

STATE OF SOUTH CAROLINA  
IN THE  
COURT OF APPEALS

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

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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.

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REPLY MEMORANDUM REGARDING  
PETITION FOR REHEARING

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Pursuant to Rule 240(f), SCACR, Petitioners Marin Right of Way Service, LLC ("Marin") and Bernardo L. Hernandez ("Mr. Hernandez") (collectively referred to as "Petitioners") hereby submit this Reply Memorandum Regarding Petition for Rehearing.

### INTRODUCTION

On January 27, 2010, Mr. Hernandez was driving a van owned by Mr. Marin. (Tr.14, lines 9 - 18). Mr. Hernandez was carrying seven laborers to a job in Allendale. (Tr.15, lines 10 - 14). Mr. Hernandez was traveling west on S.C. Highway 641 in Colleton County. (Tr.15, lines 15 - 25; Tr.16, lines 1 - 7). He stopped for a stop sign at the intersection of S.C. Highway 641 and U.S. Highway 601. (Tr.16, lines 3 - 7). 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 van 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. (Tr.16, lines 13 - 25; Tr.17, lines 1 - 10). He then promptly returned to Walterboro in search of legal advice regarding the accident. (Tr.18, lines 6 - 16). He first sought advice from Dorcas Tuten, Esquire. (Tr.18, lines 17 - 22). After explaining to her what had happened, Ms. Tuten told Mr. Marin that she could not help him but knew somebody that could help and referred him to Mr. Utsey. (Tr.18, lines 23 - 25). Mr. Marin left Ms. Tuten's office and proceeded directly to Mr. Utsey in search of legal advice. (Tr.19, lines 1 - 2; 16 - 25; Tr.20, lines 1 - 11). Mr. Utsey subsequently met with Mr. Marin wherein Mr. Utsey asked questions regarding details of the accident and took several pages of notes. (Tr.20, lines 18 - 25; Tr.21, lines 6 - 19; Tr.23, lines 8 - 25;

Tr. 24, lines 1 – 25; Tr.25, line 1; Defendants' Hrg. Ex. No. 5). Throughout this meeting, Mr. Marin believed Mr. Utsey was helping him by offering legal advice regarding the accident. (Tr.23, lines 3 – 7). Mr. Utsey was aware that Mr. Marin looked extremely upset – as though he had been crying. (Tr. 105, lines 2-6). Mr. Marin left this meeting, which lasted over an hour, under the belief that he received legal advice from Mr. Utsey. (Tr. 26, line 19 – 23; Tr. 27, lines 3 – 8, 13 - 18).

Mr. Utsey last met with Mr. Marin to discuss this accident on Friday, January 29, 2010. (Tr. 33, lines 4 - 10). Unbeknownst to Mr. Marin, Mr. Mitchell retained Mr. Utsey to file this action against Petitioners within five weeks of Mr. Utsey's last meeting with Mr. Marin (Tr. 35, lines 11 - 20; Tr. 123, lines 17 - 18). In that suit, Mr. Mitchell seeks compensation for injuries which he sustained in the accident. (Tr. 35, lines 1 - 3). This is the same accident about which Mr. Marin first sought legal advice from Mr. Utsey within hours after the accident. (Tr. 19, lines 18 – 25; Tr.20, lines 1 – 25; Tr.21, lines 1 – 25; Tr.22, lines 1 – 25; Tr. 23, lines 1 - 2).

### ARGUMENT

The trial court order is immediately appealable because it denies Petitioners of a substantial right and could determine the action and prevent a judgment from which an appeal might be taken. S.C. Code Ann. § 14-3-330(2)(a) (1976 & Supp.).

**A. This Court of Appeals incorrectly concluded that the order denying Petitioners' motion to disqualify was not immediately appealable under S.C. Code § 14-3-330(2).**

“The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal (2) [a]n 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 . . .” S.C. Code § 14-3-330(2)(a) (1976 & Supp.).

**1. The trial court’s order affects a substantial right of the Petitioners.**

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. “The right to be represented by an attorney of one’s choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case.” Id., at 197-98, 607 S.E.2d at 710. Moreover, the right to be represented by one’s preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right. Id., at 198, 607 S.E.2d at 710.

As in Hagood, Petitioners’ right is closely related to the right to a particular mode of trial, a well-established substantial right. *See Hagood*, at 197-98, 607 S.E.2d at 710. The trial court’s order denying Petitioners’ motion to disqualify deprives them of a mode of trial to which they are entitled to as a matter of right. Specifically, the trial court’s order denies Petitioners’ of their substantial right to a mode of trial in which (1) the adverse party is not represented by the attorney from whom Petitioners had first sought legal advice about the same matter and (2) not have information learned from discussions in the consultation used against them at trial.

At the very least, Petitioners were a potential client of Respondent's counsel based on the initial meeting between Mr. Utsey and Mr. Marin, wherein the latter sought legal advice in light of the recent accident. (Tr.19, lines 1 – 2; 16 – 25; Tr.20, lines 1 - 11). A lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation and "shall not represent a client with interests materially adverse to those of a prospective client in the same matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter".<sup>1</sup> Rule 1.18(b),(c), SCACR 407. Petitioners, as prospective clients, have the right to a trial where the adverse party is not represented by a lawyer whom Petitioners (through Mr. Marin) originally consulted on the very same matter. (Tr.19, lines 1 – 2; 16 – 25; Tr.20, lines 1 - 11).

