

**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Colleton County
The Honorable Perry M. Buckner, Circuit Judge
Civil Action No.: 2011-CP-15-20

Ricky S. Mitchell.....Respondent,

v.

Marin Right of Way Service, LLC, and
Bernardo L. Hernandez.....Petitioners,

v.

Bernardo L. Hernandez.....Third-Party Plaintiff,

v.

Three-Gen, Inc.....Third-Party Defendant.

**APPENDIX TO PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC**

Thomas J. Keaveny, II, Esquire
Amy B. Rothschild, Esquire
Matthew S. Byzet, Esquire
KEAVENY LAW FIRM, LLC
1634 Ashley River Road
Charleston, South Carolina 29407
Telephone: 843.225.2820
Telecopier: 843.225.2823
Attorneys for the Petitioners

The following is a list of Circuit Court Orders and other filings attached as exhibits to the **Petition for Rehearing with Suggestion for Rehearing En Banc**:

1. Complaint dated January 3, 2011
2. Requests for Admission dated February 10, 2011
3. Motion to Disqualify dated July 22, 2011
4. Order dated January 23, 2013
5. Motion for Reconsideration dated March 1, 2012
6. Memorandum in Support of Motion for Reconsideration dated March 5, 2012
7. Supplemental Memorandum in Support of Motion for Reconsideration dated April 16, 2012
8. Order dated May 1, 2012
9. Motion to Dismiss Appeal dated July 6, 2012
10. Memorandum in Support of Motion to Dismiss Appeal dated July 6, 2012
11. Petitioners' Return to Motion to Dismiss Appeal dated July 24, 2012
12. Reply Memorandum Regarding Motion to Dismiss Appeal dated July 31, 2012
13. Order dated January 3, 2013.

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

RICKY S. MITCHELL,

Plaintiff,

v.

MARIN RIGHT OF WAY SERVICE, LLC,
and BERNARDO L. HERNANDEZ,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2011-CP-15-20

COMPLAINT
(Jury Trial Requested)

2011 JAN -6 PM 2:55

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS

Plaintiff alleges:

1. Plaintiff is a resident of Colleton County, South Carolina, and was so at the time the cause of action set forth herein arose.

2. Defendant Marin Right of Way Service, LLC (hereinafter, "Marin") is a domestic limited liability company with its principal place of business in Colleton County, South Carolina, and was so at the time the cause of action set forth herein arose.

3. Upon information and belief, Defendant Bernardo L. Hernandez (hereinafter, "Hernandez") is a resident of Colleton County, South Carolina, and was so at the time the cause of action set forth herein arose.

4. At all times relevant herein, Hernandez was an employee and agent of Marin acting within the course and scope of said employment.

5. On or about January 27, 2010, at approximately 7:05 a.m., Plaintiff was operating a log truck on U.S. Highway 601 in Colleton County, South Carolina.

6. At the same time, Hernandez was operating a vehicle owned by Marin, with Marin's permission, on S.C. Highway 641, approaching its intersection with U.S. Highway 601 in Colleton County, South Carolina.

7. At the intersection of S.C. Highway 641 and U.S. Highway 601, traffic on S.C. Highway 641 is governed by a stop sign.

8. At the intersection of S.C. Highway 641 and U.S. Highway 601, traffic on U.S. Highway 601 has the right of way.

9. At the time and place described above, Hernandez failed to stop fully for the stop sign governing his lane of traffic and/or failed to yield the right of way to Plaintiff's lane of traffic and entered the intersection onto U.S. Highway 601 directly into Plaintiff's path of travel, causing a collision with the truck operated by Plaintiff (hereinafter, the "Collision").

10. The Collision was due to and caused directly and proximately by the negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and unlawful acts, delicts and omissions of Hernandez in one or more of the following particulars:

- a. In failing to keep a proper lookout;
- b. In failing to obey the stop sign governing his lane of traffic;
- c. In failing to yield the right of way to Plaintiff;
- d. In failing to come to a complete stop at the intersection;
- e. In failing to utilize his brakes properly;
- f. In failing to maintain proper control over his motor vehicle;
- g. In failing to take adequate evasive action to avoid the Collision;
- h. In colliding with the vehicle Plaintiff was operating;
- i. In entering the intersection when Plaintiff's vehicle was approaching on another roadway so closely as to constitute an immediate hazard during the time when Hernandez would be moving across or within the intersection;
- j. In violating S.C. Code Ann. § 56-5-2310(a) (1976, as amended);
- k. In violating S.C. Code Ann. § 56-5-2330(b) (1976, as amended);
- l. In violating other laws, statutes, and ordinances of the State of South Carolina; and
- m. In failing to exercise the degree and caution that a reasonable prudent person would have executed under the circumstances then and there prevailing.

11. Marin is vicariously liable for Hernandez's negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and unlawful acts, delicts and omissions under the doctrine of *respondeat superior*.

12. The Collision was also due to and caused directly and proximately by the negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and unlawful acts, delicts and omissions of Marin in entrusting its vehicle to Hernandez when it knew or should have known he was not adequately trained and qualified to operate it safely on the roadways of South Carolina.

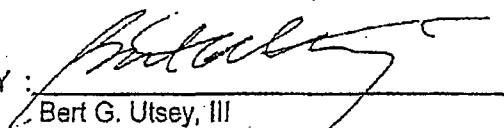
13. As a direct and proximate result of the Collision, Plaintiff sustained serious, severe, and permanent injuries from which he continues to suffer, and upon information and belief, will continue to suffer in the future.

14. As a direct and proximate result of the aforementioned negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and unlawful acts, delicts and omissions of Defendants, Plaintiff has suffered actual damages in an amount to be determined by the jury. In addition, Plaintiff is entitled to an award of punitive damages in an appropriate amount.

WHEREFORE, Plaintiff prays for judgment against Defendants for actual damages, punitive damages, the costs of this action, and for such other and further relief as the Court may deem just and proper.

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.

BY :



Bert G. Utsey, III
123 Walter Street
Post Office Box 1164
Walterboro, SC 29488
Phone: (843) 549-9544
Fax: (843) 549-9546
butsey@pmped.com

ATTORNEYS FOR PLAINTIFF

January 3, 2011
Walterboro, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2011-CP-15-020
RICKY S. MITCHELL,	)	
	)	
Plaintiff,	)	
	)	REQUESTS FOR ADMISSIONS
v.	)	TO THE DEFENDANTS
	)	
MARIN RIGHT OF WAY SERVICE, LLC,	)	
and BERNARDO L. HERNANDEZ,	)	
	)	
Defendants.	)	
_____	)	

TO: THE DEFENDANTS AND THEIR ATTORNEY:

INTRODUCTION

Pursuant to SCRPC 36, Plaintiff hereby requests that the Defendants admit the following statements within thirty days of service hereof. If Defendants fail to admit the truthfulness of any of these statements, the Plaintiff will apply to the Court for the cost of proving same at trial. If Defendants fail to deny the truthfulness of any statement below within thirty days, it will be deemed admitted pursuant to SCRPC 36.

To the extent these requests seek admissions regarding the "application of law to fact", as expressly permitted by SCRPC 36(a), it is not proper to object to these requests on the grounds that they seek "conclusions of law". See, e.g., *G.H. Bass & Co. v. Fulton County Bd. of Tax Assessors*, 268 Ga. 327, 328-29, 486 S.E.2d 810, 811-12 (1997).

Capitalized terms herein have the same definitions as used in Plaintiff's Complaint.

REQUESTS

1. The Multi-Disciplinary Accident Investigation Team of the South Carolina Highway Patrol (hereinafter, "MAIT Team") investigated the Collision.

2. The MAIT Team concluded that the approximate speed of Plaintiff's vehicle at the time of impact with the vehicle operated by Hernandez was 44 miles per hour.

3. The approximate speed of Plaintiff's vehicle at the time of impact with the vehicle operated by Hernandez was 44 miles per hour.

4. At the time of impact with the vehicle operated by Hernandez, Plaintiff's vehicle was not exceeding the posted speed limit at that location.

5. The MAIT Team concluded that the headlights on Plaintiff's vehicle were illuminated at the time of impact with the vehicle operated by Hernandez.

6. The headlights on Plaintiff's vehicle were illuminated at the time of impact with the vehicle operated by Hernandez.

7. Attached hereto as Exhibit A is a true and accurate recording of South Carolina Highway Patrol Corporal J.A. Myrick's interview of Hernandez on January 28, 2010.

8. On January 27, 2010, immediately before the Collision, Hernandez did not see Plaintiff's vehicle before Hernandez began proceeding through the intersection of S.C. Highway 641 and U.S. Highway 601.

9. On January 27, 2010, Hernandez did not see Plaintiff's vehicle before it collided with the vehicle operated by Hernandez.

10. At the time of the Collision, Hernandez did not have a valid South Carolina driver's license.

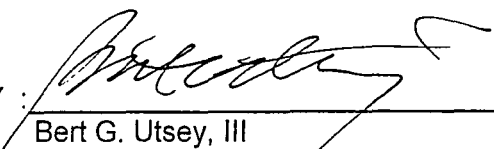
11. At the time of the Collision, Hernandez did not have a valid Georgia driver's license.

12. At the time of the Collision, Hernandez did not have a valid driver's license issued by any State of the United States of America.

13. At the time of the Collision, Marin knew that Hernandez did not have a valid driver's license issued by any State of the United States of America.

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.

BY :


Bert G. Utsey, III

123 Walter Street
Post Office Box 1164
Walterboro, SC 29488
Phone: (843) 549-9544
Fax: (843) 549-9546
butsey@pmped.com

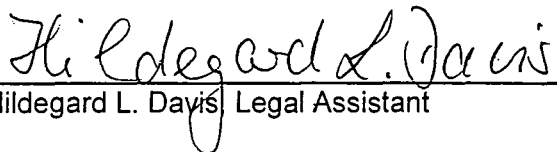
ATTORNEYS FOR PLAINTIFF

February 10, 2011
Walterboro, South Carolina

CERTIFICATE OF SERVICE BY MAIL

The undersigned certifies that this day she served a true and correct copy of the foregoing Plaintiff's Requests for Admissions to the Defendants in civil action 2011-CP-15-020 upon all parties by mailing same via U.S. First Class Mail, postage prepaid, addressed to counsel of record:

Thomas K. Keaveny, II, Esquire
Keaveny Law Firm, LLC
445 Folly Road
Charleston, SC 29412


Hildegard L. Davis, Legal Assistant

February 10, 2011
Walterboro, South Carolina

700-050

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

RICKY S. MITCHELL,

Plaintiff,

vs.

MARIN RIGHT OF WAY SERVICE,
LLC, and BERNARDO L.
HERNANDEZ,

Defendants.

BERNARDO L. HERNANDEZ,

Third-Party Plaintiff,

vs.

THREE GEN, INC.,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.:2011-CP-15-20

**MOTION TO DISQUALIFY BERT G.
UTSEY, J. PAUL DETRICK AND THE
LAW FIRM OF PETERS, MURDAUGH,
PARKER, ELTZROTH AND DETRICK,
P.A.**

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
2011 JUL 26 AM 11:23

TO: BERT G. UTSEY, III, ESQUIRE AND J. PAUL DETRICK ESQUIRE, ATTORNEYS
FOR PLAINTIFF:

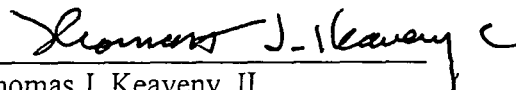
YOU WILL PLEASE TAKE NOTICE that on August 1, 2011 at 10:00 a.m. or thereafter as
he may be heard, the undersigned will move to disqualify Mr. Utsey, Mr. Detrick and the law firm
of Peters Murdaugh Parker Eltzroth and Detrick P.A. ("law firm") from representing Plaintiff in this
matter. The motion will be heard at the Colleton County Courthouse.

The motion to disqualify is made pursuant to Rule 1.18 and Rule 3.7 of the South Carolina
Rules of Professional Conduct. It is based upon the testimony of Carlos Marin which will be elicited
at the hearing that on January 27, 2010, and thereafter, he met at length with Mr. Utsey and other
members of his firm seeking legal advice relating to the very accident which is the subject of this

lawsuit. Under Rule 1.18 (c) counsel cannot now represent Mr. Mitchell whose interests are materially adverse to Mr. Marin. Furthermore, during those meetings, Mr. Marin gave and received information which may even have established an attorney-client relationship under Rule 1.9 so that Mr. Utsey and the law firm are disqualified from representing Plaintiff in this action under Rule 1.9 and Rule 1.10. Finally, Rule 3.7 prevents an attorney from serving as both an advocate and a witness. This may become an issue in the case and may be the reason Attorney Detrick filed a Notice of Appearance (Exhibit "A") on May 10, 2011 – 4 months after suit was filed by his law partner, Mr. Utsey.

The motion will be supported by the testimony of Carlos Marin. Application of the rules to the facts of this matter will be supported by the testimony of Mr. Michael Virzi, professor of legal ethics at the University of South Carolina, School of Law (C.V. attached as Exhibit "B").

Respectfully submitted,


Thomas J. Keaveny, II
KEAVENY LAW FIRM LLC
(S.C. Bar No. 3308)
445 Folly Road
Charleston, South Carolina 29412
Telephone: 843.225.2820
Facsimile: 843.225.2823
Email: tkeaveny@keavenylawfirm.com

ATTORNEYS FOR DEFENDANTS
AND THIRD-PARTY PLAINTIFF

July 22nd, 2011
Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Motion to Compel has been served upon opposing counsel by hand delivery, email, facsimile, or by mailing a copy properly addressed with sufficient postage affixed thereto this 22nd day of July, 2011.

KEAVENY LAW FIRM, LLC

BY: J. Shelton
Jennifer Shelton, Legal Assistant

PATRICIA C. GRAFT
COLLETON COUNTY
COMMON PLEAS
2011 JUL 26 AM 11:24

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2011-CP-15-020
	)	
RICKY S. MITCHELL,,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NOTICE OF APPEARANCE
	)	OF
MARIN RIGHT OF WAY SERVICE, LLC,	)	J. PAUL DETRICK
AND BERNARDO L. HERNANDEZ,,	)	FOR PLAINTIFF
Defendants.	)	
_____	)	

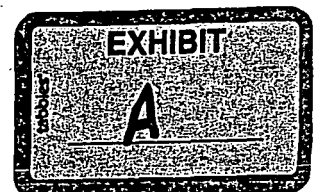
PLEASE TAKE NOTICE, that the undersigned, J. Paul Detrick, attorney with the law firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, PA, does hereby give his Notice of Appearance as co-counsel for the plaintiff, Ricky S. Mitchell, along with Bert G. Utsey, III co-counsel, and requests that copies of any future correspondences served in this action by the parties be served upon him at the address given below.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: 
J. Paul Detrick
Bert G. Utsey, III
P.O. Box 457
Hampton, SC 29924
(803) 943-2111

ATTORNEYS FOR PLAINTIFF

May 10, 2011
Hampton, South Carolina



CERTIFICATE OF SERVICE

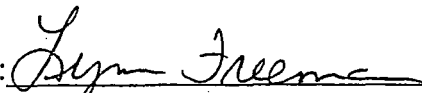
This is to certify that I, Lynn Freeman, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Plaintiff(s), have this date mailed via the U.S. Postal Service, a true and correct copy of the within *Notice of Appearance* with first class postage prepaid to:

Thomas J. Keaveny, II, Esquire
Keaveny Law Firm, LLC
445 Folly Road
Charleston, SC 29412

Pratt-Thomas Walker, P.A.
Lindsay K. Smith-Yancey, Esquire
Post Office Drawer 22247
Charleston, South Carolina 29413-2247

Turner Padget Graham & Laney, P.A.
Britton M Hawk, Esquire
P.O. Box 22129
Charleston, SC 29413

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: 
Lynn Freeman

May 10, 2011
Hampton, South Carolina

MICHAEL J. VIRZI

P.O. Box 50252

michael.virzi@gmail.com

Columbia, SC 29250

803-404-0429

EDUCATION

University of South Carolina School of Law, Columbia, SC

J.D., *cum laude*, May 2000

Honors:

- Order of the Coif
- CALI Award, Business Corporations
- Order of Wig & Robe
- Articles Editor, *ABA Real Property, Probate and Trust Journal*
- Roy Webster Scholar
- Dean's List

University of South Carolina, Columbia, SC

B.A., Political Science, May 1991

LAW PRACTICE

Michael J. Virzi, LLC, Columbia, SC

Solo practitioner (part-time), August 2006 – present

Ethics & Malpractice Consultation

Attorney Grievances

S.C. Supreme Court's Office of the Disciplinary Counsel, Columbia, SC

Assistant Disciplinary Counsel, February 2003 – August 2006

Investigated and prosecuted lawyer misconduct and incapacity, with a concentration in real estate transactions, mortgage fraud, and the unauthorized practice of law

Represented the Disciplinary Counsel in non-disciplinary legal matters

Sowell Gray Stepp & Laffitte, L.L.C., Columbia, SC

Associate Attorney, July 2001 – February 2003

Business, Commercial and Real Estate Litigation

Bankruptcy & Creditors' Rights

Employment Litigation

Gallivan, White & Boyd, P.A., Greenville, SC

Associate Attorney, August 2000 – July 2001

Business and Real Estate Litigation

Bankruptcy & Creditors' Rights

TEACHING EXPERIENCE

University of South Carolina School of Law, Columbia, SC

Legal Writing Instructor, August 2006 – Present (adjunct 2005 – 2006)

Legal Writing I & II

Advanced Legal Writing

Supervised Legal Research

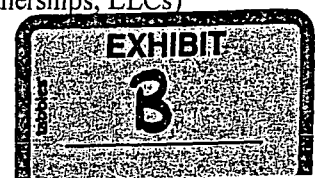
Fundamentals of Law Practice & Professionalism

Midlands Technical College, Columbia, SC

Adjunct Instructor, Paralegal Degree Program, May 2003 – August 2005

Business Law I (contracts, agency)

Business Law II (payment systems, secured transactions, corporations, partnerships, LLCs)



PUBLICATIONS

Quality Control: In re Wells and the Regulation of Adverbs and Adjectives in Lawyer Advertising, S.C. Lawyer, July 2011, at 27.

REAL ESTATE TRANSACTIONS: CASES AND MATERIALS (2d ed. 2010) (with Stephen A. Spitz).

Who Can You Trust? How the TLGP, CDARS, FDIC and NCUSIF Affect the Safekeeping of Client Funds, S.C. Lawyer, May 2009, at 14.

If It Walks Like a Duck...: Ethics Advisory Opinion 06-11 & the Attorney- Client Relationship in Real Estate Transactions, S.C. Lawyer, March 2007, at 30.

SIGNIFICANT CASES

Doe Law Firm v. Richardson, 371 S.C. 14, 636 S.E.2d 866 (2006).

Ex Parte Watson, 356 S.C. 432, 589 S.E.2d 760 (2003) (brief only).

