorneys' fees.

Pursuant to Rule 69 of the *South Carolina Rules of Civil Procedure*, acceptance of the Offer of Settlement by the Defendant must be served in writing within 10 days after service of the Offer of Settlement. An Offer not accepted shall be deemed withdrawn. Should the Defendant refuse the Offer and fail to obtain a more favorable judgment at trial, it cannot recover costs, but must pay the Plaintiff's costs from the time of the offer.

Respectfully submitted this 13th of April, 2012,

By: _____

John T. Crawford, Jr., Esq.
Townes B. Johnson, III (SC Bar# 75412)
KENISON, DUDLEY & CRAWFORD, LLC
704 E. McBee Avenue
Greenville, South Carolina 29601
PH: (864) 242-4899
FAX: (864) 242-4844
Attorneys for Plaintiff

Greenville, South Carolina

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 13 PM 2:31
M. HOPE BLACKLEY

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.	)	AFFIDAVIT OF
	)	SCOTT DODENHOFF
TMKG, Inc.,	)	
	)	
Defendant.	)	
	)	

PERSONALLY APPEARED before me, an officer duly authorized by law to administer oaths, Scott Dodenhoff, who after first being duly sworn, states:

1. My name is Scott Dodenhoff, and I am competent in all respects to testify regarding the matters set forth herein.

2. I am and have been during at all relevant times herein the Vice President of D&C Builders, Inc. ("D&C"), the Plaintiff in the above-styled action.

3. I have personal knowledge of the facts stated herein and know them to be true. I give this affidavit voluntarily.

4. On or about July 29, 2011, I received an email from Gerald Koch, TMKG's General Manager, which enclosed a July 27th correspondence from TMKG's principals. A true and correct copy of the email and attachment are attached hereto as "**Exhibit A**".

5. On or about August 10, 2011, I met with Defendant TMKG, Inc. ('TMKG") wherein TMKG offered D&C Forty-One Thousand and 0/100ths Dollars ($41,000.00) as "final payment". A true and correct copy of the Forty-One Thousand and 0/100ths Dollars ($41,000.00) check is attached hereto as "**Exhibit B**".

6. D&C refused the Forty-One Thousand and 0/100ths Dollars ($41,000.00) payment since it was offered as a final payment.

7. On or about August 29, 2011, I received Invoice No. 18 from TMKG, wherein TMKG reduced the undisputed contract balance due and owing to Twenty-Nine Thousand, Four Hundred Thirty-Three and 0/100ths Dollars

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:27
M. HOPE BLACKLEY

($29,433.00). A true and correct copy of Invoice No. 18 is attached hereto as "Exhibit C".

8. On or about September 17, 2011, I received a correspondence from TMKG enclosing a check in the amount of Twenty-Nine Thousand, Four Hundred Thirty-Three and 0/100ths Dollars ($29,433.00).

9. On or about September 19, 2011, I received an email from Gerald Koch regarding referring to Invoice No. 18 in regard to TMKG's payment. A true and correct copy of the email is attached hereto as "Exhibit D".

10. On or about September 26, 2011, I received an email from Gerald Koch regarding referring to Invoice No. 18 and no balance being owed. A true and correct copy of the email is attached hereto as "Exhibit E".

11. Accordingly, on or about October 6, 2011, D&C deposited the Twenty-Nine Thousand, Four Hundred Thirty-Three and 0/100ths Dollar ($29,433.00) check into trust. A true and correct copy of the Kenison, Dudley & Crawford, LLC's deposit statement is attached hereto as "Exhibit F".

12. Those funds were held in trust until April 11, 2012, when TMKG represented that those funds weren't conditioned on being accepted as payment in full.

13. Upon those funds' release from trust, D&C reduced its claim by Twenty-Nine Thousand, Four Hundred Thirty-Three and 0/100ths Dollars ($29,433.00) and filed an Offer of Settlement reflecting same.

FURTHER THE AFFIANT SAYETH NAUGHT.

Scott Dodenhoff

Sworn to and subscribed before me
this 19th day of April, 2012.

Erica Hawthorne
Notary Public, State of South Carolina
My commission expires: 12-12-2016

FILED
CLERK OF COURT
SPARTANSBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

Exhibit A

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

From: geraldkoch@charter.net [mailto:geraldkoch@charter.net]
Sent: Friday, July 29, 2011 8:26 AM
To: scott dodenhoff
Cc: Peter Janisch
Subject: Contract balance

Hello Scott!

Please open the attachment!

Thank you

Gerald Koch

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

Mengeler, Wilfried

Von: geraldkoch@charter.net
Gesendet: Mittwoch, 27. Juli 2011 22:47
An: Janisch, Peter
Cc: Mengeler, Wilfried
Betreff: Contract balance

From:
TMKG Inc.
527B Brookshire Rd
Greer, SC 29651
864 991 7069

To:
D&C Builders, Inc.
131 Sanpiper Lane
Greenville SC, 29607
864 303 2878

Contract balance

Hello Scott!

Peter and Wilfried have asked me to inform you with the following:

TMKG received your Notice and Certificate of Mechanics' Lien today, that has been placed against TMKG Inc. property.

TMKG will have a final itemized list of deductions, which will be subtracted from the outstanding balance of $74,123.40, no later than August 10th 2011.

Credit for canceled contracted work
TMKG rework time for labor and materials
Existing damage caused by poor construction work

TMKG is not represented by a Attorney at this point. If no agreement is met, either through a Mediator or between us, TMKG has no choice but to hire a attorney too.

A copy off this letter will be mailed through certified mail.

Thank you

07.28.2011

Gerald Koch — General Manager

Peter Janisch — Owner

Wilfried Mengeler — Owner

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M HOPE BLACKLEY

Exhibit B

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

364

NOTICE TO CUSTOMERS
The purchase of an Indemnity Bond will be required before this check will be replaced or refunded in the event it is lost, misplaced or stolen.

Countybank

67-681
532

151965

DATE Aug 10, 2011

PAY TO THE ORDER OF D&C BUILDERS, INC.

$41,000.00

Forty One Thousand and 00/100********** DOLLARS

CASHIER'S CHECK

THIS CHECK VOID IF NOT PRESENTED FOR PAYMENT WITHIN 180 DAYS

TMKG
PURCHASER

AUTHORIZED SIGNATURE

[TMKG-00036]

M. HOPE BLACKLEY
2012 APR 19 PM 2:28
CLERK OF COURT
SPARTANBURG COUNTY
FILED

483

Exhibit C

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

David Proffitt

From: geraldkoch@charter.net
Sent: Monday, November 14, 2011 3:23 PM
To: david proffitt
Cc: Peter Janisch
Subject: FW: WG: Neue Rechnung - noch mal neu
Attachments: image003.jpg; image002.gif; image001.jpg; invoice_no0018.doc

-------- Begin forwarded message --------
Subject: FW: WG: Neue Rechnung - noch mal neu
Date: 8/29/11 2:56:49 PM
From: geraldkoch@charter.net
To: "scott dodenhoff" <scott@dandcbuildersinc.com>

Hello Scott!

Here is TMKG Invoice to D&C Builders, Inc.

Thank you

-------- Begin forwarded message --------
Subject: WG: Neue Rechnung - noch mal neu
Date: 8/26/11 10:20:24 AM
From: "Mengeler, Wilfried" <W.Mengeler@tmkg.de>
To: geraldkoch@charter.net

Hallo Gerald,

anbei sende ich dir die Rechnung an Scott. Bitte schicke die Rechnung an Scott, den Angebotenen Scheck von 41.000,-$ den du Scott angeboten hast, bieten wir erstmal nicht mehr an.

Gruß

Willi

TM GmbH & Co. KG

Elektrische Industrieausrüstungen

Friedrich-List-Allee 66

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

D-41844 Wegberg-Wildenrath

Tel.: +49 2432 49120-11

Fax: +49 2432 49120-20

www.tmkg.de <http://www.tmkg.de/>

w.mengeler@tmkg.de <mailto:w.mengeler@tmkg.de>

Rechtsform: Kommanditgesellschaft - Sitz Viersen - Reg.-Gericht Mönchengladbach HRA 5528

Persönlich haftender Gesellschafter: TM Verwaltungs GmbH - Sitz: Viersen
- Reg.-Gericht: Mönchengladbach HRB 10696

Geschäftsführer: Peter Janisch, Wilfried Mengeler

Von: Schultz, Heidi
Gesendet: Freitag, 26. August 2011 14:47
An: Mengeler, Wilfried
Betreff: AW: Neue Rechnung - noch mal neu

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

TM GmbH & Co. KG

Elektrische Industrieausrüstungen

Friedrich-List-Allee 66

D-41844 Wegberg-Wildenrath

Tel.: +49 2432 49120-14

Fax: +49 2432 49120-20

www.tmkg.de <http://www.tmkg.de/>

h.schultz@tmkg.de <mailto:h.schultz@tmkg.de>

Rechtsform: Kommanditgesellschaft - Sitz Wegberg - Reg.-Gericht Mönchengladbach HRA 5528

Persönlich haftender Gesellschafter: TM Verwaltungs GmbH - Sitz: Wegberg - Reg.-Gericht: Mönchengladbach HRB 10696

Geschäftsführer: Peter Janisch, Wilfried Mengeler

Von: Mengeler, Wilfried
Gesendet: Freitag, 26. August 2011 09:18
An: Schultz, Heidi
Betreff: WG: Neue Rechnung

Heidi,

bitte Rücksprache

Willi

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

TM GmbH & Co. KG

Elektrische Industrieausrüstungen

Friedrich-List-Allee 66

D-41844 Wegberg-Wildenrath

Tel.: +49 2432 49120-11

Fax: +49 2432 49120-20

www.tmkg.de <http://www.tmkg.de/>

w.mengeler@tmkg.de <mailto:w.mengeler@tmkg.de>

Rechtsform: Kommanditgesellschaft - Sitz Viersen - Reg.-Gericht Mönchengladbach HRA 5528

Persönlich haftender Gesellschafter: TM Verwaltungs GmbH - Sitz: Viersen
- Reg.-Gericht: Mönchengladbach HRB 10696

Geschäftsführer: Peter Janisch, Wilfried Mengeler

Von: geraldkoch@charter.net [mailto:geraldkoch@charter.net]
Gesendet: Donnerstag, 25. August 2011 15:01
An: Mengeler, Wilfried
Betreff: Neue Rechnung

Hallo Willi!

Bis dahin...

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

TMKG

TMKG Inc.
527B Brookshire Rd - Greer, SC 29651

D&C Builders, Inc

131 Sandpiper Lane

Greenville, SC 29607

Invoice No: 0018
Date: 8-24-2011
Date of delivery:
Order No:
Job No:
Reference:

Original

Type of dispatch:
Package:
Payable:

Notation of dispatch:

Address for shipment:

Pos.	Amount	Item	Unit Price USD	All Round Price USD
		Hourly wage		75.00
1	1,00	Kitchen installed		2,053.00
2	1,00	Locking for all outside doors		1,787.00
3	1,00	Remove sill fence		1,750.00
4	1,00	Stripping of the concrete slab for the transformer		75.00
5	1,00	Rework all windows		2,600.00
6	1,00	Cleaning for windows and sills, doors		880.00
7	1,00	Cleaning for work shop floor and shelves		1,155.00
8	1,00	Rework windowsills		1,350.00
9	1,00	Scratched windowsills after Stucco work completed		500.00
10	1,00	Subtraction for 23 office lights according to Quote		1,840.00
11	1,00	Subtraction for electrical installation in the work shop and Exterior lighting		10,900.00
12	1,00	Repair Landscaping according to estimates in order to pass Inspection		5,000.00
13	1,00	Estimates for HVAC with ceiling mounted cassettes		8,000.00
14	1,00	Overtime for laying tile on uneven concrete floors and walls		780.00
15	1,00	Subtraction for two water dispensers and one sink for work shop .		2,500.00
16	1,00	Rework stucco around windows and front door		600.00
17	1,00	Replace door handle for front door		150.00

FILED
2012 APR 19 PM 2:28
CLERK OF COURT
SPARTANBURG COUNTY

2. Seite zur Rechnung vom
mit der Auftrags-Nr.:

Pos	Amount	Item	Unit Price USD	All Around Price USD
18	1,00	Water meter installation for irrigation system		2,000.00
19	1,00	Subtraction for additional sewer charges		700.00
20	1,00	Subtraction for stairs for work shop		1,000.00

The following issues still need to be resolved and addressed:

A. Cracks in the work shop flooring
B. Cracks in the loading dock wall
C. Height for loading dock is off
D. Lien through paving contractor
E. Lien through D&C Builders

Total Due 44,690.00

From point number 1 to point 20 we have a total of $44,690.00 for subtractions. Detailed description of itemized totals can be reviewed in the email sent June 29th 2011.
$74,123.40 minus $43,690.00 translates into a balance of $29,433.00.
TMKG prepared a Certified Check in the amount of $41,000.00 which was hand delivered to the office of D&C Builders, where it was rejected by Scott the owner of D&C Builders.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

Exhibit D

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

From: geraldkoch@charter.net [mailto:geraldkoch@charter.net]
Sent: Monday, September 19, 2011 8:50 AM
To: scott dodenhoff
Cc: Peter Janisch
Subject: Certified Check

From:
TMKG Inc.
527B Brookshire Rd
Greer, SC 29651
864 991 7069

To:
D&C Builders, Inc.
131 Sandpiper Lane
Greenville SC, 29607
864 303 2876

Certified Check from TMKG Inc to D&C Builders in the amount of $29,433.40.

Peter and Wilfreid have asked me to inform you of the following:

Please refer to Invoice No: 0018.

Thank you

Gerald Koch Peter Janisch Wilfried Mengeler

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

Exhibit E

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

From: geraldkoch@charter.net [mailto:geraldkoch@charter.net]
Sent: Monday, September 26, 2011 5:27 PM
To: John Crawford
Cc: scott dodenhoff
Subject: Check, Invoice

Hello John and Scott!

TMKG Inc. recieved your letter dated September 19th. 2011.

We mailed a check for 29,433.40 that D&C recieved. Please refer to Invoice 0018.
In our view threre is no balance due.

Thank you

Peter Janisch Wilfried Mengeler Gerald Koch

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

Exhibit F

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

Register: IOLTA:First Citizens:Crawford:D and C Builders
From 10/06/2011 through 10/06/2011
Sorted by: Date, Type, Number/Ref

Date	Number	Payee	Account	Memo	Payment	C	Deposit	Balance
10/06/2011			Client Escrow Liability	Deposit		X	29,433.40	29,433.40

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 APR 19 PM 2:28
M. HOPE BLACKLEY

5

90

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-42-4121

D&C Builders Inc.

PLAINTIFF(S)

Tmkg Inc.

DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ 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), 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.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAY -3 PM 3:08
M. HOPE BLACKLEY

This matter is before the Court on cross motions for summary judgment. After reviewing the materials presented, both motions are denied since dispute exists as to material facts and that some discovery remains to be done. Since both motions are being denied, no other formal order will be issued. If the parties believe a formal order will assist in clarifying the issues, consult with each other on the terms of the order and the Court will consider signing the order.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

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.

Circuit Court Judge _____ Judge Code _____ Date 5/3/12

For Clerk of Court Office Use Only

This judgment was entered on the 3 day of May 20 12 and a copy mailed first class or placed in the appropriate attorney's box on this 3 day of May 20 12 to attorneys of record or to parties (when appearing pro se) as follows:

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAY -3 PM 3:08
M. HOPE BLACKLEY

Townes Boyd Johnson
John T. Crawford, Jr.
Kennison Dudley & Crawford, LLC
704 E. McBee Avenue
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert David Proffitt
Proffitt & Cox, LLP
8910 Two Notch Road
Suite 400
Columbia, SC 29223

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley
CLERK OF COURT
Pat Doteuchos.

Court Reporter:

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.	)	
TMKG, Inc.,	)	
Defendant.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiff, D&C Builders, Inc., and the defendant TMKG, Inc., hereby dismiss the above-referenced matter **with prejudice** pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure.

Respectfully submitted this 10th of July, 2012.

John T. Crawford, Jr.
Townes B. Johnson III (SC Bar# 75412)
KENISON, DUDLEY & CRAWFORD, LLC
704 E. McBee Avenue
Greenville, SC 29601
Counsel for Plaintiff D&C Builders, Inc.

Greenville, South Carolina

I SO STIPULATE:

David Proffitt, Esq.
Proffitt & Cox, LLP
8910 Two Notch Rd. Suite 400
Columbia, SC 29223
Counsel for TMKG, Inc.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 JUL 20 PM 4:08
M. HOPE BLACKLEY

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP4204121

D&C Builders Inc	Tmkg Inc
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), 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: _____

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 JUL 30 PM 2:43
M. HOPE BLACKLEY

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:

CANCEL LIS PENDENS

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.

Circuit Court Judge

2132
Judge Code

7-30-12
Date

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 JUL 30 PM 2:43
M. HOPE BLACKLEY

For Clerk of Court Office Use Only

This judgment was entered on 7/30/12 and a copy mailed first class or placed in the appropriate attorney's box on 7/30/12 to attorneys of record or to parties (when appearing pro se) as follows:

Townes Boyd Johnson Kennison Dudley & Crawford Llc 704 E Mcbee Ave Greenville, SC 29601
John T. Crawford Jr. Kenison Dudley & Crawford Llc 704 E Mcbee Ave Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert David Proffitt Proffitt & Cox Llp 8910 Two Notch Rd Suite 400 Columbia, SC 29223

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley

M Hope Blackley - Clerk of Court
Natalie Bishop DC

Court Reporter

RECEIVED
JAN 12 2015
SC Court of Appeals

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

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 OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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

December 23, 2014

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case No. 2013-CP-23-1833

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

v.

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

Of whom Richard M. Buckley is the ..... Respondent.

MOTION TO DISMISS

Respondent, Richard M. Buckley, by and through his undersigned attorney and pursuant to Rule 240, SCACR, hereby moves the Court to dismiss Appellant's Appeal in accordance with S.C. Code Ann. § 14-3-330 for lack of appellate jurisdiction. Dismissal is appropriate because, as is clear from, *inter alia*, the Appellant's Notice of Appeal together with Appellant's Initial Brief, the underlying lawsuit has not reached final judgment and the issues for which the Appellant has based its appeal are not immediately appealable.

This Motion is further based upon the submissions of Appellant, the applicable

South Carolina Appellate Court Rules and their related authority, and upon such supporting memorandum and affidavits as are submitted in connection herewith.

It is further requested, pursuant to Rule 240(b), that all time be held in abeyance during the pendency of this motion.

Respectfully Requested,

November 27, 2013

M. Stokely Holder (SC Bar # 73892)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. (864) 242-4899
Fax (864) 242-4844

Attorney for Respondent

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case No. 2013-CP-23-1833

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

v.

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

Of whom Richard M. Buckley is the ..... Respondent.

MEMORANDUM OF RESPONDENT IN SUPPORT OF ITS MOTION TO DISMISS

M. Stokely Holder, Esquire
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
(864) 242-4899
Attorney for Respondent

Other Counsel of Record:

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

H. Stewart James, Esq.
Babb & Brown, P.C.
505 West Butler Road
Greenville, SC 29607
Co-Counsel for Appellant

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
PO Box 71727
North Charleston, SC 29415
Attorney for Defendant Wells Fargo, N.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

FACTS 1

ARGUMENT 2

APPELLATE JURISDITION – INJUNCTION 'REQUEST' 3

APPELLATE JURISDITION – ORDER ON MOTION TO DISQUALIFY 4

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Enersys Delaware, Inc. v. Hopkins, 401 S.C. 615, 738 S.E.2d 478 (2013) 2, 4, 5, 6

Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) 2

Halbersberg v. Berry, 302 S.C. 97, 104, 394 S.E.2d 7, 12 (1990) 3

State v. Wilson, 387 S.C. 597, 600, 693 S.E.2d 923, 924 (2010) 3

STATUTES

S.C. Code Ann. § 14-3-330 (1979 & Supp.2012) 2, 4, 5

OTHER AUTHORITIES

Rule 59(e), SCRCP 3

Rule 65, SCRCP 1, 3

COMES NOW, Respondent, Richard M. Buckley ("Buckley"), by and through his undersigned attorney, and files this Memorandum in Support of its Motion to Dismiss Appellant's Appeal.

I. FACTS

At the outset of the underlying lawsuit, the Appellant filed a Motion to Disqualify Respondent's counsel (a copy of said Motion without attachments is attached herein and incorporated by reference as "**Exhibit A**"). The lower court issued an Order holding the Appellant's Motion to Disqualify in abeyance (a copy of said Order is attached herein and incorporated by reference as "**Exhibit B**"). In the same Order, the lower court ordered Appellant to produce a privilege log by a stated date under a protective order. Prior to the deadline delineated in the lower court's Order for Appellant's production of the privilege log, the Appellant filed a Motion to Reconsider wherein, for the first time, the Appellant included any reference to an injunction or 'request' for same- notably, without meeting the specificity requirements delineated in Rule 65, SCRCP[1] (a copy of said Motion to Reconsider without attachments is attached herein and incorporated by reference at "**Exhibit D**"). The Motion to Reconsider was based primarily on the lower Court's prior ruling in regards to the production of the privilege log.

---

1 The Appellant has never filed a Motion for Injunction or otherwise asserted a cause of action against the Respondent for an injunction. The first mention or reference to an 'injunction' was merely in the title to the Appellant's Motion to Reconsider: "Motion to Reconsider, Clarify and Amend Order to Issue Injunction", which was filed in response to an erroneous email sent by Judge Miller's law clerk to all counsel wherein she states that "Judge Miller has asked me to check on the status of this case and whether a ruling is necessary for temporary injunction." At no time prior to that email had the term 'injunction' been used in connection with this case. In fact, Judge Miller had earlier that day already sent an email directly to all counsel indicating that an "Order has been signed and is being filed with the Clerk of Court's office this afternoon." (Copies of said emails are attached hereto and incorporated herein by reference as "**Exhibit C**".)

The lower court issued an order denying the Motion to Reconsider wherein the lower court did not specifically or substantively address the Appellant's 'injunction request' (a copy of said Order is attached herein and incorporated by reference as "**Exhibit E**"). The Appellant never filed a Motion to Reconsider in regards to its 'request' for an injunction or the purported lower court's ruling regarding same. Prior to the aforementioned privilege log deadline, the Appellant filed the underlying Notice of Appeal.

The lower court has not issued a final order on the Appellant's Motion to Disqualify. Likewise, the lower court has not issued a final judgment on any of the claims pending in the underlying lawsuit.

II. ARGUMENT

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).

Id. at 616-617, 738 S.E.2d at 479 (emphasis in original).

A. Appellate Jurisdiction - Injunction 'Request'

As discussed *supra*, the Appellant did not file a motion or claim for an injunction. The first reference by Appellant to an injunction came in response to an erroneous email sent by the lower court's office staff and in the form of a mere reference to "injunction" in Appellant's Motion to Reconsider the lower Court's ruling on a separate Motion filed by Appellant. Notwithstanding the fact that the Appellant failed to meet the specificity requirements delineated in Rule 65, SCRCP for a proper request for injunctive relief, the lower court never specifically ruled upon an injunction request in this case. Furthermore, the Appellant did not make a motion by way of Rule 59(e), SCRCP, or otherwise, to obtain a specific ruling on the issue. Therefore, the Appellant should be precluded from arguing this issue before this Court. Halbersberg v. Berry, 302 S.C. 97, 104, 394 S.E.2d 7, 12 (1990).

B. Appellate Jurisdiction - Order on Motion to Disqualify

The afore-referenced Enersys case is perhaps the most analogous appellate case in this State to the current issues in the case at hand. Notably, in the Enersys 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 Enersys 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, by reference to this subsection in the 'Standard of Review' portion of its Initial Brief, appears to concede that this particular contention in its appeal is governed by this subsection 2. (Initial Brief p. 13).