In his Return, Respondent relies on State v. Wilson, 387 S.C. 597, 603 n. 3, 693 S.E.2d 923, 926 n. 3 (2010), to contend the trial court order does not affect a substantial right because it defined the scope of the Hagood holding. (Return to Petition, p. 11). Respondent's assertion is loosely based on dicta in the holding of a criminal proceeding. See Wilson, at 597, 603 n. 3, 693 S.E.2d at 926 n. 3. The cases cited by the Wilson court did not involve a motion filed by a former client or a former prospective client against an attorney. Id. Those cases involved motions filed to disqualify a judge.

The case at hand is distinguishable from Wilson. 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

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<sup>1</sup> Petitioners' still maintain the position originally asserted in their Motion to Disqualify Counsel, that Petitioners' are former clients, but in the alternative, they were potential clients based on Mr. Marin's consultation with Mr. Utsey. Further, Mr. Marin did not give informed consent in writing. See Rule 1.18(d), SCACR 407.

not exist in the context of disqualifying an assistant solicitor. Id., at 602-03, 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. Unlike in Wilson, the policy implications which were present in Hagood are also present in the case at hand. Id. As such, the holding in Hagood should be extended to Petitioners and permit an order denying a motion to disqualify in a civil case to be immediately appealed under S.C. Code Ann. § 14-3-330(2)(a) (1976 & Supp.).

Respondent's contention that the trial court's order does not deprive Petitioners of a mode of trial is an apples-to-oranges comparison based on case law distinguishable from the matter at hand. First, Respondent incorrectly asserts that the mode of trial ground for appealability is limited to orders which affect a party's constitutional right to trial by jury. (Resp. Return, p. 12). The basis for Respondent's argument is a case involving the appeal of a probate court order. Fulmer v. Cain, 380 S.C. 466, 670 S.E.2d 652 (2008). Appeals from the probate court are governed by S.C. Code § 62-1-308 (Supp. 2007), an entirely separate statute from the controlling statute for this matter. See Id., at 469, 670 S.E.2d at 654. Moreover, the specific language cited by Respondent is from a minority dissent. Salmonsens v. CGD, Inc., 377 S.C. 442, 461, 661 S.E.2d 81 91 (2008) (Pleciones, J., dissenting).

Second, the Return incorrectly contends that in 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), the South Carolina Supreme Court found that denials of motions to disqualify judges did not affect a mode of trial. (Return, p. 13). In fact, neither case specifically addressed whether the orders affected a mode of trial and based their decisions on a different basis

from the one at hand. *See Id.* Rather, Townsend and Rogers held that the denial of motions for disqualification of a judge is an interlocutory order because they do not affect the merits. *See* S.C. Code § 14-3-330(1) (1976 & Supp.); 323 S.C. at 312, 474 S.E.2d at 427. The other two cases cited by Respondent, Breland v. Love Chevrolet Olds, 339 S.C. 89, 529 S.E.2d 11 (2000) and Burkey v. Noce, 398 S.C. 35, 726 S.E.2d 229 (Ct. App. 2012), did not involve the appeal of a motion to disqualify.

**2. The trial court's order in effect determines the action and prevents a judgment from which an appeal might be taken.**

The trial court's denial of Petitioners' motion to disqualify could effectively determine the action and prevent a judgment from which an appeal can be taken due to the potential impact on the overall litigation and trial of the case. As previously stated herein, it "is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken . . . due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case." Hagood, at 197-98, 607 S.E.2d at 710.

The same policy considerations that led the Court to reach its decision in Hagood apply to the case at hand. *Id.*, at 197, 607 S.E.2d at 710. The trial court's order could in effect determine the action because it would permit opposing counsel to use information learned from discussions with Mr. Marin while Petitioners were prospective clients against Petitioners at trial for the very same matter for which he first sought legal advice. An appeal after a trial would not adequately protect Petitioners' interests because it would be absolutely impossible to rectify any prejudice that results. In addition, the order would in effect determine the action because Petitioners would not be permitted to appeal this issue in a subsequent appeal. If there are no other grounds for appeal, the

action would effectively be determined by the trial court's order because Petitioners would be prohibited from an appeal after final judgment.

The court in Hagood further held that such an order must be immediately appealed or any later objection in a subsequent appeal will be waived. Id. (emphasis added). If an order deprives a party of a mode of trial to which that party is entitled as a matter of right, the order is immediately appealable, and failure to do so forever bars appellate review. Cobb v. South Carolina Dept. of Transp., 365 S.C. 360, 618 S.E.2d 299 (2005). As stated above, the trial court's order denying Petitioners' motion to disqualify deprives them of a mode of trial to which they are entitled to as a matter of right. If Petitioners' cannot appeal the trial court's order at this time, appellate review is forever barred. The order would prevent a judgment from which an appeal can be taken.