PROFESSIONAL ASSOCIATIONS

Bar:

American Bar Association	2006 – present
South Carolina Bar	2000 – present
Professional Responsibility Committee	2011 – present
Ethics Advisory Committee (Chair 2007-2010)	2003 – present
Technology Committee	2001 – 2003
S.C. Association of Ethics Counsel	2008 – present
Richland County Bar	2001 – present
North Carolina Bar (inactive since 2004)	2001 – present

Courts:

U.S.D.C., District of South Carolina	2001 – present
U.S.D.C., Western, Middle & Eastern Districts of North Carolina	2001 – present
U.S. Court of Appeals, Fourth Circuit	2002 – present

Law Enforcement:

National White Collar Crime Center	2004 – 2007
F.B.I. Multi-Jurisdictional Lending Fraud Task Force	2004 – 2006

LECTURES & SEMINARS

Advertising School (panelist), S.C. Bar & Supreme Court LEAPP Program, Dec. 15, 2010

Ethics & Malpractice in a Real Estate Practice (guest lecturer), Charleston School of Law, Sept. 15, 2010

Ethics & Malpractice in a Real Estate Practice (guest lecturer), USC School of Law, Aug. 30, 2010

Ethics in Real Estate Transactions (guest lecturer), Charleston School of Law, June 3, 2010

Ethics & Malpractice in a Real Estate Practice (guest lecturer), Charleston School of Law, May 26, 2010

LECTURES & SEMINARS (Continued)

- Ethics School* (panelist), S.C. Bar & Supreme Court LEAPP Program, May 14, 2010
- If I Only Had A Brain: Real Estate Ethics*, Fidelity National Annual Seminar, Feb. 26, 2010
(For what it's worth, I did not name this one.)
- Ethics School* (panelist), S.C. Bar & Supreme Court LEAPP Program, Feb. 19, 2010
- Ethics School* (panelist), S.C. Bar & Supreme Court LEAPP Program, Oct. 15, 2009
- Recent Issues in Trust Accounting and Real Estate*, First American Fall Seminar, Oct. 9, 2009
- Ethics School* (panelist), S.C. Bar & Supreme Court LEAPP Program, June 11, 2009
- UPL in Real Estate Transactions* (guest lecturer), USC School of Law, April 1, 2009
- Ethics School* (panelist), S.C. Bar & Supreme Court LEAPP Program, Feb. 12, 2009
- Ethics in Real Estate Transactions* (guest lecturer), Charleston School of Law, Feb. 11, 2009
- Classroom Ethos: The Trophy Case and Beyond*, NC/SC Legal Writing Conference, May 21, 2008
- Guided Meditation for Getting in Touch with Your Inner Ethics Counsel*, S.C. Bar, Apr. 11, 2008
- Ethics and Beyond: Hot Topics in Foreclosure*, S.C. Masters-in-Equity, Mar. 14, 2008
- Ethics in Real Estate Transactions* (guest lecturer), USC School of Law, Feb. 27, 2008
- The Attorney Grievance Process, Part II* (guest lecturer), USC School of Law, Feb. 13, 2008
- The Attorney Grievance Process, Part I* (guest lecturer), USC School of Law, Feb. 6, 2008
- Hot Topics in Ethics for Government Lawyers*, SCAC Fall Seminar, Dec. 7, 2007
- Practical Tips for Solo and Small-Firm Lawyers*, Lexington County Bar, Dec. 5, 2007
- Ethics Update for Real Estate Lawyers*, Stewart Title Fall Seminar, Nov. 2, 2007
- Ethics Issues in Housing Law and Beyond*, S.C. Appleseed Legal Justice Center, Oct. 19, 2007
- Ethics in Real Estate Transactions* (guest lecturer), USC School of Law, Oct. 15, 2007
- Ethics Impact of The 2006 Property Tax Reform Act*, S.C. Bar, Aug. 24, 2007
- Real Estate Ethics* (guest lecturer), USC School of Law, Apr. 9, 2007
- Ethics in Real Estate Transactions* (guest lecturer), USC School of Law, Mar. 23, 2007
- The Attorney Discipline Process* (guest lecturer), USC School of Law, Feb. 29, 2007
- Legal Ethics of Non-Profit Corporations*, S.C. Bar, Feb. 9, 2007
- Real Estate Fraud*, Charleston County Real Estate Section Meeting, Dec. 8, 2006
- ODC's Top Ten List*, S.C. Bar Solo & Small Firm Section Conference, Oct. 6, 2006
- Avoiding Discipline in a Real Estate Practice*, SCALA Ethics Seminar, July 27, 2006
- A Closing Lawyer's Ethical Obligations* (panelist), S.C. Bar Real Estate Section Update, May 12, 2006
- Ethics Rules & Real Estate Practice* (panelist), S.C. Bar Convention, Jan. 27, 2006
- UPL Issues in Real Estate Closings*, Richland County Bar Annual Ethics Seminar, Nov. 4, 2005
- Real Estate Fraud & Property Flips*, PLTA Fall Seminar, Sept. 13, 2005

LECTURES & SEMINARS (Continued)

Ethics in Real Estate Transactions, PLTA Spring Convention, May 13, 2005
Pitfalls of a Real Estate Practice (panelist), S.C. Bar Convention, Jan. 21, 2005
The Revised Lawyer's Oath (panelist), Office of the Attorney General, Aug. 20, 2004
Professionalism in the Law (panelist), USC School of Law, Aug. 17, 2004
Professionalism in the Law (panelist), USC School of Law, Aug. 19, 2003
Basics of Civil Litigation, Half-Moon Seminars, Apr. 25, 2003
Racial Discrimination & the 14th Amendment (guest lecturer), Columbia College, Apr. 9, 2003

PRESS

Diana Smith, *E-mail Marketing Presents Opportunities for Firms but Perils if Done Wrong*, S.C. Law. Weekly, Oct. 4, 2010.

Tim Smith, *High Court Puts Lawyers on Notice about Relationships*, Greenville (S.C.) News, Sept. 15, 2010.

Stephanie Francis Ward, *Grade Anxiety*, ABA Journal, Feb. 2010, at 52.

Adam Parker, *Complaint Filed in Diocese Settlement Case*, Post & Courier (Charleston, S.C.), Feb. 26, 2009.

Sandy Hodson, *After Mortgage Fraud Cases, Federal Leaders Urge Caution*, Augusta Chronicle, Dec. 28, 2008.

Bess Battle, *Battle Zone*, S.C. Law. Weekly, Sept. 1, 2008, at 6.

Gregory Froom, *Attorneys May Threaten Criminal Action While Trying to Collect on Bad Checks*, S.C. Law. Weekly, Sept. 24, 2007, at 1.

Kristy Eppley Rupon, *Lawyers Required to Oversee Refinancing*, The State (Columbia, S.C.), Nov. 6, 2006, at H23.

Michael Dayton, *Disbursement of Closing Funds Requires Attorney Supervision*, S.C. Law. Weekly, Oct. 30, 2006, at 1.

Gregory Froom, *Must Lawyers Disburse?*, S.C. Law. Weekly, Oct. 16, 2006, at 1.

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

RICKY S. MITCHELL,

Plaintiff,

v.

MARIN RIGHT OF WAY SERVICE, LLC,
AND BERNANDO L. HERNANDEZ,

Defendants.

BERNARDO L. HERNANDEZ,

Third-Party Plaintiff,

v.

THREE-GEN, INC.,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2011-CP-15-0020

ORDER DENYING DEFENDANT
MARIN RIGHT OF WAY SERVICE,
LLC'S MOTION TO DISQUALIFY
PLAINTIFF'S COUNSEL

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
2012 JAN 30 PM 3:18

#1
Pmb

This matter came before the Court on December 19, 2011 pursuant to Defendant Marin Right of Way Service, LLC's Motion to Disqualify Plaintiff's Counsel. Present and appearing at the hearing was Paul Detrick, Esq. for the Plaintiff and Tom Keaveny, Esq. for the Defendant Marin Right of Way Service, LLC (hereinafter "Marin"). Based on the evidence presented by both parties at the hearing for this matter, the arguments of both parties, and the written submissions of both parties, this Court denies Marin's Motion to Disqualify Plaintiff's Counsel.

FACTS

On January 27, 2010, an automobile collision occurred involving a Marin-owned van driven by Marin employee, Defendant/Third-Party Plaintiff Bernardo L. Hernandez (hereinafter "Hernandez"). The van was occupied by seven other employees of Marin, three of whom were killed as a result of the collision. The other vehicle was a truck-trailer owned by Third-Party Defendant Three Gen. Inc. and operated by Plaintiff Ricky Mitchell (hereinafter "Mitchell").

Mitchell was also injured. The MAIT team of the South Carolina Highway Patrol investigated the accident.

Immediately following the incident, Mr. Marin, owner of Marin, came to Mr. Utsey's office in Walterboro on the morning of the collision and met with Mr. Utsey. There is considerable dispute among the parties about several details of the meeting, including whether Mr. Utsey informed Mr. Marin that he would not be representing him. They did discuss the collision and the fact that Marin's employees and their families may need representation.

Later that same day, the parties agree that with Mr. Marin's assistance, Mr. Utsey met with the father-in-law of one of the deceased employees regarding representing his estate on a wrongful death claim. The parties agree also that Mr. Utsey and Mr. Marin met again two days later at Mr. Utsey's office with Johnny Parker, Dorcas Tuten, Mr. Marin's brother, and a mutual acquaintance of Mr. Marin and Mr. Utsey present. Mr. Marin and Mr. Utsey had no further contacts after the January 29, 2010 meeting. Ultimately, Mr. Utsey and his firm (PMPED) did not represent any victims of the January 27 collision or their family members.

#2
PMB
Mitchell retained PMPED on March 3, 2010 to represent him with respect to his workers' compensation claim, and he later retained PMPED to represent him in this action.

This action was filed on January 6, 2011 by Mr. Utsey on behalf of Mitchell. Mr. Detrick with PMPED filed a notice of appearance on May 12, 2011. Mr. Marin was served on January 13, 2011.

LEGAL ANALYSIS

The issues raised by Defendants' motion are governed by the South Carolina Rules of Professional Conduct (hereinafter "the Rules"), namely Rules 1.9, 1.10 and 1.18. Rule 1.9(a) states:

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

Rule 407, SCACR, RPC 1.9. Rule 1.10 states: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), or 1.9" except in certain circumstances which are not applicable here. Rule 1.18 applies to circumstances where a lawyer represents a party adverse to

a former "prospective client" who has previously consulted with the lawyer about the now adverse matter but without ultimately creating an attorney-client relationship. This rule reads in pertinent part:

- (a) A person with whom a lawyer discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

#3
PMB
Rule 407, SCACR, RPC 1.18. Rule 1.18 hinges on the idea that there must be a "reasonable expectation that the lawyer is likely to form the relationship."

There was never a contract of representation formally entered into by Mr. Marin and Mr. Utsey or by Mr. Marin and PMPED. As to whether Mr. Marin believed one had been entered into or that Mr. Utsey was likely to form one, that is a factual dispute and the information provided in the affidavits, discovery responses, other documentation, and the testimony during the hearing must be examined.

Thus, while these rules provide guidance, ultimately, the Court has to weigh the credibility of the two fact witnesses, Mr. Marin and Mr. Utsey. Since their testimonies are in opposition to each other, the Court turns to (1) the letter of May 31, 2011 from Mr. Keaveny that states that Mr. Marin knew there was no relationship and (2) the affidavit of Mr. Parker which attests that Mr. Marin was informed that they would not be representing him and that they would be making claims against his company and his workers' compensation carrier. Based on these two documents, the Court finds that no client-lawyer relationship was formed. The Court believes this is a miscommunication, possibly due to the language barrier since English is Mr.

Marin's second language, and this Court had the opportunity to observe the witnesses and listen to their testimony during the hearing. In no event, however, does this Court believe based on the writings submitted to this Court that a lawyer-client relationship was formed.

CONCLUSION

Accordingly, this Court respectfully denies the Motion to Disqualify Plaintiff's Counsel.
IT IS SO ORDERED.


Perry M. Buckner
Presiding Judge, Fourteenth Judicial Circuit

January 23, 2012
Walterboro, SC

STATE OF SOUTH CAROLINA)
COUNTY OF COLLETON)

RICKY S. MITCHELL,)
Plaintiff,)

vs.)

MARIN RIGHT OF WAY SERVICE,)
LLC, and BERNARDO L.)
HERNANDEZ,)
Defendants.)

BERNARDO L. HERNANDEZ,)
Third-Party Plaintiff,)

vs.)

THREE GEN, INC.,)
Third-Party Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.:2011-CP-15-20

**NOTICE OF MOTION AND MOTION
FOR RECONSIDERATION OF
DEFENDANTS' MOTION TO
DISQUALIFY COUNSEL**

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
2012 MAR -5 PM 12:43

TO: BERT G. UTSEY, III, AND J. PAUL DETRICK, ATTORNEYS FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that Defendants Marin Right of Way Service, LLC, and Bernardo L. Hernandez (hereinafter "Defendants") will, ten (10) days from the date of service of this motion or at such time as the Court may determine, move the Court, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, to reconsider its ruling (*i.e.*, alter or amend its Order) on Defendants' Motion to Disqualify Counsel, and to grant the same.

The Defendants' original motion is based on Rule 1.9, 1.10 and 1.18 of the South Carolina Rules of Professional Conduct. On January 30, 2012, Colleton County Clerk of Court filed the

Court's Order Denying Defendant Marin Right of Way Service LLC's Motion to Disqualify Plaintiff's Counsel. Defendants received the Court's order via email from Colleton County Clerk of Court on February 21, 2012. Defendants ask the Court to reconsider Defendants' motion because the Court's order does not appear to address Defendants' Rule 1.18 claim that Plaintiff's counsel is disqualified because Defendants were potential clients. Furthermore, the Court appears not to have appreciated that the motion extended to matters filed against Marin's agents and servants (*i.e.*, Hernandez) as well.

This motion is based on the South Carolina Rules of Civil Procedure, the memorandum of law submitted with this motion, previous memoranda of law submitted to the court, previous oral argument and evidence which was presented at the hearing, and the proposed order which was previously submitted.

KEAVENY LAW FIRM LLC



Thomas J. Keaveny, II (S.C. Bar No. 3308)

Matthew S. Byzet (S.C. Bar No. 100035)

1634 Ashley River Road

Charleston, South Carolina 29407

Telephone: 843.225.2820

Facsimile: 843.225.2823

Email: tkeaveny@keavenylawfirm.com

ATTORNEYS FOR DEFENDANTS AND

THIRD-PARTY PLAINTIFF

March 1, 2012
Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Motion for Reconsideration has been served upon opposing counsel by hand delivery, email, facsimile, or by mailing a copy properly addressed with sufficient postage affixed thereto this 15th day of March, 2012.

KEAVENY LAW FIRM, LLC

BY: K. L. Strickland
Karyn L. Strickland, Paralegal

PATRICIA C. GRAY
COLLETON COUNTY
COMMON PLEAS
2012 MAR -5 PM 12:43

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

RICKY S. MITCHELL

Plaintiff,

vs.

MARIN RIGHT OF WAY SERVICE, et al

Defendant.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2011-CP-15-20

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:
Bert g. Utsey, III, Bar No. _____
Address:
123 Walter St
Walterboro, SC 29488
Phone: 843-549-9544 Fax 843-549-9546
E-mail: butsey@pmped.com Other: _____

Defendant's Attorney:
Matthew S. Byzet, Bar No. 100035
Address:
1634 Ashley River Road, Charleston, SC 29407
Phone: 843-225-2820 Fax 843-225-2823
E-mail: mbyzet@keavenylawfirm.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: Motion to Reconsider

Estimated Time Needed: 30 min

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.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant 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

Collected by: _____ Date Filed: _____

- ☐ **MOTION FEE COLLECTED: \$ _____**
☐ **CONTESTED - AMOUNT DUE: \$ _____**

2012 MAR -5 PM 12:43

PATRICIA P. GRAY
COLLETON COUNTY
COMMON PLEAS

STATE OF SOUTH CAROLINA)

COUNTY OF COLLETON)

RICKY S. MITCHELL,)

Plaintiff,)

vs.)

MARIN RIGHT OF WAY SERVICE,)

LLC, and BERNARDO L.)

HERNANDEZ,)

Defendants.)

BERNARDO L. HERNANDEZ,)

Third-Party Plaintiff,)

vs.)

THREE GEN, INC.,)

Third-Party Defendant.)

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

CASE NO.:2011-CP-15-20

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
RECONSIDERATION OF DEFENDANTS'
MOTION TO DISQUALIFY COUNSEL**

2012 MAR -5 PM 12:43
PATRICIA S. GRANT
COLLETON COUNTY
COMMON PLEAS

TO: BERT G. UTSEY, III, AND J. PAUL DETRICK, ATTORNEYS FOR PLAINTIFF:

I. INTRODUCTION

This matter comes before this court upon the Defendants' Marin Right of Way Service, LLC and Bernardo Hernandez' ("MRWS") Motion to Disqualify Bert G. Utsey ("Utsey"), J. Paul Detrick and the Law Firm of Peters, Murdaugh, Parker, Eltzroth and Detrick, P.A. ("PMPED"). The motion was served on July 22, 2011 and filed on July 26, 2011. Defendants' Memorandum in Support of Motion to Disqualify was served on opposing counsel via email on December 6, 2011. At the

court's request the memorandum was provided to the court by email that same day. Plaintiff served a Memorandum in Opposition to Defendants' Motion to Disqualify on December 15, 2011. Defendants filed a Reply Memorandum on December 19, 2011. The Court held an evidentiary hearing on this motion on December 19, 2011. On January 30, 2012, the Colleton County Clerk of Court filed the Court's Order Denying Defendant Marin Right of Way Service, LLC's Motion to Disqualify Plaintiff's Counsel. Defendants received the Court's Order via email from the Colleton County Clerk of Court on February 21, 2012. Defendants serve the instant Motion for Reconsideration, pursuant to Rule 59(e), SCRCPP, on March 1, 2012.

II. RULE 1.18, SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT

Rule 1.18 applies to circumstances where a lawyer represents a party adverse to a former "prospective client" who has previously consulted with the lawyer about the now adverse matter but without ultimately creating an attorney-client relationship. Rule 1.18 states,

- (a) A person with whom a lawyer discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received disqualifying information as defined in paragraph

(c), representation is permissible if:

- (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or
- (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

Marin alleges that he, his company and its agents ("Marin") were "prospective clients" as defined in Rule 1.18 at the time of his consultation with Utsey and that he conveyed potentially harmful information to Utsey during that meeting such that Utsey and PMPED are disqualified from representing Mitchell against Defendants in the matter of the same collision.

If Marin was a prospective client and Utsey received information that "could be significantly harmful" to Marin in the present matter, Utsey is disqualified from representing Mitchell without Marin's informed consent confirmed in writing. Rule 1.18(d)(1). Under those circumstances, PMPED would also be disqualified unless Utsey (1) "took reasonable measures to avoid exposure to more disqualifying information than was necessary to determine whether to represent" Marin and (2) Utsey is screened from the case, and (3) apportioned no part of the fee, and (4) written notice was promptly given to Marin upon Mitchell's retaining PMPED. Rule 1.18(d)(2).