The glaring difference between the Enersys case and this case is that the lower court in Enersys actually issued a dispositive order on the motion; whereas, here, no such order has been rendered. Even still, in the Enersys 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 Enersys 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 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.

III. CONCLUSION

Based on the arguments heretofore made together with the precedential authority in South Carolina relevant to the issues in this case, the Respondent respectfully requests that this court dismiss the appeal at issue and remand the case to the lower court for a full adjudication of the case, including a full adjudication of the motion at issue.

Respectfully Requested,

November 27, 2013

M. Stokely Holder (SC Bar # 73892)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. (864) 242-4899
Fax (864) 242-4844

Attorney for Respondent

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 DISQUALIFY ATTORNEY AND LAW FIRM
Richard M. Buckley, Third-Party Plaintiff, Vs. Scott Dodenhoff, Third-Party Defendant.	)	

2013 JUN 19 P 3:42

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2013CP2301833

D&C Builders Inc *vs.* Richard M Buckley

2013 JUL 15 A 9:02
PAUL B. WICKENSIMER
GREENVILLE CO. S.C.
CLERK OF COURT

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

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

ATTORNEY(S) FOR THE DEFENDANT(S)

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

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;	)	
Richard M. Buckley,	)	
Third-Party Plaintiff,	)	**ORDER**
vs.	)	
Scott Dodenhoff,	)	
Third-Party Defendant.	)	

2013 JUL 15 P 4:02

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~~ 25, 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

Stokely Holder

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.

EXHIBIT "C"

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.

The information contained in this email message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, email or facsimile.

Stokely Holder

From: Miller, Edward W. Law Clerk (Courtney S. Camferdam) [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
(864) 879-7171 Fax
brian@martinlawsc.com

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

The information contained in this email message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, email or facsimile.

From: Stokely Holder [mailto: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

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
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.

The information contained in this email message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, email or facsimile.

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
212 Trade Street
Greer, SC 29651
(864) 879-7779
Attorney for Plaintiff

Greenville, South Carolina
July 16th, 2013

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 D. WICKENSIMER
2013 JUL 25 A 11:10

D&C Builders, Inc.	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), 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; (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.**

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

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case No. 2013-CP-23-1833

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

v.

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

Of whom Richard M. Buckley is the ..... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of Respondent's Motion to Dismiss and Memorandum of Respondent in Support of Its Motion to Dismiss in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States mail, postage prepaid this 27 day of November, 2013, addressed as follows:

Brian A. Martin, Esquire
Brian A. Martin, LLC
212 Trade Street
Greer, SC 29651
Attorney for Appellant

H. Stewart James, Esq.
Babb & Brown, P.C.
505 West Butler Road
Greenville, SC 29607
Co-Counsel for Appellant

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
PO Box 71727
North Charleston, SC 29415
Attorney for Defendant Wells Fargo, N.A.

Laurie Warren

Laurie Warren, Legal Assistant
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
PH: (864) 242-4988
FAX: (864) 242-4844

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

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

v.

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

of whom:

Richard M. Buckley ..... Respondent,

RETURN TO MOTION TO DISMISS

Appellant, D&C Builders, Inc., by and through its undersigned attorney and pursuant to Rule 224(e), SCACR, hereby opposes the Motion to Dismiss filed by Respondent, Richard M. Buckley, alleging a lack of appellate jurisdiction. Jurisdiction over the appeal in this matter is granted pursuant to S.C. Code Ann. § 14-3-330(4) as the appeal of an order refusing to grant an injunction **and** pursuant to S.C. Code Ann § 14-3-330(4) as the appeal of an order affecting a substantial right.

Appellant's appeal is not based on the order to produce a privilege log, but rather the specific information ordered disclosed in such privilege log, which constitutes both basis for the request for an injunction that was denied and the substantial right being affected. The Circuit Court order requires Appellant and Counsel for Appellant to directly violate Rule 1.6 of the Rules of Professional Conduct and disclose specific confidential attorney-client communications damaging to the Appellant to the very attorneys Appellant is seeking to disqualify. The Circuit Court's requirement of such disclosure for consideration of disqualification of Respondent's attorney directly contradicts Rule 1.9 and Comment 3 thereto of the Rules of Professional Conduct which 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 Cmmt. 3, RPC, Rule 407, SCACR (Emphasis Added).

Despite this requirement and in order to protect its rights, Appellant sought to enjoin Respondent and his attorney from accessing confidential information from its prior representation of Appellant with the initial filing of the Motion to Disqualify and continued such requests at every opportunity to the Circuit Court. A motion for injunction was specifically requested in Appellant's motion to reconsider, clarify and amend order to issue injunction. The motion for the injunction was denied in the Circuit Court Order of July 25, 2013. As a result, appellate jurisdiction is granted pursuant to S.C. Code Ann § 14-3-330(4).

Additionally, the Circuit Court's order significantly affects the substantial right of Appellant to maintain the confidential nature of privileged communications with its

attorneys, both former and present, as well as the substantial right of Appellant to rely on compliance with the Rules of Professional Conduct to protect clients and ensure the fair administration of justice in South Carolina. Compliance with the order will also deny Appellant its right to a particular mode of trial, a well-established substantial right. Appellate jurisdiction is therefore appropriate under S.C. Code Ann. § 14-3-330(2)

Finally, Respondent's Motion to Dismiss seeks to mischaracterize Appellant's refusal to provide the ordered privilege log as a "procedural" issue rather than an "ethical" issue so as to avoid having to justify the clear violation of Rule 1.9 of the Rules of Professional Conduct to this Court. The Circuit Court furthered Respondent's claim that there was no "specific" confidential information in their possession by incorrectly balancing Appellant's right to keep its confidences with Respondent's right to choose its own counsel.

Appellant's opposition to Respondent's Motion is supported by the submissions of Appellant thus far, the applicable South Carolina Appellate Court Rules and their related authority, and upon such supporting memorandum and affidavits as are submitted in connection herewith.

Respectfully submitted,

December 9th, 2013

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

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

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

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

v.

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

of whom:

Richard M. Buckley.....Respondent,

MEMORANDUM OF APPELLANT IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

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

Other Counsel of Record:
M. Stokely Holder, Esq.
Kenison, Dudley & Crawford, LLC
704 E. McBee Avenue
Greenville, South Carolina 29601

Attorney for Respondent

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

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

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Facts 1

Standard of Review 5

Argument 6

I. Appellate jurisdiction exists in this matter pursuant to S.C. Code § 14-3-330(4) as the appeal of an order refusing to grant an injunction. 6

II. Appellate jurisdiction exists in this matter pursuant to S.C. Code § 14-3-330(2) as the appeal of an order affecting a substantial right. 14

Conclusion 26

TABLE OF AUTHORITIES

Cases

AJG Holdings, LLC v. Dunn, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (S.C.App. 2009) 8, 11

Arkansas v. Dean Foods Products Co., 605 F.2d 380 (8th Cir. 1979) 19, 21

Brent v. Smathers, 529 So.2d 1267 (Fla.Dist.Ct.App. 1988) 20

Cord v. Smith, 338 F.2d 516 (9th Cir. 1964) 20

Curtis v. State of South Carolina, 345 S.C. 557, 549 S.E.2d 591(S.C. 2001). ..6, 14

Donaldson v. City of Walterboro Police Dept., No. 2:06-cv-02492-PMD, 2008 WL 906707 (D.S.C. March 31, 2008) 24, 25

Enersys Delaware, Inc. v. Hopkins, 401 S.C. 615, 738 S.E.2d 478 (S.C. 2013) 14, 15, 16, 17

Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 533 S.E.2d 331 (2000) 6

Foulke v. Knuck, 784 P.2d 723, 162 Ariz. 517 (Ariz.App.Div. 2 1989) 19, 20

Green v. Montgomery Cy., Ala., 784 F.Supp. 841 (M.D.Ala. 1992) 21

H&C Corporation, Inc. v. Puka, 4:12-cv-00013-RBH (D.S.C. October 11, 2013) 24, 25

Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005)..5, 6, 15, 16, 17, 24

Junger Util. & Paving Co. v. Myers, 578 So.2d 1117 (Fla.Dist.Ct.App. 1989) 20

Lowder v. All Star Mills, Inc., 60 N.C.App. 275, 300 S.E.2d 230 (N.C.App. 1983) 21

Madison v. Graffix Fabrics, Inc., 304 S.C. 321, 404 S.E.2d 37 (S.C. App. 1991) 12

Martindale v. Richmond, 301 Ark. 167, 782 S.W.2d 582 (1990) 20

Matter of Evans, 113 Ariz. 458, 556 P.2d 792 (1976) 20

Oxford Dev. Minn., Inc. v. Ramsey, 428 N.W.2d 434 (Minn.Ct.App. 1988).....20

Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 626 S.E.2d 34 (Ct. App. 2005).....8, 10

Reading Anthracite Co. v. Lehigh Coal & Nav. Co., 771 F.Supp. 113 (E.D.Pa. 1991).....20

Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 603 S.E.2d 905 (2004).....8

State v. Allen, 539 So.2d 1232 (La. 1989).....19

Teja v. Saran, 68 Wn.App. 793, 846 P.2d 1375 (Wash.App. Div. 1 1993).....20

T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F.Supp. 265 (S.D.N.Y. 1953).....20

Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996).....7, 12, 13, 15, 22, 23, 25

United States v. Casiano, 929 F.2d 1046, 1052 (5th Cir. 1991).....25

United States v. Kitchin, 592 F.2d 900 (5th Cir.), cert. denied, 444 U.S.843, 100 S.Ct 86, 62 L.Ed.2d 56 (1979).....19

United States ex rel. Lord Elec. Co. v. Titan P. Constr. Corp., 637 F.Supp. 1556 (W.D.Wash. 1986).....20

United States v. Ross, 33 F.3d 1507 (11th Cir. 1994).....13, 25

Statutes & Rules

S.C. Code Ann. §14-3-330(2) 6, 14, 15, 17, 18, 24, 25, 26

S.C. Code Ann. §14-3-330(4) 6, 14, 26

Preamble ¶8, RPC, Rule 407, SCACR 17

Rule 1.6(a), RPC, Rule 407, SCACR 9, 17, 18, 23

Rule 1.6 Cmmt. 2, RPC, Rule 407, SCACR 18, 24

Rule 1.6 Cmmt. 14, RPC, Rule 407, SCACR 23, 24

Rule 1.9, RPC, Rule 407, SCACR 12, 19

Rule 1.9(a), RPC, Rule 407, SCACR 18

Rule 1.9(c)(1), RPC, Rule 407, SCACR 18

Rule 1.9 Cmmt. 3, RPC, Rule 407, SCACR 9, 18, 19, 22

Rule 3.7, RPC, Rule 407, SCACR 16

Rule 65, SCRCP 6

Other Authority

7 Am.Jur.2d *Attorneys at Law* § 186 12

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) 7

The Appellant, D&C Builders, Inc. ("D&C Builders"), by and through its undersigned attorney, files the following Memorandum in Opposition to Respondent's Motion to Dismiss.

STATEMENT OF FACTS

For a thorough examination of the Facts, Appellant would refer the Court to the Statement of Case (p. 2-4) and Statement of Facts (p. 4-13) contained in Appellant's Initial Brief already filed with the Court in this matter. However, by way of a summary and clarification of the incorrect and relevant omitted facts from Respondent's recitation in his Memorandum, Appellant would present the following facts.

Appellant filed a motion to disqualify Respondent's counsel and the entire Kenison Firm in this matter due to an obvious, material and un-waived conflict of interest. (A copy of such motion is attached herein and incorporated as "**Exhibit A**"). As demonstrated by the supporting Affidavit of Scott Dodenhoff (attached herein and incorporated as **"Exhibit B"**), the Kenison Firm (Respondent's counsel) was actively representing Appellant as their client in a substantially related matter ***during the exact same time*** that the actions giving rise to the current claims between Appellant and Respondent were arising. (Exhibit B ¶ 4- ¶13).

The representation of Respondent in this matter by the Kenison Firm clearly violated Rule 1.9 of the Rules of Professional Conduct under the "substantially related" test promulgated by Comment 3 to Rule 1.9 and by the Supreme Court in Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (S.C. 1996). Both the prior representation (referred to as the TMKG case) and the present matter (referred to as the Buckley case) were actions to foreclose mechanic's liens by Appellant. (Exhibit B ¶ 4-5, ¶ 18). Both

cases involved the same claims, counterclaims and defenses by and against Appellant as specifically compared in Appellant's Initial Brief at pages 7-9 and pages 38-40. The Kenison Firm pursued those claims and defended those counterclaims on behalf of Appellant in the TMKG case before changing sides less than a year later in direct violation of Rule 1.9 of the Rules of Professional Conduct to represent Buckley against Appellant in this case. (Exhibit B ¶ 5, ¶ 19-20).

At the hearing on the motion to disqualify and based on the Affidavit of Scott Dodenhoff and the pleadings in both the TMKG case and those filed by Respondent in the Buckley case, Appellant argued to the Circuit Court that disqualification is warranted based on the former representation being "substantially related" to the current matter. Appellant further argued that the Kenison Firm had obtained information, particularly confidential information, in its prior representation of Appellant regarding financial matters, corporate structure and internal operations that could be used against Appellant in the current matter in violation of Rule 1.9. (Transcript of Hearing held July 8, 2013 attached herein and incorporated as **"Exhibit C"** p. 3, l. 15 – p. 10, l. 14).

The intention to use such information gained from its prior representation was clearly demonstrated in Respondent's Answer, Counterclaims and Third-party Claims filed on behalf of Respondent in this matter (a copy of which is attached herein and incorporated as **"Exhibit D"**) which included allegations against Appellant, their former client, that it **(1) "did not have a functioning corporate structure, was incapable of making independent decisions, and did not follow the corporate formalities applicable to a South Carolina corporation at all pertinent times herein,"** (Exhibit D p.26 ¶116); **(2) "was insolvent prior to and/or during construction of the Project"**

(Exhibit D p.27, ¶117); and (3) **"was grossly undercapitalized prior to and during construction of the Project."** (Exhibit D p. 27, ¶118; Exhibit B p.3, ¶20).

The Kenison Firm challenged the motion to disqualify on the basis that they were unaware of any specific confidential matter at issue in the Buckley case, (Exhibit C p. 16, ll. 19-20), and had not been provided any specific alleged confidential information that could potentially create a conflict. (Exhibit C p. 17, l. 22 – p. 18, l. 2). In support of these assertions, Attorneys Holder, Johnson and Crawford all state in their respective affidavits (attached and incorporated herein as **"Exhibits E, F and G"** respectively) that they are "unaware of" or "do not remember" any confidential information provided by Appellant to them in connection with their prior representation against TMKG. (Exhibit E p.5, ¶ 13, Exhibit F p. 2, ¶ 4, Exhibit G p. 2, ¶ 4).

Based on Respondent's assertions, the Circuit Court requested Appellant provide the specific information it contended was learned in the prior representation that would be injurious to Appellant in the current case. (Exhibit C p. 21, ll. 19-22). Appellant argued that such specific disclosure was not required by the ethical rule given the cases were "substantially related" and objected to disclosing such information due to confidential nature of such information. (Exhibit C p. 21, l. 23 – p. 24, l. 9). The Circuit Court nevertheless ordered Appellant at the hearing to prepare and submit a privilege log to both the Circuit Court ***and*** the Kenison Firm of the information claimed to be confidential that the Kenison Firm could potentially use in the Buckley case. (Exhibit C p. 24 l.10- p. 25, l. 17). Although the order included that the privilege log would be under a protective order, it still required Appellant to provide the very information it was seeking to protect through the motion to disqualify to the very attorneys it was seeking to

prevent remembering and using such confidential information to Appellant's disadvantage.

Appellant 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 requested that the Respondent and Kenison Firm be enjoined from accessing any information provided by letter of July 11, 2013. (Exhibit A to Appellant's Motion to Reconsider, Clarify and Amend Order to Issue Injunction attached and incorporated herein as **"Exhibit H"**). In that letter, Appellant specifically expressed concern that complying with the Circuit Court's directive to produce the privilege log would force Counsel for Appellant to violate ethical obligations to his client. Appellant requested specific instruction as to how to address matters in the privilege log that were relayed through confidential attorney/client communications. (Exhibit A to Exhibit H, p. 6). Appellant again requested that the Kenison Firm be enjoined from accessing the information to be provided in the privilege log due to the irreparable harm it would cause to the Appellant. (Exhibit A to Exhibit H, p. 6). Without further clarification, the Circuit Court filed its written order on July 16, 2013. (Attached and incorporated herein as **"Exhibit I"**).

Appellant thereafter filed a motion to reconsider, clarify and amend order to issue injunction on July 16, 2013. (Exhibit H). On July 18, 2013, Respondent forwarded a letter to the Circuit Court addressing Appellant's motion (attached and incorporated herein as **"Exhibit J"**) and specifically stating unequivocally that **"no confidential information was gained by my firm in its prior representation of Plaintiff."** (Exhibit

J p. 2, ll.27-29). The letter further states that **"The Plaintiff has failed to provide any "specific" confidential facts to counter this position."** (Exhibit J p. 2, ll. 31-33).

A very brief hearing was held on July 23, 2013 on the motion to reconsider, clarify and amend order to issue injunction (transcript is attached and incorporated herein as **"Exhibit K"**) wherein the Circuit Court refused to consider disqualification without seeing the alleged confidential information Appellant claimed could be used (Exhibit K p. 4, ll. 19-22), and that such confidential information must be provided to the Respondents to review and be able to respond. (Exhibit K p. 4 l. 23- p. 5, l. 3). The Circuit Court admonished *Counsel for Appellant* that the only potential ethical violation would be Counsel failing to comply with the Order to produce the privilege log! (Exhibit K p. 6, ll. 23-25).

Despite Appellant's position and the authority that disqualification should be based on the cases being "substantially related" and the substantial risk that the Kenison Firm obtained confidential information detrimental to Appellant, the Circuit Court denied the motion to reconsider, motion to clarify and motion to issue an injunction by written order filed July 25, 2013. (Attached and incorporated herein as **"Exhibit L"**). This appeal followed.

STANDARD OF REVIEW

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. Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). An order granting, continuing, modifying, or refusing

an injunction is 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). "The denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)." Hagood 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.

ARGUMENT

Respondent's motion to dismiss is centered on two arguments; (1) that there has been no ruling on a proper request for an injunction and (2) that no final judgment has been made in the lower court. As is demonstrated below, neither of these arguments are valid and even if merit is found in those arguments, appellate jurisdiction in this matter is further granted pursuant to the order of the lower court affecting a substantial right under S.C. Code § 14-3-330(2).

I. Appellate jurisdiction exists in this matter pursuant to S.C. Code § 14-3-330(4) as the appeal of an order refusing to grant an injunction.

Respondent contends that Appellant has never asked for an injunction, that any request for an injunction made did not meet the specificity requirements of Rule 65, SCRCP, and that the lower court never specifically ruled on the motion for injunction. All three of these assertions are incorrect based on the filings, arguments, evidence and rulings of the lower court contained in the exhibits hereto.

The issue of injunctive relief arose out of the Circuit Court's order of July 16, 2013 wherein the Circuit Court ordered Appellant to provide specific information

provided to Respondent's counsel through confidential attorney-client communications in a prior matter that Appellant contended could be used against Appellant in the present matter. (Exhibit I pp. 2-3). Prior to the Circuit Court agreeing with Respondent that the Appellant must supply confidential information as proof, there was no need to request injunctive relief.

Despite the evidence and argument presented that the test was whether the cases were "substantially related", the Circuit Court solely focused on whether information the Kenison Firm obtained was privileged, (Exhibit C p. 21, l. 19 - p. 23, l. 24, Exhibit L, p. 7, ll. 20-23), and refused to consider the appropriate standard under the Rules of Professional Conduct or the Supreme Court's decision in Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996). (Exhibit C p. 8, ll. 16-25, p. 9, ll. 11-17, p. 21, l. 23 - p. 24, l. 9, Exhibit L p. 5, l. 18 - p. 6, l. 7).

In Townsend, the Court specifically rejected the argument that an attorney had to have actually obtained confidential information to support disqualification, holding the standard 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)). Even more significant than the present case, the attorney in Townsend admitted having such information but claimed he didn't use it. However, 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).

When the Circuit Court failed to give clear instructions in this matter and appropriately address Respondents access to such confidential information pursuant to Appellant's letter of July 11, 2013 (Exhibit H), Appellant filed its motion to reconsider, clarify and amend the order to issue and injunction which very clearly sets out the specifics required for an injunction in this situation. (Exhibit H ¶ 5-15).

To obtain an injunction, the requesting party must allege facts to demonstrate such an injunction is "reasonably necessary to protect the legal rights" of the requesting party. AJG Holdings, LLC v. Dunn, 382 S.C. 43, 51, 674 S.E.2d 505, 508 (S.C.App. 2009). For an injunction to be granted, a party "must establish that: (1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." Id. (Citing Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). Moreover, "before granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief." Id. (Citing Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 455, 626 S.E.2d 34, 36-37 (Ct. App. 2005).

In the interests of judicial economy, Appellant consolidated its motion to reconsider requiring the privilege log with its motion to clarify the information requested and its motion to issue an injunction preventing Respondent and the Kenison Firm from

obtaining the information. (Exhibit H). Respondent contends the only reference for injunction is in the title of the motion and that such request was based on an erroneous e-mail. (Respondent's Memorandum in Support of Motion to Dismiss p. 3). Despite Respondent's contention to the contrary, the evidence, allegations and specifics of the request for injunctive relief are clearly set forth in the body of the motion filed, the hearing transcripts and letter of July 11, 2013 seeking clarification of the order. (Exhibits H, C and K).

From the outset of the request by the Circuit Court at the July 8, 2013 hearing on the motion to disqualify, Appellant has objected to being required to produce information it relayed to Counsel for Respondent through confidential attorney-client communications. (Exhibit C p. 24, ll. 2 – 9). Rule 1.6 of the Rules of Professional Conduct clearly protects the rights clients have to the confidentiality of their communications with their attorneys. Rule 1.6, RPC, Rule 407 SCACR. Comment 3 to Rule 1.9 also states that a former client "is not required to reveal confidential information" to establish disqualification. Rule 1.9 Cmmt. 3, RPC, Rule 407, SCACR.

Appellant's motion for an injunction alleges that compliance with the court's order requiring the disclosure to Respondent will violate Appellant's rights to keep this information confidential. (Exhibit H, ¶ 5-6). Appellant's motion also alleges that the forced disclosure of such information would require Appellant to (1) refresh the Kenison Firm's memory of the information and (2) potentially disclose more confidential information than previously disclosed. (Exhibit H ¶ 7-8). It would also require Appellant to disclose confidential information to its current counsel that it would otherwise not need to disclose. (Exhibit H ¶ 11). Appellant's motion alleges that the

disclosure of such information pursuant to the order would cause irreparable harm (Exhibit H ¶ 12), and that there is no adequate remedy after disclosure because once the disclosure is made it cannot be undisclosed. (Exhibit H ¶ 14). Finally, as demonstrated by the Rules of Professional Conduct and the overwhelming authority below, Appellant would likely succeed on the merits in preventing the ordered disclosure. (Exhibit H ¶ 13).

If Appellant is required to disclose the ordered information to the Kenison Firm, there would be no other remedy to address the irreparable harm. (Exhibit H ¶14). Once that information is disclosed, it can't be undisclosed. If the Circuit Court eventually denies the motion to disqualify, Appellant will have provided ammunition for the Kenison Firm to represent Respondent. Even if the Circuit Court eventually grants the motion to disqualify, the information disclosed in the log could be used against Appellant by Respondent. Even if the Circuit Court prohibits a new attorney for Respondent from using any of the disclosed information in the proceeding, the knowledge of the information will help shape a better strategy by the new attorney and provide direction to lead to the discovery of other similar information that could be used, all to the disadvantage of Appellant.