For the foregoing reasons, this Court of Appeals improperly concluded that it lacks appellate jurisdiction and incorrectly dismissed Petitioners' appeal.

**B. This Court of Appeals' Order overlooked the irreparable harm that Petitioners' would suffer as a result if the trial court's order was not immediately appealed.**

Given the unique circumstances of this case, not only should the Court's inquiry be whether Petitioners have a right which has been injured, but also whether that right can be affected by later trial level proceedings, or by appeal from a final judgment on the merits. Clearly, the revelation and/or use of confidential communications would affect the trial proceedings and, as discussed immediately above, an appeal from any final verdict would be insufficient to rectify the injustice.

Unlike Townsend and Rogers, where an appellate court could review the trial court judge's rulings on the parties' motions and objections, the record at the conclusion

of a trial in the case at hand would not provide any means by which to determine whether the denial of their motion to disqualify caused Petitioners to suffer irreparable harm. It would be impossible for an appellate court to objectively determine the existence of irreparable harm because a record on appeal does not identify how the disclosure of Petitioners' confidences had an effect on the members of the jury and their verdict.

An appeal after a trial on the merits of the case, final verdict and a new trial, if granted, would not adequately protect Petitioners' 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.

There is no rationale that would support an argument that Respondent's right to counsel of his choice in an adversarial system is any greater than that of Petitioners. Mr. Marin immediately sought legal advice, on behalf of Petitioners, from opposing counsel regarding the subject of the accident but was effectively denied the right to retain opposing counsel because, unbeknownst to Mr. Marin, opposing counsel elected to formally represent Respondent less than five (5) weeks after Mr. Marin's last meeting with opposing counsel wherein the subject accident was discussed.

**C. This Court of Appeals' did not address whether the trial court's order was immediately appealable under the Collateral Order doctrine.**

In the alternative, Petitioners assert that the order is immediately appealable under the collateral order doctrine. Under this doctrine, 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. Doe v. Howe, 362 S.C. 212, 215-16, 607 S.E.2d 354, 355-56 (Ct. App. 2004). The trial court's order denying Petitioners' motion to disqualify satisfies all three criteria.

While Respondent<sup>2</sup> indicates the doctrine is a product of the federal courts and is prohibited from use by Firestone Tire & Rubber Co. v. Risjord, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981), state courts in other jurisdictions have nonetheless subsequently 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)).

In Doe, this Court of Appeals specifically cited with approval, enumerated the collateral order analysis employed by the federal courts and utilized that doctrine by

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<sup>2</sup> See Return, pp. 19-20.

finding found that the order in met all criterion for review<sup>3</sup>. Doe, at 216-17, 607 S.E.2d at 356.

As in Doe, the denial of Petitioners' Motion to Disqualify Counsel in this case meets the criteria for appellate review under the collateral order analysis cited with approval and utilized by this Court. The trial court's orders denying Petitioners' Motion to Disqualify Counsel, and subsequent 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. Should this Court disagree with Petitioners' arguments outlined above, then, respectfully, it must find Petitioners' motion presented a question entirely independent of the merits of the litigation under the collateral order doctrine.

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." Id., 362 S.C. at 217, 607 S.E.2d at 356. In the case at hand, the denial of Petitioners' 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. (Tr.19, lines 1 - 2; 16 - 25; Tr.20, lines 1 - 11). There would effectively be no review of this issue on appeal from a final judgment because the damage would have

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<sup>3</sup> Respondent also argues that the South Carolina Supreme Court has expressly stated that the collateral order doctrine is not applied in our state courts and that appealability of the order in this case is controlled by statute. Yet, the case in which Respondent cited for this proposition, Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006), also states in footnote 2, "we believe the reasoning of these cases [federal cases employing the collateral order doctrine] is sound." (Return, p. 19).

already been done. Any information derived from that initial meeting will have been publicly disclosed at trial. Therefore, the order denying Petitioners' Motion to Disqualify is immediately appealable.

**CONCLUSION**

For the foregoing reasons, Petitioners Marin Right of Way Service, LLC and Bernardo L. Hernandez respectfully request this Court to grant the Petition for Rehearing, reverse its January 3, 2013 decision by finding that the issue is immediately appealable, allow the appeal to proceed and examine the underlying merits of the appeal, reverse the trial court's order denying Petitioners' motion to disqualify, and for such further and other relief as the Court deems appropriate.