All parties agree PMPED did not promptly give Marin written notice of its representation of Mitchell. Furthermore, the evidence is indisputable that Utsey did not take reasonable measures to avoid exposure to more disqualifying information than necessary to determine whether to represent

Marin. Comment 4 to Rule 1.18 explains how to avoid exposure to disqualifying information: “In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose.” Utsey testified he knew within minutes that neither he nor PMPED could represent Marin, yet he admitted to questioning Marin for approximately 45 minutes and to taking several pages of notes on subjects related to the collision, all in the interest of recruiting the worker’s comp claims of Marin’s employees. While there is nothing unethical or otherwise improper about the meeting, Utsey did not limit it to “only such information as reasonably appears necessary” to decide whether to represent Marin. Therefore, PMPED may not avail itself of the subsection (d) exception to subsection (c) imputed disqualification.

Whether subsection (c) disqualifies Utsey and PMPED depends first on whether Marin was a “prospective client” under subsection (a) and, second on whether Utsey received information that “could be significantly harmful” to Marin. The parties agree the matter about which Marin consulted Utsey is “the same matter” in which Utsey and PMPED now represent Mitchell who is adverse to Marin.

1. Prospective Client

Subsection (a) of Rule 1.18 states, “A person with whom a lawyer discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship.” The “only when there is a reasonable expectation” clause is not a part of the ABA Model Rule but was added by the South Carolina Supreme Court. The parties agree that under the rule, Marin’s subjective expectation

of an attorney-client relationship must have been objectively reasonable in order for Marin to be a prospective client. However, the parties disagree as to the point in time during the discussion that the test is to be applied. Marin argues the expectation is evaluated before the representation is declined and that at the beginning of the conversation Marin had a “reasonable expectation that the lawyer [was] willing to discuss the possibility of forming a client-lawyer relationship.” See Rule 1.18 Comment 2. Plaintiff argues that once Utsey informed Marin that neither he nor PMPED could represent him, Marin could not then have had a reasonable expectation of forming an attorney-client relationship and thus could not be a “prospective client” as defined in subsection (a).

Rule 1.18 clearly operates to protect persons who are not protected by Rule 1.9—i.e., persons with whom no attorney-client relationship is created. Subsection (b) states, “Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.” All further subsections expressly apply to lawyers who are “subject to paragraph (b)”; thus Rule 1.18 operates only in those circumstances where no attorney-client relationship is created.

Furthermore, if Rule 1.18 operated as Plaintiff’s counsel proposes, it would have no operation at all. By their logic, if a lawyer accepts representation in an initial consultation, Rule 1.9 applies, but if the lawyer declines, no rule would apply and Rule 1.18 would not apply to any circumstances. The rule cannot be construed in this way. In order for it to have any meaning and effect at all, the “reasonable expectation” must be measured prior to the decision (by the lawyer or the client) not to create an attorney-client relationship.

Plaintiff further asks this court to be persuaded by Comment 2, which states:

Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, therefore is not a "prospective client" within the meaning of paragraph (a).

All parties agree that when Marin arrived at PMPED's Walterboro office he said he was in need of legal advice. Utsey invited him into his office; Utsey questioned Marin between 45 and 90 minutes; Utsey took detailed notes. Thus, Marin's communications with Utsey were not unilateral. Marin came to Utsey's office with a reasonable expectation that an attorney-client relationship was likely to be created.

2. Harmful Information

Because Marin was a "prospective client," subsection (c) will prohibit Utsey and PMPED from representing anyone with interests materially adverse to Marin "in the same or a substantially related matter if [Utsey] received information from [Marin] that could be significantly harmful to [Marin]." Rule 1.18(c). The parties agree that the present case is the same matter as the one about which Marin shared information with Utsey. Therefore, the remaining question is whether the information Utsey received "could be significantly harmful" to Marin in this case.

The parties agree as to the details of the conversation between Marin and Utsey, and they are reflected in Utsey's notes. Marin alleges that four categories of information could be significantly harmful in this case: 1) Marin's immediate impressions of the accident; 2) the immigration and driver's license status of Hernandez and the other passengers; 3) MRWS's policies and procedures regarding hiring immigrants; and 4) MRWS's available automobile and general liability insurance. Plaintiff argues that the rule requires that the information shared "is significantly harmful." Plaintiff

contends that none of this information is harmful, nor is it potentially harmful. Initially, the court notes that the information need not be proven to be significantly harmful, as long as it has the potential to be significantly harmful. See Rule 1.18(c).

Plaintiff cites cases from many jurisdictions for the proposition that certain types of information is not harmful; however, in nearly each such case, disqualification was denied not because specific information was found to be non-disqualifying, but because the movant in each case was unable to identify any specific information provided to the lawyer. In *O Builders and Associates v. Yuna Corp. Of N.J.*, 206 N. J. 109, 19 A. 3d. 966 (2011) the court upheld denial of disqualification because movant failed to demonstrate beyond mere vagueries that the matters discussed were substantially related (they were not the same matter) or that any harmful information was even received during the consultation; movant's "entire description of the substance of that consultation was scant." *Id*, at 115; In *Pelley v. State*, 901 N.E. 2d 494, 508 (Ind. 2009) movant "does not claim he communicated any confidential information" so there were no facts from which to find confidentiality or potential harm." *Sullivan v Congelosi*, 84 A.D. 3d 1486, 923 N.Y.S. 737 (2011) is nearly identical. The movant "failed to establish he shared any information with Carroll during the telephone conversation that could be considered confidential" *Id*, at 1487.

On the other hand, in a New York case cited by Plaintiff, the court found three categories of information to be disqualifying: "(1) the plaintiff's present thoughts and feelings on the developing situation, (2) the plaintiff's personal accounts of each relevant event shortly after it happened, and (3) the plaintiff's strategic thinking concerning how to manage the situation." *Miness v. Ahuja*, 762 F.Supp.2d 465, 480-81 (E.D.N.Y 2010). Marin communicated precisely these same categories of information regarding a fatal accident involving his company's van driver and passengers. The

present lawsuit alleges negligence against MRWS and its driver. Marin conveyed to Utsey the driver's account of the accident, Marin's present thoughts and feelings, his account of the collision immediately after he left the scene, and his thoughts about how to manage the situation. Without more, this information itself is potentially harmful to Marin in this case. But, Marin conveyed additional potentially harmful information.

Information about Marin's available insurance coverage can significantly change Plaintiff's bargaining position; MRWS's immigrant-employment policies and procedures could easily and obviously become a direct liability issue; and information about Marin's knowledge of Hernandez' driver's license status not only could be a liability issue for MRWS but has specifically been made an issue in Plaintiff's pleadings and discovery requests. While Hernandez' immigration status appears nowhere in the complaint, it is the kind of information that could be significantly influential with a jury, particularly in the present, highly charged political climate on the subject of Mexican immigration.

Plaintiff alleges that the harmful information also must be confidential in order to be disqualifying under Rule 1.18. Nowhere in the rule or any of its commentary is "information that could be significantly harmful" limited to confidential information. Furthermore, the cases Plaintiff cites in support of this proposition have widely varying opinions of what is and what is not confidential. Plaintiff's case against confidentiality rests largely on the notion that the information Marin provided—or at least some of it—either has been disclosed to third parties or could have been obtained elsewhere including through discovery in the present litigation. Neither disclosure to third parties nor discoverability have any impact on confidentiality. Notably, Plaintiff equates confidentiality to the attorney-client privilege, both in his Memorandum and at the hearing.

Confidentiality is far broader than the attorney-client privilege and not subject to the same exceptions. All information obtained by a lawyer from a client or prospective client is confidential. See Rule 1.6(a)(“information relating to the representation”); Comment 3 (“The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”); Comment 4 (“Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.”). While disclosure to a third party may waive the attorney-client privilege, such disclosure does not waive confidentiality. Confidentiality may be waived only by informed consent. Rule 1.6(a).

The commentary on confidentiality most relevant to a 1.18 analysis is Comment 2: “Confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.” (emphasis added). Rule 1.18 itself offers commentary on the circumstances under which a lawyer may later use information obtained from a prospective client: “A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(g) for the definition of

informed consent.” Rule 1.18 Comment 5. The parties agree Utsey placed no such conditions on his conversation with Marin. Therefore, to the extent confidentiality is relevant to a 1.18 analysis, the information Marin provided to Utsey was confidential. In any case, it could be significantly harmful and Utsey did not prevent the conversation from going beyond the minimal information he states he needed in order to decide not to undertake the representation. Therefore, Rule 1.18(c) disqualifies both Utsey and PMPED from representing Mitchell in the present litigation, and the subsection (d) exceptions to that disqualification have not been met.

III. CONCLUSION

For the reasons stated above, Defendants’ Rule 59(e) Motion for Reconsideration of the Court’s Order Denying Defendant Marin Right of Way, LLC’s Motion to Disqualify Plaintiff’s Counsel should be granted, and, accordingly, the Court should grant Defendants’ Motion to Disqualify Counsel.

KEAVENY LAW FIRM LLC



Thomas J. Keaveny, II, (S.C. Bar No. 3308)

Matthew S. Byzet, (S.C. Bar No. 100035)

1634 Ashley River Road

Charleston, South Carolina 29407

Telephone: 843.225.2820

Facsimile: 843.225.2823

Email: tkeaveny@keavenylawfirm.com

ATTORNEYS FOR DEFENDANTS AND
THIRD-PARTY PLAINTIFF

March 1, 2012
Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Memorandum in Support of Defendants' Motion for Reconsideration has been served upon opposing counsel by hand delivery, email, facsimile, or by mailing a copy properly addressed with sufficient postage affixed thereto this 1st day of March, 2012.

KEAVENY LAW FIRM, LLC

BY: K. L. Strickland
Karyn L. Strickland, Paralegal

PATRICIA C. GRAY
COLLETON COUNTY
COMMON PLEAS
2012 MAR -5 PM 12:44

RECEIVED APR 16, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF COLLETON)

RICKY S. MITCHELL,)

Plaintiff,)

vs.)

MARIN RIGHT OF WAY SERVICE,
LLC, and BERNARDO L.
HERNANDEZ,)

Defendants.)

BERNARDO L. HERNANDEZ,)

Third-Party Plaintiff,)

vs.)

THREE GEN, INC.,)

Third-Party Defendant.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.:2011-CP-15-20

**SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF DEFENDANTS' MOTION
FOR RECONSIDERATION OF
DEFENDANTS' MOTION TO
DISQUALIFY COUNSEL**

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
2012 APR 16 AM 9:03

TO: BERT G. UTSEY, III, AND J. PAUL DETRICK, ATTORNEYS FOR PLAINTIFF:

I. INTRODUCTION

The Defendant, Marin Right of Way Service, LLC (MRWS) has moved for reconsideration of its motion to disqualify the law firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A. (PMPED) and its attorneys from representing the Plaintiff in this action. This Supplemental Memorandum is submitted in further support of the motion.

The basis for this Supplemental Memorandum is the decision this week of the Hon. Sol Blatt, Jr., United States District Court Judge, District of South Carolina wherein, under facts remarkably similar to those of the case *sub judice*, the Court granted a motion to disqualify counsel under Rule

1.18¹. *Spearman v. Verathon, Inc., et al.*, No. 9:11-cv-1652-SB (D.S.C. April 10, 2012). (Exhibit A - transcript of Hon. Sol Blatt, Jr.'s ruling at the hearing).

II. RULE 1.18, SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT

In *Spearman*, the plaintiff met with an attorney who was a partner with a local law firm. The plaintiff did so with the express purpose of discussing the intellectual property issues which were the subject of that case. During the meeting, the plaintiff spoke with the attorney for about 45 minutes and disclosed sensitive information about the case. He believed that the attorney was his lawyer. This was the only meeting between the two parties; the plaintiff did not have any further contact with the attorney until six or seven weeks later when he received a letter from the law firm declining representation. On the same day the firm filed a motion on behalf of the adverse party to dismiss the plaintiff's case. Transcript of Oral Argument at 4:17-22, *Spearman* (No. 9:11-cv-1652-SB). Subsequently, the plaintiff and his counsel moved to disqualify the attorney and the law firm from representing the adverse party in the matter.

The Court granted the plaintiff's motion to disqualify the attorney and the law firm under Rule 1.18 on two bases. *Id.* at 2:10-12. First, under Rule 1.18(c), that the information provided by the plaintiff to the attorney could be significantly harmful, placing emphasis on the words "could be." *Id.* at 2:13-15. The Court stated that the words: could be, "should be interpreted as could be, just like they say." *Id.* at 3:21-22. The Court reasoned that even though the information disclosed by the plaintiff could have been attained some other way, such as formal discovery, the "fact that it came from the plaintiff in the manner that it came from the plaintiff . . . says could be significantly

¹Although *Spearman* was held in federal court, the motion and ruling were based on Rule 1.18 of the South Carolina Rules of Professional Conduct.

harmful.” *Id.* at 3:17-20. Further explaining the basis for its ruling, the Court stated, “I’m convinced that the information could be significantly harmful, and that they would know, representing the defendant, coming from the plaintiff himself, what the bad parts about his case, and even the good parts, they could get ready for it.” *Id.* at 5:10-15.

Second, that the law firm failed to provide prompt, written notice of the adverse representation to the prospective client. *Id.* at 4:9-10. The Court found that the plaintiff did not know that the attorney or the law firm was not going to represent him until six (6) or seven (7) weeks later when he received a letter from the law firm declining representation on the same day it filed a motion to dismiss on behalf of the adverse party. *Id.* at 4:17-22.

In opposing the motion, the law firm argued that the plaintiff was not a prospective client because the appointment between the plaintiff and the attorney was set on short notice, the meeting was limited in duration and scope, and no continuing contact or proceeding was contemplated, carried out, or even attempted. In response, Judge Blatt noted that the plaintiff met with the attorney for the sole purpose of discussing the possibility of legal representation in the matter. Moreover, the Court gave weight to the fact that the attorney asked specific questions related to the matter and took down one and a half pages of notes. The argument that there was only one meeting for 45 minutes was given little weight, because the Court reasoned that based on the exchange of information during that time, it was reasonable for the plaintiff to believe the lawyer was likely to form an attorney-client relationship. For these reasons, the Court held that the plaintiff was a prospective client of the attorney’s law firm under Rule 1.18(a).

The similarities between *Spearman* and the case at hand are striking. In this case, Mr. Marin’s (Marin) appointment with Mr. Utsey (Utsey) was set on short notice with the intent to seek

legal advice and representation for this matter. Utsey asked Marin specific questions about his company and about the events which occurred just hours earlier and which eventually gave rise to this litigation. While the attorney in *Spearman* took less than two pages of notes, Utsey recorded several pages of notes. At the time Marin met with Utsey and disclosed sensitive information about the matter, it was done so in confidence with the specific intention of seeking legal representation. For these reasons, Marin had a reasonable expectation of forming an attorney-client relationship with Utsey. Therefore, just as in *Spearman*, this Court should find that Marin and his company were, in fact prospective clients under Rule 1.18(a).

Furthermore, PMPED should be disqualified pursuant to Rule 1.18. During the hearing, PMPED argued that it should not be disqualified because none of the information disclosed by Marin was “significantly harmful” since all of it would have been provided through formal discovery. The same argument was made by the law firm in *Spearman*. The Court held that whether the information actually was “significantly harmful” is not the issue. Rather, the standard of Rule 1.18(c) is whether the information “*could* be significantly harmful.” That the information could have been obtained in some other way or from some other sources was, similarly, insufficient to withstand the test of Rule 1.18.

The parties agree as to the details of the conversation between Marin and Utsey; the details are reflected in Utsey’s notes. Marin alleges that four categories of information could be significantly harmful in this case: 1) Marin’s immediate impressions of the accident; 2) the immigration and driver’s license status of Hernandez and the other passengers; 3) MRWS’s policies and procedures regarding hiring immigrants; and 4) MRWS’s available automobile and general liability insurance. This information is directly applicable to the matter and could have an effect on a party’s legal

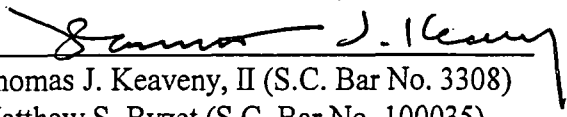
strategy. Similar to the plaintiff in *Spearman*, the information disclosed by Marin was sensitive to the matter and provided in confidence. Therefore, the information disclosed by Marin falls with the "could be significantly harmful" language set forth in Rule 1.18(c).

Finally, PMPED failed to satisfy the requirements of Rule 1.18(d). This argument is addressed in Defendants' initial Memorandum in Support filed with the Court for this motion to reconsider. The language of Rule 1.18(d)(2)(ii) clearly requires *written* notice. It should be noted that not only did PMPED fail to promptly provide Marin with written notice, just as the law firm in *Spearman*, but PMPED never provided written notice of the adverse representation to Marin.

II. CONCLUSION

For the reasons stated above, Defendants' Rule 59(e) Motion for Reconsideration of the Court's Order Denying Defendant Marin Right of Way, LLC's Motion to Disqualify Plaintiff's Counsel should be granted, and, accordingly, the Court should grant Defendants' Motion to Disqualify Counsel.

KEAVENY LAW FIRM, LLC


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ATTORNEYS FOR DEFENDANTS AND
THIRD-PARTY PLAINTIFF

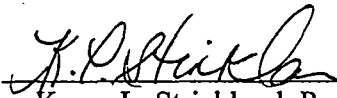
April ⁶13, 2012
Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Supplemental Memorandum in Support of Defendants' Motion for Reconsideration has been served upon opposing counsel by hand delivery, email, facsimile, or by mailing a copy properly addressed with sufficient postage affixed thereto this 13th day of April, 2012.

KEAVENY LAW FIRM, LLC

BY:


Karyn L. Strickland, Paralegal

PATRICIA C. GRANT
COLETON COUNTY
COMMON PLEAS
2012 APR 16 AM 9:03

IN THE DISTRICT COURT OF THE UNITED STATES
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

WILLIAM SPEARMAN,) 9:11-CV-1652
)
Plaintiff) Charleston,
) South Carolina
VS) April 10, 2012
)
VERATHON, INC., ET AL,)
)
Defendants)

EXCERPTED TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE SOL BLATT, JR.,
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: MR. HAROLD KUHN, JR., ESQ.
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For the Defendants: MR. WILLIAM WOOD, JR.
Nelson Mullins Riley and Scarborough
P.O. Box 11070
Columbia, SC 29211

Court Reporter: Amy C. Diaz, RPR, CRR
P.O. Box 835
Charleston, SC 29402

Proceedings recorded by mechanical shorthand,
Transcript produced by computer-aided transcription.