The trial judge most definitely understood the request to keep the information from Respondent and clearly indicated that he had, as required by Peek, weighed the equities in Appellant's right to keep the information confidential with Respondent's right to have the attorney of his choosing. (Exhibit K p. 4, l. 9 – p. 5, l. 12, p. 6, ll. 17 – 21, p. 7, ll. 14-24). As demonstrated in Appellant's second argument for denial of the motion to dismiss below, the trial judge 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. (Exhibit K, p. 6, ll. 17 – 21).

The Circuit Court attempted to give Appellant some additional protection by requiring the privilege log to be subject to a protective order. The purpose of an injunction is to "prevent irreparable harm." AJG Holdings at 50, S.E.2d 508. Even under a protective order, the information being required to be provided to the Kenison Firm, requires providing that information to the very people it is sought to be protected from. Even under a protective order, the providing of that information would be to the distinct disadvantage of Appellant and constitute irreparable harm.

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 Appellant failed to properly perform work and was trying to collect more than is owed. Hypothetically speaking, if Appellant had provided information to the Kenison Firm during a verbal confidential attorney-client communication about other situations where Appellant 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 to Appellant in the Buckley case. While it is conceivable that the Kenison Firm truly does not remember such information, forcing the disclosure of that information to the very attorneys sought to be disqualified puts the client in a quandary. Does the client disclose information and hope disqualification is granted and so information stays protected, or does the client not disclose and risk Respondent's attorneys 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 can make the decision without placing clients in this unenviable position.

The standard set in Townsend 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.

At the hearing on July 8, 2013, the Kenison Firm proposed 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) was the controlling authority and was more applicable to this situation than Townsend. (Exhibit C p. 13, l. 22 – p. 15, l. 19). However, even Madison supports Appellants 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).

The Madison Court specifically used the terminology of "knowledge or information" rather than "confidential knowledge" or "confidential information." Based

on the answer, counterclaims and third-party claims filed by the Kenison Firm, (Exhibit D), it will be impossible for the Kenison Firm to forward the interests of Respondent without using information gained in the TMKG matter against Appellant in this matter.

Under the restrictions imposed on the Kenison Firm from their prior representation, they cannot advocate zealously for Respondent if they are 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 again erroneously determined the decision for limited representation was between Buckley and the Kenison Firm telling Counsel for Appellant, "You've got no business getting involved in an attorney and their client's relationship" and "That is between his counsel and the client." (Exhibit C p. 19, ll. 1-16). On the contrary, that decision goes to the heart of the fair administration of justice, a substantial right (discussed below).

If the Circuit Court had at least issued an injunction against Respondent and the Kenison Firm as requested, the 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 Appellants 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.

Following the hearing on July 23, 2013, the Court filed a written order on July 25, 2013 denying Appellant's motion to reconsider, clarify and amend order to issue injunction. (Exhibit L). Such denial is a clear indication that the Circuit Court refused to grant an injunction as requested by Appellant.

Based on this information and supporting evidence, Appellant clearly requested by motion that the Circuit Court issue an injunction preventing Respondent and the Kenison Firm from accessing the confidential information ordered to be provided in a privilege log. The Circuit Court considered and ruled on Appellant's motion by written order denying the motion to issue an injunction, therefore, this Court has appellate jurisdiction to hear the appeal. An order granting, continuing, modifying, or refusing an injunction is 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).

II. Appellate jurisdiction exists in this matter pursuant to S.C. Code § 14-3-330(2) as the appeal of an order affecting a substantial right.

Respondent contends in support of its Motion to Dismiss 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. (Respondent's Memorandum in Support of Motion to Dismiss pp. 4-5).

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, the fair administration of justice, and to a particular mode of trial.

Respondent points out in the Enersys 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 Enersys 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 Enersys, 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***. (Exhibit C p. 16, ll. 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 Enersys and Hagood, the trial judge made his ruling to grant or deny disqualification based on the applicable standard under the Rules of Professional Conduct.

In Enersys, 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 Enersys' 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 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).

Respondent's position is that no substantial right is affected in this case based on the analysis in Enersy, however, 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 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 Cmmt. 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 Cmmt. 2, RPC, Rule 407, SCACR. **"Confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship."** Rule 1.6 Cmmt. 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 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 Cmmt. 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 Appellant 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." (Exhibit K p. 4, ll. 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." (Exhibit K p. 5, l. 18 – p. 6, 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 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 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 "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 Cmmt. 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"** (Exhibit D p.27, ¶117) and **"grossly undercapitalized prior to and during construction of the Project."** (Exhibit D p. 27, ¶118, Exhibit B p. 3, ¶20).

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.

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. (Exhibit I p. 3). 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. (Exhibit K p. 4, l. 23 – p. 5, l. 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. (Exhibit A to Exhibit H p. 6).

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. (Exhibit H ¶5-6, Exhibit A to Exhibit H p. 6, Exhibit K p. 6, ll. 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 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). 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 the United States Supreme Court decision in 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 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. The imposition of such a requirement in this situation also most definitely prevents the fair administration of justice, a right to which every client is entitled.

Based on the impact the order of the Circuit Court will have on the substantial right to maintain confidences and to the fair administration of justice, appellate jurisdiction is granted pursuant to S.C. Code § 14-3-330(2).

CONCLUSION

Appellate jurisdiction exists with this Court through S.C. Code § 14-3-330(4) as an order refusing to grant an injunction and §14-3-330(2) as an order affecting a substantial right.

For the reasons stated above, together with Appellant's Initial Brief filed with the Court, the exhibits attached hereto and the applicable legal authority, Respondent's motion to dismiss for lack of appellate jurisdiction must be denied.

Respectfully submitted,

BRIAN A. MARTIN, LLC



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

ATTORNEY FOR APPELLANT

Greenville, South Carolina
December 9th, 2013

EXHIBIT A

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

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 JUN 19 P 8:44

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

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO.: 2013-CP-23-1833

D&C Builders, Inc.,

Plaintiff,

Vs.

Richard M. Buckley and Wells Fargo National Association,

Defendants.

Richard M. Buckley,

Third-Party Plaintiff,

Vs.

Scott Dodenhoff,

Third-Party Defendant.

FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 JUN 19 P 8:42

AFFIDAVIT OF SCOTT DODENHOFF

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

July 8, 2013
Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD MILLER, Judge.

A P P E A R A N C E S

Brian A. Martin, Esquire
Attorney for Plaintiff

Stokely Holder, Esquire
Attorney for the Defendant

CAROLINE HISKELL
Thirteenth Circuit Court Reporter

I N D E X

(There were no exhibits or witnesses presented).

P R O C E E D I N G S

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

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

THE COURT: Go ahead and tell me about it.

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

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

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

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

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

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

A dispute arose after the construction was

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

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

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

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

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

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

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

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

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

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

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

THE COURT: No, I've got it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

MR. MARTIN: That connection simply is ---

THE COURT: They're friends.

MR. MARTIN: They were friends.

THE COURT: Okay.

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

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

THE COURT: That's all public record.

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

THE COURT: Who did they represent in the

former?

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

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

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

MR. MARTIN: No, sir.

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

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

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

THE COURT: Put together a privilege log.

MR. MARTIN: Yes.

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

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

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

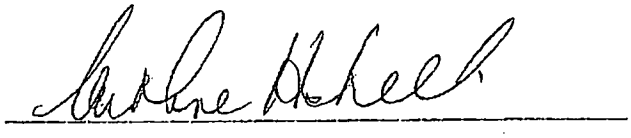
MR. MARTIN: Yes, sir.

MR. HOLDER: Thank you.

---END OF TRANSCRIPT RECORD---

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

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



Caroline Hiskell

EXHIBIT D

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 **DEFENDANT RICHARD M. BUCKLEY'S ANSWER, COUNTERCLAIMS AND THIRD-PARTY CLAIM**
Richard M. Buckley, Third-Party Plaintiff, vs. Scott Dodenhoff, Third-Party Defendant.	

FILED
2013 MAY 15 P 4:48
CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

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.

(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)
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 15th, 2013
Greenville, SC

EXHIBIT E

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 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

EXHIBIT F

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. WICKENSIMER
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

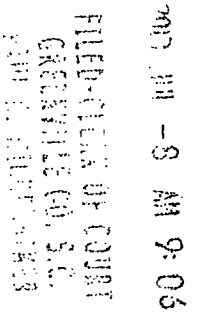
Townes B. Johnson III

Sworn to and subscribed before
me this 8th day of July, 2013.

Notary Public
My Commission Expires:
5/2/2023

EXHIBIT G

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
Richard M. Buckley, Third-Party Plaintiff, vs. Scott Dodenhoff, Third-Party Defendant.	) AFFIDAVIT OF JOHN T. CRAWFORD, JR., ESQ.



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

EXHIBIT H

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

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

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

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

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

SECTION I: Hearing Information

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

SECTION II: Motion/Order Type

☒ Written motion attached
☒ Form Motion/Order

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

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

July 16, 2013
Date submitted

SECTION III: Motion Fee

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

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	_____ JUDGE
☐ Other:	CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted this 16th day of July, 2013.

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

Greenville, South Carolina
July 16th, 2013

"EXHIBIT A"

BRIAN A. MARTIN LLC

ATTORNEY AT LAW

LICENSED IN SC & NC

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 the he contends was obtained by law firm in the prior representation that would be relevant and useful in the present representation to warrant disqualification.
6. Defendant presented an Affidavit from Attorney John H. Heckman to the extent that Defendant was referred to law firm by Mr. Heckman and not through Defendant's prior knowledge of law firm's previous representation of Plaintiff.
7. Defendant presented Affidavits from Attorneys for Defendant, M. Stokely Holder, John T. Crawford and Townes B. Johnson wherein each states:
   a) They were aware of law firm's prior representation of Plaintiff prior to undertaking representation of Defendant.
   b) They did not believe that the two cases were related in any way.
   c) They did not remember any confidential information disclosed to them during the prior representation of Plaintiff.
   d) They did not recall Plaintiff sharing any information about the Defendant or the project for Defendant during the prior representation of Plaintiff.
   e) In the prior representation, they did not obtain any information from Plaintiff regarding its financial status or the impact the outcome of the prior representation would have on that financial status.
   f) Any information obtained in the prior representation was a matter of public record.
   g) They do not believe the duties required in representing Defendant in the present case conflict with the duties required in representing Plaintiff in the prior case.
   h) They do not believe forwarding the interests of the Defendant in this matter will improperly injuriously affect Plaintiff.
8. Defendant presented an Affidavit of Pamela Burns-Byers Buckley stating:
   a) Defendant was referred to law firm by Attorney John H. Heckman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In rebuttal to these arguments, I presented the following:

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

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

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

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

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

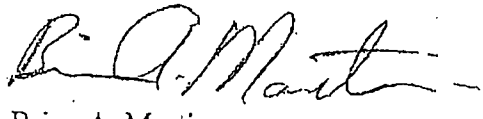
In order to be sure I am providing the correct information that you were seeking in your instruction to prepare the Privilege Log, and particularly in light of my own ethical obligations if I am being requested to disclose confidential attorney/client communications, I would request that you issue a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

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

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

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

Sincerely,



Brian A. Martin

Enclosure

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

Brian A. Martin

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

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

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

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

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

Respectfully,

Stokely Holder

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

Brian A. Martin

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

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

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

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

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

Dear Judge Miller,

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

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

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

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

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

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

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

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

The information contained in this email message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, email or facsimile.

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

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

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

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

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

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

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

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

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

(1)

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

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

IT IS SO ORDERED!

_____
Edward W. Miller
Judge, 13th Judicial Circuit

July ___, 2013
Greenville, South Carolina

EXHIBIT 1

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;	)	
Richard M. Buckley,	)	
Third-Party Plaintiff,	)	**ORDER**
vs.	)	
Scott Dodenhoff,	)	
Third-Party Defendant.	)	

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. WICKENSIMER
2013 JUL 16 A 9:02

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~~ 25, 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

EXHIBIT J

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".

704 East McBee Avenue • Greenville, South Carolina 29601
Phone 864.242.4899 • Fax 864.242.4844

1201 Main Street • Suite 1980 • Columbia, South Carolina 29201
Phone 803.748.1529 • Fax 803.748.1248

534 B Onsto Ridge • Edisto Beach, South Carolina 29438
Phone 843.869.1000

1130 Hurricane Shoals Road • Suite 600 • Lawrenceville, Georgia 30043
Phone 770.513.6400 • Fax 770.518.6577

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.

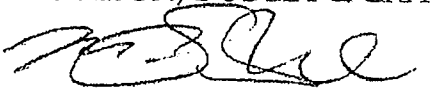
Mr. Martin cites that portion of comment 3 to Rule 1.9 of the South Carolina Rules of Professional Conduct which states that a former client *is not required* to reveal the purported confidential information. In support of his Motion to Reconsider, Mr. Martin states that his client "will be forced to 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



MSH/lw

M. Stokely Holder

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.

EXHIBIT K

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

INDEX

WITNESS	PAGE NO.
CERTIFICATE OF REPORTER	9

EXHIBITS

NO	DESCRIPTION	ID	EVIDENCE

(No exhibits were presented during this hearing)

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

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

THE COURT: Well, here's the deal.

MR. MARTIN: Yes, sir.

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

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

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.

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

not going to know what they know or what's privileged, for them to respond under a protective order to explain what the -- whether or not it is, in fact, privileged. Because 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. And that's what they're talking -- that's what you're talking about them doing.

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

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

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

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

THE COURT: 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. Okay?

MR. MARTIN: Yes, Your Honor.

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

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

MR. MARTIN: Yes, sir.

THE COURT: 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 thin air. Okay?

MR. MARTIN: Yes, sir.

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

MR. MARTIN: Yes, sir. I do still have the problem of understanding how if I provide information to them because of this circumstances, and again, this is -- I understand the quandary, that if I provide the information that I contend is confidential information that they have and obtained in the prior case, and I give that information to them, and -- pursuant to this privileged log, and then the -- they contend that information is not confidential or that that information is not privileged and the motion to disqualify is denied, and they continue to represent the Defendants, then I have handed over significant information for them to use ---

THE COURT: That they already know.

MR. MARTIN: I guess what I'm saying is is ---

THE COURT: 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 privileged 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.

If they have violated some confidential information, some

part of Rule 1.9, they're going to get disqualified. It's as simple as that. And they'll be under their attorney's oath not to disclose confidential information as they currently are. So produce the log. Okay?

MR. MARTIN: Yes, sir.

THE COURT: Mr. Holder, do you want to say anything?

MR. HOLDER: No. That's it. Thank you, Your Honor.

THE COURT: All right. Thank you.

(Hearing ended at 10:44 am)

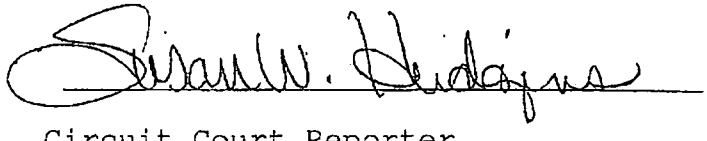
(End of requested transcript of record)

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



Circuit Court Reporter

EXHIBIT L

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 B. WICKENSHER
2013 JUL 25 A 11 10

D&C Builders, Inc.	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), 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; (formal order to follow) ☒ Statement of Judgment by the Court:

otion 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

his order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

CPFORM4M
SCCA SCRCP Form 4C (Revised 10/2011)

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.**

C. W. McC.

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

CPFORM4M
SCCA SCRCP Form 4C (Revised 10/2011)

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

Respondent has filed a motion to dismiss this appeal, arguing the underlying order is not immediately appealable. After careful consideration, Respondent's motion is denied. *See* S.C. Code Ann. § 14-3-330 (Supp. 2013) (noting this court has appellate jurisdiction "for correction of errors of law in law cases, and shall review upon appeal: . . . (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction").

FOR THE COURT

Columbia, South Carolina

FILED
3/10/14

cc:
Brian A. Martin
Harold Stewart James
M. Stokely Holder

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case No. 2013-CP-23-1833

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

v.

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

Of whom Richard M. Buckley is the .....Respondent.

MOTION FOR ORDER GRANTING PARTIAL RELIEF; and
MOTION TO DISMISS APPELLANT'S REMAINING ISSUE ON APPEAL

Respondent, Richard M. Buckley, by and through his undersigned attorney and pursuant to Rule 240, SCACR, hereby moves for an Order Granting Partial Relief Requested on Appellant's Issues numbered 1 and 2; and for an Order to Dismiss Appellant's remaining issue, including Issue numbered 3 in Appellant's Issues on Appeal, in accordance with the complete and overwhelming authority found in South Carolina law in support thereof.

Issues I and II

Respondent has offered Appellant the Respondent's consent to the partial relief requested by Appellant under Appellant's Issues I and II, as outlined in Appellant's Statement of Issues on Appeal (and under its Notice of Appeal). Specifically, the Respondent has offered its consent to the Appellant's request under Issues I and II (respectively) that "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"; and "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".

However, *despite these offers and requests upon Appellant* ***by Respondent,*** ***Appellant has refused to consent to the partial relief that Appellant is requesting under its own Issues on Appeal I and II.***

Issue III

In accordance with the Appellant's Issue III, as outlined in Appellant's Statement of Issues on Appeal, it is Respondent's understanding that Appellant is seeking an order from this Court to determine that "[t]he 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 ... 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." [1] However, **it is absolutely undisputed that the lower court has not ruled on this issue of disqualification (the omission of this issue in the Appellant's Notice of Appeal is glaring). No final determination on the issue was ever rendered by the lower court.** *Peterkin v. Brigman,* 319 S.C. 367, 461 S.E.2d 809 (1995); *Mid–State Distributors,* 310 S.C. at 334, 426 S.E.2d at 780; *Knowles v. Standard Savings & Loan Assn.,* 274 S.C. 58, 261 S.E.2d 49 (1979). The partial relief requested in Appellant's Issues I and II (as addressed above) highlights the obvious nature of this undisputed fact that the lower court has not ruled on the issue of disqualification. As such, there is no order to be appealed that "involves the merits," as that term is used in Section 14–3–330(1), such that Appellant's aforementioned requested relief is not properly before this Court. *Id.* The dearth of authority in this State, and in this Country, to support a contrary determination is compelling.

This Motion is further based upon the submissions of Respondent, the applicable South Carolina Appellate Court Rules and their related authority, and upon such supporting memorandum and affidavits as are submitted in connection herewith.

It is further requested, pursuant to Rule 240(b), that all time be held in abeyance during the pendency of this motion.

---

1 To the extent the Appellant is requesting this same relief under all three of its Issues on Appeal, then this Motion shall apply to all such requests for relief.

Respectfully Requested,

April 10th, 2014

M. Stokely Holder (SC Bar # 73892)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. (864) 242-4899
Fax (864) 242-4844

Attorney for Respondent

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case No. 2013-CP-23-1833

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

v.

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

Of whom Richard M. Buckley is the ..... Respondent.

MEMORANDUM OF RESPONDENT IN SUPPORT OF ITS MOTION FOR ORDER GRANTING PARTIAL RELIEF; and MOTION TO DISMISS APPELLANT'S REMAINING ISSUE ON APPEAL

M. Stokely Holder, Esquire
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
(864) 242-4899
Attorney for Respondent

Other Counsel of Record:

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

H. Stewart James, Esq.
Babb & Brown, P.C.
505 West Butler Road
Greenville, SC 29607
Co-Counsel for Appellant

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
PO Box 71727
North Charleston, SC 29415
Attorney for Defendant Wells Fargo, N.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

FACTS 1

ARGUMENT 2

MOTION FOR ORDER GRANTING PARTIAL RELIEF AS TO APPELLANT'S ISSUES I AND II 2

MOTION TO DISMISS APPELLANT'S ISSUE III 3

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Knowles v. Standard Savings & Loan Assn., 274 S.C. 58, 261 S.E.2d 49 (1979) 4

Mid–State Distributors, 310 S.C. at 334, 426 S.E.2d at 780 ..... 4, 5

Peterkin v. Brigman, 319 S.C. 367, 461 S.E.2d 809 (1995) 4

STATUTES

S.C. Code Ann. § 14-3-330 (1) 5

OTHER AUTHORITIES

Rule 11, SCRCP 2

Rule 201, SCACR 4

COMES NOW, Respondent, Richard M. Buckley ("Buckley"), by and through his undersigned attorney, and files this Memorandum in Support of its Motion for Order Granting Partial Relief as Requested in Appellant's Issues on Appeal Numbered I and II; and in Support of its Motion to Dismiss Appellant's Issue Number III.

I. FACTS

As made abundantly clear in the Appellant's Notice of Appeal and Initial Brief, the only orders that have been appealed by Appellant are the Orders of the lower court dated July 15, 2013 and July 23, 2013 – these are, in fact, the only Orders issued by the lower court on the issues raised in this Court by Appellant (A copy of said Orders are attached hereto and incorporated herein by reference as **Exhibit A**).

As is also evident in the Appellant's filings with this Court together with counsel for Appellant's correspondence with Respondent's counsel (a copy of said correspondence is attached hereto and incorporated herein by reference as **Exhibit B**), the relief requested by Appellant is tri-fold:

(1) First, the Appellant seeks an order from this Court declaring that "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".

(2) Second, the Appellant seeks an order from this Court declaring "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 15,

2013".

(3) Third, the Appellant seeks an order from this Court declaring "[t]he 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 ... 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."

As evidenced by the correspondence exchanged by Respondent's counsel to counsel for Appellant in accordance with Rule 11, SCRCP, Respondent offered its consent to the partial relief requested by Appellant identified as 1 and 2 above. In response, *Appellant* repeatedly refused to accept *Respondent's consent* to the relief *as requested by Appellant in its own Appeal.*

In regards to the relief requested by Appellant as described in 3 above, no final judgment or appealable order has been issued by the lower court.

II. ARGUMENT

A. Motion for Order Granting Partial Relief as to Appellant's Issues I and II

Respondent has offered its consent to the relief requested by Appellant in two of the three main issues raised by Appellant on this Appeal. However, Appellant has incredibly refused to accept this consent.

Based on the correspondence exchanged by counsel for Appellant to Respondent's counsel, Appellant contends it is requesting the relief identified in 3 above

on all three of its separate Issues on Appeal and that this portion of relief sought is not mutually exclusive from the other 2 requests for relief identified above. Upon this line of 'reasoning', the Appellant has refused to consent to the partial relief offered by Respondent. Not only does Respondent consider this position of Appellant unreasonable, but it is shocking to the conscience. As remains obvious, the purpose of this untenable position is to have this Court rule on the third issue noted above- which, as outlined herein, is an issue that is clearly not properly before this Court.

Regardless of the semantics being employed by Appellant in a clear effort to avoid its exposure to an issue for which Appellant has no authority in support of its position (see Motion to Dismiss herein below), the *manner* for which the requested relief has been presented to the Court via Plaintiff's Initial Appellate Brief is largely irrelevant to this Motion. Based on the fundamental principles of judicial economy, the Court has the inherent power to grant relief – whether partial or full – upon the consent of the Respondent. To suggest otherwise is contrary to one of the primary goals of this State's Judiciary in promoting judicial economy by efficiently managing litigation in order to avoid the unnecessary expenditure of time, effort and expense by litigants and the Court.

For these reasons, the Respondent respectfully requests an Order from this Court granting the relief requested by Appellant on the issues numbered 1 and 2 herein above.

B. *Motion to Dismiss Appellant's Issue III*

In an effort to merely provide clarity regarding the scope of this remaining issue, this Motion to Dismiss may be properly characterized as a Motion to Dismiss the

"Remaining Issue" on Appeal (numbered 3 above) should the Court grant the Respondent's above referenced Motion for consent relief. This Motion to Dismiss the "Remaining Issue" centers upon this Court's jurisdiction, or lack thereof, over an issue that has yet to be ruled on by the lower court.[1] The Remaining Issue concerns the status of the lower court's ruling on the seminal issue of whether Respondent's counsel should be disqualified.