Respectfully submitted:

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January 29, 2013

STATE OF SOUTH CAROLINA  
IN THE  
COURT OF APPEALS

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Appeal from the Court of Common Pleas  
For Colleton County  
The Honorable Perry M. Buckner, Circuit Judge  
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**APPENDIX TO REPLY MEMORANDUM  
REGARDING PETITION FOR REHEARING**

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The following is a list of documents submitted in support of Petitioners' Reply  
Memorandum Regarding Petition for Rehearing:

1. Excerpts from the Transcript of Record from the Circuit Court's December 19, 2011 hearing on the Motion to Disqualify Counsel (pp. 1, 14 - 21, 23 - 27, 33, 35, 105).
2. Exhibits from the hearing on the Motion to Disqualify:
  - a. Defendants' Exhibit 5 (notes of Bert G. "Skip" Utsey)

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
 COUNTY OF COLLETON ) CASE NO.: 2011-CP-15-00020

RICKY S. MITCHELL, )

PLAINTIFF, )

v. )

TRANSCRIPT OF RECORD

MARIN RIGHT OF WAY SERVICE, LLC, )

DEFENDANT, )

BERNARDO L. HERNANDEZ, )

THIRD-PARTY PLAINTIFF, )

v. )

THREE GEN, INC. )

THIRD-PARTY DEFENDANT. )

DECEMBER 19TH, 2011  
 WALTERBORO, SOUTH CAROLINA  
 BEFORE THE HONORABLE PERRY M. BUCKNER, III, JUDGE.

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 Official Court Reporter

Direct Examination of Carlos Marin by Mr. Keaveny

- 1 A Yes.
- 2 Q January 27th, 2010?
- 3 A Yes.
- 4 Q Okay. At that time, can you tell me approximately how  
5 many employees you had?
- 6 A I would say about -- about -- between 15 and 20.
- 7 Q All right. Does your company own vehicles?
- 8 A Yes, sir.
- 9 Q All right. How many vehicles does your company own?
- 10 A Right now, I have seven.
- 11 Q All right. The accident that occurred on January 27th,  
12 2010, at that time, what vehicle was involved in that  
13 accident?
- 14 A A passenger van; a 15-passenger van.
- 15 Q Okay. And was that van owned by your company?
- 16 A Yes.
- 17 Q And who was driving that van?
- 18 A Bernardo Lopez.
- 19 THE COURT: Who is that?
- 20 MR. MARIN: Bernardo Lopez.
- 21 THE COURT: L-O-P-E-Z?
- 22 MR. KEAVENY: Yes, sir, Your Honor.
- 23 THE COURT: You got it, Becky?
- 24 COURT REPORTER: Yes, sir.
- 25 Q And was Mr. Lopez employed by your company?

Direct Examination of Carlos Marin by Mr. Keaveny

- 1 A Yes, sir.
- 2 Q And how long had Mr. Lopez been employed by your
- 3 company?
- 4 A Couple years.
- 5 Q Couple of years, okay. Is Mr. Lopez related to you in
- 6 any way?
- 7 A Not himself.
- 8 Q All right. Is he married to your niece?
- 9 A Yes, sir.
- 10 Q Okay. And how many people were in the van on January
- 11 27th, 2010, that Mr. Lopez was driving?
- 12 A Total of eight.
- 13 Q Total of eight? Did that include Mr. Lopez?
- 14 A Yes.
- 15 Q Okay. And where was the van heading to?
- 16 A To Allendale.
- 17 Q And what was the purpose of going ---
- 18 THE COURT: I'm sorry. What was the response, last
- 19 part?
- 20 MR. MARIN: Going to Allendale.
- 21 THE COURT: Allendale.
- 22 MR. MARIN: Yeah, Allendale.
- 23 Q And why were they going to Allendale?
- 24 A To plant trees.
- 25 Q And approximately what time of the day did this

Direct Examination of Carlos Marin by Mr. Keaveny

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1 accident occur?  
2 A About seven.  
3 Q Okay. And where did the accident occur?  
4 A The crossroad of Highway 601, and I think it's 642 or  
5 Confederate Highway.  
6 Q I think it's 641.  
7 A 641.  
8 Q Okay. All right. Were you present when the accident  
9 itself happened?  
10 A No.  
11 Q All right. Did you become aware of the accident?  
12 A No.  
13 Q When did you learn of the accident?  
14 A The guy, the driver, called me just a few minutes after  
15 the accident.  
16 Q All right. Where were you at that time?  
17 A I was leaving downtown Walterboro.  
18 Q Going to where?  
19 A Going to Allendale.  
20 Q What did you do?  
21 A I was planning to meet a consultant on another job.  
22 Q What did you when Mr. Lopez called you to tell you  
23 about the accident?  
24 A First asked -- asked -- first question I asked him is,  
25 "Is everybody -- everybody okay?" He said, "No."

## Direct Examination of Carlos Marin by Mr. Keaveny

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1 Q What else happened?

2 A Well, he told me probably one -- one person was dead.

3 Q All right. Did you have any -- what else was  
4 discussed? Was anything else discussed at that time with  
5 Mr. Lopez?

6 A Well, not much. He hang up and -- and I called my  
7 brothers, tell them to go to the -- to the accident area,  
8 and I was on my way there too at that moment.

9 Q Did you go to the accident?

10 A Yes.

11 Q All right. And tell me what you saw when you got  
12 there.

13 A When I first got there I saw an ambulance and police  
14 cars. You know, I saw the semi-truck turned -- turned over  
15 and -- and the highway -- the van. I saw one body or one  
16 guy dying close to semi-truck. I just walked over to the  
17 van and I saw another guy was pretty hurt in the front seat.  
18 And then in the -- in the back was two -- three more guys,  
19 one was bad, too, laying in the seat. Just walk around the  
20 van, I saw another guy laying on the ground, too. And the  
21 driver, he was -- I mean, he was trying to walk, but he  
22 wasn't walking good.