* * *

1
2 THE COURT: We have been over this, and I have given
3 quite a lot of thought to it, particularly today, and prior
4 to today, and I don't think that Rule 19 applies in this case
5 because I don't think -- it starts off by saying a lawyer who
6 has formerly represented a client, but I don't think the --
7 Mr. McElwaine or Nelson Mullins, there is no evidence they
8 had ever represented this plaintiff. So I don't think 19 is
9 applicable.

10 Now, as to Rule 1.18, there are two issues that
11 would disqualify Nelson Mullins, and when I say "Nelson
12 Mullins," Mr. McElwaine and Nelson Mullins.

13 One is that the information that Dr. Spearman gave
14 to Mr. McElwaine could be, those are important words, could
15 be significantly harmful. And if they could be significantly
16 harmful, the Chinese Wall, that's what we used to call it,
17 the requirements were met, one of which included written
18 notice was promptly given to the prospective client.

19 So the first thing that -- the thing that has given
20 me quite a bit of concern is whether the information that Dr.
21 Spearman gave to Mr. McElwaine could be significantly harmful
22 in the case.

23 Now, I accept as true that Mr. McElwaine -- I've got
24 a good friend named John McElwaine in Columbia, that's why I
25 keep saying it that way -- Mr. McElwaine has some difference

1 about the fee, but I think Dr. Spearman went in and told Mr.
2 McElwaine all -- everything he knew about the case, the good
3 and the bad, and they discussed the strengths and weaknesses
4 of the case. And I think that could be, could be
5 significantly harmful to the plaintiff even if the defendant
6 could have gotten it or did get it or could have gotten it in
7 some other way. Getting it from the mouth of the plaintiff,
8 and then representing the other side, I think without a doubt
9 not only could be, but is significantly harmful.

10 I just don't think that -- I think that Dr.
11 Spearman -- I accept that he went in there, as I said, and
12 gave Mr. McElwaine everything he knew about the case, the
13 good part and the bad part.

14 Now, I think Mr. McElwaine discussed with him the
15 strong parts of his case, as well as the weak parts of his
16 case. And I think even though they may have gotten it some
17 other way later, the fact that it came from the plaintiff in
18 the manner that it came from the plaintiff, that just doesn't
19 say was significantly harmful, or is significantly harmful,
20 it says could be significantly harmful. And I think those
21 words under the circumstances like this should be interpreted
22 as could be, just like they say. And I think that could be
23 significantly harmful to have the plaintiff come in and tell
24 you all the weaknesses of his case and the strong parts, too,
25 and you go represent the other side.

1 But even then the defendant could avoid the
2 disqualification if they took reasonable methods to avoid the
3 exposure of that information to anybody else besides Mr.
4 McElwaine. And if a screen -- we used to call it a Chinese
5 Wall, I don't know what it's called now, apparently, it's
6 called screen -- but was placed around Mr. McElwaine, which I
7 think Nelson Mullins would do, and that he wouldn't get any
8 part of the fee, I don't know the mechanics of that, but I'm
9 confident that that would happen, but this thing says, and
10 written notice was promptly given to the prospective client.

11 I think that's an important factor because in this
12 particular case when Dr. Spearman and Mr. McElwaine talked,
13 he left papers there, he expected to get a bill, whether it
14 was a bill to be paid monthly or -- because he didn't get it
15 on a contingent basis, so he expected to get a bill, at least
16 a bill for a day, but a bill at some time. He left his
17 papers there, he left his information there. And it wasn't
18 until six or seven weeks later when a written Notice to
19 Dismiss, I think it was, was filed, and maybe some other
20 motions, too, by Nelson Mullins on behalf of Dr. Spearman's
21 adversary, that he ever knew that Nelson Mullins was not
22 going to, or Mr. McElwaine was not going to represent him.

23 I don't know of a firm in South Carolina, I bet I
24 know 30 or 40, I don't know how big Nelson Mullins, I'm sure
25 I know 30 or 40 of them, and I don't know of a firm in South

1 Carolina or anybody in that firm that I know is more ethical
2 than they are, and I have nothing but the greatest of
3 admiration for that firm.

4 I knew old Mr. Ed Mullins, and I knew Mr. Nelson of
5 Nelson Mullins -- I can't think, it wasn't the first
6 Mr. Nelson, it was the second. And of course I know
7 everybody in that firm. And I know of the highest ethical
8 conduct that they've got.

9 But they just, in this particular case, they just
10 slipped by. And I can't believe that, as I said, I'm
11 convinced that the information could be significantly
12 harmful, and that they would know, representing the
13 defendant, coming from the plaintiff himself, what the bad
14 parts about his case, and even the good parts, they could get
15 ready for it.

16 And as much as they screened Mr. McElwaine, and I'm
17 confident they would, I'm confident he wouldn't participate
18 in it, I'm confident that he wouldn't get any fee, but that
19 information which could be significantly harmful, they just
20 didn't give written notice of the conflict to Dr. Spearman
21 who was a prospective client.

22 And I can't imagine when Dr. Spearman -- I don't
23 know exactly how he found out -- but when he got, I guess a
24 letter that was sent out the same day, he got a letter from a
25 lawyer he thought was representing him saying he couldn't

1 represent him, and the same day, the same time, got a Motion
2 to Dismiss his other motion, I think one of them was to
3 change the venue, that must have been quite a shock. It
4 would have been a shock to me.

5 So I looked at it -- and I want to emphasize the
6 fact that I don't think Nelson Mullins or Mr. McElwaine or
7 Mr. Wood or anybody set out to do anything wrong, it was just
8 sometimes you have a mixup. And the bigger a firm is, the
9 more likely you are to have a mixup. And I remember one time
10 they had 500 lawyers in there, I don't know how many they've
11 got now. It's a great law firm.

12 But I just think it would be inappropriate for them
13 to represent the defendant in this matter. So I'm going to
14 grant the plaintiff's motion that they be disqualified, and
15 I'm going to strike all the pleadings that they filed and
16 give the defendant 60 days to secure representation -- to all
17 the defendants -- 60 days to secure representation and to
18 file any legal -- any pleadings or motions or any other legal
19 document that they choose to file.

20 Now, if for some reason -- it seems like 60 days is
21 long enough -- but if for some reason they feel that if
22 something comes up and 60 days is not long enough, all
23 they've got to do is come to me with any kind of reasonable
24 reason and I'll certainly be glad to extend the time.

25 I'm sorry this matter came up. And it's just --

1 it's just something that I had to decide, and I just feel
2 that it wouldn't be appropriate for the reasons that I've
3 said to allow Nelson Mullins to continue to represent these
4 defendants.

5 Now, I want the record to show I made some comment,
6 I might have asked Mr. McElwaine, if I recall, Mr. Kuhn or
7 somebody, I think I asked him, but that has nothing to do
8 with my decision in this case, that specific thing in the
9 record. I didn't give that any consideration. It's got
10 nothing to do with this. It's got nothing to do with it. I
11 didn't give it any consideration. I had no business to give
12 it any consideration. It was just a matter -- it was just
13 something I asked, but it had nothing to do with the case.

14 Now, having said everything that I think that I need
15 to say, is there any question that anybody has they want to
16 ask me before we recess?

17 MR. KUHN: Not from the plaintiff, Your Honor.
18 Thank you.

19 MR. WOOD: Nothing from the defendants, Your Honor.

20 THE COURT: Okay. Well, at least we've gotten
21 behind this thing. It was particularly unpleasant for me,
22 but you don't get this job and have the opportunity to pick
23 the cases that you like, even if you have been doing it as
24 long as I have, they don't let up on you.

25 And I appreciate the briefs that you've filed and

1 the arguments that you've made, and they have been
2 particularly helpful to the Court. And after the 60 days is
3 up, then we'll proceed with the case.

4 Okay. Thank you. We'll be in recess.

5 *****

6
7 I certify that the foregoing is a correct transcript from the
8 record of proceedings in the above-titled matter.
9
10
11

12 -----
13
14 Amy C. Diaz, RPR, CRR

April 12, 2012

15 S/ Amy Diaz
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The South Carolina Court of Appeals

Ricky S. Mitchell, Respondent,

v.

Marin Right of Way Service, LLC, and Bernardo L.
Hernandez, Appellants,

v.

Bernardo L. Hernandez, Third-Party Plaintiff,

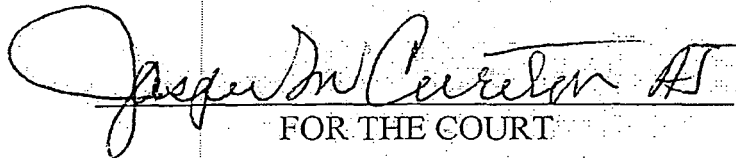
v.

Three-Gen, Inc., Third-Party Defendant.

Appellate Case No. 2012-212460

ORDER

Respondent has filed a motion to dismiss. This is an appeal from the denial of a motion to disqualify counsel. Because such an order is interlocutory and not immediately appealable, we grant Respondent's motion to dismiss. See S.C. Code Ann. §14-3-330(2) (1977).


FOR THE COURT

Columbia, South Carolina

cc:

FILED

RG 1-3-13

Thomas J. Keaveny, II
Matthew S. Byzet
Bert Glenn Utsey, III

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-15-020

RICKY S. MITCHELL,

Plaintiff,

v.

MARIN RIGHT OF WAY SERVICE, LLC,
and BERNARDO L. HERNANDEZ,

Defendants.

ORDER

BERNARDO L. HERNANDEZ,

Third-Party Plaintiff,

v.

THREE GEN, INC.,

Third-Party Defendant.

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
2012 MAY -7 PM 1:28

#1
PnB

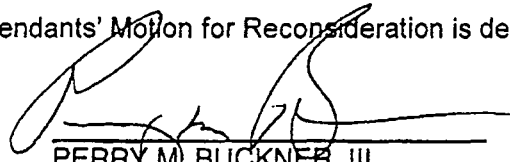
This matter is before the Court on a Rule 59(e), SCRPC, Motion for Reconsideration filed by Defendants Marin Right of Way Service, LLC (hereinafter, "Marin") and Bernardo Hernandez (hereinafter, "Hernandez"). Defendants contend the Court's Order dated January 23, 2012, "failed to address Defendants' Rule 1.18 claim that Plaintiffs counsel is disqualified because Defendants were potential clients" and "appear[ed] not to have appreciated that the motion extended to matters filed against Marin's agents and servants (*i.e.*, Hernandez) as well." (Memorandum in Support of Motion for Reconsideration, p. 2).

I have again reviewed all matters related to Defendants' Motion to Disqualify Plaintiff's attorneys, Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A. (hereinafter, "PMPED"). I am disposing of the Motion for Reconsideration based on the record and the briefs, without the necessity of a hearing, as authorized by *Pollard v. City of Florence*, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994).

I find there is no factual support for Hernandez's claim he formed an attorney-client relationship with PMPED; therefore, South Carolina Rule of Professional Conduct (hereinafter, "RPC") 1.9 does not provide a basis for disqualification of PMPED.

I also find that neither Defendant was a prospective client of PMPED as contemplated by RPC 1.18 and that neither Defendant provided to PMPED any information which could be significantly harmful to him or it in this matter. Therefore, RPC 1.18 does not provide a basis for disqualification of PMPED.

IT IS THEREFORE ORDERED that Defendants' Motion for Reconsideration is denied.



PERRY M. BUCKNER, III
JUDGE
FOURTEENTH JUDICIAL CIRCUIT

May 1, 2012
Walterboro, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2011-CP-15-0020

Ricky S. Mitchell, ... Respondent,

v.

Marin Right of Way Service, LLC, and
Bernardo L. Hernandez..... Appellants.

MOTION TO DISMISS APPEAL

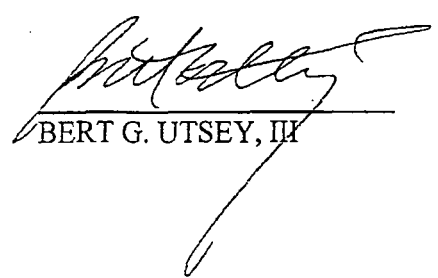
Pursuant to Rule 224, SCACR, Respondent Ricky Mitchell hereby moves this Honorable Court for an Order dismissing the present appeal on the ground that it is an appeal from an interlocutory Order; therefore, this Court lacks appellate jurisdiction.

The bases for this Motion are set forth in greater detail in the Memorandum in Support filed herewith. Copies of the subject Orders, as well as other pertinent Circuit Court filings, are attached as an Appendix to the Memorandum in Support.

Respectfully submitted,

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.

BY:


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Attorneys for Respondent

July 6, 2012
Walterboro, S.C.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2011-CP-15-0020

Ricky S. Mitchell, ... Respondent,

v.

Marin Right of Way Service, LLC, and
Bernardo L. Hernandez..... Appellants.

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS APPEAL

INTRODUCTION

Pursuant to Rule 224(c), SCACR, Respondent Ricky Mitchell submits this Memorandum in Support of his Motion to Dismiss Appeal. Pertinent Orders and other Circuit Court filings are listed on the Appendix to this Memorandum and are attached as exhibits hereto.

ARGUMENT

THE APPEAL IS FROM AN INTERLOCUTORY ORDER AND SHOULD BE
DISMISSED AS THIS COURT LACKS JURISDICTION.

An aggrieved party's right to appeal is set forth in Rule 201(a), SCACR, which states: "Appeal may be taken, as provided by law, from any final judgment, appealable order or decision."

Thus, the initial question presented is whether the appealed Order¹ constitutes a final judgment; if not, then the remaining question is whether it is an “appealable order.”

“Final judgment’ is a term of art referring to the disposition of all the issues in the case.” *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354, 356 (Ct. App. 2004), citing *Link v. School Dist. of Pickens County*, 302 S.C. 1, n. 3, 393 S.E.2d 176, n. 3 (1990). A judgment is not final if it “leav[es] some further act to be done by the court before the rights of the parties are determined.” *Neely v. Thomasson*, 355 S.C. 521, 586 S.E.2d 141, 144 (Ct. App. 2003), *rev’d in part on other grounds* 365 S.C. 345, 618 S.E.2d 884 (2005), citing *Adickes v. Allison & Bratton*, 21 S.C. 245, 259 (1884); accord *Ex parte Wilson*, 367 S.C. 7, 625 S.E.2d 205 (2005).

The Order does not dispose of the substantive issues in this case. The parties’ claims and defenses will be litigated regardless of the Order. Consequently, it is not a final judgment. The questions presented by this appeal will be inherent in and can be argued in any appeal from the final judgment; thus, the Order is regarded as interlocutory. *Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209, 212 (1942), quoting 4 C.J.S., *Appeal and Error*, § 99.

Since the Order is an interlocutory order, Appellants have no right to appeal it unless it is considered an “appealable order” as contemplated by Rule 201(a), SCACR. “Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within South Carolina Code section

¹ This appeal actually relates to two Orders, the first of which denied Appellants’ Motion to Disqualify (Order dated January 23, 2012) and the second of which denied Appellants’ Motion for Reconsideration of the first Order (Order dated May 1, 2012). Because the Orders relate to the denial of the same motion and the second Order amended the first Order, Respondent refers to them jointly as “the Order” for the sake of simplicity.

14-3-330.” *Wieters v. Bon-Secours-St. Francis Xavier Hosp.*, 378 S.C. 160, 166, 662 S.E.2d 430, 433 (Ct. App. 2008), *vacated* 381 S.C. 332, 333, 673 S.E.2d 417, 418 (2009) (on the grounds the circuit court’s order was not directly appealable), *citing Baldwin Const. Co. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004).

South Carolina Code section 14-3-330 governs the appealability of Orders and the scope of this Court’s appellate jurisdiction. It provides that this Court has 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 . . . ;
- (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 . . . ; 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.

S.C. CODE ANN. § 14-3-330 (1976 & Cum. Supp. 2002) [emphasis added].

The appealed Order does not “involv[e] the merits” of this action sufficient to trigger appellate jurisdiction. *See Peterkin v. Brigman*, 319 S.C. 367, 461 S.E.2d 809, 810 (1995) *quoting Mid-State Distributors v. Century Importers*, 310 S.C. 330, 426 S.E.2d 777 (1993) (“To involve the merits, the order must ‘finally determine some substantial matter forming the whole or part of some cause of action or defense....’”). Therefore, subsection (1) does not apply.

Moreover, the subject Order is not a final order; therefore, subsection (3) does not provide for appellate jurisdiction in this Court.

In addition, the Order does not deal with injunctive relief, so subsection (4) is inapplicable.

Finally, while Appellants may contend subsection (2) provides them a basis to appeal the Order because it affects a substantial right,² the South Carolina Supreme Court has clearly rejected such an argument. *Compare Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707, 709 (2005) (“The provisions of Section 14-3-330, including subsection (2), have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed. Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial.”; but, an order *granting* a motion to disqualify a party’s attorney is “one of those rare orders” which is directly appealable as affecting a party’s substantial rights) *with State v. Wilson*, 387 S.C. 597, 602-03 & n. 3, 693 S.E.2d 923, 926 & n. 3 (2010) (“The *denial* of a disqualification motion is not directly appealable as the ruling does not affect the merits or a party’s substantial rights, nor does it effectively determine the action, and any error in the failure to grant the motion is more amenable to correction through the remedy of a new trial.” [emphasis in original]; “[T]he policy implications present in *Hagood*, i.e., the right of a party to retain counsel of his or her choosing and the development of an attorney/client relationship, are not compelling factors when considering the disqualification of [opposing counsel].”); *see also Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707, 711 (2005) (Pleicones, J., dissenting) (“Attorney disqualification does not fall within the ambit of section 14-3-330(2)(a).”) and David B. Harrison, *Appealability of State Court’s*

² Notably, the Order neither determines the action, rules upon a new trial motion, nor strikes any portion of a pleading; consequently, even if this argument had merit (which Respondent denies), subsection (2) still would not apply.

Order Granting or Denying Motion to Disqualify Attorney, 5 A.L.R.4th 1251, § 3 (1981) (cited with approval in *Hagood*) (demonstrating that, except with respect to a split of authority in California, courts have uniformly held orders denying motions to disqualify counsel are not directly appealable).

Here, the appealed Order is not a final judgment, does not involve the merits, does not affect a substantial right of Appellants, and is simply an interlocutory Order as to which there is no right to an immediate appeal. Consequently, this Court lacks appellate jurisdiction and should dismiss the present appeal.

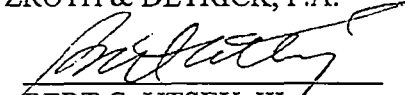
CONCLUSION

For the foregoing reasons, Respondent requests that the Court dismiss the present appeal and remand this matter to the Court of Common Pleas for Colleton County.

Respectfully submitted,

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.

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July 6, 2012
Walterboro, S.C.

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2011-CP-15-0020

Ricky S. Mitchell, ... Respondent,

v.

Marin Right of Way Service, LLC, and
Bernardo L. Hernandez..... Appellants.

APPENDIX TO
MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS APPEAL

The following is a list of Circuit Court Orders and other filings attached as exhibits to the Memorandum in Support of Motion to Dismiss Appeal:

1. Complaint dated January 3, 2011.
2. Motion to Disqualify dated July 22, 2011.
3. Order dated January 23, 2012.
4. Motion for Reconsideration dated March 1, 2012.
5. Order dated May 1, 2012.