The record is abundantly clear that the lower court has not issued *any order* on this issue, much less any finding that: (1) "the matters involved in the prior representation and current representation were 'substantially related'"; (2) that 'the Kenison Firm be disqualified'; or that (3) 'the filings and actions taken by the Kenison Firm in this matter be vacated'. *See Orders of lower court attached; see also Appellant's Initial Brief.* **Likewise, the record is abundantly clear that the lower court has not issued an order finding the converse, or that: (1) the matters are *not* substantially related; (2) that the Kenison Firm *not* be disqualified; or that (3) the filings and actions taken by the Kenison Firm in this matter *not* be vacated.**

The most fundamental aspect of South Carolina Appellate Law is that an appeal may only be taken from a final judgment or appealable order. Rule 201, SCACR; *Peterkin v. Brigman,* 319 S.C. 367, 461 S.E.2d 809 (1995); *Mid-State Distributors,* 310 S.C. at 334, 426 S.E.2d at 780; *Knowles v. Standard Savings & Loan Assn.*, 274 S.C. 58, 261 S.E.2d 49 (1979).

---

1 The Respondent readily acknowledges this Court's denial of Respondent's Motion to Dismiss on Appellant's Issue pertaining to injunctive relief (A copy of said Order is attached hereto and incorporated herein by reference as **Exhibit C**). Based upon the herein described consent of Respondent to the Appellant's requested relief on that injunction issue, it is Respondent's position that this Motion to Dismiss is properly before the Court with respect to the Remaining Issue.

It being obvious that the lower court has yet to render judgment on the issue of disqualification, the Appellant has made creative attempts to disguise that seminal issue by mischaracterizing the lower court's ruling as a failure to find the two matters in question 'substantially similar'; although, the lower court hasn't even offered a ruling on that narrow issue (either). The Appellant further contends that the lower court has failed to apply certain case law to the issue of disqualification. However, this is also inaccurate because, again, the lower court has not issued a ruling on the matter whereby the lower court's application of *any law* on this issue can even be properly identified at this point.

It is absolutely undisputed that the lower court has not ruled on this issue of disqualification.[2] No final determination on the issue was ever rendered by the lower court. As such there is no order to be appealed that "involves the merits,"[3] as that term is used in Section 14–3–330(1). Therefore, in conformance with this most fundamental premise of appellate review, this Remaining Issue is not only not immediately appealable, there is nothing yet to appeal on this "Issue". *Id.* **There is not a dispositive order from the lower court on this issue at all**- so, unlike the Respondent's position on the injunction issue that has been ruled upon, this cannot even be described as an interlocutory order; there is no order. The dearth of authority in this State, and in this Country, to support a contrary determination is glaring, the reasons being just as obvious.

---

2 One needs to look no further than the above referenced issues 1 and 2 for evidence that the lower court has yet to rule on the issue of disqualification.

3 The phrase "involving the merits" is narrowly construed in modern precedent. An *order* usually will be deemed not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. *Mid–State Distributors,* 310 S.C. at 334–335, 426 S.E.2d at 780 (*order* denying motion to dismiss case based on lack of personal jurisdiction was not immediately appealable, as the litigant had "not arrived at the end of the road"). The "further act" required here is the actual issuance of an order on the issue.

Dismissal of this Remaining Issue is appropriate because, as is clear from the entire record to include, *inter alia*, the lower court's orders to date and the Appellant's Notice of Appeal together with Appellant's Initial Brief, the lower court has not issued *any judgment* on this Remaining Issue for which this Court could even review or consider.

III. CONCLUSION

Based on the arguments heretofore made together with the precedential authority in South Carolina relevant to the issues addressed herein and the overriding fundamental principles of judicial economy, the Respondent respectfully requests an Order from this Court granting the following partial relief requested by Appellant:

(1) declaring that "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"; and

(2) declaring "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".

In addition, the Respondent respectfully requests an Order from this Court dismissing the Appellant's remaining request for relief regarding what the Appellant incorrectly characterizes as an appealable ruling from the lower court on disqualification.

Respectfully Requested,

April 10th, 2014

M. Stokely Holder (SC Bar # 73892)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. (864) 242-4899
Fax (864) 242-4844

Attorney for Respondent

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

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 DEFENDANT(S)

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

EXHIBIT A

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
Richard M. Buckley, Third-Party Plaintiff, vs. Scott Dodenhoff, Third-Party Defendant.	)	**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~~ 25, 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

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP231833

D&C Builders, Inc.	Richard M. Buckley And Wells Fargo N.A.
PLAINTIFF(S)	DEFENDANT(S)

2013 JUL 25 A 11:10

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), 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; (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.**

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

From: Brian A. Martin [mailto:brian@martinlawsc.com]
Sent: Tuesday, April 08, 2014 6:15 PM
To: Stokely Holder; 'Brian A. Martin'
Subject: RE: D&C v. Buckley

Stokely,

It seems your understanding of the Appellant's filings does not coincide with the actual Appellant filings. I would again refer you to the specific and complete requests for relief in **Appellant's Brief on Page 30, lines 1-4 and Page 36, Lines 8-23,** to be even more specific.

My e-mail below clearly explains and points to exactly where in the **Appellant's Initial Brief (Page 30, lines 1-4 and Page 36, lines 8-23)** where each relief requested is fully stated. Each request for relief specifically includes a request that the Kenison firm be disqualified and all actions vacated. Your request for consent and your understanding of the requested relief as you stated below in your email is simply not accurate. You are not suggesting consent to all of the relief requested but rather consent to only a part of relief requested. I think it has been made very clear that unless you are willing to consent to the disqualification sought as relief from the Court of Appeals **on Page 30, lines 1-4 and Page 36, lines 8-23 of Appellant's Initial Brief** then we have nothing further to discuss. I believe the Court of Appeals has the authority to order the disqualification of the Kenison firm or at least instruct the Circuit Court to disqualify the Kenison firm. You may disagree that the Court has this authority but unless you are willing to consent to the disqualification, Appellant intends to continue asking the Court to grant that relief. Disqualification is clearly part of the relief requested in Appellant's brief and will be part of the relief requested if the matter is scheduled for oral argument regardless of whether or not you recognize that as a relief requested.

Appellant is not willing to consent to the partial relief you suggest. Either consent to all of the relief requested in Appellant's Brief specifically including disqualification or submit your Initial Brief and Designation of Matter as ordered by the Court so that we can move forward with the appeal.

Also, please be aware that I do not consider these meaningful settlement discussions since you indicated in your initial telephone call after the Motion to Dismiss was denied, that you did not intend to withdraw from representing Buckley and did not believe there was any basis for disqualification. Since you've had Appellant's Initial Brief since November, you've known all along that disqualification was a relief requested by Appellant in that Brief. If you never intended to withdraw as indicated in the phone call and now with your unwillingness to recognize disqualification as a requested relief in your e-mail below despite it being clearly stated in the Brief, I'm not exactly sure why you even suggested such consent unless it was simply to make Appellant look like it was refusing a reasonable request to consent to the relief requested. But you've said you won't consent to disqualification and no matter how you want to spin Appellant's denial of your request to consent, the Brief speaks for itself when it comes to what relief Appellant requested.

Anyway, be aware that I do intend to oppose the Motion for the Extension of Time.

Brian

Brian A. Martin, LLC
Attorney at Law

212 Trade Street
Greer, SC 29651

EXHIBIT B

(864) 879-7779
(864) 879-7171 Fax
brian@martinlawsc.com

The information contained in this email message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, email or facsimile.

From: Stokely Holder [mailto:holder@conlaw.com]
Sent: Tuesday, April 08, 2014 5:08 PM
To: Brian A. Martin; 'Brian A. Martin'
Subject: RE: D&C v. Buckley

Brian,

Thank you for the email.

As I understand from your Appellate filings, you have the following 3 issues with the lower court's orders whereby you are making the following 3 requests for relief:

- As for your first issue, you are requesting the appellate court to issue an order vacating the Order of the Circuit Court requiring Appellant to provide specific confidential information pursuant to a privilege log to support disqualification of the Kenison Firm and its attorneys.
- On your second issue, you are requesting the Order of the Circuit Court 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.
- On your third issue, you are requesting the Appellate Court to determine that the lower court erred in failing to find the matters involved were substantially related, and to further disqualify Respondent's Counsel and vacate all filings and actions taken by the Kenison Firm on Buckley's behalf.

So, in accordance with that understanding, we would consent to the relief requested under issues I and II.

Thank you,

Stokely

From: Brian A. Martin [mailto:brian@martinlawsc.com]
Sent: Tuesday, April 08, 2014 4:22 PM
To: Stokely Holder; 'Brian A. Martin'
Subject: RE: D&C v. Buckley

Stokely,

I'm sorry, but I'm not exactly sure of what you are asking now. Appellant's Statement of Issues on Appeal do not specify any relief requested, but simply pose the question of whether the Circuit Court

erred in its decisions in those regards. The relief requested by Appellant under issue I is stated on page 30 of Appellant's Initial Brief as "The Order of the Circuit Court of July 15, 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." The relief requested by Appellant under issue II is stated on page 36 of Appellant's Initial Brief that the Appellate Court should "reverse the Circuit Court's Order denying the injunction and remand the matter to the Circuit Court" with instructions that the "Circuit Court 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."

Through our telephone conversation, I specifically inquired if you and the Kenison Firm were willing to withdraw from representing Buckley and you said no. Therefore, the consent you were seeking appeared to me to be only that the Circuit Court committed error and the case should be remanded back without any instructions on how to address the existing conflict with the Rules of Professional Conduct. If I misunderstood you, I am sorry, but it seemed clear you were not willing to agree to the relief Appellant requested of the Court of Appeals. If I am mistaken and you are willing to consent to the full relief requested in Appellant's brief as stated above to include withdrawing from representation of Buckley in this matter, then by all means, let me know of the error and we can discuss resolving this situation by consent further.

However, if your request for Appellant's consent to the relief requested is interpreted as only seeking declaration that the Circuit Court committed error and the case should be remanded without instruction or disqualification of the Kenison firm, then my client is not willing to consent to that request.

Hopefully, this clears up any misunderstanding of your request to consent. Thanks, Brian

Brian A. Martin, LLC
Attorney at Law

212 Trade Street
Greer, SC 29651
(864) 879-7779
(864) 879-7171 Fax
brian@martinlawsc.com

The information contained in this email message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, email or facsimile.

From: Stokely Holder [mailto:holder@conlaw.com]
Sent: Tuesday, April 08, 2014 3:24 PM
To: Brian A. Martin
Subject: RE: D&C v. Buckley

Brian,

Just to be clear, my understanding is that your client is not willing to consent to the relief it is requesting on its issues numbered 1 and 2, as outlined in your Statement of Issues on Appeal I and II. If I am mistaken, please let me know.

Thank you,

Stokely

From: Brian A. Martin [mailto:brian@martinanddavis.com]
Sent: Tuesday, April 08, 2014 11:39 AM
To: Stokely Holder
Subject: RE: D&C v. Buckley

Stokely,

My client is not willing to consent to the appeal being remanded back to the circuit court as you suggested unless your firm withdraws from the representation of Mr. Buckley. Since you indicated that you were not going to do that, I look forward to receiving your initial brief and designation of matter when due.

Brian

Brian A. Martin, LLC
Attorney at Law

212 Trade Street
Greer, SC 29651
(864) 879-7779
(864) 879-7171 Fax
brian@martinlawsc.com

The information contained in this email message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, email or facsimile.

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

Respondent has filed a motion to dismiss this appeal, arguing the underlying order is not immediately appealable. After careful consideration, Respondent's motion is denied. *See* S.C. Code Ann. § 14-3-330 (Supp. 2013) (noting this court has appellate jurisdiction "for correction of errors of law in law cases, and shall review upon appeal: . . . (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction").

FOR THE COURT

EXHIBIT C

Columbia, South Carolina

FILED
3/10/14

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

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

RECEIVED
MAY 0 2 2014
SC Court of Appeals

of whom:

Richard M. Buckley.....Respondent,

RETURN TO RESPONDENT'S MOTION FOR ORDER GRANTING PARTIAL RELIEF AND MOTION TO DISMISS APPELLANT'S REMAINING ISSUE ON APPEAL

Appellant, D&C Builders, Inc., by and through its undersigned attorney and pursuant to Rule 240(e), SCACR, hereby opposes the motion by Respondent, Richard M. Buckley, for an Order Granting Partial Relief and second (2nd) Motion to Dismiss.

Respondent's motions should be denied for multiple reasons to be addressed, but most obviously under Rule 269, SCACR as frivolous motions made solely for the

purpose of delay. Respondent was given thirty (30) days to file his initial brief on March 10, 2014 when his previous motion to dismiss was denied. He then waited until the very last day of that time in which to file a motion for an extension of time to have another thirty (30) days and then subsequently file these motions (notably requesting further abeyance to file its brief pending this decision on these frivolous motions) again attempting to get this Court to relinquish jurisdiction. It is quite apparent that Respondent has never intended to file an initial brief and the current motions are made for the sole purpose of delay.

The motions should also be denied because this appeal presents a novel issue in South Carolina. Through sworn affidavits by three members of the bar, (See Memorandum of Appellant in Opposition to Respondent's Motion to Dismiss previously filed, Exhibits E, F and G), the ruling of the Circuit Court (See Memorandum of Appellant in Opposition to Respondent's Motion to Dismiss previously filed, Exhibits I, K p. 4, ll. 19-22 and p. 7, ll. 19-24, and L), and the refusal to act by the Office of Disciplinary Counsel (Exhibit M of Memorandum in Support of this Return), all of which are contrary to the clear language of Rule 1.9 of the Rules of Professional Conduct and Comment 3 thereto, it is clear that this particular Rule of Professional Conduct is subject to varying interpretations. 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. A simple "consent" to remand the case back to the Circuit Court 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).

The granting of Respondent's motion would also set a terrible precedent encouraging litigants to make completely unsupported arguments to a lower court while knowing that when faced with having to make a good faith argument to this Court, they could simply "consent" the argument wasn't valid to begin with and seek to try a different argument with the lower court. The high standards of professional conduct expected of members of the bar by this Court require that such a course of action not be condoned or rewarded. The furtherance of such conduct would only serve to increase number of cases on the appellate docket.

Respondent further argues that because the Court granted jurisdiction under Section 14-3-330(4) as the appeal of an Order refusing to grant an injunction, and because Respondent is now willing to consent to the injunction, that jurisdiction no longer exists because no ruling was issued by the lower court on any other issue to establish jurisdiction. This argument is false in two respects also requiring that Respondent's motions be denied.

First, in responding to Respondent's previous motion to dismiss, Appellant demonstrated that appellate jurisdiction existed under both 14-3-330(4) as an order refusing to grant an injunction **and** 14-3-330(2) as an order affecting a substantial right. (See Memorandum of Appellant in Opposition to Respondent's Motion to Dismiss previously filed, pp. 14 – 25). Obviously with the Court finding jurisdiction under 14-3-330(4) thereby denying the previous motion to dismiss, it was not necessary for the Court to confirm jurisdiction under 14-3-330(2). However, appellate jurisdiction clearly exists

under 14-3-33-(2) as affecting a substantial right as demonstrated by the Circuit Court's flat refusal to consider disqualification under the standard provided in the Rules of Professional Conduct without concrete proof of the possession of confidential information. The proposed "consent" of Respondent to remand to the Circuit Court **without** further instruction does absolutely nothing to change the impact the Court's refusal has on Appellant's substantial right to the fair administration of justice and the particular mode of trial to which it is entitled.

Second, there was a ruling by the lower court on the issue of disqualification for this Court to review. The Circuit Court ruled that it was impossible to grant or deny the request for disqualification without knowing specifically what confidential information counsel for Respondent may possess; a ruling that is directly contrary to the Rules of Professional Conduct and to which Respondent is now willing to "consent" was incorrect. (See Memorandum of Appellant in Opposition to Respondent's Motion to Dismiss previously filed, Exhibit K p. 4, ll. 19-22 and p. 7, ll. 19-24). If the Circuit Court deemed it impossible to rule on disqualification without receiving such information and Respondent is now willing to "consent" that Appellant cannot be required to provide such information, then remand to the Circuit Court without instruction from this Court on how to proceed will not yield any different ruling than the existing ruling by the Circuit Court that disqualification cannot be decided.

Respondent continues to examine this issue as a "procedural" issue rather than an "ethical" issue and once again, by these motions, seeks to escape from being forced to justify how the Rules of Professional Conduct allow counsel for Respondent to represent an adverse party (Respondent) to a former client (Appellant) when the claims between

the adverse party (Respondent) and former client (Appellant) arose while counsel was representing the former client (Appellant) in a substantially related matter. Respondent cannot justify this position under any circumstances, but is unwilling to "consent" to this requested relief. This Court must deny the motions of the Respondent, review the argument and applicable authority and provide guidance to the bar of this state how to address disqualification in these circumstances.

This Return is based on the submissions of both parties to the Court in this matter thus far, the applicable South Carolina Appellate Court Rules and their related authority, and upon such supporting memorandum and affidavits submitted in connection herewith.

For the reasons stated above, Respondent's motion for an Order granting partial relief and motion to dismiss remaining issues on appeal should be denied and the Court should review these motions by Respondent under Rule 269, SCACR for the determination of additional relief or action by the Court.

Respectfully submitted,

April 29, 2014

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

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

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

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

v.

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

of whom:

Richard M. Buckley..... Respondent,

MEMORANDUM OF APPELLANT IN OPPOSITION TO RESPONDENT'S MOTION FOR ORDER GRANTING PARTIAL RELIEF AND MOTION TO DISMISS APPELLANT'S REMAINING ISSUE ON APPEAL

RECEIVED
MAY 02 2014
SC Court of Appeals

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

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

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

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

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Facts 1

Standard of Review 5

Argument 6

I. Respondent's motions should be denied under Rule 269, SCACR as frivolous motions made solely for the purpose of delay 7

II. Respondent's motions should be denied as the issues presented in this appeal are novel and both the bench and bar are in need of clear direction from the Court in the application of the Rules of Professional Conduct. 9

III. Respondent's motions should be denied because it would set a precedent of encouraging litigants to make unsupported and invalid arguments to the trial court knowing they can simply "consent" to relief at a later time 14

IV. Respondent's motion to dismiss should be denied as it has already been addressed by the Court in the denial of the prior motion to dismiss and appellate jurisdiction exists under S. C. Code Section 14-3-330(2). 15

Conclusion 22

TABLE OF AUTHORITIES

Cases

Enersys Delaware, Inc. v. Hopkins, 401 S.C. 615, 738 S.E.2d 478 (S.C. 2013) 17

Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 533 S.E.2d 331 (2000) 6

Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005). ...5, 6, 9, 17, 19, 21

Knowles v. Standard Savings and Loan Association, 274 S.C. 58, 261 S.E.2d 49 (S.C. 1979) 18, 19

Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (S.C. 1993) 17, 18, 19

Peterkin v. Brigman, 319 S.C. 367, 461 S.E.2d 809 (S.C. 1995) 17, 19

State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (S.C. 2000) 14

Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996) 2, 17, 20, 21

Statutes & Rules

S.C. Code Ann. §14-3-330(1) 18

S.C. Code Ann. §14-3-330(2) 6, 7, 15, 16, 18, 21

S.C. Code Ann. §14-3-330(4) 6, 15, 16, 18

Rule 1.9, RPC, Rule 407, SCACR 1, 2, 12, 13

Rule 1.9 Cmmt. 3, RPC, Rule 407, SCACR 2, 10

Rule 269, SCACR 6, 7, 9, 22

The Appellant, D&C Builders, Inc. ("D&C Builders"), by and through its undersigned attorney, files the following Memorandum in Opposition to Respondent's Motion for Order Granting Partial Relief and second Motion to Dismiss. Please note that all of the Exhibits attached to Appellant's previously filed Memorandum in Opposition to Respondent's Motion to Dismiss labeled Exhibits A through L, are specifically incorporated herein to prevent unnecessary duplication, and the additional Exhibits attached hereto are a supplement and continuation of the evidence presented previously to this Court.

STATEMENT OF FACTS

For a thorough examination of the Facts, Appellant would refer the Court to the Statement of Case (p. 2-4) and Statement of Facts (p. 4-13) contained in Appellant's initial brief already filed with the Court in this matter as well as the summary of facts contained in Appellant's previously filed memorandum in opposition to Respondent's previous motion to dismiss. However, by way of a brief summary, Appellant would present the following facts.

Appellant filed a motion to disqualify Respondent's counsel and the entire Kenison Firm in this matter due to a conflict of interest. (See Exhibit A of prior Memorandum). The Kenison Firm (Respondent's counsel) was actively representing Appellant as their client in a substantially related matter ***during the exact same time*** that the actions giving rise to the current claims between Appellant and Respondent were arising. (See Exhibit B of prior Memorandum ¶ 4- ¶13).

The representation of Respondent in this matter by the Kenison Firm clearly violates Rule 1.9 of the Rules of Professional Conduct under the "substantially related"

test promulgated by Comment 3 to Rule 1.9 and by the Supreme Court in Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (S.C. 1996). Both the prior representation (referred to as the TMKG case) and the present matter (referred to as the Buckley case) were actions to foreclose mechanic's liens by Appellant. (Exhibit B ¶ 4-5, ¶ 18). Both cases involved the same claims, counterclaims and defenses by and against Appellant as specifically compared in Appellant's Initial Brief at pages 7-9 and pages 38-40.

At the hearing on the motion to disqualify Appellant argued to the Circuit Court that disqualification was warranted based on the former representation being "substantially related" to the current matter and that the Kenison Firm had obtained information, including confidential information from Appellant during that representation, that could be used against Appellant in the current matter in violation of Rule 1.9. (See Exhibit C, p. 3, l. 15 – p. 10, l. 14).

The intention to use such information from its prior representation was clearly demonstrated in Respondent's Answer, Counterclaims and Third-party Claims filed by the Kenison Firm (See Exhibit D of prior Memorandum) which included allegations against Appellant, their former client, that it **(1) "did not have a functioning corporate structure, was incapable of making independent decisions, and did not follow the corporate formalities applicable to a South Carolina corporation at all pertinent times herein,"** (Exhibit D p.26 ¶116); **(2) "was insolvent prior to and/or during construction of the Project"** (Exhibit D p.27, ¶117); and **(3) "was grossly undercapitalized prior to and during construction of the Project."** (Exhibit D p. 27, ¶118; Exhibit B p.3, ¶20).

The Kenison Firm's sole argument against the motion to disqualify was that they were unaware of any specific confidential matter at issue in the Buckley case, (Exhibit C p. 16, ll. 19-20), and had not been provided any specific confidential information that could potentially create a conflict. (Exhibit C p. 17, l. 22 – p. 18, l. 2). The **only support** for these assertions were ***sworn affidavits*** of Attorneys Holder, Johnson and Crawford that they are "unaware of" or "do not remember" any confidential information provided by Appellant to them in connection with their prior representation against TMKG. (Exhibit E p.5, ¶ 13, Exhibit F p. 2, ¶ 4, Exhibit G p. 2, ¶ 4).

Based on these affidavits by members of the bar and the Court's stated familiarity with the attorneys (See Exhibit K p. 5, ll. 6-10), the Circuit Court ignored Appellants argument that disclosure was not required by the ethical rule given the cases were "substantially related," and ordered Appellant to submit the information claimed to be confidential to both the Circuit Court ***and*** the Kenison Firm of. (Exhibit C p. 21, l. 19 – p. 25, l. 17). This order required Appellant to provide the very information it was seeking to protect through the motion to disqualify to the very attorneys it was seeking to prevent remembering and using such confidential information to Appellant's disadvantage.

Appellant requested clarification from the Circuit Court on the ethical issues, and requested that the Respondent and Kenison Firm be enjoined from accessing any information. (See Exhibit H). Appellant also requested specific instruction from the Court as to how to address confidential attorney/client communications and that the Kenison Firm be enjoined from accessing the information provided. (See Exhibit H, p.

6). Without further clarification, the Circuit Court filed its written order on July 16, 2013. (See Exhibit I).

Appellant thereafter filed a motion to reconsider, clarify and amend order (Exhibit H), to which Respondent replied specifically stating unequivocally that **"no confidential information was gained by my firm in its prior representation of Plaintiff."** (Exhibit J p. 2, ll.27-29). The letter further states that **"The Plaintiff has failed to provide any "specific" confidential facts to counter this position."** (Exhibit J p. 2, ll. 31-33).