23 I saw Mr. Mitchell seated right by the -- the edge of  
24 the highway, and I asked him what happened, you know. And  
25 then I couldn't handle it. I just -- my brother was -- he

## Direct Examination of Carlos Marin by Mr. Keaveny

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1 was arriving there, asking about insurance, proof of  
2 insurance, and I say "Just take care of these." I couldn't  
3 handle it. I left.

4 Q How did you feel at that time?

5 A I was. -- I was in a shock. I mean, it's terrible.

6 Q What did you do?

7 A I just left the area and came back to town.

8 Q Where did you go?

9 A My first thought was just looking for legal advice.

10 Q Why?

11 A Well, I mean, it was a bad accident and I feel like I  
12 need -- need a legal advice.

13 Q Were you able to drive yourself from the accident scene  
14 at the time?

15 A No, sir. My -- had my -- by that time, my sister-in-  
16 law had arrived there and she drove back to town.

17 Q So where did you go when you got back to town?

18 A Well, I know Mrs. Dorcas Tuten.

19 Q Yes, sir.

20 A And first I told her I'd need to go to her and ask if  
21 she can help.

22 Q Did you go to Ms. Tuten's office?

23 A Yes, I did. And I explained to her what happened. She  
24 told me she cannot help me. She say "I know somebody that  
25 can help you," and she gave me Mr. Utsey's name and address.

## Direct Examination of Carlos Marin by Mr. Keaveny

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1 She told me how to get to his office, and that's what I did  
2 after I left Mrs. Dorcas office; I went to Mr. Utsey office.

3 Q All right. Now, when you're saying Mr. -- I know that  
4 English is not your native tongue. So are you referring to  
5 Mr. Skip Utsey here sitting at this table?

6 A Yes.

7 Q Okay. Very good. Did you understand when you left  
8 Dorcas Tuten's office that she would not be able to help  
9 you?

10 A Yes.

11 Q Did you understand that she would not be your lawyer?

12 A Yes.

13 Q Did you understand that she would not be representing  
14 you?

15 A Yes.

16 Q All right. What did you do when you left Ms. Tuten's  
17 office?

18 A Well, I went straight to Mr. Utsey's office.

19 Q And tell me what you did, step-by-step through the  
20 process of when you got there.

21 A When I first got there, I went to the front desk. The  
22 person who was there, the lady, I asked her, I said, "I need  
23 to see Mr. Utsey." And she -- she asked me if I had  
24 appointment, I said, "No." And she asked me what I was  
25 about for, and I explained her a little bit, you know. And

Direct Examination of Carlos Marin by Mr. Keaveny

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1 she talked to Mr. Utsey about it, and then she me to go --  
2 go to the back to his office.

3 Q All right. When you went to Mr. Utsey's office, did  
4 you go there seeking legal advice?

5 A Yes.

6 Q Did you intend to hire Mr. Utsey to advise you?

7 A Yes.

8 Q And did you speak to Mr. Utsey?

9 A Yes.

10 Q Did you speak to him in confidence?

11 A Yes, sir.

12 Q And did you expect him to keep secret the confidential  
13 information that you gave him?

14 A Well, really and truly, I never expect that I give  
15 confidential information to somebody that's going to  
16 represent me, I never expect to give that information to  
17 somebody else who use it against me.

18 Q All right. Would you please walk us through what  
19 happened from the point when the woman in Mr. Utsey's office  
20 told you to back to the back and speak to Mr. Utsey. Just  
21 walk us through the process.

22 A Yes. I went to his office and I introduced myself to  
23 him. And I remember he told me that he remembers --  
24 remembered my name because we -- we had another claim before  
25 and ---

Direct Examination of Carlos Marin by Mr. Keaveny

21

1 Q Was he representing -- did he represent you -- when you  
2 said you had another claim before. Did he represent you or  
3 somebody else?

4 A Somebody else.

5 Q Okay. All right. Go ahead.

6 A But before that, he called his -- his assistant to  
7 cancel all of the appointments. I guess he had a court that  
8 day, he told me.

9 Q He asked his office to cancel his appointments?

10 A Yes.

11 Q Okay.

12 A And after that, he started asking me a lot of  
13 questions. I asked him did I need his help and he said --  
14 he asking me a lot of questions about my business, the  
15 people that got hurt, how many people die, and how many  
16 people were in the van. A lot of more stuff that I don't  
17 even remember everything right now.

18 Q Did Mr. Utsey take notes?

19 A Yes.

20 MR. KEAVENY: Do you have any objections to Skip's  
21 notes?

22 MR. DETRICK: I don't have any objection, but how is he  
23 going to testify to them?

24 MR. KEAVENY: I'm going to go through his notes and  
25 talk to him about it. I'm not going to give him these

Direct Examination of Carlos Marin by Mr. Keaveny

1 arrived at Mr. Utsey's office?

