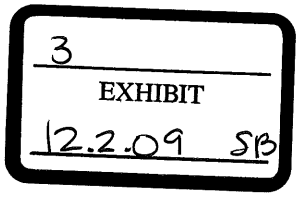

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16 North Brooks Street
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William H. Johnson*
Steven S. McKenzie
Scott L. Robinson

April 25, 2006

Telephone 803.435.0909
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The Honorable Frances P. Segars-Andrews
Judge of the Family Court
Charleston County
Post Office Box 934
Charleston, SC 29402-0934
VIA FACSIMILE (843)-958-4415

Re: W. R. Simpson, Jr. vs. Becky H. Simpson
Docket #: 04-DR-14-243 & 315

Dear Judge Segars-Andrews:

I am in receipt of Mr. Warner's Letter dated April 24, 2006; the accompanying memorandum of law; and the affidavit of Professor Nathan Crystal. I would respond as follows:

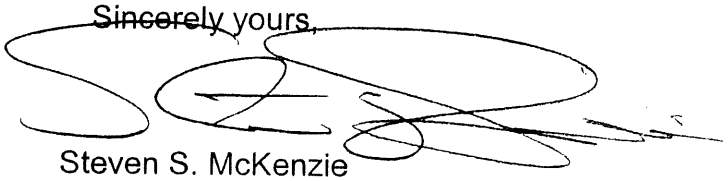
It is apparent to me after reading the memorandum and Professor Crystal's affidavit, I or either opposing counsel misunderstood your Honor's reasoning for recusal. It was my understanding that your Honor's husband's law firm and Mr. McLaren's law firm were the recipients of a large legal fee in a shared personal injury case prior to this matter being heard. Your honor knew about said case (and fee) prior to the trial of this case; however, you had forgotten about the case. After discussing my motion with your husband, he reminded you of the case. At that time, you recalled the matter and realized that you had a duty to disclose the matter prior to the hearing even though you didn't remember the matter at the time of the hearing; however, you were still aware of the large settlement prior to the hearing. As Professor Crystal states on page 6, paragraph 8: "A judge should disclose on the record information that the judge believes the **parties or their lawyers** consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification."

Professor Crystal then states: "Judge Segars-Andrews did not know nor did she have a duty to know about the alleged conflict of interest at the beginning of the case" (page 6, paragraph 9 of the Affidavit of Nathan Crystal). I do not believe that Professor Crystal knows the exact reasoning for your Honor's recusal in this matter. I could be mistaken, but I recall your Honor stating the aforementioned as her rationale for the recusal. I recall that you knew prior to the hearing about the large settlement, but had

forgotten and your husband reminded you about it. You stated that the parties should have been made aware of that fact, and they were not made aware of the settlement involving Mr. McLaren and your husband's law firm. You also stated that you cannot now undue that omission. Therefore, a new trial is the only remedy.

Professor Crystal raises another interesting point regarding Cannon 3(E)(2) when he states: "(2) A judge shall keep informed about the judge's personal and fiduciary interests, and make reasonable efforts to keep informed about the personal economic interest of the judge's spouse...." I believe that you Honor abided by that Cannon; however, you had forgotten about the large settlement before the trial. When you were reminded of it by your husband, you had to then recuse yourself because of the appearance that it created. Said omission(the large settlement) could not be undone unless you recused yourself. You were truly concerned about the problem of wasting court time and money, but couldn't this matter have been avoided if opposing counsel had reminded the Court of the large settlement prior to the hearing? I certainly had no knowledge of it.

Sincerely yours,



Steven S. McKenzie

SSM:gpb

cc: W. R Simpson, Jr. w/ enclosure(s)
Jan Warner, Esq. w/ enclosure(s)
James T. McLaren, Esq. w/ enclosure(s)

WARNER, PAYNE & BLACK, L.L.P.

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PLEASE REPLY TO:
COLUMBIA OFFICE

April 24, 2006

VIA FACSIMILE
The Honorable F.P. Segars-Andrews
Family Court Judge, Third Judicial Circuit
Attention: Connie
100 Broad Street
Charleston, South Carolina 29401
Facsimile: (843) 958-4415

Re: W.R. Simpson, Jr. vs. Becky H. Simpson
Case No.: 04-DR-14-243/315

Dear Judge Segars-Andrews:

Pursuant to Your Honor's direction on the 13th of April 2006, we are faxing copy of Memorandum in Opposition to Your Honor's Recusal and Affidavit of Nathan M. Crystal in support thereof.

We are simultaneously faxing the same to Mr. McKenzie, counsel for the Plaintiff.

We are mailing the original to the Clerk in Manning for filing.