8. At the intersection of S.C. Highway 641 and U.S. Highway 601, traffic on U.S. Highway 601 has the right of way.

9. At the time and place described above, Hernandez failed to stop fully for the stop sign governing his lane of traffic and/or failed to yield the right of way to Plaintiff's land of traffic and entered the intersection onto U.S. Highway 601 directly into Plaintiff's path of travel, causing a collision with the truck operated by Plaintiff (hereinafter, the "Collision").

10. The Collision was due to and caused directly and proximately by the negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and unlawful acts, delicts and omissions of Hernandez in one or more of the following particulars:

- a. In failing to keep a proper lookout;
- b. In failing to obey the stop sign governing his lane of traffic;
- c. In failing to yield the right of way to Plaintiff;
- d. In failing to come to a complete stop at the intersection;
- e. In failing to utilize his brakes properly;
- f. In failing to maintain proper control over his motor vehicle;
- g. In failing to take adequate evasive action to avoid the Collision;
- h. In colliding with the vehicle Plaintiff was operating;
- i. In entering the intersection when Plaintiff's vehicle was approaching on another roadway so closely as to constitute an immediate hazard during the time when Hernandez would be moving across or within the intersection;
- j. In violating S.C. Code Ann. § 56-5-2310(a) (1976, as amended);
- k. In violating S.C. Code Ann. § 56-5-2330(b) (1976, as amended);
- l. In violating other laws, statutes, and ordinances of the State of South Carolina; and
- m. In failing to exercise the degree and caution that a reasonable prudent person would have executed under the circumstances then and there prevailing.

11. Marin is vicariously liable for Hernandez's negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and unlawful acts, delicts and omissions under the doctrine of *respondeat superior*.

12. The Collision was also due to and caused directly and proximately by the negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and unlawful acts, delicts and omissions of Marin in entrusting its vehicle to Hernandez when it knew or should have known he was not adequately trained and qualified to operate it safely on the roadways of South Carolina.

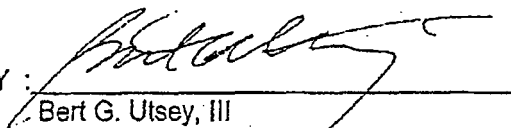
13. As a direct and proximate result of the Collision, Plaintiff sustained serious, severe, and permanent injuries from which he continues to suffer, and upon information and belief, will continue to suffer in the future.

14. As a direct and proximate result of the aforementioned negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and unlawful acts, delicts and omissions of Defendants, Plaintiff has suffered actual damages in an amount to be determined by the jury. In addition, Plaintiff is entitled to an award of punitive damages in an appropriate amount.

WHEREFORE, Plaintiff prays for judgment against Defendants for actual damages, punitive damages, the costs of this action, and for such other and further relief as the Court may deem just and proper.

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.

BY :



Bert G. Utsey, III
123 Walter Street
Post Office Box 1164
Walterboro, SC 29488
Phone: (843) 549-9544
Fax: (843) 549-9548
butsey@pmped.com

ATTORNEYS FOR PLAINTIFF

January 3, 2011
Walterboro, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO.:2011-CP-15-20
	)	
RICKY S. MITCHELL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	MOTION TO DISQUALIFY BERT G.
	)	UTSEY, J. PAUL DETRICK AND THE
MARIN RIGHT OF WAY SERVICE,	)	LAW FIRM OF PETERS, MURDAUGH,
LLC, and BERNARDO L.	)	PARKER, ELTZROTH AND DETRICK,
HERNANDEZ,	)	P.A.
Defendants.	)	
	)	
BERNARDO L. HERNANDEZ,	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
THREE GEN, INC.,	)	
	)	
Third-Party Defendant.	)	
	)	

TO: BERT G. UTSEY, III, ESQUIRE AND J. PAUL DETRICK ESQUIRE, ATTORNEYS
FOR PLAINTIFF:

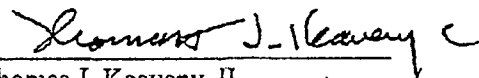
YOU WILL PLEASE TAKE NOTICE that on August 1, 2011 at 10:00 a.m. or thereafter as he may be heard, the undersigned will move to disqualify Mr. Utsey, Mr. Detrick and the law firm of Peters Murdaugh Parker Eltzroth and Detrick P.A. ("law firm") from representing Plaintiff in this matter. The motion will be heard at the Colleton County Courthouse.

The motion to disqualify is made pursuant to Rule 1.18 and Rule 3.7 of the South Carolina Rules of Professional Conduct. It is based upon the testimony of Carlos Marin which will be elicited at the hearing that on January 27, 2010, and thereafter, he met at length with Mr. Utsey and other members of his firm seeking legal advice relating to the very accident which is the subject of this

lawsuit. Under Rule 1.18 (c) counsel cannot now represent Mr. Mitchell whose interests are materially adverse to Mr. Marin. Furthermore, during those meetings, Mr. Marin gave and received information which may even have established an attorney-client relationship under Rule 1.9 so that Mr. Utsey and the law firm are disqualified from representing Plaintiff in this action under Rule 1.9 and Rule 1.10. Finally, Rule 3.7 prevents an attorney from serving as both an advocate and a witness. This may become an issue in the case and may be the reason Attorney Detrick filed a Notice of Appearance (Exhibit "A") on May 10, 2011 -- 4 months after suit was filed by his law partner, Mr. Utsey.

The motion will be supported by the testimony of Carlos Marin. Application of the rules to the facts of this matter will be supported by the testimony of Mr. Michael Virzi, professor of legal ethics at the University of South Carolina, School of Law (C.V. attached as Exhibit "B").

Respectfully submitted,


Thomas J. Keaveny, II
KEAVENY LAW FIRM LLC
(S.C. Bar No. 3308)
445 Folly Road
Charleston, South Carolina 29412
Telephone: 843.225.2820
Facsimile: 843.225.2823
Email: tkeaveny@keavenylawfirm.com

ATTORNEYS FOR DEFENDANTS
AND THIRD-PARTY PLAINTIFF

July 22nd, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)
)
RICKY S. MITCHELL,,)
)
Plaintiff,)
)
v.)
)
MARIN RIGHT OF WAY SERVICE, LLC,)
AND BERNARDO L. HERNANDEZ,,)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2011-CP-15-020

NOTICE OF APPEARANCE
OF
J. PAUL DETRICK
FOR PLAINTIFF

PLEASE TAKE NOTICE, that the undersigned, J. Paul Detrick, attorney with the law firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, PA, does hereby give his Notice of Appearance as co-counsel for the plaintiff, Ricky S. Mitchell, along with Bert G. Utsey, III co-counsel, and requests that copies of any future correspondences served in this action by the parties be served upon him at the address given below.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

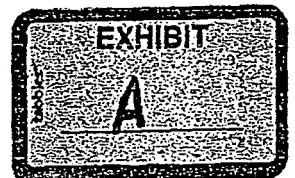
BY:



J. Paul Detrick
Bert G. Utsey, III
P.O. Box 457
Hampton, SC 29924
(803) 943-2111

ATTORNEYS FOR PLAINTIFF

May 10, 2011
Hampton, South Carolina



CERTIFICATE OF SERVICE

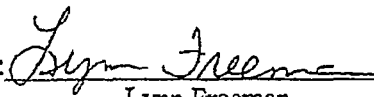
This is to certify that I, Lynn Freeman, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Plaintiff(s), have this date mailed via the U.S. Postal Service, a true and correct copy of the within *Notice of Appearance* with first class postage prepaid to:

Thomas J. Keaveny, II, Esquire
Keaveny Law Firm, LLC
445 Folly Road
Charleston, SC 29412

Pratt-Thomas Walker, P.A.
Lindsay K. Smith-Yancey, Esquire
Post Office Drawer 22247
Charleston, South Carolina 29413-2247

Turner Padgett Graham & Laney, P.A.
Britton M Hawk, Esquire
P.O. Box 22129
Charleston, SC 29413

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: 
Lynn Freeman

May 10, 2011
Hampton, South Carolina

MICHAEL J. VIRZI

P.O. Box 50252

Columbia, SC 29250

michael.virzi@gmail.com

803-404-0429

EDUCATION

University of South Carolina School of Law, Columbia, SC

J.D., *cum laude*, May 2000

Honors:

- Order of the Coif
- Order of Wig & Robe
- Roy Webster Scholar
- Dean's List
- CALI Award, Business Corporations
- Articles Editor, *ABA Real Property, Probate and Trust Journal*

University of South Carolina, Columbia, SC

B.A., Political Science, May 1991

LAW PRACTICE

Michael J. Virzi, LLC, Columbia, SC

Solo practitioner (part-time), August 2006 – present

Ethics & Malpractice Consultation

Attorney Grievances

S.C. Supreme Court's Office of the Disciplinary Counsel, Columbia, SC

Assistant Disciplinary Counsel, February 2003 – August 2006

Investigated and prosecuted lawyer misconduct and incapacity, with a concentration in real estate transactions, mortgage fraud, and the unauthorized practice of law

Represented the Disciplinary Counsel in non-disciplinary legal matters

Sowell Gray Stepp & Laffitte, L.L.C., Columbia, SC

Associate Attorney, July 2001 – February 2003

Business, Commercial and Real Estate Litigation

Bankruptcy & Creditors' Rights

Employment Litigation

Gallivan, White & Boyd, P.A., Greenville, SC

Associate Attorney, August 2000 – July 2001

Business and Real Estate Litigation

Bankruptcy & Creditors' Rights

TEACHING EXPERIENCE

University of South Carolina School of Law, Columbia, SC

Legal Writing Instructor, August 2006 – Present (adjunct 2005 – 2006)

Legal Writing I & II

Advanced Legal Writing

Supervised Legal Research

Fundamentals of Law Practice & Professionalism

Midlands Technical College, Columbia, SC

Adjunct Instructor, Paralegal Degree Program, May 2003 – August 2005

Business Law I (contracts, agency)

Business Law II (payment systems, secured transactions, corporations, partnerships, LLCs)



PUBLICATIONS

Quality Control: In re Wells and the Regulation of Adverbs and Adjectives in Lawyer Advertising, S.C. Lawyer, July 2011, at 27.

REAL ESTATE TRANSACTIONS: CASES AND MATERIALS (2d ed. 2010) (with Stephen A. Spitz).

Who Can You Trust? How the TLGP, CDARS, FDIC and NCUSIF Affect the Safekeeping of Client Funds, S.C. Lawyer, May 2009, at 14.

If It Walks Like a Duck...: Ethics Advisory Opinion 06-11 & the Attorney-Client Relationship in Real Estate Transactions, S.C. Lawyer, March 2007, at 30.

SIGNIFICANT CASES

Doe Law Firm v. Richardson, 371 S.C. 14, 636 S.E.2d 866 (2006).

Ex Parte Watson, 356 S.C. 432, 589 S.E.2d 760 (2003) (brief only).

PROFESSIONAL ASSOCIATIONS

Bar:

American Bar Association	2006 – present
South Carolina Bar	2000 – present
Professional Responsibility Committee	2011 – present
Ethics Advisory Committee (Chair 2007-2010)	2003 – present
Technology Committee	2001 – 2003
S.C. Association of Ethics Counsel	2008 – present
Richland County Bar	2001 – present
North Carolina Bar (inactive since 2004)	2001 – present

Courts:

U.S.D.C., District of South Carolina	2001 – present
U.S.D.C., Western, Middle & Eastern Districts of North Carolina	2001 – present
U.S. Court of Appeals, Fourth Circuit	2002 – present

Law Enforcement:

National White Collar Crime Center	2004 – 2007
F.B.I. Multi-Jurisdictional Lending Fraud Task Force	2004 – 2006

LECTURES & SEMINARS

Advertising School (panelist), S.C. Bar & Supreme Court LEAPP Program, Dec. 15, 2010

Ethics & Malpractice in a Real Estate Practice (guest lecturer), Charleston School of Law, Sept. 15, 2010

Ethics & Malpractice in a Real Estate Practice (guest lecturer), USC School of Law, Aug. 30, 2010

Ethics in Real Estate Transactions (guest lecturer), Charleston School of Law, June 3, 2010

Ethics & Malpractice in a Real Estate Practice (guest lecturer), Charleston School of Law, May 26, 2010

LECTURES & SEMINARS (Continued)

- Ethics School* (panelist), S.C. Bar & Supreme Court LEAPP Program, May 14, 2010
- If I Only Had A Brain: Real Estate Ethics*, Fidelity National Annual Seminar, Feb. 26, 2010
(For what it's worth, I did not name this one.)
- Ethics School* (panelist), S.C. Bar & Supreme Court LEAPP Program, Feb. 19, 2010
- Ethics School* (panelist), S.C. Bar & Supreme Court LEAPP Program, Oct. 15, 2009
- Recent Issues in Trust Accounting and Real Estate*, First American Fall Seminar, Oct. 9, 2009
- Ethics School* (panelist), S.C. Bar & Supreme Court LEAPP Program, June 11, 2009
- UPL in Real Estate Transactions* (guest lecturer), USC School of Law, April 1, 2009
- Ethics School* (panelist), S.C. Bar & Supreme Court LEAPP Program, Feb. 12, 2009
- Ethics in Real Estate Transactions* (guest lecturer), Charleston School of Law, Feb. 11, 2009
- Classroom Ethos: The Trophy Case and Beyond*, NC/SC Legal Writing Conference, May 21, 2008
- Guided Meditation for Getting in Touch with Your Inner Ethics Counsel*, S.C. Bar, Apr. 11, 2008
- Ethics and Beyond: Hot Topics in Foreclosure*, S.C. Masters-in-Equity, Mar. 14, 2008
- Ethics in Real Estate Transactions* (guest lecturer), USC School of Law, Feb. 27, 2008
- The Attorney Grievance Process, Part II* (guest lecturer), USC School of Law, Feb. 13, 2008
- The Attorney Grievance Process, Part I* (guest lecturer), USC School of Law, Feb. 6, 2008
- Hot Topics in Ethics for Government Lawyers*, SCAC Fall Seminar, Dec. 7, 2007
- Practical Tips for Solo and Small-Firm Lawyers*, Lexington County Bar, Dec. 5, 2007
- Ethics Update for Real Estate Lawyers*, Stewart Title Fall Seminar, Nov. 2, 2007
- Ethics Issues in Housing Law and Beyond*, S.C. Appleseed Legal Justice Center, Oct. 19, 2007
- Ethics in Real Estate Transactions* (guest lecturer), USC School of Law, Oct. 15, 2007
- Ethics Impact of The 2006 Property Tax Reform Act*, S.C. Bar, Aug. 24, 2007
- Real Estate Ethics* (guest lecturer), USC School of Law, Apr. 9, 2007
- Ethics in Real Estate Transactions* (guest lecturer), USC School of Law, Mar. 23, 2007
- The Attorney Discipline Process* (guest lecturer), USC School of Law, Feb. 29, 2007
- Legal Ethics of Non-Profit Corporations*, S.C. Bar, Feb. 9, 2007
- Real Estate Fraud*, Charleston County Real Estate Section Meeting, Dec. 8, 2006
- ODC's Top Ten List*, S.C. Bar Solo & Small Firm Section Conference, Oct. 6, 2006
- Avoiding Discipline in a Real Estate Practice*, SCALA Ethics Seminar, July 27, 2006
- A Closing Lawyer's Ethical Obligations* (panelist), S.C. Bar Real Estate Section Update, May 12, 2006
- Ethics Rules & Real Estate Practice* (panelist), S.C. Bar Convention, Jan. 27, 2006
- UPL Issues in Real Estate Closings*, Richland County Bar Annual Ethics Seminar, Nov. 4, 2005
- Real Estate Fraud & Property Flips*, PLTA Fall Seminar, Sept. 13, 2005

LECTURES & SEMINARS (Continued)

Ethics in Real Estate Transactions, PLTA Spring Convention, May 13, 2005

Pitfalls of a Real Estate Practice (panelist), S.C. Bar Convention, Jan. 21, 2005

The Revised Lawyer's Oath (panelist), Office of the Attorney General, Aug. 20, 2004

Professionalism in the Law (panelist), USC School of Law, Aug. 17, 2004

Professionalism in the Law (panelist), USC School of Law, Aug. 19, 2003

Basics of Civil Litigation, Half-Moon Seminars, Apr. 25, 2003

Racial Discrimination & the 14th Amendment (guest lecturer), Columbia College, Apr. 9, 2003

PRESS

Diana Smith, *E-mail Marketing Presents Opportunities for Firms but Perils if Done Wrong*, S.C. Law. Weekly, Oct. 4, 2010.

Tim Smith, *High Court Puts Lawyers on Notice about Relationships*, Greenville (S.C.) News, Sept. 15, 2010.

Stephanie Francis Ward, *Grade Anxiety*, ABA Journal, Feb. 2010, at 52.

Adam Parker, *Complaint Filed in Diocese Settlement Case*, Post & Courier (Charleston, S.C.), Feb. 26, 2009.

Sandy Hodson, *After Mortgage Fraud Cases, Federal Leaders Urge Caution*, Augusta Chronicle, Dec. 28, 2008.

Bess Battle, *Battle Zone*, S.C. Law. Weekly, Sept. 1, 2008, at 6.

Gregory Froom, *Attorneys May Threaten Criminal Action While Trying to Collect on Bad Checks*, S.C. Law. Weekly, Sept. 24, 2007, at 1.

Kristy Eppley Rupon, *Lawyers Required to Oversee Refinancing*, The State (Columbia, S.C.), Nov. 6, 2006, at H23.

Michael Dayton, *Disbursement of Closing Funds Requires Attorney Supervision*, S.C. Law. Weekly, Oct. 30, 2006, at 1.

Gregory Froom, *Must Lawyers Disburse?*, S.C. Law. Weekly, Oct. 16, 2006, at 1.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2011-CP-15-0020

PATRICK C. GRANT
COLLETON COUNTY
COMMON PLEAS

#1
Pmb

On January 27, 2010, an automobile collision occurred involving a Marin-owned van driven by Marin employee, Defendant/Third-Party Plaintiff Bernardo L. Hernandez (hereinafter "Hernandez"). The van was occupied by seven other employees of Marin, three of whom were killed as a result of the collision. The other vehicle was a truck-trailer owned by Third-Party Defendant Three Gen. Inc. and operated by Plaintiff Ricky Mitchell (hereinafter "Mitchell").

Mitchell was also injured. The MAIT team of the South Carolina Highway Patrol investigated the accident.

Immediately following the incident, Mr. Marin, owner of Marin, came to Mr. Utsey's office in Walterboro on the morning of the collision and met with Mr. Utsey. There is considerable dispute among the parties about several details of the meeting, including whether Mr. Utsey informed Mr. Marin that he would not be representing him. They did discuss the collision and the fact that Marin's employees and their families may need representation.