2 A I would say about between 9:00 and 9:30.

3 Q And how were you feeling at that time? What was your  
4 state?

5 A Well, my feeling is -- was soon as I got into his  
6 office and he start asking me questions, my feeling were  
7 that he was trying to help me.

8 Q Did Mr. Utsey ask you what happened?

9 A Yes.

10 Q Did you tell Mr. Utsey what happened?

11 A Yes.

12 Q Did Mr. Utsey ask you about what of day the accident  
13 happened?

14 A Yes.

15 Q Did he ask you how many people were taken to the  
16 hospital?

17 A Yes.

18 Q Did he ask you how many were killed?

19 A Yes.

20 Q Did he ask you how many others there were that were  
21 injured that weren't in the hospital or killed?

22 A Yes.

23 Q All right. Did he ask you whether or not the workers  
24 in the van were in the United States legally?

25 A Yes, he did.

## Direct Examination of Carlos Marin by Mr. Keaveny

24

1 Q Did he ask you about whether or not -- did he ask you  
2 questions about the driver, Bernardo Hernandez Lopez, the  
3 co-defendant in this case?

4 A Yes.

5 Q And did you talk to Mr. Utsey about Mr. Lopez?

6 A Yes.

7 Q Did you answer all the questions Mr. Utsey asked you?

8 A Yes, sir.

9 Q Did you answer them freely and fully?

10 A Yes.

11 Q Did you answer them confidentially?

12 A Yes.

13 Q Did Mr. Utsey ask you whether or not -- did Mr. Utsey  
14 ask you what kind of driver's license Mr. ---

15 A Yes, he did.

16 Q --- Hernandez Lopez had? Okay. Did Mr. Utsey ask you  
17 whether or not your employees were authorized to work in the  
18 United States through the Department of Labor?

19 A Yes.

20 Q Did you express concern about possible ramifications  
21 about the fact that they were not registered with the  
22 Department of Labor and now ---

23 A Yes.

24 Q -- this accident? And were you concerned about those  
25 kinds of things?

Direct Examination of Carlos Marin by Mr. Keaveny

25

1 A Yes.

2 Q All right. Did Mr. Utsey ask you if you had a lawyer  
3 that helped you with immigration ---

4 MR. DETRICK: Your Honor, I could let him going on, but  
5 I think he's asking leading questions. These are the first  
6 questions he asked and went through. And I'd ask he not  
7 lead witnesses for those ---

8 THE COURT: All right. Mr. Keaveny, it is direct  
9 examination and we've been letting you testify here for  
10 about ten minutes ---

11 MR. KEAVENY: I'm just trying ---

12 THE COURT: --- with your witness saying "yes" and  
13 "no". Ask direct questions. The objection is sustained.

14 MR. KEAVENY: Your Honor, I'm just trying to get  
15 through this ---

16 THE COURT: I understand you're trying to move, and I  
17 appreciate that. But we're getting down to the heart of the  
18 matter now. Ask direct questions.

19 MR. KEAVENY: Yes, Your Honor.

20 Q Was there any discussion about insurance of any kind?

21 A Yes.

22 Q Would you tell the Court what kind of questions there  
23 were about insurance?

24 A He asked me did I have insurance. I said, "Yes." And  
25 he say "We need the proof of insurance." And so after I

Direct Examination of Carlos Marin by Mr. Keaveny

1 left the office, I called my agent and she told me not to  
2 worry about it, she would take care of that. She sent that  
3 information to him.

4 Q All right. Did you talk about any other kind of  
5 insurance?

6 A No. I mean, everything's in the certificate.

7 Q Did you talk about insurance for your employees?

8 A Just the workers, the Workers' Comp.

9 Q Did you explain to Mr. Utsey -- what, if anything, did  
10 you tell Mr. Utsey about where your employees were going?

11 A Well, actually, I was -- I was worried more about me  
12 and my employees, you know, than anything else. And I was  
13 trying to see what I need to do, you know. And since he  
14 told me that I have insurance, he -- he said not to worry  
15 about -- about it.

16 Q Did Mr. Utsey ask you if you had spoken to Mr. Lopez  
17 about how the accident happened?

18 A Well, I don't remember that, to tell you the truth.

19 Q Okay. All right. All right. Why were you seeing Mr.  
20 Utsey?

21 A Well, like I said at the beginning, I was looking for  
22 legal advice. It was a major problem, and I can -- I don't  
23 know what to do.

24 Q What, if anything, did Mr. Utsey tell you?

25 A Well, like I said, he told me that not to worry about

Direct Examination of Carlos Marin by Mr. Keaveny

1 it; that's what I have insurance for. And he would -- he  
2 would try to help me.