A very brief hearing was held on July 23, 2013 (See Exhibit K) wherein the Circuit Court ruled that it could not determine disqualification without seeing the alleged confidential information (Exhibit K p. 4, ll. 19-22), and Respondent having an opportunity to contest the confidentiality. (Exhibit K p. 4 l. 23- p. 5, l. 3). The Circuit Court also admonished *Counsel for Appellant* that the only potential ethical violation would be Counsel failing to provide the information. (Exhibit K p. 6, ll. 23-25).

The Circuit Court denied the motion to reconsider, motion to clarify and motion to issue an injunction by written order filed July 25, 2013. (See Exhibit L).

During this time, Appellant also filed a complaint with the Commission on Lawyer Conduct regarding its former counsel's determination to ignore the conflict and represent Respondent in this substantially related matter. The matter was referred to the Office of Disciplinary Counsel and following its investigation and receipt of the same information presented to the Circuit Court, the Office of Disciplinary Counsel **dismissed the complaints** against all three members of the bar. (See Notices of Dismissal attached and incorporated herein as "Exhibit M").

This appeal followed and Appellant filed and served its initial brief on Respondent on November 12, 2013. Rather than file an initial brief, Respondent filed a Motion to Dismiss on November 27, 2013 which was denied by this Court on March 10, 2014. Respondent was ordered to file his initial brief by April 9, 2014, but despite having five (5) months to prepare, Respondent files a motion for extension of time to file his initial brief on April 9, 2014. Appellant filed a return objecting to any extension of time and Respondent then filed the motions to which this return is directed on April 10, 2014.

Based on such motions, Respondent is now willing to "consent" that the argument made to the Circuit Court was invalid, unsupported and that the Circuit Court was in error to agree with Respondent, all in an attempt to remove appellate jurisdiction and dispose of the requirement to brief his argument to this Court. Respondent also seeks a second opportunity to have the remaining portions of the appeal to which he does not "consent" be dismissed, despite presenting the exact same argument from his prior motion to dismiss already denied by this Court by Order of March 10, 2014.

STANDARD OF REVIEW

In cases raising novel questions of law, the appellate court is free to decide those questions with no particular deference to the trial court. Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (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)." Hagood 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.

ARGUMENT

Respondent has made two motions for the Court's consideration, a motion for Order granting partial relief and a motion to dismiss. The motion for an Order granting partial relief is based on Respondent's desire to now "consent" that the Circuit Court was in error in agreeing with Respondent that Appellant must demonstrate proof Respondent's Counsel obtained confidential information from its prior representation of Appellant and give such counsel the opportunity to refute such claims. The motion to dismiss is based on the position that the "consent" from the first motion eliminates appellate jurisdiction under S.C. Code § 14-3-330(4) and that there has been no ruling by the lower court on any remaining issue.

As demonstrated below, not only are these motions in violation of Rule 269, SCACR, both motions should be denied because (1) this matter is an issue of first impression in South Carolina and both the bench and bar clearly need direction in addressing this situation, (2) allowing a Respondent with a weak argument to "cherry pick" which relief they can live with and "consent to" in order to avoid complying with the Court's Orders or to remove appellate jurisdiction sets a terrible precedent, and (3) even with Respondent's suggested "consent" to relief, appellate jurisdiction remains with

this Court due to the ruling and order of the lower court affecting a substantial right under S.C. Code § 14-3-330(2).

I. Respondent's motions should be denied under Rule 269, SCACR as frivolous motions made solely for the purpose of delay.

Appellant filed and served its initial brief in this appeal on Respondent on November 12, 2013. Rather than filing an initial brief, Respondent filed a motion to dismiss on November 27, 2013 arguing the appeal was from an interlocutory order and no appellate jurisdiction existed. As required, the time for Respondent to file his initial brief was held in abeyance during the Court's consideration of the motion to dismiss.

Respondent's motion to dismiss was thereafter denied by this Court on March 10, 2014 and Respondent was given an additional thirty (30) days to file an initial brief. He then waited until the very last day of that additional time period to file a motion for an extension of time to have another thirty (30) days to file an initial brief. This motion was based on the assertion that the parties were engaged in settlement discussions.

Appellant filed a return opposing this motion for more time as Respondent had already had five (5) months to prepare, specifically including the last thirty (30) days by this Court and refuting that any meaningful settlement discussions were ongoing. Respondent's Exhibit B to his memorandum in support of these motions fully demonstrates the extent of the alleged "settlement discussions" referred to in such motion for more time. As can clearly be seen, the communications submitted begin the day before his initial brief is due and consists of the offer to "consent" to the only the partial relief that remands the matter back to the circuit court.

Based on Respondent's unwillingness to consent to all the relief requested, including disqualification, Respondent filed these motions for partial relief and a second motion to dismiss to further extend the time in which Respondent had to file an initial brief. Not only did Respondent ask for the thirty (30) day extension in its motion for extension of time, but also asks for this Court to hold all actions in abeyance during the consideration of these frivolous motions.

As demonstrated in the remainder of this memorandum, Respondent has absolutely no good faith basis upon which to make these motions. The motion for an Order granting partial relief is clearly made to escape having to justify to this Court the argument used to convince the Circuit Court to disregard the plain language of the rules of professional conduct; an argument that Respondent is now seeks to "consent" was invalid. The motion to dismiss is nothing more than using this creative attempt to avoid filing an initial brief to create another opportunity to move for a dismissal. Respondent therefore mischaracterizes the issues Respondent is not willing to "consent" to as not subject to appellate jurisdiction so that their "consent" results in remand to the Circuit Court. Clearly, Respondent believes that he has a better chance of persuading the Circuit Court to again ignore the plain language of the Rules of Professional Conduct on disqualification than he does of persuading this Court to do the same.

Based on the now willingness to "consent" that its argument to the Circuit Court was invalid and the Court was in error to agree with him, it is quite apparent that Respondent has never intended to file an initial brief and the current motions are made for the sole purpose of delay.

Respondent's motions should be denied under Rule 269, SCACR as frivolous motions made solely for the purpose of delay and this Court should review such actions within the Rule to impose any other relief or sanctions the Court deems appropriate.

II. Respondent's motions should be denied as the issues presented in this appeal are novel and both the bench and bar are in need of clear direction from the Court in the application of the Rules of Professional Conduct.

In cases raising novel questions of law, the appellate court is free to decide those questions with no particular deference to the trial court. Hagood at 194, S.E.2d at 708. The issues in this appeal have not been addressed by the Court before, and now that Respondent is faced with arguing against the overwhelming authority from other jurisdictions as demonstrated in Appellant's initial brief and memorandum filed in the first motion to dismiss, Respondent seeks to "consent" to some relief so that this argument is capable of being used in the future.

Respondent argued against the motion to disqualify of the Appellant by shifting the burden of proof onto the former client to prove its former counsel obtained specific confidential information that could be used against the former client. In support of this 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. (Exhibit E p.5, ¶ 13, Exhibit F p. 2, ¶ 4, Exhibit G p. 2, ¶ 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.**

(Exhibit C, p. 17, l. 22 – p. 18, l. 2) (See also Exhibit B, Affidavit of Scott Dodenhoff).

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.**

(Exhibit J, p. 2-3).

Clearly, Respondent interprets Comment 3 to Rule 1.9 that the former client must choose between providing the confidential information alleged in possession of former counsel to support disqualification or not be able to obtain disqualification. There is

simply no South Carolina authority to support this position is what was intended by the rules.

As an aside, there is ample authority from thirteen (13) other jurisdictions to support Appellant's position that are presented in its previously filed memorandum in opposition to Respondent's first motion to dismiss. All of those jurisdictions have confirmed that confidential information must be protected, particularly in disqualification situations and former clients cannot be forced to reveal such information to establish disqualification. (Memorandum of Appellant in Opposition to Respondent's Motion to Dismiss, pp. 19 – 23). Presumably, since Respondent could find no support to counter the argument and authority presented by Appellant, and as this Court denied the first motion to dismiss, Respondent seeks to use his "consent" to partial relief to remove his feet from the fire so to speak and avoid having a precedential opinion on the issue.

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 agreed with this interpretation and cautioned Appellant's counsel that he would be violating an ethical duty by not obeying the court's order to produce the requested confidential information. (See Exhibit K, p. 6 ll. 23-25). 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?**

(Exhibit K, p. 6, ll. 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.**

(Exhibit K, p. 7, ll. 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. Now, Respondent is willing to "consent" the Circuit Court was in error, but does not want this Court to provide any direction or instruction to the Circuit Court or to the bar.

Finally, along with the appeal of the Circuit Court's Order, Appellant filed a complaint with the Commission on Lawyer Conduct presenting the same information for disciplinary action against these members of the bar for violating Rule 1.9 in representing an adverse party to a former client in a substantially related matter. The complaint was referred to the Office of Disciplinary Counsel and following their investigation, the Office of Disciplinary Counsel dismissed the complaints. (Exhibit L)

The Office of Disciplinary Counsel saw nothing wrong with Appellant's former counsel providing ***sworn affidavits*** that no confidential information was obtained in the course of representing Appellant, saw nothing wrong with shifting the burden of proof onto the client to prove possession of confidential information, and saw nothing wrong with attorneys representing an adversarial party to their former client on a similar dispute ***that arose while they were representing the former client.*** Finally, the Office of Disciplinary Counsel saw nothing wrong with the attorneys representing Appellant, a

corporation, in a financially related matter, and then turning around a few months later and alleging on behalf of Respondent that Appellant (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," (Exhibit D p.26 ¶116); (2) "was insolvent prior to and/or during construction of the Project" (Exhibit D p.27, ¶117); and (3) "was grossly undercapitalized prior to and during construction of the Project." (Exhibit D p. 27, ¶118; Exhibit B p.3, ¶20). If these allegations do not indicate an intent to use financial information obtained in the prior representation, what will?

Respondent's willingness to now "consent" after strongly arguing for the Circuit Court to require the production of "specific confidential information" begs the question as to how many other members of the bar are confused as to the application of Rule 1.9 and what is required for disqualification.

If Rule 1.9, as Appellant argued in its initial brief and Respondent now "consent," was erroneously interpreted by the Circuit Court and the Office of Disciplinary Counsel refuses to act on, what Appellant argued in its initial brief and Respondent now "consents," is a violation of the Rules of Professional Conduct, then this Court must provide guidance to the bar as to how to address this situation in the future. This Court must determine disqualification as requested by Appellant and specifically instruct the Circuit Court in how to determine disqualification in the future without requiring a former client to provide confidential information.

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. A simple "consent" to remand the case back to the Circuit Court 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).

Granting Respondent's motion for partial relief will leave the bench and the bar with varying interpretations on what is required for disqualification under Rule 1.9 and whether former clients must prove the existence of confidential information to establish disqualification. As an issue of first impression in this state, this Court must deny Respondent's motions and provide guidance and instruction on how to balance the rights of all parties involved and still accomplish the fair administration of justice.

III. Respondent's motions should be denied so as not to set a precedent of encouraging litigants to make unsupported and invalid arguments to the trial court knowing they can simply "consent" to relief at a later time.

As stated above, Respondent's willingness to now "consent" that his argument to the Circuit Court was erroneous is nothing more than an attempt to escape having to justify its argument to this Court. Respondent cannot be allowed to "cherry pick" the relief to which is shall be subjected as a means of avoiding the hard questions this Court would surely ask of a stance that is the polar opposite of the intent of the Rules of Professional Conduct.

Respondent was obviously aware that his argument to the Circuit Court was shifting the burden of proof for disqualification onto the former client in direct

opposition to the Rules of Professional Conduct. Respondent argued this position with great fervor to the Circuit Court and was counting on winning the first motion to dismiss with this Court to avoid having to present this position on appeal. Upon having the first motion to dismiss denied and faced with apparently being unable to even draft a response to Appellant's initial brief, Respondent devised this plan to "consent" as an attempt to avoid having his feet held to the fire to justify the argument made to the Circuit Court.

Granting Respondent's motions would set a terrible precedent of encouraging litigants to make unsupported arguments to a lower court and fight the appeal while knowing that when faced with having to eventually make a good faith argument to this Court, they could simply "consent" the argument wasn't valid to begin with, eliminate appellate jurisdiction and try a different approach with the lower court. The high standards of professional conduct expected of members of the bar by this Court require that such a course of action not be condoned or rewarded.

This "consent" plan attempted by the Respondent serves only to benefit the Respondent and the motions must be denied as allowing these motions would set a terrible precedent for future litigants and the courts.

IV. Respondent's motion to dismiss should be denied as it has already been addressed by the Court in the denial of the prior motion to dismiss and appellate jurisdiction exists under S. C. Code Section 14-3-330(2).

Respondent argues that because this Court granted jurisdiction under S.C. Code Section 14-3-330(4) as the appeal of an Order refusing to grant an injunction, and since Respondent is now willing to "consent" to the injunction, appellate jurisdiction no longer exists. This Court has already denied Respondent's first motion to dismiss, as

acknowledge by Respondent in his own memorandum, (Page 4, footnote 1) and granted jurisdiction. Despite Respondent's creative attempt, his request to "consent" the Circuit Court was in error does not eliminate appellate jurisdiction in this matter.

In responding to Respondent's first motion to dismiss, Appellant demonstrated that appellate jurisdiction existed under both S.C. Code Section 14-3-330(4) as an order refusing to grant an injunction ***AND under S.C. Code Section 14-3-330(2) as an order affecting a substantial right.*** (See Memorandum of Appellant in Opposition to Respondent's Motion to Dismiss previously filed, pp. 14 – 25, which is incorporated herein by reference as if restated verbatim). Obviously with the Court finding jurisdiction under Section 14-3-330(4) and thereby denying the motion to dismiss, it was not necessary for the Court to also confirm jurisdiction in its Order under Section 14-3-330(2). Despite Appellant's argument on this point taking a significant portion of its previously filed memorandum, Respondent has failed to even acknowledge, let along argue against the Circuit Court's rulings affecting a substantial right.

Appellate jurisdiction clearly exists under 14-3-330(2) as affecting a substantial right. As pointed out in Argument II above, the Circuit Court flat out refused to consider disqualification without Appellant providing specific confidential information in the possession of Respondent's counsel, a position Respondent now "consents" was error. However, the proposed "consent" of Respondent to remand to the Circuit Court intentionally without further instruction does absolutely nothing to change the impact the Circuit Court's ruling has on Appellant's substantial right to the fair administration of justice and the particular mode of trial to which it is entitled.

It the first motion to dismiss, Respondent relied on the recent Supreme Court decision of Enersys Delaware, Inc. v. Hopkins, 401 S.C. 615, 738 S.E.2d (2013) that a motion to disqualify does not affect a substantial right. Respondent further argued this case didn't even rise to the level of Enersys because Enersys at least involved a dispositive order denying the motion to disqualify and there is no such dispositive order in this appeal. (Respondent's Memorandum in Support of Motion to Dismiss pp. 4-5).

Appellant argued before and maintains that the position now that neither Enersys (denying motion to disqualify is not immediately appealable) or the opposite holding in Hagood (granting motion to disqualify is immediately appealable) are directly applicable in this case. 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. Appellant further argued the Circuit Court's requirement to provide specifics was in direct violation of the Rules of Professional Conduct , contrary to the Supreme Court's holding in Townsend, and clearly affects the substantial rights clients have in maintaining the confidential nature of attorney-client communications, the fair administration of justice, and to a particular mode of trial. (Appellant's Memorandum in Opposition to Motion to Dismiss, pp. 14-25).

In attempting to rebrand the current motion to dismiss as different than the first motion to dismiss, Respondent no longer relies on Enersys, a 2013 decision specifically dealing with a motion to disqualify, but instead cites the 1995 decision of Peterkin v. Brigman, 319 S.C. 367, 461 S.E.2d 809 (S.C. 1995)(appeal of the refusal to approve a settlement agreement), the 1993 decision of Mid-State Distributors, Inc. v. Century

Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (S.C. 1993)(lack of personal jurisdiction), and the 1979 decision of Knowles v. Standard Savings and Loan Association, 274 S.C. 58, 261 S.E.2d 49 (S.C. 1979)(order of class certification) as towering over the alleged "dearth of authority in this State, and in this Country, to support a contrary determination." (Respondent's Motion for Order Granting Partial Relief; and Motion to Dismiss Appellant's Remaining Issue on Appeal, p. 3) The cases are also used to support Respondent's claim that this Court cannot address the issue of disqualification since Respondent erroneously asserts there was no final determination on the issue of disqualification by the lower court.

First, Appellant has already demonstrated to this Court as shown above that the Circuit Court did make a final determination on disqualification; ***it ruled that it could not rule without Appellant providing specific confidential information***. The Respondent is now willing to "consent" that ruling was in error, but does not want the Circuit Court given any guidance on how disqualification should be addressed without having the specific confidential information.

Second, Respondent's entire argument is that, now that he "consents" the Circuit Court was in error, appellate jurisdiction no longer exists under Section 14-3-330(1). Without conceding that argument, Appellant has not contended that jurisdiction exists under Section 14-3-330(1) but rather under Section 14-3-330(2) and Section 14-3-330(4). Respondent presented no authority to refute, and hasn't even argued against, Appellant's position in response to the first motion to dismiss that appellate jurisdiction exists under 14-3-330(2) as affecting a substantial right.

Respondent's proposed authority does not address any of the substantial rights that are affected in the present case. In Peterkin, the Court ruled as part of its decision that the refusal to approve a settlement agreement did not prevent a judgment from being rendered, therefore it did not affect a substantial right under 14-3-330(2). Id. at 368, S.E.2d at 810. The Mid-State decision specifically notes in footnote 4 that the Court had previously ruled the denial of a motion to dismiss for lack of jurisdiction did not impair a substantial right. Id. at 336, S.E.2d at 781. Likewise, the Court in Knowles recognized that the Court had already determined that class certification was procedural in nature and did not involve substantial or essential legal rights. Id. at 59, S.E.2d at 49.

However, as Appellant demonstrated in the argument to the first motion to dismiss by Respondent, the Hagood court analyzed disqualification as a case of first impression just like the present case, and found that a ruling disqualifying a party's attorney does affect 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).

The Respondent's right of choosing his own attorney was exactly the reason cited by the Circuit Court as to why it was not able to rule on disqualification without giving

the Respondent the opportunity to refute the claim that its counsel possessed confidential information. (See p. 11-12 supra and Exhibit K, p. 7, ll. 19-24). However, now that Respondent is willing to "consent" this decision was error, despite the ruling of the Circuit Court that it could not make a decision without this information, Respondent again argues in support of its new motion to dismiss that the Circuit Court has made no ruling on the issue of disqualification and has not failed to apply certain case law because it hasn't yet applied any law.

Appellant presented evidence to the Circuit Court that the prior representation and current representation were substantially related, but the Circuit Court refused to consider the evidence. Appellant presented the Affidavit of Scott Dodenhoff and a comparison of the pleadings of both cases, and then argued to the Circuit Court that the law to be applied in considering disqualification was expressed by the Supreme Court in Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996). (Exhibit C., p. 8, l. 12 – p. 10, l. 10, and Exhibit H, ¶ 2, 3 & 4).

At the hearing on Appellant's Motion to Reconsider, Appellant attempted to point out that this particular situation is exactly why the Rule against representing an adversary to a former client in a substantially related case was written the way that it was written.

> **In reading the Rule and the court's analysis of that Rule as I can find, I believe that this particular situation is the reason the Rule is written the way that it is for lawyers. And I believe that it is the way – the reason that the court in the Rule put the qualification of substantially related being the determining factor of this case versus another case determining whether confidential information has been, could be, or will be used, but whether that the two types of cases are so similar in nature that the information that an attorney would obtain in that representation would necessarily, or most likely, or there would be a substantial risk, which is the language used in the Rule –**

(Exhibit K, p. 5, l. 18 – p. 6, l. 4)

After cutting Appellant's argument short, the Circuit Court stated **"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."** (Exhibit K, p. 6, ll. 5-7). The Circuit Court refused to consider analyzing the evidence presented under the standard given by the Rules of Professional Conduct and the Supreme Court in Townsend, of looking at the facts of the two cases and determining if there would be a "substantial risk" that the counsel would have obtained confidential information.

Again, as an issue of first impression, this Court is free to take its own view of the evidence presented. Hagood. Appellant presents a detailed comparison on pages 37-40 of its initial brief previously filed with this Court, comparing the former representation and the current representation, which the Circuit Court would have seen had it been willing to look at the evidence offered and consider it pursuant to the appropriate "substantially related" test. The only evidence Respondent has offered to refute the cases being "substantially related" is the general contention that both cases were foreclosures but otherwise unrelated. The Circuit Court was presented the information to make a decision under the applicable standard but determined that it was impossible to rule under that standard without specific proof that confidential information had been exchanged.

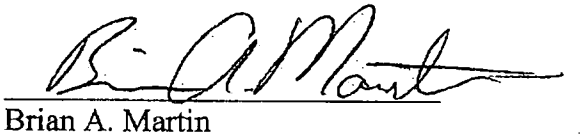
Based on the impact the order of the Circuit Court will have on the substantial right to maintain confidences and to the fair administration of justice, appellate jurisdiction is granted pursuant to S.C. Code § 14-3-330(2).

CONCLUSION

For the reasons stated above, together with Appellant's initial brief, Appellant's memorandum in opposition to respondent's motion to dismiss filed with the Court and the exhibits attached thereto and incorporated herein, the additional exhibits attached hereto and the applicable legal authority, Respondent's motion for Order granting partial relief and his second motion to dismiss must be denied. The Court should further examine these motions within the context of SCACR 269 as frivolous motions made solely for the purpose of delay and Order any other relief the Court deems necessary.

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
April 29, 2014

Exhibit M

The Supreme Court of South Carolina
OFFICE OF DISCIPLINARY COUNSEL

Lesley M. Coggiola
Disciplinary Counsel

William C. Campbell
Assistant Disciplinary Counsel

Post Office Box 12159
Columbia, South Carolina 29211

Telephone: (803) 734-2038
Fax: (803) 734-1964

December 27, 2013

PERSONAL & CONFIDENTIAL

Scott Dodenhoff
131 Sandpiper Lane
Greenville, SC 29607

Re: Lawyer: M. Stokely Holder, Esquire
Case Number: 13-DE-L-1116

Dear Mr. Dodenhoff:

This office previously informed you of its intent to dismiss the complaint you filed in connection with the above-referenced matter. You were given thirty days to submit your written request for a review of that decision. No request was received from you. Accordingly, the complaint in this matter is dismissed pursuant to the provisions of Rule 19(d)(1) of RLDE. As required by these rules, a copy of this letter is being sent to Mr. Holder as notice of the dismissal of this complaint.

Sincerely,

William C. Campbell

WCC/

cc: Brian Patrick Murphy, Esquire
Counsel for Mr. Holder

The Supreme Court of South Carolina
OFFICE OF DISCIPLINARY COUNSEL

Lesley M. Coggiola
Disciplinary Counsel

William C. Campbell
Assistant Disciplinary Counsel

Post Office Box 12159
Columbia, South Carolina 29211

Telephone: (803) 734-2038
Fax: (803) 734-1964

December 27, 2013

PERSONAL & CONFIDENTIAL

Scott Dodenhoff
131 Sandpiper Lane
Greenville, SC 29607

Re: Lawyer: John T. Crawford, Jr., Esquire
Case Number: 13-DE-L-1115

Dear Mr. Dodenhoff:

This office previously informed you of its intent to dismiss the complaint you filed in connection with the above-referenced matter. You were given thirty days to submit your written request for a review of that decision. No request was received from you. Accordingly, the complaint in this matter is dismissed pursuant to the provisions of Rule 19(d)(1) of RLDE. As required by these rules, a copy of this letter is being sent to Mr. Crawford as notice of the dismissal of this complaint.

