IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

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Michael G. Nettles, Circuit Court Judge
Appellate Case No. 2018-000092

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Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford . . . . . Appellant

v.

Scott L. Robinson and Johnson, McKenzie & Robinson, LLC . . . . . Respondents

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# INITIAL REPLY BRIEF OF APPELLANT

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## ARGUMENT

### 1. Standard of Review

The lower court's discretion is not unlimited. Its exercise is circumscribed by obedience to the substantive law and the necessity of at least some evidentiary support for the factual predicates underpinning its rulings. An abuse of discretion occurs when the lower court's ruling is based on an error of law or when grounded in factual conclusions which have no evidentiary support. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987). In this case, the lower court abused its discretion by misapplying Rule 3.7 of the S.C. Rules of Professional Conduct, SCACR 407; and by finding, without any supporting evidence in the record, that Mr. Epting had an impermissible expert witness compensation arrangement with the Appellant.

### 2. The issue of appealability is not properly before the court

The Respondents' argument about the appealability of the lower court's order (Respondents' Joint Brief at pages 5 - 6) is misplaced. First, the Court has already addressed and determined the issue of appealability.[1] Second, the proper mechanism for challenging appealability is to make a motion to dismiss pursuant to Rule 240, SCACR. *See*, State v. James, 34 S.C. 579, 13 S.E.2d 899 (1891). Respondents have made no such motion but nevertheless suggest the Appellant has waived this Court's appellate jurisdiction by positions taken in its Brief.

Respondents argue that because Appellant's Brief only assigns error to the lower court for ordering Mr. Epting to withdraw before trial, *ipso facto* the order on

[1] By letter dated February 6, 2018, the Clerk "requested that [the parties] serve and file a memorandum addressing the issue of appealability . . . .") By letter dated April 23, 2018, the Clerk advised, "[T]he Court has determined the appeal will be allowed to proceed."

appeal does not affect the "mode of trial" as required for appellate jurisdiction under Hagood v. Summerville, 362 S.C. 191, 607 S.E.2d 785 (2010).

This clever argument fails because it both misconstrues Hagood and ignores the language of S.C. CODE ANN. §14-3-330(2), which grants appellate jurisdiction over final orders "affecting a substantial right."

The attorney disqualification order in Hagood was held immediately appealable not because it affected the "mode of trial" (Respondents' Joint Brief at page 6) but rather because it affected a "substantial right," which the Supreme Court specifically identified as "the right to be represented by an attorney of ones choosing." *Ibid*, 362 S.C. at 197.

The Hagood court explained that the right to choose ones counsel is "substantial" because it simultaneously impacts: (a) the attorney-client relationship; (b) the overall litigation; and (c) the trial of the case. The court further explained that (1) the right to be represented by an attorney of ones choosing and (2) the right to a particular mode of trial are separate, well-established "substantial rights." The court noted, "[T]he right to be represented by ones preferred attorney *is closely related to* the right to a particular mode of trial," 362 S.C. at 198 (emphasis added), thus highlighting that the two "substantial rights" are not identical.

In short, the Hagood court specifically ruled that an order disqualifying counsel affects the substantial right "to be represented by an attorney of ones choosing" and is therefore immediately appealable pursuant to §14-3-330(2). Nothing in the Appellant's Brief constitutes a waiver of appellate jurisdiction over the lower court's order, which affects the Appellant's substantial right to be represented by the attorney of it's

choosing.

### 3. The lower court's disqualification order was outside its discretion

The logic of the argument in Respondents' Joint Brief is somewhat difficult to follow. They offer pages of extended commentary about a sweeping variety of issues — whether Mr. Epting is an expert witness; a voluntary witness; a rebuttal witness; a necessary witness; an uncontested witness; whether Mr. Epting had an opportunity to withdraw as a witness; etc.

All of these arguments are presumably presented as support for a discretionary ruling by the lower court. But they all ignore one inescapable restraint on the lower court's exercise of discretion: the substantive parameters of Rule 3.7. Which is to say, the lower court does not have the discretion to misapply or ignore Rule 3.7, no matter how appealing the Respondents' invitation to do so may appear. The lower court does not have discretion to sacrifice the Appellant's substantial right to counsel of its own choosing on anything other than the altar of Rule 3.7.