Later that same day, the parties agree that with Mr. Marin's assistance, Mr. Utsey met with the father-in-law of one of the deceased employees regarding representing his estate on a wrongful death claim. The parties agree also that Mr. Utsey and Mr. Marin met again two days later at Mr. Utsey's office with Johnny Parker, Dorcas Tuten, Mr. Marin's brother, and a mutual acquaintance of Mr. Marin and Mr. Utsey present. Mr. Marin and Mr. Utsey had no further contacts after the January 29, 2010 meeting. Ultimately, Mr. Utsey and his firm (PMPED) did not represent any victims of the January 27 collision or their family members.

#2
PMB
Mitchell retained PMPED on March 3, 2010 to represent him with respect to his workers' compensation claim, and he later retained PMPED to represent him in this action.

This action was filed on January 6, 2011 by Mr. Utsey on behalf of Mitchell. Mr. Detrick with PMPED filed a notice of appearance on May 12, 2011. Mr. Marin was served on January 13, 2011.

LEGAL ANALYSIS

The issues raised by Defendants' motion are governed by the South Carolina Rules of Professional Conduct (hereinafter "the Rules"), namely Rules 1.9, 1.10 and 1.18. Rule 1.9(a) states:

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

Rule 407, SCACR, RPC 1.9. Rule 1.10 states: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), or 1.9" except in certain circumstances which are not applicable here. Rule 1.18 applies to circumstances where a lawyer represents a party adverse to

a former "prospective client" who has previously consulted with the lawyer about the now adverse matter but without ultimately creating an attorney-client relationship. This rule reads in pertinent part:

- (a) A person with whom a lawyer discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

#3
PMB

Rule 407, SCACR. RPC 1.18. Rule 1.18 hinges on the idea that there must be a "reasonable expectation that the lawyer is likely to form the relationship."

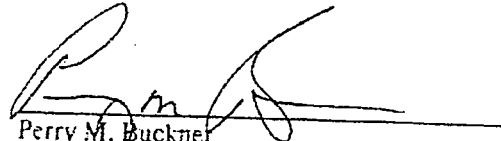
There was never a contract of representation formally entered into by Mr. Marin and Mr. Utsey or by Mr. Marin and PMPED. As to whether Mr. Marin believed one had been entered into or that Mr. Utsey was likely to form one, that is a factual dispute and the information provided in the affidavits, discovery responses, other documentation, and the testimony during the hearing must be examined.

Thus, while these rules provide guidance, ultimately, the Court has to weigh the credibility of the two fact witnesses, Mr. Marin and Mr. Utsey. Since their testimonies are in opposition to each other, the Court turns to (1) the letter of May 31, 2011 from Mr. Keaveny that states that Mr. Marin knew there was no relationship and (2) the affidavit of Mr. Parker which attests that Mr. Marin was informed that they would not be representing him and that they would be making claims against his company and his workers' compensation carrier. Based on these two documents, the Court finds that no client-lawyer relationship was formed. The Court believes this is a miscommunication, possibly due to the language barrier since English is Mr.

Marin's second language, and this Court had the opportunity to observe the witnesses and listen to their testimony during the hearing. In no event, however, does this Court believe based on the writings submitted to this Court that a lawyer-client relationship was formed.

CONCLUSION

Accordingly, this Court respectfully denies the Motion to Disqualify Plaintiff's Counsel.
IT IS SO ORDERED.


Perry M. Buckner
Presiding Judge, Fourteenth Judicial Circuit

January 23, 2012
Walterboro, SC

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.:2011-CP-15-20

CASE NO.:2011-CP-15-20

CASE NO.:2011-CP-15-20

CASE NO.:2011-CP-15-20

CASE NO.:2011-CP-15-20

**NOTICE OF MOTION AND MOTION
FOR RECONSIDERATION OF
DEFENDANTS' MOTION TO
DISQUALIFY COUNSEL**

**NOTICE OF MOTION AND MOTION
FOR RECONSIDERATION OF
DEFENDANTS' MOTION TO
DISQUALIFY COUNSEL**

**NOTICE OF MOTION AND MOTION
FOR RECONSIDERATION OF
DEFENDANTS' MOTION TO
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DISQUALIFY COUNSEL**

**NOTICE OF MOTION AND MOTION
FOR RECONSIDERATION OF
DEFENDANTS' MOTION TO
DISQUALIFY COUNSEL**

**NOTICE OF MOTION AND MOTION
FOR RECONSIDERATION OF
DEFENDANTS' MOTION TO
DISQUALIFY COUNSEL**

Court's Order Denying Defendant Marin Right of Way Service LLC's Motion to Disqualify Plaintiff's Counsel. Defendants received the Court's order via email from Colleton County Clerk of Court on February 21, 2012. Defendants ask the Court to reconsider Defendants' motion because the Court's order does not appear to address Defendants' Rule 1.18 claim that Plaintiff's counsel is disqualified because Defendants were potential clients. Furthermore, the Court appears not to have appreciated that the motion extended to matters filed against Marin's agents and servants (*i.e.*, Hernandez) as well.

This motion is based on the South Carolina Rules of Civil Procedure, the memorandum of law submitted with this motion, previous memoranda of law submitted to the court, previous oral argument and evidence which was presented at the hearing, and the proposed order which was previously submitted.

KEAVENY LAW FIRM LLC



Thomas J. Keaveny, II (S.C. Bar No. 3308)

Matthew S. Byzet (S.C. Bar No. 100035)

1634 Ashley River Road

Charleston, South Carolina 29407

Telephone: 843.225.2820

Facsimile: 843.225.2823

Email: tkeaveny@keavenylawfirm.com

ATTORNEYS FOR DEFENDANTS AND

THIRD-PARTY PLAINTIFF

March 1, 2012

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

RICKY S. MITCHELL,

Plaintiff,

v.

MARIN RIGHT OF WAY SERVICE, LLC,
and BERNARDO L. HERNANDEZ,

Defendants.

BERNARDO L. HERNANDEZ,

Third-Party Plaintiff,

v.

THREE GEN, INC.,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2011-CP-15-020

ORDER

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
2012 MAY -7 PM 1:28

#1
PMB

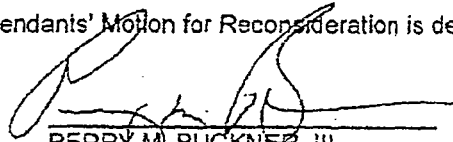
This matter is before the Court on a Rule 59(e), SCRCP, Motion for Reconsideration filed by Defendants Marin Right of Way Service, LLC (hereinafter, "Marin") and Bernardo Hernandez (hereinafter, "Hernandez"). Defendants contend the Court's Order dated January 23, 2012, "failed to address Defendants' Rule 1.18 claim that Plaintiffs counsel is disqualified because Defendants were potential clients" and "appear[ed] not to have appreciated that the motion extended to matters filed against Marin's agents and servants (*i.e.*, Hernandez) as well." (Memorandum in Support of Motion for Reconsideration, p. 2).

I have again reviewed all matters related to Defendants' Motion to Disqualify Plaintiff's attorneys, Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A. (hereinafter, "PMPED"). I am disposing of the Motion for Reconsideration based on the record and the briefs, without the necessity of a hearing, as authorized by *Pollard v. City of Florence*, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994).

I find there is no factual support for Hernandez's claim he formed an attorney-client relationship with PMPED; therefore, South Carolina Rule of Professional Conduct (hereinafter, "RPC") 1.9 does not provide a basis for disqualification of PMPED.

I also find that neither Defendant was a prospective client of PMPED as contemplated by RPC 1.18 and that neither Defendant provided to PMPED any information which could be significantly harmful to him or it in this matter. Therefore, RPC 1.18 does not provide a basis for disqualification of PMPED.

IT IS THEREFORE ORDERED that Defendants' Motion for Reconsideration is denied.



PERRY M. BUCKNER, III
JUDGE
FOURTEENTH JUDICIAL CIRCUIT

May 1, 2012
Walterboro, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2011-CP-15-0020

Ricky S. Mitchell Respondent,

v.

Marin Right of Way Service, LLC, and
Bernardo L. Hernandez Appellants.

PROOF OF SERVICE

I certify that this day I served a true and correct copy of Respondent's Motion to Dismiss Appeal and Memorandum in Support of Motion to Dismiss Appeal upon all parties herein by mailing same via U.S. First Class Mail, postage prepaid, addressed to counsel of record

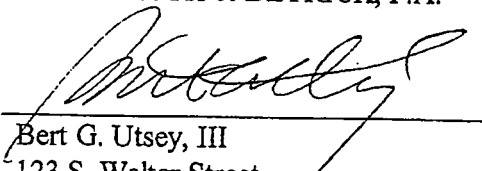
Thomas J. Keaveny, II, Esquire
Matthew S. Byzet, Esquire
Keaveny Law Firm, LLC
1634 Ashley River Road
Charleston, SC 29407
Attorneys for Appellants

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Charleston, SC 29413

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Pratt-Thomas Walker, PA
Post Office Drawer 22247
Charleston, SC 29413-2247

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.

BY:



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July 6, 2012
Walterboro, South Carolina

SOUTH CAROLINA COURT OF APPEALS

Ricky S. Mitchell.....Respondent,

v.

Marin Right of Way Service, LLC and

Bernardo L. Hernandez.....Appellants,

v.

Bernardo L. Hernandez.....Third-Party Plaintiff,

v.

Three Gen, Inc.....Third-Party Defendant.

Appellate Case No. 2012-212460

The Honorable Perry M. Buckner

COLLETON COUNTY

Trial Court Case No. 2011CP1500020

RETURN TO RESPONDENT'S MOTION TO DISMISS

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SC Court of Appeals

Pursuant to Rule 240(e), SCACR, Appellants Marin Right of Way Service, LLC ("Marin") and Bernardo L. Hernandez submit this Return to Respondent's Motion to Dismiss Appeal.

INTRODUCTION

On January 27, 2010, Mr. Marin owned a van which was being driven by Bernardo Hernandez. Mr. Hernandez was carrying seven laborers to a job. Mr. Hernandez was traveling west on S.C. Highway 641 in Colleton County. He stopped for a stop sign at the intersection of S.C. Highway 641 and U.S. Highway 601. Believing it was safe to proceed, Mr. Hernandez entered the intersection. Mr. Mitchell, traveling south on U.S. Highway 601, struck the passenger side of the vehicle resulting in the immediate death of several Marin employees and causing grievous injury to Mr. Mitchell and others.

Mr. Marin learned of the accident within minutes after it occurred and proceeded to the scene. He then promptly returned to Walterboro in search of legal advice. He first sought advice from Dorcas Tuten, Esquire. She referred Mr. Marin to Mr. Utsey. Mr. Utsey testified at the hearing on Appellants' Motion to Disqualify. He acknowledged meeting with Mr. Marin. He also acknowledged that his first meeting was not brief and he took several pages of notes. He testified that Mr. Marin looked extremely upset -- as though he had been crying. Mr. Marin and Mr. Utsey do not agree on what occurred during this and subsequent meetings. Mr. Marin believes he received legal advice from Mr. Utsey after answering about 45 minutes worth of questions. Mr. Utsey acknowledged meeting with the father-in-law of one of the deceased employees to discuss representing his estate in a wrongful death claim against Ricky Mitchell. This meeting was arranged by Mr. Marin.

Mr. Utsey last met with Mr. Marin to discuss this accident on Friday, January 29, 2010. Mr. Marin heard nothing from Mr. Utsey until he was served with a Summons and Complaint which Mr. Utsey filed and served as counsel for Mr. Mitchell, less than a year after his last meeting with Mr. Marin. In that suit, Mr. Mitchell seeks compensation for injuries which he sustained in the accident. This is the same accident about which Mr. Marin first sought legal advice from Mr. Utsey within hours after the accident. Apparently, and unbeknownst to Mr. Marin, Mr. Mitchell retained Mr. Utsey to file this action against Marin within weeks of Mr. Utsey's last meeting with Mr. Marin.

Appellants filed a Motion to Disqualify Respondent's counsel pursuant to Rule 1.9, RPC, Rule 407, SCACR (Duties to Former Clients) and Rule 1.18, RPC, Rule 407, SCACR (Duties to Prospective Client). The trial court denied Appellants' Motion to Disqualify. A copy of the court's order denying both the original motion and the Motion for Reconsideration are attached.

ARGUMENT

The right to appeal arises from and is controlled by statutory law. *N.C. Federal Sav. & Loan Ass'n v. Twin States Dev. Corp.*, 289 S.C. 480, 347 S.E.2d 97 (1986). The appellate jurisdiction of the South Carolina Supreme Court in law cases is set forth in S.C. Code Ann. § 14-3-330 (1976 & Supp.2002). An order must generally fall into one of several categories set forth in that statute in order to be immediately appealable. *Baldwin Constr. Co., Inc. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004); *Woodward v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995), *overruled on other grounds*, *Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002); *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 333, n. 3, 426 S.E.2d 777, 780 (1993). An order affects a substantial right and is immediately appealable when it "(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.” S.C. Code Ann. § 14-3-330(2) (1976 & Supp.2002).

A. THE ORDER AFFECTS A SUBSTANTIAL RIGHT AND IS IMMEDIATELY APPEALABLE

In *Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005), the South Carolina Supreme Court held that an order granting a motion to disqualify a party’s attorney “implicitly falls within the statutory definition of a substantial right under Section 14-3-330(2)(a)” because it involves important policy concerns. It further held that such an order must be immediately appealed or any later objection in a subsequent appeal will be waived. *Id.*; at 198, 607 S.E.2d at 710 (emphasis added). In *Hagood*, Mr. Hagood was the plaintiff in a claim for injuries arising out of an automobile accident. His counsel intended to call an employee of counsel’s firm as a witness. Counsel for the defendant moved to exclude the witness. The court gave plaintiff’s counsel a choice: exclude the witness and represent plaintiff or step down as plaintiff’s counsel and allow the witness to testify. Mr. Hagood appealed the decision of the lower court. The issue presented was whether an order disqualifying counsel was immediately appealable. The court concluded it was because such an order affected a substantial right.

Hagood was a case of first impression. In reaching its decision, the court looked to other jurisdictions for guidance. The court noted that important policy considerations were at stake. The considerations most often cited by those courts that have allowed immediate appeal of such orders include: (1) the importance of the party’s right to counsel of his choice in an adversarial system; (2) the importance of the attorney-client relationship, which demands a confidential, trusting relationship that often develops over time; (3) the unfairness in requiring a party to pay another attorney to

become familiar with a case and repeat preparatory actions already completed by the preferred attorney; and (4) an appeal after final judgment would not adequately protect a party's interests because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney. *Id.* at 197, 607 S.E.2d at 710 (citing *Goldson v. Am. Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735, 737-38 (1990)); *Russell v. Mercy Hosp.*, 15 Ohio St.3d 37, 472 N.E.2d 695, 697-98 (1984); *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430, 434-35 (1997); *Casco Northern Bank v. JBI Associates, Ltd.*, 667 A.2d 856, 859 n. 3 (Me. 1995); *Parker v. Volkswagenwerk*, 245 Kan. 580, 781 P.2d 1099, 1104-05 (1989); *In re Estate of French*, 166 Ill.2d 95, 209 Ill.Dec. 677, 651 N.E.2d 1125, 1130-31 (1995) (Heiple and Freeman, J.J., dissenting)).

South Carolina has never been asked to specifically decide if an order denying a motion to disqualify counsel is immediately appealable. This is an issue of first impression. As such, the appellate court is free to decide the question with no particular deference to the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (internal citations omitted). However, the same policy considerations which serve as the basis for holding that an order granting such a motion is immediately appealable mandate the same result when such a motion is denied.

At least two of the four reasons identified by the Court in *Hagood* exist in the case at hand. These two important policy considerations are (1) the importance of the attorney-client relationship and (2) the inability to protect a party's interest in a subsequent trial. One court recently noted that "[t]he 'paramount' concern in determining whether counsel should be disqualified is 'the preservation of public trust in the scrupulous administration of justice and the integrity of the bar.'"

Roush v. Seagate Technology, LLC, 150 Cal. App.4th 210, 220, 58 Cal. Rptr.3d 275, 282 (2007)

(internal citations omitted). The court went on to note that:

The classic disqualification case involves the attorney switching sides 'so that an attorney who once represented A now seeks to represent B in a matter materially related to the original representation.' Disqualification in such a case is necessary to safeguard the attorney-client relationship. A client should not fear that confidences conveyed to his attorney in one action will return to haunt him in a later one.

Id. (internal citations omitted). The matter before the court is even more stark. Marin does not seek to disqualify Plaintiff's counsel for fear that confidences conveyed to his attorney (or prospective attorney) in a 'matter materially related' will return to haunt him; he fears that confidences conveyed to his attorney or prospective attorney in the *very matter* about which he sought counsel will return to haunt him. Even if Marin is determined to be only a prospective client, as opposed to a former client, he is entitled to the protections provided under Rule 1.18, RPC, Rule 407, SCACR.

Furthermore, an appeal after final judgment and a new trial, if granted, would not adequately protect Marin's interests because it would be absolutely impossible to rectify any prejudice that results. Not only would his confidences no longer be confidential, but public trust in the "scrupulous administration of justice and the integrity of the bar" would be completely undermined. *See Roush*, 150 Cal.App.4th at 220, 58 Cal.Rptr.3d at 282. The damage would already be done. A new trial could not possibly rectify either.

B. THE CASE AT HAND IS DISTINGUISHABLE FROM *WILSON, TOWNSEND AND ROGERS*

In his motion to dismiss, Respondent gives nodding reference to the Supreme Court's decision in *Hagood* but then quickly directs this court to *State v. Wilson*, 387 S.C. 597, 693 S.E.2d

923 (2010), and the *dicta* which appears at footnote 3 of the opinion (Motion to Dismiss Appeal, p. 4). Respondent correctly notes that the Court refused to extend the holding in *Hagood* to criminal proceedings; but that fact has no bearing on the case presently before the Court. Similarly, the cases which are discussed in footnote 3 are distinguishable.

In *Wilson*, Mr. Wilson was charged with murdering his ex-wife. He moved to disqualify the assistant solicitor assigned to his case based on the fact that the assistant solicitor's husband represented Wilson in a divorce proceeding against his ex-wife sixteen months earlier. Surprisingly, the court granted the motion and the State appealed. The Supreme Court found against the State. It refused to extend the holding of *Hagood* for two reasons. First, the Court found that the policy considerations which existed in *Hagood* -- "the right of a party to retain counsel of his or her choosing and the development of an attorney/client relationship" -- simply do not exist in the context of disqualifying an assistant solicitor. *Id.*, at 603, 693 S.E.2d at 926. Second, the Court noted that the State's "ability to appeal has historically been limited in criminal matters." *Id.*

In footnote 3, the Court gratuitously notes that the "denial" of a motion to disqualify is not immediately appealable because the ruling does not affect a party's substantial rights. *Id.* Of course, that was not the issue before the court in *Wilson*. More importantly, the cases cited by the Court did not involve a motion filed by a former client or a former prospective client against an attorney. Those cases involved motions filed to disqualify a judge.