Sincerely,

William C. Campbell

WCC/

cc: Brian Patrick Murphy, Esquire
Counsel for Mr. Crawford

The Supreme Court of South Carolina
OFFICE OF DISCIPLINARY COUNSEL

Lesley M. Coggiola
Disciplinary Counsel

Tiffany N. Richardson
Staff Attorney

Post Office Box 12159
Columbia, South Carolina 29211

Telephone: (803) 734-2038
Fax: (803) 734-1964

December 19, 2013

PERSONAL AND CONFIDENTIAL

Scott Dodenhoff
131 Sandpiper Lane
Greenville, SC 29607

RE: Lawyer: Townes Boyd Johnson, III, Esquire
Case Number: 13-DE-L-1114

Dear Mr. Dodenhoff:

As we discussed, we have received and reviewed your complaint against Townes Boyd Johnson, III, Esquire. The authority of this office and the jurisdiction of the Commission on Lawyer Conduct concerning complaints against lawyers are limited to issues of whether a lawyer has committed misconduct or is incapacitated within the guidelines of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, adopted by the Supreme Court of South Carolina.

We find that the allegations you have raised as to Mr. Johnson would not constitute misconduct or incapacity under these rules. For this reason, your complaint is dismissed pursuant to the provisions of Rule 413-19(a), SCACR.

Sincerely,

Tiffany Richardson

Tiffany N. Richardson

TNR/clg

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case No. 2013-CP-23-1833

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

v.

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

Of whom Richard M. Buckley is the .....Respondent.

RESPONDENT'S REPLY TO APPELLANT'S RETURN TO RESPONDENT'S MOTION FOR ORDER GRANTING PARTIAL RELIEF; and MOTION TO DISMISS APPELLANT'S REMAINING ISSUE ON APPEAL

M. Stokely Holder, Esquire
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
(864) 242-4899
Attorney for Respondent

Other Counsel of Record:

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

H. Stewart James, Esq.
Babb & Brown, P.C.
505 West Butler Road
Greenville, SC 29607
Co-Counsel for Appellant

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
PO Box 71727
North Charleston, SC 29415
Attorney for Defendant Wells Fargo, N.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 4

TABLE OF AUTHORITIES

STATUTES

S.C. Code Ann. § 14-3-330 4

OTHER AUTHORITIES

Rule 11, SCRCP 1

COMES NOW, Respondent, Richard M. Buckley ("Buckley"), by and through his undersigned attorney, and files this Reply to Appellant's Return (the "Appellant's Return") to Respondent's Motion (the "Motion") for Order Granting Partial Relief as Requested in Appellant's Issues on Appeal Numbered I and II; and in Support of its Motion to Dismiss Appellant's Issue Number III.

I. ARGUMENT

Appellant's Return requests the denial of the Motion because "it would set a precedent of encouraging litigants to make unsupported and invalid arguments to the trial court knowing they can simply 'consent' to relief at a later time."

As the record reflects, the lower court has not ruled on the issue of disqualification. The Appellant acknowledges this otherwise readily apparent fact in its Return where it confirms that the lower court "[did] not determine disqualification". **See page 4 of Return**. As the record also reflects, the lower court is who initiated the argument and subsequent order regarding those issues raised by Appellant for which the Respondent has offered his consent, to no avail. The Respondent did not request these rulings. In fact, the record reflects the *Respondent's* request that the lower court *grant* the Appellant's Motion to Reconsider the lower court's Order regarding the injunctive relief and to issue a ruling on the underlying issue of disqualification. The lower court did not accept this request of Respondent. If the lower court had done so and actually issued an order in favor of Respondent on the Appellant's request for disqualification, then the Respondent readily admits that the issue could properly come before this Court upon the final disposition of the case in the lower court. **See Appellant's Exhibit J, p. 3.** The

record also reflects that, much like the Appellant's attempt to ambush Respondent with its Motion to Disqualify, the Appellant never made any effort under the spirit of Rule 11, SCRCP, to discuss these issues with Respondent prior to filing this appeal. The record also reflects that after the appeal was initiated, the Appellant rejected the good faith efforts made by Respondent to consent to relief requested by the Appellant.

Appellant's Return includes the serious yet wholly unsupported allegation that Respondent has filed the Motion at issue in a "frivolous" manner "solely for the purpose of delay". **See Return pp. 1-2.** Again, as the record reflects, the Motion at issue was filed only after *the Appellant refused to accept the consent offered by Respondent to 2 of the 3 issues raised on appeal by the Appellant*. If any attempts at frivolous delay have been initiated in this matter, it has not been that of Respondent.

The Appellant states in its Return: "[c]learly, Respondent believes that he has a better chance of persuading the Circuit Court to again ignore the plain language of the Rules of Professional Conduct on disqualification than he does of persuading this Court to do the same." **See Return p. 8.** Not only does this statement enlighten the motives of Appellant in having this Court rule on an interlocutory matter, it is entirely based on a false premise and is further exemplary of a fundamental misunderstanding of the function of the lower court as compared to the function of this State's appellate court system. Due to the obvious fact that the lower court has not ruled in either the Respondent's or Appellant's favor on the underlying issue of disqualification, the conjecture initiated by the Appellant regarding the purported beliefs of Respondent on its chances of persuasion of one court versus another is void of logic, and perhaps indicative of not only

Appellant's own beliefs regarding its persuasiveness, or lack thereof, but also of Appellant's understanding and respect for the respective roles of this State's judiciary. The Respondent merely wants the lower court to issue an order on the issue of disqualification, which naturally must occur, *inter alia*, before this Court can assert its appellate role. The Respondent chooses not to respond in substance to the further unprofessional conjecture offered in the Return on what Appellant perceives as Respondent's intentions here, as the Respondent has full faith in this Court to use its learned discretion in understanding the true intentions being employed here, and the motives behind them.

Appellant's Return states that "there was a ruling by the lower court on the issue of disqualification for this Court to review." **See Return, p. 4**. Again, the record reflects the void of any such "ruling".

Appellant's Return requests the denial of the Motion because "both the bench and the bar are in need of clear direction from the Court in the application of the Rules of Professional Conduct." Out of respect for the sanctity of this Court, the undersigned purposefully did not notify this Court of the Office of Disciplinary Counsel's prior rulings in favor of Respondent's counsel. Now that Appellant has introduced these rulings to the Court[1], the Respondent respectfully suggests that these rulings speak for themselves. As is readily apparent in the Return, the vast majority of Appellant's voluminous argument is a higher pitched version of what has already been argued before the lower court and the Office of Disciplinary Counsel (the "ODC")- the result of which is just one substantive ruling, that of the ODC. The record now reflects that the Office of

1 Notably, these rulings were not appealed despite notice to Appellant of its right to do just that.

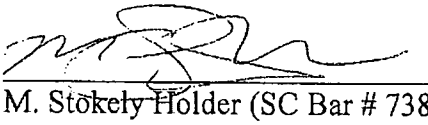
Disciplinary counsel is the only entity that has ruled on the underlying issue. Rather than properly appealing that ruling, the Appellant has initiated this Appeal with, in conjunction with the noticeable void of authority in support thereof, its increasingly perspicuous motives to try and disparage Respondent's counsel in hopes of using the threat thereof to leverage a positive outcome for itself on the seminal (unripe) issue of disqualification. The attempts to cloak such personal motives as a "novel" issue and "a case of first impression" evidence the Appellant's palpable desire to not only get continuing (untimely) bites at the apple but to present this unripe issue in a (false) light in an effort to gain leverage with the threat of publication of what the Appellant and its counsel obviously take pleasure in viewing as a threat to the professional standing of Respondent's counsel. Why else would the Appellant and its counsel be so adamantly opposed to accepting the consent offered by the opposing party to the relief *the Appellant, itself,* has requested?

Appellant's Return requests the denial of the Motion because "it has already been addressed by the Court in the denial of the prior motion to dismiss and appellate jurisdiction exists under S.C. Code Section 14-3-330(2)." The prior order of this Court, and specifically the limited grounds provided therein, speaks for itself. And, insofar as the remaining issue on appeal is concerned (that being disqualification- in light of Respondent's consent to the other relief requested by Appellant in its appeal) what remains glaring is the dearth of authority in support of this Court being able to hear an appeal of an issue that has not been the subject of a definitive order from the lower court.

II. CONCLUSION

Based on the arguments heretofore made together with the precedential authority in South Carolina relevant to the issues addressed herein and the overriding fundamental principles of judicial economy, the Respondent respectfully requests an Order from this Court granting the Respondent's Motion.

Respectfully Requested,



May 9th, 2014

M. Stokely Holder (SC Bar # 73892)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. (864) 242-4899
Fax (864) 242-4844

Attorney for Respondent

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, Respondent's motion for an order granting partial relief and dismissing remaining issues is denied. Respondent's request for an extension is granted. Respondent shall serve and file Respondents' initial brief and designation of matter within twenty days. No further extensions will be granted absent a showing of extraordinary circumstances.

FOR THE COURT

Columbia, South Carolina

FILED
6/2/14

cc:
Brian A. Martin, Esquire
Harold Stewart James, Esquire
M. Stokely Holder, Esquire

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

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,

MOTION TO STIKE MATTER FROM RESPONDENT'S DESIGNATION AND BRIEF, OR IN THE ALTERNATIVE, ORDER OFFICE OF DISCIPLINARY COUNSEL TO RELEASE ENTIRE FILE ON APPELLANT'S ETHICS COMMISSION COMPLAINT FILED JULY 26, 2013

Appellant, D&C Builders, Inc., by and through its undersigned attorney and pursuant to Rule 240, SCACR, hereby respectfully moves the Court for an Order striking certain matter from Respondent's Designation of Matter and any references, provisions or

arguments supported by such matters in Respondent's Initial Brief. This motion is based in part on Rule 210(c) of the South Carolina Rules of Appellate Procedure as being matters not presented to the lower court at all, and in part on Rule 209(b) as matters not properly included in the Record because they were not preserved for appeal.

The following items contained in Respondent's Designation of Matter and argued in Respondent's Brief were never presented to the lower court prior to the filing of the Notice of Appeal on July 26, 2013 and are not contained, incorporated or referenced in any way in the pleadings, transcripts, affidavits, orders, exhibits or other filings made to the lower court in this matter:

5. June 19, 2013 email

18. August 1, 2013 Email (emphasis added)

20 Appellant's Ethics Commission Complaint filed July 26, 2013

21. SC Supreme Court's Office of Disciplinary Counsel Ruling dated November 22, 2013

22. SC Supreme Court's Office of Disciplinary Counsel Ruling dated December 27, 2013

30. Appellants' Returns to Appellate Motions Filed by Respondent

31. April 8, 2014; June 9 and 10, 2014 email chain

32. Respondent's Motion for Partial Relief dated April 10, 2014

34. Appellant's email dated August 1, 2013

35. Initial Brief of Appellant dated November 8, 2013

40. All Appellate Filings of Appellant

Respondent's Initial Brief extensively utilizes the substance of the above improperly designated matter as the basis and support for its facts and arguments presented to the Court. Therefore, to the extent such matters are stricken from Respondent's Designation by the Court, Appellant hereby moves that any corresponding references, provisions or arguments supported by the stricken designated matters also be stricken from Respondent's Initial Brief.

Should the Court deny the motion to strike as it particularly relates to items 20, 21 and 22 of Respondent's Designation of Matter, Appellant would move pursuant to Rule 12(a) of Rule 413 of the Appellate Court Rules (Rules for Lawyer Disciplinary Enforcement) that the Court issue an Order to the Office of Disciplinary Counsel to release the entire contents of its investigation file into Appellant's Ethics Commission Complaint filed July 26, 2013 to Appellant to be included in the Record on Appeal in its entirety.

Although not presented to the lower court, Respondent argues to this Court in its brief that the determination of the Office of Disciplinary Counsel to dismiss Appellant's complaint without action supports Respondent's claims that the two cases are not "substantially related" and should be taken as authority by this Court. Undersigned counsel for Appellant did not represent Appellant in such complaint which was filed by Appellant pro se, has had no communications with the Office of Disciplinary Counsel about the matter and is not privy to what facts, circumstances, arguments or information was presented to the Office of Disciplinary Counsel regarding such matter.

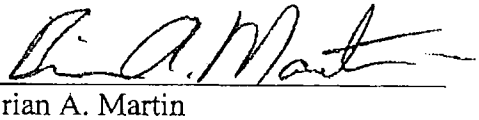
If the Court should allow Respondent's argument as to the interpretation of such decision as binding to stand, the Court must Order that all information considered by the

Office of Disciplinary Counsel in such decision be made available to Appellant for review and allow Appellant the opportunity to respond to Respondent's argument in its Reply Brief.

As a result, counsel respectfully requests an Order striking the herein referenced items from Respondent's Designation of Matter and striking all corresponding references, provisions and arguments supported by such stricken matter contained in Respondent's Initial Brief. In the alternative, if Respondent's Designation of Matter regarding Appellant's Ethics Complaint and the decision of the Office of Disciplinary Counsel are allowed to be included in the Record, counsel respectfully requests an Order requiring the Office of Disciplinary Counsel to release its entire file to Appellant for inclusion in the Record on Appeal.

Respectfully submitted,

July 1, 2014



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

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

RECEIVED
JUL 07 2014
SC COURT OF APPEALS

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,

MEMORANDUM OF APPELLANT IN SUPPORT OF APPELLANT'S MOTION TO STRIKE MATTER FROM RESPONDENT'S DESIGNATION AND BRIEF, OR IN THE ALTERNATIVE, ORDER OFFICE OF DISCIPLINARY COUNSEL TO RELEASE ENTIRE FILE ON APPELLANT'S ETHICS COMMISSION COMPLAINT FILED JULY 26, 2013

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

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

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

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

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Facts 1

Standard of Review 2

Argument 3

Conclusion 6

TABLE OF AUTHORITIES

Cases

Armstrong v. Collins, 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct.App.2005)..2, 5

Busillo v. City of North Charleston, 745 S.E.2d 142, 404 S.C. 604 (S.C.App. 2013).....2, 5

Elam v. South Carolina Dept. of Transp., 602 S.E.2d 772, 361 S.C. 9 (S.C. 2004).....2, 4

In the Interest of Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ..2, 5

State v. White, 642 S.E.2d 607, 372 S.C. 364 (S.C.App. 2007).....2, 4

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

Ulmer v. Ulmer, 632 S.E.2d 858, 369 S.C. 486 (S.C. 2006) 2, 5

Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) 2, 5

Statutes & Rules

Rule 1.9, RPC, Rule 407, SCACR.....1, 5

Rule 210(c), SCACR 2

STATEMENT OF FACTS

For a thorough examination of the Facts, Appellant would refer the Court to the Statement of Case (p. 2-4) and Statement of Facts (p. 4-13) contained in Appellant's initial brief already filed with the Court in this matter as well as the summary of facts contained in Appellant's previously filed memorandum in opposition to Respondent's Motion to Dismiss and the exhibits thereto. However, by way of a brief summary, Appellant would present the following.

Appellant filed a motion to disqualify Respondent's counsel in this matter due to a conflict of interest under Rule 1.9 of the Rules of Professional Conduct, comment 3 thereto, and the Supreme Court decision in Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (S.C. 1996). Respondent contested the disqualification on the basis that Respondent's counsel was not aware of any confidential information obtained from Appellant in the first case that would be relevant in the current case and that Appellant had not provided any specific information to prove they were in possession of such information.

The Circuit Court refused to determine the issue of disqualification until specific information was received and counsel for Respondent had an opportunity to respond. The Court therefore ordered Appellant to submit the information claimed to be confidential to both the Circuit Court ***and*** the Kenison Firm for review by written order of July 16, 2013. Appellant thereafter filed a motion to reconsider, clarify and amend order to issue an injunction, which was denied by the Circuit Court after a brief hearing on July 23, 2013 by written order filed July 25, 2013.

Appellant filed its Notice of Appeal with this Court on July 26, 2013.

STANDARD OF REVIEW

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

An appellate court will not consider issues on appeal which have not been preserved for appellate review. Ulmer v. Ulmer, 632 S.E.2d 858, 369 S.C. 486 (S.C. 2006) citing, In the Interest of Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) (holding that issues must be raised and ruled upon in the trial court to be preserved for appellate review); See also Busillo v. City of North Charleston, 745 S.E.2d 142, 404 S.C. 604 (S.C.App. 2013) citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating " an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review") and Armstrong v. Collins, 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct.App.2005) (stating " [b]ecause this argument was not presented to the trial court.... the matter is not preserved and we decline to address it").

ARGUMENT

Respondent filed its Designation of Matter to be Included in the Record on Appeal ("Designation") and its Initial Brief ("Brief") on or about June 23, 2014. The Designation contains the following items (numbered as in the Designation) that were not presented to the lower court at any time:

5. June 19, 2013 email

18. August 1, 2013 Email (emphasis added)

20 Appellant's Ethics Commission Complaint filed July 26, 2013

21. SC Supreme Court's Office of Disciplinary Counsel Ruling dated November 22, 2013

22. SC Supreme Court's Office of Disciplinary Counsel Ruling dated December 27, 2013

30. Appellants' Returns to Appellate Motions Filed by Respondent

31. April 8, 2014; June 9 and 10, 2014 email chain

32. Respondent's Motion for Partial Relief dated April 10, 2014

34. Appellant's email dated August 1, 2013

35. Initial Brief of Appellant dated November 8, 2013

40. All Appellate Filings of Appellant

Item number five (5) was a communication between counsel only regarding the substitution of counsel, and the remaining items all occurred subsequent to the filing of the Notice of Appeal with this Court on July 26, 2013 and did not include any involvement or action by the lower court.

Although not presented to the lower court, Respondent's Brief utilizes these items as support in his Statement of the Case, Statement of Facts and Arguments presented therein.

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

Since none of the items referenced above that were included in Respondent's Designation were presented to the lower court, this Court must strike those items from Respondent's Designation so that the Record on Appeal to be prepared by Appellants Counsel reflects those items that are in compliance with Rule 210(c) of the South Carolina Rules of Appellate Procedure.

In the alternative to striking these items, particularly if the Court does not strike items numbered twenty (20), twenty-one (21) and twenty-two (22), Appellant moves for the Court to Order the Office of Disciplinary Counsel (ODC) to release its entire file of the investigation into Appellant's Ethics Complaint filed July 26, 2013 to the Appellant for inclusion in the Record in its entirety.

Respondent uses these particular items designated to support argument on pages 23-28 of his Brief that the determinations of the ODC not to pursue any action against Counsel for Respondent should be taken as conclusive that there is no basis for disqualification as Appellant requested and that the two cases handled by Counsel for Respondent are therefore not "substantially related."

First of all, this argument was never presented to the lower court. The decisions of the ODC to which Respondent refers were not even made until approximately four months after this Court obtained jurisdiction. An appellate court will not consider issues on appeal which have not been preserved for appellate review. Ulmer v. Ulmer, 632 S.E.2d 858, 369 S.C. 486 (S.C. 2006) (citing, In the Interest of Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) (holding that issues must be raised and ruled upon in the trial court to be preserved for appellate review); See also Busillo v. City of North Charleston, 745 S.E.2d 142, 404 S.C. 604 (S.C.App. 2013) citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating " an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review") and Armstrong v. Collins, 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct.App.2005) (stating " [b]ecause this argument was not presented to the trial court.... the matter is not preserved and we decline to address it").

Secondly, undersigned counsel for Appellant did not represent Appellant in the filing of the Ethics Complaint referenced by the Respondent; such filing was undertaken by Appellant pro se. Undersigned counsel is therefore not privy to what information, exhibits, responses, interviews or other actions were undertaken by the ODC or was provided to the ODC by Respondent's counsel and certainly was not privy to the basis for their decision, which admittedly seems directly opposite of the explicit directive contained in Rule 1.9 that is the subject of this appeal.

Although Respondent's argument and the designated support are indicative of the necessity of the clarification of the applicability of Rule 1.9 as requested in Appellant's Brief, the designated matter and arguments were not presented to the lower court and are

not proper to be included in the Record on Appeal or Respondent's Brief. Those matters designated and the arguments supported by such matter must be stricken.

In the event the Court deems it prudent and justified to more thoroughly examine the Ethics Complaint and decisions of the ODC referenced by Respondent, the Court cannot simply accept Respondent's assertion that the only possible basis was that the matters weren't "substantially related." It is just as likely that the ODC could have reached their decision based on their interpretation of the circuit court's ruling and a lack of authority to overrule the circuit court's order that brought about this appeal. Regardless of the possible reasons, if the Court wishes to consider the ODC's rulings in evaluating this appeal, it must examine all of the contents of the ODC file to determine the actual basis for such a determination in light of the clear direction of Rule 1.9. Appellant must also be afforded the opportunity to review this information and respond to the argument by Respondent.

Therefore, should the Court deny the Motion to Strike as it applies to Respondent's designated items regarding the Ethics Complaint filed July 26, 2013 or the rulings of the ODC, Appellant must be afforded the opportunity to examine the full contents of the ODC file to respond accordingly in its Reply Brief. Therefore, this Court should issue an Order to the ODC to release such information.

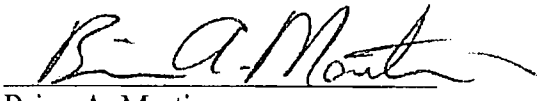
CONCLUSION

For the reasons stated above, together with the Notice of Appeal, Appellant's initial brief, and all other filings in this matter, Appellant's Motion to Strike should be granted and the specifically referenced items contained in Respondent's Designation

should be stricken as well as any references, support or argument based on such matters in Respondent's Brief. In the alternative to striking items 20, 21 and 22, the Court should issue an Order to the ODC to release the entire contents of its investigation file on Appellant's Ethics Complaint to the Appellant.

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
July 1, 2014

THE STATE OF SOUTH CAROLINA
IN THE 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 is the .....Respondent.

INITIAL BRIEF OF RESPONDENT

M. Stokely Holder, Esquire
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. 864.242.4899
Fax 864.242.4844

Other Counsel of Record:
Brian A. Martin, Esq.
212 Trade Street
Greer, South Carolina 29651
(864) 879-7779
Attorney for Appellant

H. Stewart James, Esq.
Babb & Brown, P.C.
505 West Butler Road
Greenville, SC 29607
Co-Counsel for Appellant

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
PO Box 71727
North Charleston, SC 29415
Attorney for Defendant Wells Fargo, N.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 7

ARGUMENT 17

I. DID THE LOWER COURT ERR IN ORDERING APPELLANT TO REVEAL TO THE LOWER COURT AD TO RESPONDENT'S COUNSEL THE SPECIFIC INFORMATION THAT APPELLANT HAS ONLY ENERALLY ALLEGED TO BE INFORMATION PREVIOUSLY PROVIDED BY APPELLANT TO RESPONDENT'S COUNSEL WHICH ALLEGEDLY SUBSTANTIATES APPELLANT'S REQUEST FOR DISQUALIFICATION? 17

II. DID THE LOWER COURT ISSUE A DISPOSITIVE ORDER DENYING THE APPELLANT'S MOTION TO DISQUALIFY? 18

A. IF NOT, IS THE APPEAL OF THIS ISSUE RIPE? 19

B. IF SO, DID THE LOWER COURT COMMIT ERROR? 23

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Corbin v. Kohler Co., 351 S.C. 613, 620, 571 S.E.2d 92, 96 (Ct.App.2002).....20

Enersys Delaware, Inc. v. Hopkins, 401 S.C. 615, 738 S.E.2d 478 (2013) 19, 20, 21, 22, 23

Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005).....19

Simpson v. Simpson, 377 S.C. 519, 525, 660 S.E.2d 274, 277 (Ct. App. 2008).....20

State v. Wilson, 387 S.C. 597, 600, 693 S.E.2d 923, 924 (2010).....20

Townsend v. Townsend, 323 S.C. 309, 315, 474 S.E.2d 424, 428 (1996).....27

STATUTES

S.C. Code Ann. § 14-3-330 (1979 & Supp. 2012).....19, 20, 21, 22

OTHER AUTHORITIES

Rule 19(d)(1) of Rules for Lawyer Disciplinary Enforcement.....6, 7, 25

Rule 413, SCACR.....25

Rule 1.9, South Carolina Rules of Professional Conduct.....15, 26, 27

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?