Respondents' Joint Brief posits that in disqualifying Mr. Epting and his firm the lower court was appropriately exercising its inherent authority to control its own docket. However, the lower court is not empowered to run its docket by dismissing lawyers without a substantive basis for doing so. The lower court certainly has the authority to control the nature and timing of discovery, but an order disqualifying a lawyer and his firm falls outside the scope of that authority. For example, neither Rule 16, SCRCP (case management) nor Rule 37, SCRCP (discovery sanctions), provide any mechanism for the disqualification of counsel as a sanction for disobedience to an order.

### 4. Rule 3.7 only prohibits serving in a dual role at trial

According to Respondents, "Rule 3.7 outlines the limited circumstances under which a person may serve as lawyer and witness in the same proceeding." Respondents' Joint Brief at page 13. This is an incorrect formulation of the witness-advocate rule because it substitutes the phrase "in the same proceeding" for the words "at a trial," which actually appear in the text of Rule 3.7(a). By these semantics, Respondents hope to induce the Court to overlook the critical requirement of jury confusion created by simultaneously serving as both witness and advocate "at a trial."

In other words, and quite simply, Rule 3.7 does not require withdrawal *prior* to trial because it is only during trial — thus the phrase "at a trial" — that prohibited jury confusion — the purpose and focus of the Rule — can be created by a lawyer acting as both advocate and witness. The great common law maxim, "When the reason for the rule has ceased, the rule itself ceases,"[2] is applicable here. No trial, no jury confusion, no disqualification, and no discretion to rule otherwise.

## CONCLUSION

The constraints of time and space do not permit Appellant to address and rebut all the myriad points and authorities recited in Respondents' Brief. Fortunately, the majority of Respondents' arguments raise hypothetical issues — e.g., crippling discovery disputes and intractable privilege problems — and rely for a showing of prejudice upon unlikely future events not yet having occurred. For example, the Respondents claim, "If allowed to continue the representation, Mr. Epting will continue to make, respond to, and argue motions, will prepare witnesses and defend

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[2] *See*, e.g., Fitzer v. Greater Greenville South Carolina YMCA, 277 S.C. 1, 282 S.E.2d 230 (1981).

depositions, will consult with Stokes-Craven on legal strategy, and will take depositions . . . ." Respondents' Joint Brief at page 21. Of course, none of those things have actually happened nor was the lower court presented with any reason to believe that any of them ever will. These chimera present nothing ripe for adjudication let alone an acceptable basis for extending the lower court's discretion beyond the boundaries of the witness-advocate rule. Nor does the lower court have the discretion to disqualify a lawyer and his firm as a case management tool.

Rule 3.7 does not say that a former lawyer may not serve as an expert witness if that would result in a waiver of the attorney-client privilege. Nor does Rule 3.7 say that a former lawyer's law firm must be disqualified from assisting in preparing for the depositions of expert witnesses who are not the former lawyer himself.

Although the lower court could legitimately use Rule 3.7 to prohibit Mr. Epting from simultaneously serving as both expert witness and advocate at trial — if in its discretion it felt that was necessary to keep the jury from being confused — it did not have the discretion to tread on Appellant's substantial right to counsel of its own choosing by ordering Mr. Epting and his firm to withdraw prior to trial. All of the grave, apocalyptic pretrial prejudice predicted by Respondent could be managed, if not avoided entirely, by routine case management techniques (e.g., those provided by Rules 16 and 26, SCRCP) which fall far short of immediate attorney disqualification.

The order of the lower court disqualifying Mr. Epting and his firm from further representation of the Appellant during pretrial proceedings exceeds the scope of Rule 3.7, which itself circumscribes the lower court's discretion, so that the order rests upon an error of law and should be reversed.

Respectfully submitted,

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**PROOF OF SERVICE**

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I certify that I have served the Initial Reply Brief of Appellant on the Respondents Scott L. Robinson and Johnson, McKenzie & Robinson, LLC by depositing a copy of it in the United States Mail, postage prepaid, on August 24, 2018, addressed to their respective attorneys of record, Susan Taylor Wall and Warren C. Powell, Jr.

August 24, 2018

By: Robert B Ransom

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August 24, 2018

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Re: Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford v. Scott L. Robinson and Johnson, McKenzie & Robinson, LLC
Appellate Case No. 2018-000092

Dear Ms. Kitchings:

Pursuant to Rule 208, SCACR, I am enclosing a copy of the Initial Reply Brief of Appellant along with Proof of Service.

Thank you for your attention to this matter. Please call me if you have any questions or comments.

Very truly yours,

Robert

Robert B. Ransom

c: Warren C. Powell, Jr.
Susan Taylor Wall
Andrew K. Epting, Jr.