In *Townsend v. Townsend*, 325 S.C. 309, 474 S.E.2d 424 (1996), Paul Townsend moved to disqualify a family court judge based on the judge's childhood acquaintance with his wife. The judge denied the motion. On appeal, the Court ruled that such an order was interlocutory and that it did not affect the merits of the case.

In *Rogers v. Wilkins*, 275 S.C. 28, 267 S.E.2d 86 (1980), Chilton Williams appealed the denial of a motion to recuse a judge. Mr. Williams previously brought an action in federal court against the judge, other members of the South Carolina judiciary and the bar. The case was dismissed as to the judge. The nature of the action before the judge at the time the motion to disqualify was filed is not clear, but Williams nevertheless moved to disqualify the judge based, no doubt in part, on the fact that the judge had been a defendant in a separate action that Williams had filed. The court denied the motion and Williams appealed. The Supreme Court concluded that such a order is interlocutory.

It is significant that both *Townsend* and *Rogers* involved motions to disqualify a judge. Neither case involves the attorney-client relationship. Furthermore, both cases were decided before the Supreme Court's decision in *Hagood*. Even *Wilson* does not raise issues involving the attorney-client relationship.

None of the four reasons identified in *Hagood* were present in the judicial disqualification cases cited in *Wilson*. The disqualification of a judge has no impact on the attorney-client relationship. Thus, the reasoning in *Wilson*, *Townsend*, and *Rogers* is inapplicable to the issue of a client or a prospective client's substantial rights. Furthermore, an appellate court would certainly be able to ascertain by an objective standard whether prejudice resulted from the denial of a motion to disqualify a judge.

Further, the holding in *Wilson* did not modify or overturn *Hagood*. While the two cases involved the same statute, the court in *Wilson* based its holding on prior decisions limiting the ability of the State to appeal lower court rulings. *Wilson*, 387 S.C. at 603, 693 S.E.2d at 926. Unlike in *Wilson*, the policy implications which were present in *Hagood* are also present in the case at hand.

As such, the holding in *Hagood* should be extended to Appellants and permit an order denying a motion to disqualify counsel for an opposing party in a civil case to be immediately appealable under S.C. Code Ann. § 14-3-330(2) (1976 & Supp.2002).

C. THE ORDER MEETS THE CRITERIA OF THE COLLATERAL ORDER ANALYSIS AND IS IMMEDIATELY APPEALABLE

In the alternative, Appellants assert that the order is immediately appealable under the collateral order analysis adopted by this Court in *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2004). In *Doe*, this Court determined the appealability of an interlocutory order by adopting the collateral order analysis employed by the federal courts. *Id.*, at 216, 607 S.E.2d at 356. Under this analysis, an order is appealable if it (1) conclusively determines the question, (2) resolves an important question independent of the merits, and (3) is effectively unreviewable on appeal from a final judgment. *Id.* The lower court's orders on Appellants' Motion to Disqualify and Motion for Reconsideration satisfy all three criteria.

Other courts have permitted the immediate appeal of an order denying the disqualification of counsel under an exception to the final judgment rule since it is collateral to the main action. *See Muller v. Fresno Comm. Hosp. & Med. Cent.*, 172 Cal.App.4th 887, 898, 91 Cal.Rptr.3d 617, 626 (2009) (an order disqualifying or denying the disqualification of counsel is appealable under an exception to the one final judgment rule, since it is collateral to the main action); *Estate of Markheim v. Markheim*, 957 A.2d 56, 59-60 (2008) ("An appeal from an interlocutory order is 'eligible for immediate review only if [it falls] within a judicially-created exception to the final judgment rule, including one of the three, well-established exceptions: the 'death knell' exception, the judicial economy exception, or the collateral order exception.'") (citing *Passalacqua v. Passalacqua*, 908 A.2d

1214, 1217 (2006)).

The denial of Appellants' Motion to Disqualify meets the criteria for appellate review under the collateral order analysis adopted by this Court in *Doe*. Judge Buckner's orders denying Appellants' Motion to Disqualify Counsel and their Motion for Reconsideration conclusively determined the question about whether Mr. Marin and his company were clients or even prospective clients of Mr. Utsey.

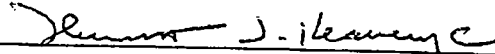
This case is a personal injury action arising out of a motor vehicle accident. Appellants' motion presented a question entirely independent of the merits of the litigation. Finally, the order would be effectively unreviewable on appeal from a final judgment. As reasoned in *Doe*, the order denying Doe's motion had "the effect of revealing his identity, the very thing he was seeking to keep confidential." *Doe*, 362 S.C. at 217, 607 S.E.2d at 356. In the case at hand, the denial of Appellants' motions has the effect of allowing the content of Mr. Marin's conversations from that initial meeting wherein he sought legal advice, to be used against him at the trial of a lawsuit arising from the very situation for which he originally sought legal advice from Respondent's counsel. There would effectively be no review of this issue on appeal from a final judgment because the damage will have already been done. Any information derived from that initial meeting will have been publicly disclosed at trial. Therefore, the order denying Appellants' Motion to Disqualify is immediately appealable.

CONCLUSION

For the reasons stated above, Appellants respectfully ask the Court to deny Respondent's Motion to Dismiss Appeal.

Respectfully submitted,

KEAVENY LAW FIRM LLC



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Attorneys for Appellants

July 24, 2012

Charleston, South Carolina

SOUTH CAROLINA COURT OF APPEALS

Ricky S. Mitchell.....Respondent,

v.

Marin Right of Way Service, LLC and

Bernardo L. Hernandez.....Appellants,

v.

Bernardo L. Hernandez.....Third-Party Plaintiff,

v.

Three Gen, Inc.....Third-Party Defendant.

Appellate Case No. 2012-212460

The Honorable Perry M. Buckner
COLLETON COUNTY
Trial Court Case No. 2011CP1500020

APPENDIX TO RETURN TO RESPONDENT'S MOTION TO DISMISS

The following is a list of Circuit Court Orders and other filings attached as exhibits to
Appellants' Return to Motion to Dismiss Appeal:

1. Complaint dated January 3, 2011.
2. Motion to Disqualify dated July 22, 2011.
3. Order dated January 23, 2012.
4. Motion for Reconsideration dated March 1, 2012.
5. Order dated May 1, 2012.

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2011-CP-15-20

RICKY S. MITCHELL,

)
)
) Plaintiff,
)
)
)

v.

MARIN RIGHT OF WAY SERVICE, LLC,
and BERNARDO L. HERNANDEZ,

)
)
) Defendants.
)
)
)

COMPLAINT
(Jury Trial Requested)

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PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS

Plaintiff alleges:

1. Plaintiff is a resident of Colleton County, South Carolina, and was so at the time the cause of action set forth herein arose.
2. Defendant Marin Right of Way Service, LLC (hereinafter, "Marin") is a domestic limited liability company with its principal place of business in Colleton County, South Carolina, and was so at the time the cause of action set forth herein arose.
3. Upon information and belief, Defendant Bernardo L. Hernandez (hereinafter, "Hernandez") is a resident of Colleton County, South Carolina, and was so at the time the cause of action set forth herein arose.
4. At all times relevant herein, Hernandez was an employee and agent of Marin acting within the course and scope of said employment.
5. On or about January 27, 2010, at approximately 7:05 a.m., Plaintiff was operating a log truck on U.S. Highway 601 in Colleton County, South Carolina.
6. At the same time, Hernandez was operating a vehicle owned by Marin, with Marin's permission, on S.C. Highway 641, approaching its intersection with U.S. Highway 601 in Colleton County, South Carolina.
7. At the intersection of S.C. Highway 641 and U.S. Highway 601, traffic on S.C. Highway 641 is governed by a stop sign.

8. At the intersection of S.C. Highway 641 and U.S. Highway 601, traffic on U.S. Highway 601 has the right of way.

9. At the time and place described above, Hernandez failed to stop fully for the stop sign governing his lane of traffic and/or failed to yield the right of way to Plaintiff's lane of traffic and entered the intersection onto U.S. Highway 601 directly into Plaintiff's path of travel, causing a collision with the truck operated by Plaintiff (hereinafter, the "Collision").

10. The Collision was due to and caused directly and proximately by the negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and unlawful acts, delicts and omissions of Hernandez in one or more of the following particulars:

- a. In failing to keep a proper lookout;
- b. In failing to obey the stop sign governing his lane of traffic;
- c. In failing to yield the right of way to Plaintiff;
- d. In failing to come to a complete stop at the intersection;
- e. In failing to utilize his brakes properly;
- f. In failing to maintain proper control over his motor vehicle;
- g. In failing to take adequate evasive action to avoid the Collision;
- h. In colliding with the vehicle Plaintiff was operating;
- i. In entering the intersection when Plaintiff's vehicle was approaching on another roadway so closely as to constitute an immediate hazard during the time when Hernandez would be moving across or within the intersection;
- j. In violating S.C. Code Ann. § 56-5-2310(a) (1976, as amended);
- k. In violating S.C. Code Ann. § 56-5-2330(b) (1976, as amended);
- l. In violating other laws, statutes, and ordinances of the State of South Carolina; and
- m. In failing to exercise the degree and caution that a reasonable prudent person would have executed under the circumstances then and there prevailing.

11. Marin is vicariously liable for Hernandez's negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and unlawful acts, delicts and omissions under the doctrine of *respondent superior*.

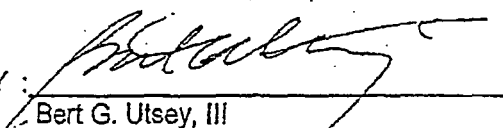
12. The Collision was also due to and caused directly and proximately by the negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and unlawful acts, delicts and omissions of Marin in entrusting its vehicle to Hernandez when it knew or should have known he was not adequately trained and qualified to operate it safely on the roadways of South Carolina.

13. As a direct and proximate result of the Collision, Plaintiff sustained serious, severe, and permanent injuries from which he continues to suffer, and upon information and belief, will continue to suffer in the future.

14. As a direct and proximate result of the aforementioned negligence, gross negligence, carelessness, recklessness, willfulness, wantonness, and unlawful acts, delicts and omissions of Defendants, Plaintiff has suffered actual damages in an amount to be determined by the jury. In addition, Plaintiff is entitled to an award of punitive damages in an appropriate amount.

WHEREFORE, Plaintiff prays for judgment against Defendants for actual damages, punitive damages, the costs of this action, and for such other and further relief as the Court may deem just and proper.

PETERS, MURDAUGH, PARKER,
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ATTORNEYS FOR PLAINTIFF

January 3, 2011
Walterboro, South Carolina

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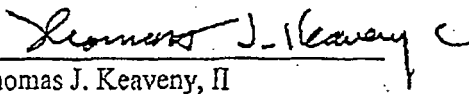
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lawsuit. Under Rule 1.18 (c) counsel cannot now represent Mr. Mitchell whose interests are materially adverse to Mr. Marin. Furthermore, during those meetings, Mr. Marin gave and received information which may even have established an attorney-client relationship under Rule 1.9 so that Mr. Utsey and the law firm are disqualified from representing Plaintiff in this action under Rule 1.9 and Rule 1.10. Finally, Rule 3.7 prevents an attorney from serving as both an advocate and a witness. This may become an issue in the case and may be the reason Attorney Detrick filed a Notice of Appearance (Exhibit "A") on May 10, 2011 – 4 months after suit was filed by his law partner, Mr. Utsey.

The motion will be supported by the testimony of Carlos Marin. Application of the rules to the facts of this matter will be supported by the testimony of Mr. Michael Virzi, professor of legal ethics at the University of South Carolina, School of Law (C.V. attached as Exhibit "B").

Respectfully submitted,


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ATTORNEYS FOR DEFENDANTS
AND THIRD-PARTY PLAINTIFF

July 22nd, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

RICKY S. MITCHELL,

Plaintiff,

v.

MARIN RIGHT OF WAY SERVICE, LLC,
AND BERNANDO L. HERNANDEZ,

Defendants.

BERNARDO L. HERNANDEZ,

Third-Party Plaintiff,

v.

THREE-GEN, INC.,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2011-CP-15-0020

ORDER DENYING DEFENDANT
MARIN RIGHT OF WAY SERVICE,
LLC'S MOTION TO DISQUALIFY
PLAINTIFF'S COUNSEL

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
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#1
Pmb

This matter came before the Court on December 19, 2011 pursuant to Defendant Marin Right of Way Service, LLC's Motion to Disqualify Plaintiff's Counsel. Present and appearing at the hearing was Paul Detrick, Esq. for the Plaintiff and Tom Keaveny, Esq. for the Defendant Marin Right of Way Service, LLC (hereinafter "Marin"). Based on the evidence presented by both parties at the hearing for this matter, the arguments of both parties, and the written submissions of both parties, this Court denies Marin's Motion to Disqualify Plaintiff's Counsel.

FACTS

On January 27, 2010, an automobile collision occurred involving a Marin-owned van driven by Marin employee, Defendant/Third-Party Plaintiff Bernardo L. Hernandez (hereinafter "Hernandez"). The van was occupied by seven other employees of Marin, three of whom were killed as a result of the collision. The other vehicle was a truck-trailer owned by Third-Party Defendant Three Gen. Inc. and operated by Plaintiff Ricky Mitchell (hereinafter "Mitchell").

Mitchell was also injured. The MAIT team of the South Carolina Highway Patrol investigated the accident.

Immediately following the incident, Mr. Marin, owner of Marin, came to Mr. Utsey's office in Walterboro on the morning of the collision and met with Mr. Utsey. There is considerable dispute among the parties about several details of the meeting, including whether Mr. Utsey informed Mr. Marin that he would not be representing him. They did discuss the collision and the fact that Marin's employees and their families may need representation.

Later that same day, the parties agree that with Mr. Marin's assistance, Mr. Utsey met with the father-in-law of one of the deceased employees regarding representing his estate on a wrongful death claim. The parties agree also that Mr. Utsey and Mr. Marin met again two days later at Mr. Utsey's office with Johnny Parker, Dorcas Tuten, Mr. Marin's brother, and a mutual acquaintance of Mr. Marin and Mr. Utsey present. Mr. Marin and Mr. Utsey had no further contacts after the January 29, 2010 meeting. Ultimately, Mr. Utsey and his firm (PMPED) did not represent any victims of the January 27 collision or their family members.

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PmB
Mitchell retained PMPED on March 3, 2010 to represent him with respect to his workers' compensation claim, and he later retained PMPED to represent him in this action.

This action was filed on January 6, 2011 by Mr. Utsey on behalf of Mitchell. Mr. Detrick with PMPED filed a notice of appearance on May 12, 2011. Mr. Marin was served on January 13, 2011.

LEGAL ANALYSIS

The issues raised by Defendants' motion are governed by the South Carolina Rules of Professional Conduct (hereinafter "the Rules"), namely Rules 1.9, 1.10 and 1.18. Rule 1.9(a) states:

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

Rule 407, SCACR, RPC 1.9. Rule 1.10 states: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), or 1.9" except in certain circumstances which are not applicable here. Rule 1.18 applies to circumstances where a lawyer represents a party adverse to

a former "prospective client" who has previously consulted with the lawyer about the now adverse matter but without ultimately creating an attorney-client relationship. This rule reads in pertinent part:

- (a) A person with whom a lawyer discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

#g
PMB
Rule 407, SCACR, RPC 1.18. Rule 1.18 hinges on the idea that there must be a "reasonable expectation that the lawyer is likely to form the relationship."

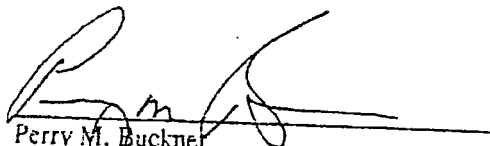
There was never a contract of representation formally entered into by Mr. Marin and Mr. Utsey or by Mr. Marin and PMPED. As to whether Mr. Marin believed one had been entered into or that Mr. Utsey was likely to form one, that is a factual dispute and the information provided in the affidavits, discovery responses, other documentation, and the testimony during the hearing must be examined.

Thus, while these rules provide guidance, ultimately, the Court has to weigh the credibility of the two fact witnesses, Mr. Marin and Mr. Utsey. Since their testimonies are in opposition to each other, the Court turns to (1) the letter of May 31, 2011 from Mr. Kcaveny that states that Mr. Marin knew there was no relationship and (2) the affidavit of Mr. Parker which attests that Mr. Marin was informed that they would not be representing him and that they would be making claims against his company and his workers' compensation carrier. Based on these two documents, the Court finds that no client-lawyer relationship was formed. The Court believes this is a miscommunication, possibly due to the language barrier since English is Mr.

Marin's second language, and this Court had the opportunity to observe the witnesses and listen to their testimony during the hearing. In no event, however, does this Court believe based on the writings submitted to this Court that a lawyer-client relationship was formed.

CONCLUSION

Accordingly, this Court respectfully denies the Motion to Disqualify Plaintiff's Counsel.
IT IS SO ORDERED.


Perry M. Buckner
Presiding Judge, Fourteenth Judicial Circuit

January 23, 2012
Walterboro, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NO.:2011-CP-15-20
	)	
RICKY S. MITCHELL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
MARIN RIGHT OF WAY SERVICE,	)	NOTICE OF MOTION AND MOTION
LLC, and BERNARDO L.	)	FOR RECONSIDERATION OF
HERNANDEZ,	)	DEFENDANTS' MOTION TO
Defendants.	)	DISQUALIFY COUNSEL
	)	
<u>BERNARDO L. HERNANDEZ,</u>	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
THREE GEN, INC.,	)	
	)	
Third-Party Defendant.	)	
	)	

TO: BERT G. UTSEY, III, AND J. PAUL DETRICK, ATTORNEYS FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that Defendants Marin Right of Way Service, LLC, and Bernardo L. Hernandez (hereinafter "Defendants") will, ten (10) days from the date of service of this motion or at such time as the Court may determine, move the Court, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, to reconsider its ruling (*i.e.*, alter or amend its Order) on Defendants' Motion to Disqualify Counsel, and to grant the same.

The Defendants' original motion is based on Rule 1.9, 1.10 and 1.18 of the South Carolina Rules of Professional Conduct. On January 30, 2012, Colleton County Clerk of Court filed the

Court's Order Denying Defendant Marin Right of Way Service LLC's Motion to Disqualify Plaintiff's Counsel. Defendants received the Court's order via email from Colleton County Clerk of Court on February 21, 2012. Defendants ask the Court to reconsider Defendants' motion because the Court's order does not appear to address Defendants' Rule 1.18 claim that Plaintiff's counsel is disqualified because Defendants were potential clients. Furthermore, the Court appears not to have appreciated that the motion extended to matters filed against Marin's agents and servants (i.e., Hernandez) as well.

This motion is based on the South Carolina Rules of Civil Procedure, the memorandum of law submitted with this motion, previous memoranda of law submitted to the court, previous oral argument and evidence which was presented at the hearing, and the proposed order which was previously submitted.