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

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. ***[Mech. Lien]*** On April 1, 2013, the Appellant filed a lawsuit against Respondent for the foreclosure of the previously filed Mechanic's Lien. ***[Appellant Lawsuit]***

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. ***[2013 Action]***

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 simply wrote an email in response stating that: "I received your message but it has been a busy day." ***[6/19/13 Email]***

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. ***[Transcript 6/20/13 Hearing]*** 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. ***[Transcript 7/8/13 Hearing]*** 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. ***[7/15/13 4:54pm Email]*** 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. ***[July 15, 2013 Order]***

Shortly after the lower court's aforementioned 4:54 PM email, at 5:13 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." ***[7/15/13 5:13 PM Email]*** 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. ***[Email 7/15/13 5:21 PM]***

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." ***[7/16/13 Email]*** 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." ***[Motion to Reconsider]***

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." ***[July 17, 2013 Email]*** 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". ***[July 18, 2013 Email]*** 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. ***[July 18, 2013 Email and Letter]***

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. ***[Order July 25, 2013]***

In response to an email from the lower court's law clerk on August 1, 2013 inquiring about the status of the privilege log, Appellant's counsel informed the lower court that it had filed a Notice of Appeal on "Thursday, July 25, 2013, appealing Judge Miller's Order requiring the privilege log and the Order ***denying an injunction against defense counsel from viewing the information it provided to the Court.*** ***[August 1, 2013 Email (emphasis added)]***

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." ***[Notice of Appeal (emphasis added)]***

On July 26, 2013, the Appellant filed its previously referenced/threatened complaint with South Carolina Supreme Court's Commission on Lawyer Conduct. ***[Ethics Commission Complaint]*** The complaint was 185 pages long. On November 22, 2013, the South Carolina Supreme Court's Office of Disciplinary Counsel issued a ruling on said Ethics Complaint. In the ruling addressed to Appellant, it stated, in pertinent part:

> In your letter of complaint, you allege that [the attorneys of the KDC firm] undertook to represent an opposing party after having previously represented your company which you contend is a conflict of interest. As a result of your letter, this office conducted an investigation to ascertain if [the attorneys of the KDC firm's] conduct violated the Rules of Professional Conduct and the RLDE [Rules for Lawyer Disciplinary Enforcement].
>
> From our investigation, this office has determined that there is no evidence of any such lawyer misconduct on the party of [the attorneys of the KDC firm] arising out of the events mentioned in your complaint and that further investigation would not likely reveal any such evidence.
>
> Accordingly, you are hereby notified of the intent of this office to dismiss your complaint pursuant to the provisions of Rule 19(d)(1) of RDLE. You may seek a review of this decision by an investigative panel of the Commission on Lawyer Conduct by filing a written request, which must be received in this office no later than December 23, 2013.

[SC Sup. Ct. Office of Disciplinary Counsel Ruling 11/22/13]

On December 27, 2013, the SC Supreme Court's Office of Disciplinary Counsel issued a subsequent letter and ruling stating, in pertinent part:

> This office previously informed you of its intent to dismiss the complaint you filed in connection with the above-referenced matter. You were given thirty days to submit your written request for a review of that decision. No request was received from you. Accordingly, the complaint in this matter is dismissed pursuant to the provisions of Rule 19(d)(1) of RLDE.

[SC Sup. Ct. Office of Disciplinary Counsel Ruling 12/27/13]

STATEMENT OF FACTS

The Respondent is 84 years old. ***[2013 Action]*** 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.]*** 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.; Affidavit of Buckley]***

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. ***[2013 Action]*** 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. ***[Mech. Lien]***

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. ***[Affidavits of Attorneys Holder, Heckman]*** 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. ***[Affidavits of Attorneys Crawford, Johnson, Holder]*** 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. ***[Affidavit of Attorney Holder]*** 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. ***[Affidavits of Attorneys Holder, Crawford, Johnson]***

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. ***[Affidavits of Buckley, Attorney Holder]*** 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.; 2013 Action]*** 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. ***[Affidavits of Buckley, Attorney Holder]***

An Answer, Counterclaims, and Third-Party Claims together with a Motion to Dismiss was filed by the KDC firm on behalf of the Buckleys. ***[2013 Action]*** Appellant filed its Motion to Disqualify and in an abundance of caution, Attorney Holder again met with Attorneys Johnson and Crawford, who explained that they 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 Buckley project. ***[Id.]***

After reviewing the KDC firm file and subsequent to their discussions regarding same, attorneys Crawford and Johnson conclude that they were unaware of any confidential information that was disclosed by Appellant during their prior representation of Appellant. ***[Id.]*** The KDC firm also discussed the facts with outside counsel. ***[Id.]*** 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. ***[Affidavits of Attorneys Heckman, Crawford, Johnson, Holder and Affidavit of Buckley]***

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. ***[All Hearing Transcripts]*** However, when Judge

Miller requested what the specific confidential information could be (as the affidavit testimony of the Buckleys made showed that the Appellant itself had shared detailed information with the Respondent about not only 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.]* 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.; Email and Letter Correspondence from Appellant's Counsel to Lower Court]*** 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. ***[July 11, 2013 email]*** Strikingly, the Appellant represented to the lower court that Appellant understood the lower court had not ultimately ruled on the Motion to Disqualify. ***[July 11, 2013 Ltr, p. 6 ("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. ***[Hearing Transcripts; Affidavits of Buckley, Attorneys Holder, Crawford, Johnson]*** 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.

This conclusion is easily reached when considering Appellant's rejection of the KDC firm's recent offers to consent to Appellant's requested relief. ***[Appellants' Returns to Appellate Motions Filed by Respondent; Emails April 8, 2014; June 9 and 10, 2014]*** As discussed in Respondent's 'Motion for Order Granting Partial Relief and Dismissing

Remaining Claims', the Respondent offered its consent to the relief sought in Appellant's Issues 1 and 2; however, the Appellant refused to accept the Respondent's offer by explaining to Appellant's counsel that unless Respondent's counsel agreed to the full relief requested (including the KDC firm's removal as counsel for Buckley) then the Appellant would not agree to any partial relief. ***[Id.; Motion for Partial Relief]*** Subsequent to this Court's Order denying said Motion of Respondent, Respondent's counsel agreed to discuss with Appellant's counsel the withdrawal of the KDC firm solely in an effort to end the appeal and allow the Buckleys to litigate the claims. ***[Id.]*** Yet, Appellant rejected the Respondent's offer based on its stated desire to prolong the appeals process, further delaying the resolution of the Buckley's claims. ***[Id.]***

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. ***[Transcripts of Lower Court Hearings]*** 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. ***[Email and Letter July 18, 2013]*** 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. ***[Order July 25, 2013]***

This consent of Respondent was further shown in its recent Motion for Order Granting Partial Relief and Dismissing Remaining Claims, which was denied *in toto* by this Court. ***[Motion for Partial Relief]*** As evidenced by said Motion, the Appellant had previously rejected the Respondent's same attempt to consent to Appellant's own requested relief. ***[Id.]***

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. ***[Transcripts of all Lower Court Hearings; all Correspondence between Counsel and/or the Lower Court; all Orders of the Lower Court; all Appellate Filings of Appellant]***

The Order of the lower court states in no uncertain terms that "the Plaintiff's Motion [to Disqualify] shall be held in abeyance." *[7/15/13 Order, p. 3]* The Appellant's separate correspondence to the lower court states that "**in the event that** the Motion to Disqualify is ultimately denied..." *[App. Ltr 7/11/13, p. 6]* Another of Appellant's correspondence to the lower court states: "I am hopeful that the Court of Appeals can provide some further guidance in how to balance the evidentiary need for the Court to have information from confidential attorney/client communications **in order to make a decision on the Motion to Disqualify**..." *[App. Email 8/1/13 (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.; Notice of Appeal (emphasis added)]* And, strikingly, the Appellant's Initial Brief perspicuously states by citation to the lower court's "Order of July 16, 2013, p. 3": "**The Motion to Disqualify was held in abeyance by the Court pending receipt of this information.**" *[App. Initial Brief, p. 3 (emphasis added)]*

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).

Enersys 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 Enersys case is perhaps the most analogous appellate case in this State to the current issues in the case at hand. Notably, in the Enersys 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 Enersys 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, by reference to this subsection in the 'Standard of Review' portion of its Initial Brief, appears to concede that this particular contention in its appeal is governed by this subsection 2. ***[App. Initial Brief p. 13]***

The glaring difference between the Enersys case and this case is that the lower court in Enersys actually issued a dispositive order on the motion; whereas, here, no such order has been rendered. **Even still, in the Enersys 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 Enersys 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. That is the premise behind the Appellant's entire argument in support of its third issue on appeal. ***[App. Initial Brief, pp. 37-43]***

However, again, the entire record on appeal does not support this contention. It is telling that on page 13 of Appellant's Initial Brief 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...". ***[App. Initial Brief, p. 13]*** 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 Enersys opinion concluding otherwise on the exact same issue), the Appellant went to great lengths in its

Initial Brief to frame the issue of disqualification as an ethical issue. ***[App. Initial Brief pp. 14-45]*** ("**Disqualification is an ethical, not a legal matter**".) 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". ***[July 18, 2013 Email]***. A week later, the Appellant sought such guidance by filing a complaint with the South Carolina Supreme Court's Commission on Lawyer Conduct. ***[Ethics Commission Complaint]*** The complaint was 185 pages long. Respondent's counsel was notified by the Supreme Court of South Carolina's Office of Disciplinary Counsel that it would be investigating the claim.

On November 22, 2013, the South Carolina Supreme Court's Office of Disciplinary Counsel issued a ruling based on the investigation it completed of said Ethics Complaint. In the ruling addressed to Appellant, it stated, in pertinent part:

> In your letter of complaint, you allege that [the attorneys of the KDC firm] undertook to represent an opposing party after having previously represented your company which you contend is a conflict of interest. As a result of your letter, this office conducted an investigation to ascertain if [the attorneys of the KDC firm's] conduct violated the Rules of Professional Conduct and the RLDE [Rules for Lawyer Disciplinary Enforcement].

> From our investigation, this office has determined that there is no evidence of any such lawyer misconduct on the party of [the attorneys of the KDC firm] arising out of the events mentioned in your complaint and that further investigation would not likely reveal any such evidence.
>
> Accordingly, you are hereby notified of the intent of this office to dismiss your complaint pursuant to the provisions of Rule 19(d)(1) of RDLE. You may seek a review of this decision by an investigative panel of the Commission on Lawyer Conduct by filing a written request, which must be received in this office no later than December 23, 2013.

[SC Sup. Ct. Office of Disciplinary Counsel Ruling 11/22/13]

On December 27, 2013, the SC Supreme Court's Office of Disciplinary Counsel issued a subsequent letter and ruling stating, in pertinent part:

> This office previously informed you of its intent to dismiss the complaint you filed in connection with the above-referenced matter. You were given thirty days to submit your written request for a review of that decision. No request was received from you. Accordingly, the complaint in this matter is dismissed pursuant to the provisions of Rule 19(d)(1) of RLDE.

[SC Sup. Ct. Office of Disciplinary Counsel Ruling 12/27/13]

As the Appellant is obviously aware, the investigation it requested of, and the conclusion/resolution it received from, the South Carolina Supreme Court Commission on Lawyer Conduct was derived from that authority provided under Rule 413, SCACR. As with the Appellant's citations in its Initial Brief to those opinions regarding the ethical nature of the issues it has raised ***[App. Initial Brief pp. 14-15]***, Rule 413 makes clear the purpose of the South Carolina Supreme Court Commission on Lawyer Conduct in "the regulation of the conduct of lawyers is critical to preserving the integrity of the legal profession and enhancing public confidence in the judicial system. These rules provide the procedure for resolving allegations that a lawyer has committed ethical misconduct". Rule 413.1, SCACR. As evidenced by the Appellant's Complaint to the SC Supreme Court

Commission on Lawyer Conduct and by the Appellant's own prior representation to the lower court regarding the "very beneficial" guidance the Commission could provide to "the ethical complexities" at issue here, the Appellant clearly places significant weight on the conclusions reached by the Commission, including the Commission's conclusions to the issues Appellant unsuccessfully brought before it.

The Commission is clearly qualified to render opinions on ethical issues such as the ones presented here. By the admission of even Appellant, the Commission's decision in this instance should not be ignored. The Appellant's choosing to not even request reconsideration of the Commission's decision is very enlightening.

Of course, the Commission's investigation centered upon the same Rules of Professional Conduct that it is empowered to not only interpret and enforce in accordance with SC law but also to initiate amendments thereto. These are the same rules and opinions the Appellant went to great lengths in its Initial Brief and in its Complaint to the Commission to highlight in an effort to obtain a favorable ruling. Rule 1.9, together with its comments and those opinions issued by the appellate courts of this State, are repeatedly referenced by Appellant as the authority for its position. However, as the Commission concluded, the Appellant is incorrect in its assertion that the KDC firm violated the Rules of Professional Conduct. The facts and circumstances here lead to the conclusions that the 2011 Action and the 2013 Action are not substantially related and the KDC firm did not learn confidential information in the 2011 Action such that there is no confidential information in the possession of Respondent's counsel that would be, or could be, of significance in the 2013 Action that will injuriously affect the Appellant.

As apparently recognized by the Commission, 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".1 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 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.

As the South Carolina Supreme Court Commission on Lawyer Conduct properly concluded (without objection from Appellant), KDC firm did not violate the Rules of

---

1 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.

Professional Conduct. The two cases at issue are not substantially related. They are entirely separate and distinct situations/transactions with entirely distinct facts. 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, securing different alleged debts and arising from completely unrelated facts. ***[Pleadings in 2013 Action; Pleadings and Entire File on 2011 Action]*** 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. What remains clear is that the Appellant allowed the information it is apparently complaining about to be generally known – to (at a minimum) *the Defendant/Respondent in this action.*

The Commission was delegated by the law of this State to resolve these very allegations regarding whether a lawyer has committed ethical misconduct. The Appellant voluntarily submitted this very issue to the province of the Commission with the understanding that the Commission was best suited to render a decision on the issue, and that its decision would carry significant weight in guiding the court. The Commission rejected the Appellant's claims.

CONCLUSION

For the foregoing reasons, Appellant 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,

June 19, 2014

M. Stokely Holder (SC Bar # 73892)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. (864) 242-4899
Fax (864) 242-4844

Attorney for Respondent

THE STATE OF SOUTH CAROLINA
IN THE 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 is the .....Respondent.

DESIGNATION OF MATTER TO
BE INCLUDED IN THE RECORD ON APPEAL

Respondent proposes the following be included in the Record on Appeal:

1. Mechanic's Lien dated February 10, 2013
2. Appellant Lawsuit filed April 1, 2013
3. Respondent's Motion to Dismiss filed May 13, 2013
4. Respondent's Answer, Counterclaims and Third-Party Claims filed May 13, 2013
5. June 19, 2013 email

6. Transcript June 20, 2013 Hearing

7. Transcript July 8, 2013 Hearing

8. July 15, 2013 4:54pm email from Honorable Edward W. Miller

9. Order of the Honorable Edward W. Miller, dated July 15, 2013

10. July 15, 2013 5:13 PM email

11. Email July 15, 2013 5:21 PM

12. July 16, 2013 email

13. Appellant's Motion to Reconsider, Clarify and Amend Order to Issue Injunction dated July 16, 2013

14. July 17, 2013 email

15. July 18, 2013 email

16. July 18, 2013 email and letter

17. Order of the Honorable Edward W. Miller dated July 25, 2013

18. August 1, 2013 Email (emphasis added

19. Appellant's Notice of Appeal filed July 25, 2013

20. Appellant's Ethics Commission Complaint filed July 26, 2013

21. SC Supreme Court's Office of Disciplinary Counsel Ruling dated November 22, 2013

22. SC Supreme Court's Office of Disciplinary Counsel Ruling dated December 27, 2013

23. Affidavit of Pamela Burns-Byers Buckley filed July 8, 2013

24. Affidavit of M. Stokely Holder, Esq. filed July 8, 2013

25. Affidavit of John H. Heckman, Esq. filed July 8, 2013

26. Affidavit of John T. Crawford, Jr., Esq. filed July 8, 2013

27. Affidavit of Townes B. Johnson, III, Esq. filed July 8, 2013

28. July 18, 2013 email chain and letter correspondence from Appellant's Counsel to Lower Court

29. July 11, 2013 email

30. Appellants' Returns to Appellate Motions Filed by Respondent

31. April 8, 2014; June 9 and 10, 2014 email chain

32. Respondent's Motion for Partial Relief dated April 10, 2014

33. Appellant's letter dated July 11, 2013

34. Appellant's email dated August 1, 2013

35. Initial Brief of Appellant dated November 8, 2013

36. Transcripts of all Lower Court Hearings

37. All Hearing Transcripts

38. All Correspondence between Counsel and/or the Lower Court

39. All Orders of the Lower Court

40. All Appellate Filings of Appellant

41. Pleadings in 2013 Action

42. Pleadings and Entire File on 2011 Action

[CERTIFICATION AND SIGNATURE ON NEXT PAGE]

I certify that this designation contains no matter which is irrelevant to this appeal.

June 19, 2014.

M. Stokely Holder (SC Bar # 73892)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
(864) 242-4899

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case No. 2013-CP-23-1833

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

v.

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

Of whom Richard M. Buckley is the .....Respondent.

RESPONDENT'S RETURN TO APPELLANT'S MOTION TO STRIKE MATTER FROM RESPONDENT'S DESIGNATION AND BRIEF, or in the alternative, ORDER OFFICE OF DISCIPLINARY COUNSEL TO RELEASE ENTIRE FILE ON APPELLANT'S ETHICS COMMISSION COMPLAINT FILED ON JULY 26, 2013

M. Stokely Holder, Esquire
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
(864) 242-4899
Attorney for Respondent

Other Counsel of Record:
Brian A. Martin, Esquire
Brian A. Martin, LLC
212 Trade Street
Greer, SC 29651
(864) 879-7779
Attorney for Appellant

H. Stewart James, Esq.
Babb & Brown, P.C.
505 West Butler Road
Greenville, SC 29607
Co-Counsel for Appellant

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
PO Box 71727
North Charleston, SC 29415
Attorney for Defendant Wells Fargo, N.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT

APPELLATE PRESERVATION 1

ETHICS COMMISSION FILE 4

TABLE OF AUTHORITIES

CASES

Armstrong v. Collins, 366 S.C. 204, 225, 621 S.E.2d 368, 378-379 (Ct.App. 2005) 3

Busillo, 404 SC 604, 745 S.E.2d 142 (Ct.App. 2013) 3

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

Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (Ct.App. 2002).....3

Ulmer v. Ulmer, 369 S.C. 486, 632 S.E.2d 858 (2006).....3

Wilder Corp., 330 S.C. 71, 497 S.E.2d 731 3

OTHER AUTHORITIES

Rule 413 SCACR.....4

Respondent, Richard M. Buckley, by and through its undersigned counsel hereby submits this Return to Appellant's Motion to Strike Matter from Respondent's Designation and Brief, or in the alternative, to Release Entire File on Appellant's Ethics Commission Complaint Filed July 26, 2013 (the "Motion to Strike"), and requests the Court to deny same.

Appellate Preservation

In Appellant's Motion to Strike, it seeks to strike from the Record on Appeal, including the Respondent's Initial Brief and Designation, all references to, and argument regarding, the Ethics Complaint filed by Appellant. The basis for this Motion to Strike is that such matters were allegedly not presented to the lower court at all, and were allegedly not preserved for appeal.

The Appellant's Motion to Strike should be denied because the Appellant is the party who raised the precise issue of the involvement of the Ethics Commission in this dispute. Notably, the Appellant raised this precise issue to the lower court in a writing addressed to the lower court on July 18, 2013 in support of its Motion to Reconsider. The Appellant explained to the lower court in support of its previously filed Motion to Reconsider that an opinion from the Ethics Commission would provide "guidance in light of the ethical complexities [at issue]" and that such an opinion "would be very beneficial". **App. Email 7.18.13.** The Judge denied the Appellant's Motion to Reconsider at a hearing on July 23, 2013. **Lower Ct. Order 7.25.13.** On July 26, 2013, the Appellant initiated this appeal. **Notice of App.** Also on July 26, 2013, the Appellant filed its Ethics Complaint. **Ethics Comp.**

On November 8, 2013, the Appellant filed its Initial Brief wherein the Appellant

made voluminous arguments about the ethical nature of this issue on appeal. **App. Init. Brief.** The Ethics Commission dismissed the Appellant's complaint on November 22, 2013. **Ethics Comm. 11.22.13.** Notably, the Appellant chose not to appeal that decision. Yet, the Appellant further referenced the ethical nature of this dispute in its subsequent filings with this Court[1], to include, without limitation, a direct reference to the Ethics Commission's finding in favor of the Respondent- and how that supported Appellant's appeal because, as Appellant asserts, the Ethics Commission, together with the lower court, need guidance from this Court on the issue. **App.'s Return 4.29.14, pp. 12-14; App. Email 7.18.13.** In Appellant's April 24, 2014 filings with this Court, the Appellant actually attached the Ethics Commission's rulings as exhibits and then referenced them in numerous paragraphs worth of argument to this Court about how the Commission and the lower court were both in error. **Id.**

Therefore, contrary to the Appellant's representations, the issues were presented to the lower court, included in the Record on Appeal, and preserved for appeal – all by Appellant himself.

The Appellant cites the case of Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004), in support of its contention that the record on appeal shall not include matter which was not presented to the lower court. However, here, the Appellant himself presented this issue regarding the Ethics Commission to the lower court in support of his own Motion to Reconsider, which the lower court denied. **App. Email 7.18.13; Lower Ct. Order.7.25.13.**

---

1 See Appellant's April 29, 2014 'Return to Respondent's Motion for Order Granting Partial Relief and Motion to Dismiss Appellant's Remaining Issue on Appeal'. See also Appellant's December 9, 2013 Return to Motion to Dismiss ("Respondent's Motion to Dismiss seeks to mischaracterize Appellant's refusal to provide the ordered privilege log as a 'procedural' issue rather than an 'ethical' issue so as to avoid having to justify the clear violation of Rule 1.9 of the Rules of Professional Conduct to this Court.")

In the 2006 Ulmer v. Ulmer case cited by Appellant in its Motion to Strike, the South Carolina Supreme Court dealt with the proper post-trial procedure for perfecting an appeal, which is not at issue here. Ulmer v. Ulmer, 369 S.C. 486, 632 S.E.2d 858 (2006).

In the 2005 Armstrong v. Collins case cited by Appellant in its Motion to Strike, this Court stated (in response to the standard respondent's contention of failure to preserve) that the Appellant never raised the argument at issue before the lower court. Armstrong v. Collins, 366 S.C. 204, 225, 621 S.E.2d 368, 378-379 (Ct.App. 2005). However, here, the argument was raised before the lower court- by Appellant.

In the 2002 In re Michael H. case cited by Appellant in its Motion to Strike, this Court stated in its opinion (in denying the standard respondent's contention of failure to preserve) that the "trial court must be given an opportunity to resolve the issue before it is presented to the lower court". In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (Ct.App. 2002). It is undisputed here that the Appellant raised the issue before the lower court[2] in its argument in support of its Motion to Reconsider, giving the lower court the opportunity to resolve the issue in accordance with the dictates of In re Michael H.. The lower court denied the Appellant's Motion to Reconsider.

Both the Busillo v. City of North Charleston case and the Wilder Corp. v. Wilke case cited by the Appellant each deal specifically with the preservation of an Appellant's objection for appellate review and the adequateness of Appellant presenting an objection to the lower court. Busillo, 404 SC 604, 745 S.E.2d 142 (Ct.App. 2013); Wilder Corp., 330 S.C. 71, 497 S.E.2d 731. That is not an issue on this appeal.