3 Q Did Mr. Utsey, at any time, tell you that he would not  
4 represent you during that meeting?

5 A No, sir.

6 Q Did Mr. Utsey tell you that you needed to go see  
7 another lawyer?

8 A Never did.

9 Q If Mr. Utsey had told you to do so, would you have kept  
10 going? Would you have gone to see another lawyer?

11 A Certainly. Definitely. He said no, he could not help  
12 me. I would have to find somebody else.

13 Q Did Mr. Utsey at any time tell you that he would file  
14 any lawsuits against you?

15 A No, sir.

16 Q About how long do you think this meeting with Mr. Utsey  
17 lasted?

18 A Probably more than -- more than an hour.

19 Q Okay. At the end of the meeting, were you supposed to  
20 do anything?

21 A Yes, on the insurance information.

22 Q Okay. And did you ask someone to do that?

23 A Yes, sir, my agent. First, let me clear this. We met  
24 later on that afternoon at my house because he wants more  
25 information about the family members and the people that got

Direct Examination of Carlos Marin by Mr. Keaveny

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1 trust in them.

2 Q Did you have any reason not to?

3 A No.

4 Q Did you talk to -- now, this is the Friday after the  
5 accident. This would be January 29th; is that right?

6 A Yes.

7 Q All right. Did you have any other conversations with  
8 Mr. Utsey or anybody from the law firm after January 27th  
9 about this accident in any way?

10 A No, sir.

11 Q Did they try to contact you and talk to you about it?

12 A No.

13 Q Did you try to contact them and talk to them about it?

14 A No, sir.

15 Q Okay. Did you ever receive a letter from Mr. Utsey or  
16 anybody at the law firm indicating that they would not  
17 represent you?

18 A No, sir.

19 Q Did you ever have a conversation with Mr. Utsey or  
20 anybody at the law firm saying that they would not represent  
21 you?

22 A No. I don't remember that.

23 Q Do you remember being served with a Summons and  
24 Complaint for this lawsuit?

25 A Yeah, well, they -- somebody brought it to my -- my

Direct Examination of Carlos Marin by Mr. Keaveny

1 Q And did you understand that by virtue of this Summons  
2 and Complaint, Mr. Mitchell was suing you?

3 A Yes, sir.

4 Q And did you notice by looking at the Summons, that the  
5 lawyer who was representing Mr. Mitchell was Mr. Utsey?

6 A Yes.

7 Q Did you read the complaint itself?

8 A Part of -- most of it.

9 Q Most of it?

10 A Yes.

11 Q How did you feel when you received this Summons and  
12 Complaint?

13 A I don't know what to say. I mean, when you put trust  
14 in somebody about confidential stuff, and then somebody just  
15 -- I mean, that person turns it around and use it against  
16 you, I mean, that's not a good feeling at all.

17 Q At any time before this Summons and Complaint was  
18 served upon you, did Mr. Utsey, or anybody from his firm,  
19 ask you if you would consent to their representing Mr. ---

20 A No, sir.

21 Q If they had called you and asked you if you would  
22 consent to their representation of Mr. Mitchell, what would  
23 you ---

24 THE COURT: Just a moment.

25 MR. DETRICK: I'm sorry, Your Honor. I just had to

## Direct Examination of Bert G. "Skip" Utsey by Mr. Detrick

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1 meeting with Mr. Marin on the 27th.

2 Q All right. So now then, Mr. Marin presented himself to  
3 your office. Kind of go through what you remember about  
4 that meeting.

5 A I remember him coming in, and it was obvious that he  
6 was emotional; he was upset. I have a distinct memory of  
7 him, actually. He had on a dark green fleece pullover,  
8 sweater-type jacket thing. And he -- it appeared that he  
9 had been crying or that, you know, he had been fighting  
10 tears. And I said, "Are you here about the wreck that  
11 happened at Carters Crossroads? I just heard about it."  
12 And he said, "Yeah." And I remember he could barely speak  
13 at first. "Yes, sir." And I said, "Well, I'm sorry. I  
14 don't know if they were friends or relatives or what, but I  
15 am really sorry to hear that there was a tragic wreck out  
16 there." And he -- he thanked me.

17 And I said, "Well, is that what you're here about?"  
18 And he said, "Yeah." And I said, "Well, I -- you know, I  
19 don't know what I could do to help you. We don't represent  
20 people in defending cases or anything like that, and there  
21 are going to be a lot of potential claims coming out of  
22 this. I can't represent your company. I know you got  
23 insurance coverage; I just finished a case with that." He  
24 agreed, said, "Yeah, I still got that same insurance  
25 coverage." And I said, "Well, your insurance company will

1

1/27/10 - Carlos Main

509-4989

- Main Right of Way Service  
- truck titled in its name  
- pass. van

- D/A - fire on 1/27/10  
- 3 in hospital  
- 3 killed  
- 3 others injured

live:   
- Benito Lopez - injured but okay  
- had international DL  
- not with intl. w/ Dept. of Labor  
- poss. sanctions for violation  
- was in NY

- Montgomery Trac. Co. - \$1 million  
- Carolina @ Comm Trac.  
- 542-2853

- has W/C + GL Corp. also  
- en route to work @ Allendale from  
Walterboro

- 601 + 644 near Eureka St  
- early fire tm

Andres Main

917 Phillips St.

deaths: Augustine Garcia  
Paul Vasquez

- Alvaro Rodriguez (w/ wife)  
542-3197 (English)  
- wife in W.boro  
- Elizabeth Lopez (Spanish)