KEAVENY LAW FIRM LLC



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ATTORNEYS FOR DEFENDANTS AND
THIRD-PARTY PLAINTIFF

March 6, 2012
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2011-CP-15-020

RICKY S. MITCHELL,

)
)
) Plaintiff,
)
)
)

v.

MARIN RIGHT OF WAY SERVICE, LLC,
and BERNARDO L. HERNANDEZ,

)
)
) Defendants.
)
)
)

ORDER

BERNARDO L. HERNANDEZ,

)
)
) Third-Party Plaintiff,
)
)
)

v.

THREE GEN, INC.,

)
)
) Third-Party Defendant.
)
)
)

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
2012 MAY -7 PM 1:28

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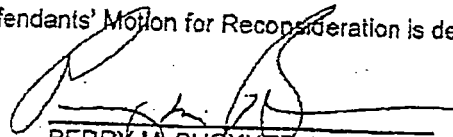
This matter is before the Court on a Rule 59(e), SCRCP, Motion for Reconsideration filed by Defendants Marin Right of Way Service, LLC (hereinafter, "Marin") and Bernardo Hernandez (hereinafter, "Hernandez"). Defendants contend the Court's Order dated January 23, 2012, "failed to address Defendants' Rule 1.18 claim that Plaintiffs counsel is disqualified because Defendants were potential clients" and "appear[ed] not to have appreciated that the motion extended to matters filed against Marin's agents and servants (i.e., Hernandez) as well." (Memorandum in Support of Motion for Reconsideration, p. 2).

I have again reviewed all matters related to Defendants' Motion to Disqualify Plaintiff's attorneys, Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A. (hereinafter, "PMPED"). I am disposing of the Motion for Reconsideration based on the record and the briefs, without the necessity of a hearing, as authorized by *Pollard v. City of Florence*, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994).

I find there is no factual support for Hernandez's claim he formed an attorney-client relationship with PMPED; therefore, South Carolina Rule of Professional Conduct (hereinafter, "RPC") 1.9 does not provide a basis for disqualification of PMPED.

I also find that neither Defendant was a prospective client of PMPED as contemplated by RPC 1.18 and that neither Defendant provided to PMPED any information which could be significantly harmful to him or it in this matter. Therefore, RPC 1.18 does not provide a basis for disqualification of PMPED.

IT IS THEREFORE ORDERED that Defendants' Motion for Reconsideration is denied.


PERRY M. BUCKNER, III
JUDGE
FOURTEENTH JUDICIAL CIRCUIT

May 1, 2012
Walterboro, South Carolina

SOUTH CAROLINA COURT OF APPEALS

Ricky S. Mitchell.....Respondent,

v.

Marin Right of Way Service, LLC and

Bernardo L. Hernandez.....Appellants,

v.

Bernardo L. Hernandez.....Third-Party Plaintiff,

v.

Three Gen, Inc.....Third-Party Defendant.

Appellate Case No. 2012-212460

The Honorable Perry M. Buckner
COLLETON COUNTY
Trial Court Case No. 2011CP1500020

PROOF OF SERVICE

I certify that I have served the Return to Motion to Dismiss Appeal on Respondent Ricky S. Mitchell and Third-Party Defendant Three-Gen, Inc., and all counsel of record for the parties by sending a copy of the same to their attorneys of record via first class mail, properly addressed, postage prepaid at the following addresses:

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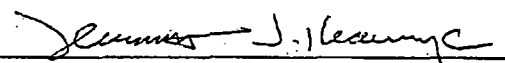
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Attorneys for Appellants

July 24, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2012-212460

Ricky S. Mitchell, ... Respondent,

v.

Marin Right of Way Service, LLC, and
Bernardo L. Hernandez, ... Appellants,

v.

Bernardo L. Hernandez, ... Third-Party Plaintiff,

v.

Three-Gen, Inc., ... Third-Party Defendant.

The Honorable Perry M. Buckner
Colleton County
Trial Court Case No. 2011-CP-15-0020

REPLY MEMORANDUM REGARDING
MOTION TO DISMISS APPEAL

INTRODUCTION

Pursuant to Rule 240(f), SCACR, Respondent hereby replies to Appellants' Return to Respondent's Motion to Dismiss Appeal (hereinafter, the "Return").

As an initial matter, although the Return's "Introduction" includes a number of factual statements about the underlying action and the Motion to Disqualify, Respondent does not respond to those statements because (1) they are not pertinent to disposition of the present motion and (2) they are an incomplete (and, to an extent, inaccurate)

statement of the underlying evidence. Presumably, Appellants have included their characterization of these facts in an effort to influence the Court's view on the merits of their appeal; however, because the sole issue presented by the Motion to Dismiss Appeal is whether Appellants have the right to appeal the Circuit Court's Order at this stage, Respondent objects to the Court's consideration of Appellants' statement of the facts in regard to this motion. If, for some reason, the Court deems it necessary to consider the evidence introduced in the lower court when considering this motion, the hearing transcript would be a more complete and unbiased source for that evidence.

ARGUMENT¹

A. THE APPEALED ORDER² DOES NOT AFFECT A SUBSTANTIAL RIGHT AND IS THEREFORE NOT IMMEDIATELY APPEALABLE.

1. Appellants fail to satisfy all requirements of the applicable statute.

Appellants claim S.C. Code Ann. § 14-3-330(2) (1976, as amended) permits them to appeal the Order immediately because it affects a substantial right. The statute reads:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: ...

(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

Appellants fail to address the fact the Order neither determines this action, rules upon a new trial motion, nor strikes any portion of a pleading. In fact, none of these

¹ In this Memorandum, Respondent only replies to the arguments set forth in the Return and does not reiterate arguments from his Memorandum in Support of Motion to Dismiss Appeal. By doing so, he does not abandon any of those arguments.

² As in his Memorandum in Support, Respondent refers to the Order dated January 23, 2012 and the Order dated May 1, 2012, jointly as "the Order" for the sake of simplicity.

statutory requirements are met in the present case; thus, even if the Order affected a substantial right (it did not; see heading 2 below), section 14-3-330(2) does not apply.

2. Failure to disqualify an opponent's attorney is not the loss of a substantial right.

While an order disqualifying a litigant's attorney affects a substantial right and could determine the action, *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707, 710 (2005) ("The right to be represented by an attorney of ones choosing is one of those rare orders which, in effect, could determine the action"), the South Carolina Supreme Court has explicitly stated the same policy reasons for such a conclusion do not apply to an order refusing to disqualify an opponent's attorney. *State v. Wilson*, 387 S.C. 597, 603 n. 3, 693 S.E.2d 923, 926 n. 3 (2010).

In *Wilson*, the Supreme Court reiterated that its holding in *Hagood* was limited in several respects. Although not all of those limitations apply in the present appeal, the court did distinguish between orders granting disqualification motions and those denying such motions; the former deal with an appellant who has lost the right to continued representation by his attorney of choice, while the latter deal with a litigant's unsuccessful attempt to require an opponent to seek new counsel. In making this distinction, the *Wilson* court rejected the "policy considerations" now urged by Appellants. (Return, p. 5).

The court there noted the "substantial right" protected by *Hagood* was "the right of a party to have counsel of his or her choosing", *Wilson*, 387 S.C. at 601, 693 S.E.2d at 925, and the "policy implications" that justified the *Hagood* decision were "the right of a party to retain counsel of his or her choosing and the development of an attorney/client relationship". *Id.* at 602, 693 S.E.2d at 926. The *Wilson* court immediately contrasted

this latter acknowledgment with the statement: “The denial of a disqualification motion is not directly appealable as the ruling does not affect the merits or a party's substantial rights, nor does it effectively determine the action, and any error in the failure to grant the motion is more amenable to correction through the remedy of a new trial.” *Id.* at 602 n. 3, 693 S.E.2d at 926 n. 3 [italics in original; underlining added]. In other words, the *Wilson* court considered – and rejected – the notion that a party has a “substantial right” in whether an attorney continues to represent his opponent. Rather, the *Hagood* policy implications weigh more in favor of the non-moving party (whose attorney-client relationship is threatened by the motion) in that circumstance.

B. THIS APPEAL IS NOT DISTINGUISHABLE FROM EXISTING AUTHORITY ON THE APPEALABILITY OF ORDERS DENYING MOTIONS TO DISQUALIFY.

1. *State v. Wilson* is controlling precedent and is not distinguishable.

Although *State v. Wilson* was decided only two years ago by our Supreme Court, Appellants argue this Court should disregard its express language regarding denials of motions to disqualify counsel since it was a criminal case and because (according to Appellants’ characterization) that portion of its decision was “gratuitous”. (Return, p. 7).

A more integrated reading of *Wilson* reveals otherwise. As discussed above, the court in that case was being careful to define the scope of its decision in *Hagood* to insure it was not expanded beyond the “rare” circumstances to which it was intended to apply. In light of *Wilson*, the holding in *Hagood* can be properly summarized as: “If a private litigant hires an attorney who is thereafter disqualified, then the litigant may immediately appeal; otherwise, *Hagood* does not provide for an immediate appeal of a ruling on a disqualification motion.”

Thus, even though the lower court in *Wilson* disqualified an attorney, the Supreme Court denied him the ability to appeal immediately because he was not hired by a private litigant. Far from being “gratuitous” in its footnote 3, the *Wilson* court insured it further clarified the parameters of *Hagood* when it expressly stated that denials of motions to disqualify (which have less impact on the attorney-client relationship than a disqualification) are not immediately appealable.

This Court should apply the *Hagood* rule, as refined by *Wilson*, in this fashion. It is the only way to reconcile the language of the two decisions without doing violence to the Supreme Court’s language in each. Otherwise, this Court must ignore the unambiguous statement in footnote 3 of *Wilson* to achieve a result not authorized by either decision.

2. Cases construing motions to disqualify judges are persuasive authority in favor of dismissing this appeal.

Appellants argue this Court should ignore *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996) and *Rogers v. Wilkins*, 275 S.C. 28, 267 S.E.2d 86 (1980)³ because they dealt with denials of motions to disqualify judges rather than attorney disqualification motions.

Neither *Townsend* nor *Rogers* specifically cited Section 14-3-330 in dismissing their respective appeals. However, it appears the *Townsend* court at least considered subsection (1) of that statute in its reasoning when it used the language “an interlocutory order not affecting the merits”. *Townsend*, 323 S.C. at 312, 474 S.E.2d at 427. *Townsend* cited *Rogers* for this proposition. The court in *Rogers* noted, without specific

citation, "There is no statutory remedy provided by our Code of Laws for the direct appeal of this order." Because Section 14-3-330 was also the operative statute at the time *Rogers* was decided, one can fairly conclude the court there considered and rejected its applicability. The fact the Supreme Court cited both *Townsend* and *Rogers* in its discussion of Section 14-3-330 in *Wilson* further supports this conclusion.

In any event, these cases are important to the present analysis because they show the Supreme Court was not concerned that post-trial appeals of the orders in *Townsend* and *Rogers* would undermine "public trust in the scrupulous administration of justice and the integrity of the bar," a concern upon which Appellants' argument is founded. (Return, p. 6). Certainly, the public would potentially have a greater distrust of judges trying cases after being challenged by a disqualification motion than of attorneys participating in a trial after such a motion. Thus, if this potential public distrust is not sufficient to qualify a judicial disqualification motion for an immediate appeal under Section 14-3-330, it certainly should not render an attorney disqualification motion immediately appealable under that statute.

C. THE APPEALED ORDER IS NOT IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE.

1. South Carolina does not apply the collateral order doctrine.

While S.C. Code Ann. § 14-3-330 (1976, as amended) fails to provide a basis for immediate appeal of the subject Order, Appellants argue it is nevertheless directly appealable under the "collateral order analysis". (Return, p. 9).

³ Respondent did not cite either of these cases in his Memorandum in Support of Motion to Dismiss Appeal; instead, Appellants' attempt to distinguish them is apparently because they were both cited (as "*cf.*" authorities) by the Supreme Court in *Wilson*.

The collateral order doctrine is a product of the federal courts. *See James v. Jacobson*, 6 F.3d 233, 237 (4th Cir. 1993) citing *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Relying upon *James*, this Court applied this analysis in one case to hold that an Order was immediately appealable. *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2004).

Thereafter, the South Carolina Supreme Court noted “the federal collateral order doctrine is not applied in our state courts”. *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 8 n. 2, 630 S.E.2d 464, 468 n. 2 (2006). Thus, Appellants’ reliance on this federal doctrine is misplaced. Instead, the appealability of the subject Order is solely governed by state statute, S.C. Code Ann. § 14-3-330 (1976, as amended).

2. The United States Supreme Court has refused to apply the collateral order analysis to motions to disqualify counsel.

Moreover, even if this Court were to apply the collateral order analysis as urged by Appellants, it should conclude that it does not render an order denying a motion to disqualify counsel immediately appealable. The United States Supreme Court, applying the collateral source analysis fashioned in *Cohen*, has rejected the argument that an order on a motion to disqualify counsel is immediately appealable. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377, 101 S.Ct. 669, 675, 66 L.Ed.2d 571 (1981) (“An order refusing to disqualify counsel plainly falls within the large class of orders that are, indeed, reviewable on appeal after final judgment, and not within the much smaller class of those that are not.”); *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 440, 105 S.Ct. 2757, 2766, 86 L.Ed.2d 340 (1985) (“We hold that orders disqualifying counsel in civil cases, like orders disqualifying counsel in criminal cases and orders denying a motion to

disqualify in civil cases, are not collateral orders subject to appeal as "final judgments" within the meaning of 28 U.S.C. § 1291.").

3. Most state courts have also rejected application of the collateral order doctrine to motions to disqualify counsel.

Consistent with these rules, the majority of state courts addressing the issue have likewise rejected the argument Appellants make herein. *See, e.g., In re: Estate of French*, 166 Ill.2d 95, 651 N.E.2d 1125, 1130 (1995) ("In view of the Supreme Court's holding in *Richardson-Merrell*, we conclude that the Federal collateral order doctrine would not validate Charles' attempt at immediate interlocutory appeal [of a disqualification order] in the present cause."); *Allen v. White Drug of Minot*, 346 N.W.2d 279, 282 (N.D. 1984) ("We therefore conclude that an order denying a motion to disqualify counsel in a civil action is not immediately appealable, but is reviewable on appeal from a final judgment."); *Peat, Marwick, Mitchell & Co. v. Los Angeles Rams Football Co.*, 284 Md. 86, 394 A.2d 801, 805-06 (1978) ("After making our analysis as to whether the failure to disqualify an attorney is immediately appealable, we conclude it is not because there are two *Cohen* elements lacking: first, the order is effectively reviewable on appeal after a final judgment and second, it is not of such importance as to warrant immediate appellate consideration."); *Gomes v. Kauwe's Heirs*, 52 Haw. 126, 127, 472 P.2d 119, 120 (1975) ("In this case, we do not think that appellants will suffer immediate and irreparable injury by a denial of their appeal. If the circuit court erred, that question may be raised on appeal from judgment on the merits. To allow appeals from all orders denying disqualification of attorneys will invite delay by piecemeal appeals." [citation omitted]).

4. Appellants will not suffer irreparable prejudice if the Court dismisses the present appeal.

Beyond these legal hurdles, Appellants' argument also suffers from a factually erroneous premise. Appellants contend they would be irreparably harmed if the Court were to dismiss this appeal, the parties proceed to trial, the trial results in a verdict against Appellants, and then they appeal the denial of their motion to disqualify counsel. They claim this would result in "confidences"⁴ provided by Mr. Marin to Mr. Utsey being "publicly disclosed at trial". (Return, pp. 6, 10). Assuming, without conceding, that disclosing such information would impair a legally protected right of Appellants, its disclosure would presumably be no greater at trial than in regard to the present motion to disqualify (and this appeal); moreover, the courts certainly would have the ability to limit disclosure and/or use of this information if a new trial were ordered.⁵

CONCLUSION

For the above reasons, and the reasons set forth in his Memorandum in Support of Motion to Dismiss Appeal, Respondent requests that the Court dismiss the present appeal and remand this matter to the Court of Common Pleas for Colleton County.

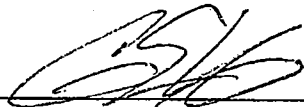
⁴ At the hearing, Appellants claimed Mr. Marin provided confidential and "significantly harmful" information to Mr. Utsey; this included a version of the collision as related to his brother by a highway patrolman, the fact Appellants had liability insurance for the collision, and questions about Appellant Hernandez's immigration status. The Circuit Judge ruled "neither Defendant provided to PMPED any information which could be significantly harmful to him or it in this matter." (Order dated May 1, 2012, p. 2).

⁵ Moreover, it appears improbable the alleged "confidences" could be used at trial against Appellants. The existence of liability insurance would likely be excluded from evidence under the collateral source rule. A third-hand account of what a police officer said about the collision would be hearsay within hearsay and the officer's report would be inadmissible under S.C. Code Ann. § 56-5-1290 (1976, as amended). Issues about Appellant Hernandez's immigration status do not appear to be relevant and his actual status (whatever that may be or have been) is a factual matter, not confidential.

Respectfully submitted,

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.

BY:



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July 31, 2012
Walterboro, S.C.

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2012-212460

Ricky S. Mitchell, ... Respondent,

v.

Marin Right of Way Service, LLC, and
Bernardo L. Hernandez, ... Appellants,

v.

Bernardo L. Hernandez, ... Third-Party Plaintiff,

v.

Three-Gen, Inc., ... Third-Party Defendant.

The Honorable Perry M. Buckner
Colleton County
Trial Court Case No. 2011-CP-15-0020

PROOF OF SERVICE

I certify that I have served the Reply Memorandum Regarding Motion To Dismiss Appeal on the Appellants herein by depositing a copy of it in the United States Mail, postage prepaid, on July 31, 2012, addressed to counsel of record

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July 31, 2012


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The South Carolina Court of Appeals

Ricky S. Mitchell, Respondent,

v.

Marin Right of Way Service, LLC, and Bernardo L.
Hernandez, Appellants,

v.

Bernardo L. Hernandez, Third-Party Plaintiff,

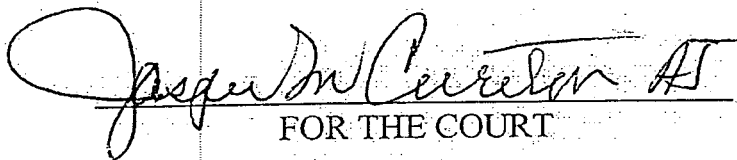
v.

Three-Gen, Inc., Third-Party Defendant.

Appellate Case No. 2012-212460

ORDER

Respondent has filed a motion to dismiss. This is an appeal from the denial of a motion to disqualify counsel. Because such an order is interlocutory and not immediately appealable, we grant Respondent's motion to dismiss. See S.C. Code Ann. §14-3-330(2) (1977).


FOR THE COURT

Columbia, South Carolina

cc:

FILED

 1-3-13

Thomas J. Keaveny, II
Matthew S. Byzet
Bert Glenn Utsey, III