For the foregoing reasons, the Appellant's Motion to Strike should be denied.

---

2 Whether the lower court ruled on the ultimate issue of disqualification is the basis of Respondent' argument regarding the appellate ripeness of the issue.

Ethics Commission File

In accordance with Rule 413, SCACR, and as such is strictly prohibited thereby, the Appellant's request for an Order to release the entire Ethics Commission file should be denied by this Court.

Respectfully Requested,

July 22, 2014

M. Stokely Holder (SC Bar # 73892)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. (864) 242-4899
Fax (864) 242-4844

Attorney for Respondent

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, Appellant's motion to strike is granted because Respondent failed to prove the actual designated matters themselves were presented to the lower court. *See* Rule 210(c), SCACR ("The Record shall not . . . include matter which was not presented to the lower court or tribunal."). Within twenty days, Respondent shall serve and file an amended initial brief that excludes citations to the stricken matter and an amended designation of matter omitting the stricken matters.

FOR THE COURT

Columbia, South Carolina

FILED

August 21, 2014

cc:
Brian A. Martin, Esquire
Harold Stewart James, Esquire
M. Stokely Holder, Esquire

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Appellate Case No. 2013-001645
(Trial Court Case No. 2013-CP-23-1833)

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

v.

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

Of whom Richard M. Buckley is the .....Respondent.

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

Respondent, Richard M. Buckley, by and through its undersigned attorney and pursuant to Rule 240, SCACR, respectfully moves the Court for an Order striking certain matter from Respondent's Designation of Matter and any references, provisions or arguments supported by such matters in Appellant's Initial Brief. This motion is based in part on Rule 210(c) of the South Carolina Rules of Appellate Procedure as being matters not presented to the lower court, and in part on Rule 209(b) as matters not properly included in the Record because they were not preserved for appeal.

None of the following items contained in Appellant's Designation of Matter and argued in Appellant's Brief were ever presented to the lower court prior to the filing of the Notice of Appeal on July 26, 2013 and were not otherwise introduced and made a part of the record in the same manner as other evidence:

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

The above improperly designated matter is a case out of an entirely different proceeding in an entirely different jurisdiction at an entirely different time, none of the 'entire contents' of which were ever made a part of the record in this matter. It is well established in this State that records from another proceeding cannot be considered by an appellate court unless they were introduced and made a part of the record in the same manner as other evidence.

As a result, counsel respectfully requests an Order striking the herein referenced item from Appellant's Designation of Matter and striking all corresponding references, provisions and arguments supported by such stricken matter contained in Appellant's Initial Brief.

Respectfully Submitted,



September 11, 2014

M. Stokely Holder (SC Bar # 73892)
John T. Crawford, Jr. (SC Bar # 69682)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. (864) 242-4899
Fax (864) 242-4844

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case No. 2013-CP-23-1833

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

v.

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

Of whom Richard M. Buckley is the ..... Respondent.

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

M. Stokely Holder, Esquire
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
(864) 242-4899
Attorney for Respondent

Other Counsel of Record:

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

H. Stewart James, Esq.
Babb & Brown, P.C.
505 West Butler Road
Greenville, SC 29607
Co-Counsel for Appellant

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
PO Box 71727
North Charleston, SC 29415
Attorney for Defendant Wells Fargo, N.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE FACTS 1

STANDARD OF REVIEW 2

ARGUMENT 3

CONCLUSION 4

TABLE OF AUTHORITIES

CASES

Armstrong v. Collins, 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct,App.2005).....3

Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 186 (Ct. App. 1984) 2, 3

Betsill v. Betsill, 187 S.C. 50, 196 S.E. 381 (1938) 2, 3

Busillo v. City of North Charleston, 745 S.E.2d 142, 404 S.C. 604 (S.C.App. 2013).....2

Conran v. Joe Jenkins Realty, Inc., 263 S.C. 332, 210 S.E.2d 309 (1974).....2

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

In the Interest of Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004).....2

Richland County v. Carolina Chloride, Inc., 382 S.C. 634, 677 S.E.2d 892 (Ct.App. 2009).....2

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

Ulmer v. Ulmer, 632 S.E.2d 858, 369 S.C. 486 (S.C. 2006) 2

Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) 3

STATUTES AND RULES

Rule 1.9, Rules of Professional Conduct 1

Rule 210(c), SCACR 2, 3, 4

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

I. STATEMENT OF FACTS

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

Appellant filed a Motion to Disqualify Respondent's counsel in this matter due to an alleged conflict of interest under Rule 1.9 of the Rules of Professional Conduct, which the Appellant claims arose by virtue of Respondent's law firm's representation of Appellant in an entirely separate and distinct matter years prior in an entirely separate jurisdiction (the separate matter being a case filed in the Spartanburg County Court of Common Pleas titled D&C Builders, Inc. v. TMKG, Inc., 2011-CP-42-04141 (the "TMKG Matter"). The Circuit Court held the Motion in abeyance until the Appellant provided the lower court with specific information in support of its allegations. Without providing any substantive information, the Appellant thereafter filed a motion to reconsider, clarify and amend order to issue an injunction, which was denied by the lower court after a brief hearing on July 23, 2013 by written order filed July 25, 2013.

Appellant filed its Notice of Appeal with this Court on July 26, 2013. At no point in time did the Appellant ever introduce and make a part of the record in the lower court a single solitary document or record from the TMKG Matter.

II. STANDARD OF REVIEW

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

Rule 210(c), SCACR requires that the record on appeal shall not include matter which was not presented to lower court. Elam v. South Carolina Dept. of Transp., 602 S.E.2d 772, 361 S.C. 9 (S.C. 2004), State v. White, 642 S.E.2d 607, 372 S.C. 364 (S.C.App. 2007). The appellate court is confined to the record in deciding issues on appeal. Richland County v. Carolina Chloride, Inc., 382 S.C. 634, 677 S.E.2d 892 (Ct.App. 2009).

An appellate court will not consider issues on appeal which have not been preserved for appellate review. Ulmer v. Ulmer, 632 S.E.2d 858, 369 S.C. 486 (S.C. 2006) citing, In the Interest of Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) (holding that issues must be raised and ruled upon in the trial court to be preserved for appellate review); See also Busillo v. City of North Charleston, 745 S.E.2d 142, 404

S.C. 604 (S.C.App. 2013) citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating " an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review") and Armstrong v. Collins, 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct.App.2005).

III. ARGUMENT

Appellant filed its Designation of Matter to be Included in the Record on Appeal ("Designation") and its Initial Brief ("Brief") on or about November 8, 2013. The Designation contains the following items (numbered as in the Designation) that were not presented to the lower court at any time:

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

Although not one shred of any of the "entire contents" of the above referenced TMKG Matter was made a part of the Record with the lower court by Appellant, Appellant's Brief utilizes these items as support in its Statement of the Case, Statement of Facts and Arguments presented therein.

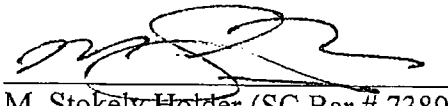
"[R]ecords in another proceeding cannot be considered by an appellate court unless they were introduced and made a part of the Record in the same manner as other evidence" Beall v. Doe, 281 S.C. 363, 315 S.E. 2d 186 (Ct. App. 1984); Betsill v. Betsill, 187 S.C. 50, 196 S.E. 381 (1938). Rule 210(c), SCACR requires that the record on appeal shall not include matter which was not presented to lower court. Elam v. South Carolina Dept. of Transp., 602 S.E.2d 772, 361 S.C. 9 (S.C. 2004), State v. White, 642 S.E.2d 607, 372 S.C. 364 (S.C.App. 2007).

Since none of the items referenced above that were included in Appellant's Designation were made a part of the record in the lower court, this Court must strike those items from Appellant's Designation so that the Record on Appeal to be prepared by Appellant's Counsel reflects those items that are in compliance with Rule 210(c) of the South Carolina Rules of Appellate Procedure.

IV. CONCLUSION

For the reasons stated above, Respondent's Motion to Strike should be granted and the specifically referenced items contained in Appellant's Designation should be stricken as well as any references, support or argument based on such matters in Appellant's Brief.

Respectfully Requested,



September 11, 2014

M. Stokely Holder (SC Bar # 73892)
John T. Crawford, Jr. (SC Bar # 69682)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. (864) 242-4899
Fax (864) 242-4844

Attorney for Respondent

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Appellate Case No. 2013-001645
(Trial Court Case No. 2013-CP-23-1833)

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

v.

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

Of whom Richard M. Buckley is the ..... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Motion to Strike Matter from Appellant's Designation and Brief and Memorandum in Support of Respondent's Motion to Strike Matter from Appellant's Designation and Brief in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States mail, first-class postage prepaid this 11th day of September, 2014, addressed as follows:

Brian A. Martin, Esquire
Brian A. Martin, LLC
212 Trade Street
Greer, SC 29651
Attorney for Appellant

H. Stewart James, Esq.
Babb & Brown, P.C.
505 West Butler Road
Greenville, SC 29607
Co-Counsel for Appellant

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
PO Box 71727
North Charleston, SC 29415
Attorney for Defendant Wells Fargo, N.A.

Laurie Warren

Laurie Warren, Legal Assistant
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
PH: (864) 242-4899 FAX: (864) 242-4844

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
OCT 10 2014
SC 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

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

v.

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

of whom:

Richard M. Buckley ..... Respondent.

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

October 9, 2014

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

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
OCT 10 2014
SC 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

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

v.

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

of whom:

Richard M. Buckley.....Respondent,

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

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

Other Counsel of Record:

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

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

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

TABLE OF CONTENTS

Table of Authorities ii

Statement of the Facts 1

Standard of Review 3

Argument 3

Conclusion 7

TABLE OF AUTHORITIES

Cases

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

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

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

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

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

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

Statutes & Rules

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

Rule 210(c), SCACR 3, 4, 6

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

STATEMENT OF FACTS

For a thorough examination of the Facts, Appellant would refer the Court to the Statement of Case (p. 2-4) and Statement of Facts (p. 4-13) contained in Appellant's initial brief already filed with the Court in this matter as well as the summary of facts contained in Appellant's previously filed memorandum in opposition to Respondent's motion to dismiss. However, by way of a brief summary, Appellant would present the following facts.

Appellant filed a motion to disqualify Respondent's counsel and the entire Kenison Firm in this matter due to a conflict of interest. Despite Respondent's contention to the contrary, the Kenison Firm (Respondent's counsel) was actively representing Appellant as their client in a substantially related matter ***during the exact same time*** that the actions giving rise to the current claims between Appellant and Respondent were arising.

The representation of Respondent in this matter by the Kenison Firm clearly violates Rule 1.9 of the Rules of Professional Conduct under the "substantially related" test promulgated by Comment 3 to Rule 1.9 and by the Supreme Court in Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (S.C. 1996). Both the prior representation (referred to as the TMKG case) and the present matter (referred to as the Buckley case) were actions to foreclose mechanic's liens by Appellant. Both cases involved the same

claims, counterclaims and defenses by and against Appellant as specifically compared in Appellant's Initial Brief at pages 7-9 and pages 38-40 and therefore were argued to the Trial Court as being substantially related.

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

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

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

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

BRIAN A. MARTIN, LLC

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

ATTORNEY FOR APPELLANT

Greenville, South Carolina
October 9th, 2014

EXHIBIT A

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

July 8, 2013
Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD MILLER, Judge.

A P P E A R A N C E S

Brian A. Martin, Esquire
Attorney for Plaintiff

Stokely Holder, Esquire
Attorney for the Defendant

CAROLINE HISKELL
Thirteenth Circuit Court Reporter

P R O C E E D I N G S

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

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

THE COURT: Go ahead and tell me about it.

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

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

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

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

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

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

A dispute arose after the construction was

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

July 8, 2013
Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD MILLER, Judge.

A P P E A R A N C E S

Brian A. Martin, Esquire
Attorney for Plaintiff

Stokely Holder, Esquire
Attorney for the Defendant

CAROLINE HISKELL
Thirteenth Circuit Court Reporter

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

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

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

A dispute arose after the construction was

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

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

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

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

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

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

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

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

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

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

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

THE COURT: No, I've got it.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

MR. MARTIN: That connection simply is ---

THE COURT: They're friends.

MR. MARTIN: They were friends.

THE COURT: Okay.

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

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

THE COURT: That's all public record.

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

THE COURT: Who did they represent in the

EXHIBIT C

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

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

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

THE COURT: Well, here's the deal.

MR. MARTIN: Yes, sir.

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

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

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.

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

not going to know what they know or what's privileged, for them to respond under a protective order to explain what the -- whether or not it is, in fact, privileged. Because 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. And that's what they're talking -- that's what you're talking about them doing.

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

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

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

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

THE COURT: 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. Okay?

MR. MARTIN: Yes, Your Honor.

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

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

MR. MARTIN: Yes, sir.

THE COURT: 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 thin air. Okay?

MR. MARTIN: Yes, sir.

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

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case No. 2013-CP-23-1833

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

v.

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

Of whom Richard M. Buckley is the ..... Respondent.

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

M. Stokely Holder, Esquire
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
(864) 242-4899
Attorney for Respondent

Other Counsel of Record:

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

H. Stewart James, Esq.
Babb & Brown, P.C.
505 West Butler Road
Greenville, SC 29607
Co-Counsel for Appellant

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
PO Box 71727
North Charleston, SC 29415
Attorney for Defendant Wells Fargo, N.A.

The Appellant is attempting to have this Court review documentation and records that the lower court has never even seen.

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

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

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

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

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

own subsequent summaries and descriptions of same to the lower court, those claims are misleading and a misrepresentation of the facts.

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

Furthermore, if the Appellant thought the lower court had actually "refused to consider" the documents offered by Appellant, then it would be "encumbent upon him to raise the issue by proper exceptions." Beall v. Doe, 281 S.C. 363, 315 S.E. 2d 186 (Ct. App. 1984). As is clear from the transcript and the Appellant's detailed, lengthy summaries of same, the Appellant never made such exception, and the Appellant was never otherwise precluded from making the documents part of the record.

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

Court.

It remains clear that despite the opportunity to "introduce and use the information" in its arguments to the lower court, the Appellant never did. The Respondent did not offer into the record any of the contents of the other case, the lower never ruled ("refused" or otherwise) on any such non-existent offer into the record, and the lower court never made a dispositive ruling on the Respondent's motion. So, as there is absolutely no basis in support of Appellant's apparent contention that the lower court issued a dispositive ruling on the seminal issue of disqualification, the record is also void of any "introduction and use" by Appellant or objection made by Appellant before the lower court, or refusal by the lower court, regarding the "Entire contents" of the other case. There being no such ruling, no such objection, and there likewise being no indication in the record that the lower court was presented with or reviewed any of the "Entire contents" of the other case, the Respondent's Motion to Strike should be granted.

Respectfully Requested,

October 16, 2014

M. Stokely Holder (SC Bar # 73892)
John T. Crawford, Jr. (SC Bar # 69682)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. (864) 242-4899
Fax (864) 242-4844

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case No. 2013-CP-23-1833

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

v.

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

Of whom Richard M. Buckley is the ..... Respondent.

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

M. Stokely Holder, Esquire
Kenison, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601
(864) 242-4899
Attorney for Respondent

Other Counsel of Record:

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

H. Stewart James, Esq.
Babb & Brown, P.C.
505 West Butler Road
Greenville, SC 29607
Co-Counsel for Appellant

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
PO Box 71727
North Charleston, SC 29415
Attorney for Defendant Wells Fargo, N.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE FACTS 1

STANDARD OF REVIEW 2

ARGUMENT 3

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Armstrong v. Collins, 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct,App.2005) 3, 4

Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 186 (Ct. App. 1984) 3, 4, 7, 8

Betsill v. Betsill, 187 S.C. 50, 196 S.E. 381 (1938) 3, 4

Busillo v. City of North Charleston, 745 S.E.2d 142, 404 S.C. 604 (S.C.App. 2013) 2, 4

City of Columbia v. Myers, 278 S.C. 288, 294 S.E.2d 787 (1982) 8

Conran v. Joe Jenkins Realty, Inc., 263 S.C. 332, 210 S.E.2d 309 (1974) 3, 4

Elam v. South Carolina Dept. of Transp., 602 S.E.2d 772, 361 S.C. 9 (S.C. 2004) 3, 4

In the Interest of Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) 2, 4

Richland County v. Carolina Chloride, Inc., 382 S.C. 634, 677 S.E.2d 892 (Ct.App. 2009) 3, 4

State v. White, 642 S.E.2d 607, 372 S.C. 364 (S.C.App. 2007). 3, 4

Ulmer v. Ulmer, 632 S.E.2d 858, 369 S.C. 486 (S.C. 2006) 2, 4

Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) 2, 4

STATUTES AND RULES

Rule 210(c), SCACR 3, 9

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

I. STATEMENT OF FACTS

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

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

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

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

II. STANDARD OF REVIEW

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

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

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

Rule 210(c), SCACR requires that the record on appeal shall not include matter which was not presented to lower court. Elam v. South Carolina Dept. of Transp., 602 S.E.2d 772, 361 S.C. 9 (S.C. 2004), State v. White, 642 S.E.2d 607, 372 S.C. 364 (S.C.App. 2007). The appellate court is confined to the record in deciding issues on appeal. Richland County v. Carolina Chloride, Inc., 382 S.C. 634, 677 S.E.2d 892 (Ct.App. 2009).

III. ARGUMENT

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

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

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

this matter:

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

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

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

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

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

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

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

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

described this particular portion of the hearing as follows:

> 7. That Plaintiff ***has ready and <u>can</u> 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.

<u>Motion to Reconsider, Ex. A, p. 5(emphasis added)</u>.

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

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

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

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

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

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

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

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

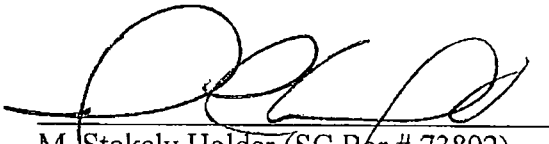
It remains clear that despite the opportunity to "introduce and use the information" in its arguments to the lower court, the Appellant never did. Had the Appellant actually presented any of the "Entire contents" of the other case, then upon review of same the Respondent would have then been able to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

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

IV. CONCLUSION

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

Respectfully Requested,



October 16, 2014

M. Stokely Holder (SC Bar # 73892)
John T. Crawford, Jr. (SC Bar # 69682)
KENISON, DUDLEY & CRAWFORD, LLC
704 East McBee Avenue
Greenville, SC 29601
Ph. (864) 242-4899
Fax (864) 242-4844

Attorneys for Respondent

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

July 8, 2013
Greenville, South Carolina

B E F O R E:

THE HONORABLE EDWARD MILLER, Judge.

A P P E A R A N C E S

Brian A. Martin, Esquire
Attorney for Plaintiff

Stokely Holder, Esquire
Attorney for the Defendant

CAROLINE HISKELL
Thirteenth Circuit Court Reporter

I N D E X

(There were no exhibits or witnesses presented).

P R O C E E D I N G S

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

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

THE COURT: Go ahead and tell me about it.

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

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

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

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

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

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

A dispute arose after the construction was

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

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

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

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

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

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

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

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

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

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

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

THE COURT: No, I've got it.

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

by D&C Builders.

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

MR. MARTIN: That connection simply is ---

THE COURT: They're friends.

MR. MARTIN: They were friends.

THE COURT: Okay.

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

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

THE COURT: That's all public record.

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

THE COURT: Who did they represent in the

former?

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

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

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

MR. MARTIN: No, sir.

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

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

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

THE COURT: Put together a privilege log.

MR. MARTIN: Yes.

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

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

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

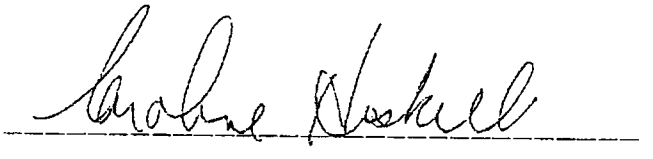
MR. MARTIN: Yes, sir.

MR. HOLDER: Thank you.

---END OF TRANSCRIPT RECORD---

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

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



Caroline Hiskell

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2013 JUL 16 P 01:20

D&C Builders, Inc.)
☒ Plaintiff)

CASE NO.
2013-CP-23-1833

v.)

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Richard M. Buckley And Wells Fargo N.A.)
☐ Defendant.)

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

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

SECTION I: Hearing Information

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

SECTION II: Motion/Order Type

☒ Written motion attached
☒ Form Motion/Order

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

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

July 16, 2013
Date submitted

SECTION III: Motion Fee

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

JUDGE'S SECTION

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

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted this 16th day of July, 2013.

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

Greenville, South Carolina
July 16th, 2013

"EXHIBIT A"

BRIAN A. MARTIN LLC

ATTORNEY AT LAW

LICENSED IN SC & NC

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 the he contends was obtained by law firm in the prior representation that would be relevant and useful in the present representation to warrant disqualification.
6. Defendant presented an Affidavit from Attorney John H. Heckman to the extent that Defendant was referred to law firm by Mr. Heckman and not through Defendant's prior knowledge of law firm's previous representation of Plaintiff.
7. Defendant presented Affidavits from Attorneys for Defendant, M. Stokely Holder, John T. Crawford and Townes B. Johnson wherein each states:
   a) They were aware of law firm's prior representation of Plaintiff prior to undertaking representation of Defendant.
   b) They did not believe that the two cases were related in any way.
   c) They did not remember any confidential information disclosed to them during the prior representation of Plaintiff.
   d) They did not recall Plaintiff sharing any information about the Defendant or the project for Defendant during the prior representation of Plaintiff.
   e) In the prior representation, they did not obtain any information from Plaintiff regarding its financial status or the impact the outcome of the prior representation would have on that financial status.
   f) Any information obtained in the prior representation was a matter of public record.
   g) They do not believe the duties required in representing Defendant in the present case conflict with the duties required in representing Plaintiff in the prior case.
   h) They do not believe forwarding the interests of the Defendant in this matter will improperly injuriously affect Plaintiff.
8. Defendant presented an Affidavit of Pamela Burns-Byers Buckley stating:
   a) Defendant was referred to law firm by Attorney John H. Heckman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In rebuttal to these arguments, I presented the following:

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

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

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

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

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

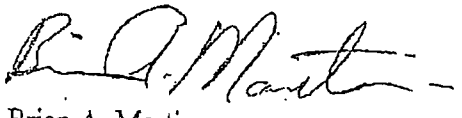
In order to be sure I am providing the correct information that you were seeking in your instruction to prepare the Privilege Log, and particularly in light of my own ethical obligations if I am being requested to disclose confidential attorney/client communications, I would request that you issue a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

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

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

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

Sincerely,



Brian A. Martin

Enclosure

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

Brian A. Martin

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

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

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

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

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

Respectfully,

Stokely Holder

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

Brian A. Martin

From: Brian A. Martin [brian@martinlawsc.com]
Sent: Thursday, July 11, 2013 1:18 PM
To: 'Stokely Holder'; 'emillerj@sccourts.org'
Cc: 'Stewart James'; 'ashook@finkellaw.com'
Subject: RE: 2013-CP-23-1833 D&C Builders, Inc. v. Richard M. Buckley

Dear Judge Miller,

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

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

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

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

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

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

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

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

The information contained in this email message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, email or facsimile.

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

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

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

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

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

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

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

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

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

(1)

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

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

IT IS SO ORDERED!

Edward W. Miller
Judge, 13th Judicial Circuit

July ___, 2013
Greenville, South Carolina

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

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

Attorney for the Plaintiff

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

Attorney for Defendant Wells Fargo, N.A.

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

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

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

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

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

Respondent's motion to strike matter from Appellant's designation and brief is denied. Appellant shall serve the record on appeal within thirty days.

FOR THE COURT

Columbia, South Carolina

FILED
11/25/14

cc:
Brian A. Martin, Esquire
Harold Stewart James, Esquire
M. Stokely Holder, Esquire