UIC  
Morgan

- hospital: Humberto Fuentes

- Sofia Diaz



(?) -  
(?) -

Jan. 29, 2013 2:26PM

(2)

- Bernardo said he stopped @ sign
- did not see truck - Q of headlights
- could not see well through window
- brother to Hugo Pineda (Trooper P. Rush)  
Leo Andres Urrain 843-908-2094

injured:

- Bladimir Morales
- Humberto Fuentes
- Emili's Fuentes
- Jose Manuel Vazquez - Cola.
- Bernardo Fuentes (DRIVER)

Angel Marin
803-
479-8468

deaths:

Jose de la Cruz
Francisco Lopez
Angel Marin

- Paul Vazquez
- Augustin Garcia-Luna (married - W in Mex.)
- Estevan Alvarez Rivera -  
- mother living from TN

Blanca - fax # 803-943-0005

Richard Hawley - coroner's office 843-9336
---

3

~~Wcomp:~~  
- AIG  
- Marine Row Svc.

v. call state trooper re: charges  
vs. Berardo Lopez - Hernandez

- Traeger Skumaker

- waiting for dr. to release him (pub. today)
- 3 warrants for reckless homicide

- ins. coverage for bond?

- Mary Bonifan (859) 275-5065  
(KY law firm)

- dealing w/ immigration issues
- work visas

Bernardo Lopez

- driver

- injured

- w: Medea Maria (Walterosa)

Emilio Fuentes

- injured

Jan. 29. 2013 2:27PM

Bladina spates

- injured

Jose M. Vazquez

- injury

- in Cuba Hospital

Humberto Fuentes

- injured

- Cole Hospital?

Esteban Alvaros Rivera

- deceased
- Contact:
  - brother Juan Fra.
  - coming to Watkinson 1/27 or 1/28

Augustine Garcia-Luna

- deceased
- contact: Alvaro Rodriguez (nephew)  
542-3197 - only one in US
- wife: Santa Martinez (Veracruz, Mex.)
- brother: Marcellino Rodriguez ("")
- per Rich Harvey, need notarized authorization from wife to release body to nephew

Paul Vazquez - Serrano

- deceased
- body @ CMC
- need to transfer to P-R Funeral H. > ID
  - waiting on family member from KY
- Contacts:
  - Francisco Lopez (FIL)
  - Elizabeth Maria (W) - Wellfariano
  - Jose dela Cruz (?)
  - Home: 539-1599
  - cell: 514-6884

**Keaveny Law Firm LLC**  
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January 29, 2013

The Hon. Jenny Abbott Kitchings  
Clerk of Court, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211-1629

Re: Rick S. Mitchell v. Marin Right of Way Service, LLC, et al.  
Appellate Case No. 2012-212460  
Our File No. 700-050

Dear Ms. Kitchings:

Pursuant to Rule 240(f), SCACR, please find enclosed the original and seven (7) copies of Petitioners' Reply Memorandum Regarding Petition for Rehearing in the above-referenced appeal.

I would appreciate you kindly filing the original and returning to me a stamped copy of each in the enclosed self-addressed and stamped envelope. By copy to counsel, I am serving the Reply upon all parties. Thank you in advance for your assistance with this request. If you have any questions, please do not hesitate to contact me.

With kindest regards, I am

Very truly yours,



Matthew S. Byzet

MSB/kls  
Enclosures

cc: Bert G. Utsey, III, Esquire (w/ encl.)  
J. Paul Detrick, Esquire (w/ encl.)  
Britton Mason Hawk, Esquire (w/ encl.)  
Lindsay Smith-Yancey, Esquire (w/ encl.)

# Keaveny Law Firm LLC

Attorneys and Counselors at Law

## FACSIMILE TRANSMISSION

**TO:** *The Honorable Jenny Abbott Kitchings*      **Fax:** 803-734-1496

**ATTN:** *Lori*

<b>Cc:</b>	<i>Bert G. Utsey, III, Esquire</i>	<b>Fax:</b> 843-549-9546
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	<i>Britton Hawk Mason, Esquire</i>	843-577-1643
	<i>Lindsay Smith-Yancey, Esquire</i>	843-722-2238

**DATE:** *January 29, 2013*

**FROM:** *Karyn L. Strickland*

**PAGES:** 48 *(including cover sheet)*

**RE:** *Mitchell v. Marin*

**CASE NO.:** *2011-CP-15-20*

**COMMENTS:**

*Please see the attached Reply Memorandum Regarding Petition for Rehearing. The original is being mailed to your office, as well as all counsel, through the U.S.P.S. priority mail.*

\*\*\*\*\*

**THIS FACSIMILE MESSAGE MAY CONTAIN PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.**

\*\*\*\*\*

**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.

---

**PROOF OF SERVICE**

---

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Amy B. Rothschild, Esquire  
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I, Matthew S. Byzet, Esquire, hereby certify that on January 29, 2013, I served one copy each of the Reply Memorandum Regarding Petition for Rehearing submitted by Petitioners on 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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\_\_\_\_\_

Matthew S. Byzet, Esquire

Charleston, South Carolina  
January 29, 2013