Yours truly,

Jan L. Warner

JLW/is

Enclosure: Memorandum with Affidavit of Nathan M. Crystal

cc: Steven McKenzie, Esquire (via fax)

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON **WILLIAM R. SIMPSON, JR.,** Plaintiff, vs. **BECKY H. SIMPSON and WADE INGLE,** Defendants.	IN THE FAMILY COURT FOR THE THIRD JUDICIAL CIRCUIT DOCKET NO: 2004-DR-14-315, 243 **MEMORANDUM OF LAW**

Defendant Becky H. Simpson, by and through her undersigned counsel, submits the following Memorandum of Law regarding whether Your Honor should *sua sponte* disqualify yourself and grant a new trial in this case based upon Your Honor recalling, post trial and post issuing a decision, that one of Defendant Becky H. Simpson's attorneys, James T. McLaren, had been co-counsel with Lon Shull (the law partner of Mark Andrew's – Your Honor's husband) in a personal injury case resulting in a substantial financial settlement in late 2004.

BACKGROUND

Defendant Becky H. Simpson has been represented in this case by Jan L. Warner, James T. McLaren and Carrie Warner. Plaintiff William R. Simpson, Jr. has been represented by Steven S. McKenzie and Scott L. Robinson.

This case was tried on February 14 and 16, 2006. A bifurcated Decree of Divorce was entered on March 24, 2005. A Consent Order dated March 7, 2006 resolved the issues of custody and visitation. Your Honor issued written instructions for a Final Order on March 13, 2006.

On March 28, 2006, attorneys McKenzie and Robinson filed a *Notice of Motion and Motion for a New Trial Based upon Failure of Defendant's Counsel to Disclose the Court's Conflict of Interest*, after Your Honor's instructions were issued but before entry of a formal Final Order asserting that Plaintiff William R. Simpson, Jr. should get a new trial because Lon Shull had given an affidavit on the issue of attorneys fees in the case of "*Daisy Wallace Simpson vs. William Robert Simpson, Sr. individually and as shareholder/member of W.R. Simpson Farms, L.L.C. and William R. Simpson, Jr., as a shareholder/member of W.R. Simpson Farms, L.L.C.*,", Docket No. 2003-DR-14-128 (the "Simpson, Sr. case"). Daisy Wallace Simpson and William Robert Simpson, Sr. are the parents of William R. Simpson, Jr., the Plaintiff in this case. Plaintiff's Motion contended that Mr. Shull having given an affidavit on the issue of attorneys fees in the Simpson Sr. case (heard and decided by Judge Turbeville) created a conflict of interest preventing Your Honor from hearing this case and that Defendant Becky H. Simpson's attorneys should have disclosed this alleged conflict of interest to Plaintiff and his attorneys. Plaintiff's Motion was not supported by an Affidavit, nor was any prejudice or bias asserted in the Motion.

On April 13, 2006, Judge Segars-Andrews held a hearing on Plaintiff's the Motion for a New Trial at Sumter. At the call of the case, Your Honor stated that she denied the Motion for a New Trial. Then, *sua sponte*, Your Honor stated she was disqualifying herself and that the case would need to be re-tried in front of a new Judge because she had failed to disclose the fact that James T. McLaren had been co-counsel with Lon Shull in a personal injury case which had resulted in a substantial settlement. Your Honor stated that her husband, Mark Andrews, had recently reminded her about

this. Although Your Honor stated she did not remember it when this case was being tried and as a result had not disclosed that fact at the beginning of the case, so she should disqualify herself. Your Honor further stated that she only realized that to be the case after the new trial Motion had been filed because she asked her husband who reminded her about the personal injury case, which had been concluded some time ago (settlement reached in December 2004 and paid in installments between January 13, 2005 and March 30, 2005). Your Honor said that she had not recalled that, nor did she have any consciousness about it when she was trying or deciding the case. Your Honor further stated that she tried and decided the case fairly without bias or prejudice.

DISCUSSION

1. The "Duty to Sit"

South Carolina law, like that of most jurisdictions, imposes a "duty to sit" in cases where disqualification is not required.

South Carolina Appellate Court Rule 501, Canon 3B(1) expressly states:

> (1) **A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.** (emphasis added)

e.g. see *United States of America vs. Gary L. DeTemple*, 162 F.3d 279 C.A.4 (VA) 1998; *U.S. v. Snyder*, 235 F.3d 42 C.A.1 (Mass.) 2000 – [" '[a] trial judge must hear cases unless [there is] some reasonable factual basis to doubt the impartiality or fairness of the tribunal.' *Blizard vs. Frechette*, 601 F.2d 1217, 1221 (1st Cir.1979). Thus, under § 455(a) a judge has a duty to recuse himself if his impartiality can reasonably be questioned; but otherwise, he has a duty to sit."]

2. **Disqualification is not required.**

South Carolina Appellate Court Rule 501, Canon 3E governs those situations where judicial disqualification is required. That Rule states:

> *E. Disqualification.*
>
> *(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:*
>
> *(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;*
>
> *(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;*
>
> *(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;*
>
> *(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:*
>
> > *(i) is a party to the proceeding, or an officer, director or trustee of a party;*
> >
> > *(ii) is acting as a lawyer in the proceeding;*
> >
> > *(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;*
> >
> > *(iv) is to the judge's knowledge likely to be a material witness in the proceeding.*
>
> *(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children*

residing in the judge's household.

Here, there is no evidence whatsoever of any factual basis requiring Your Honor's disqualification in this case.

There is no evidence that Your Honor has "*a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts*" in this case nor has any been alleged.

There is no evidence that Your Honor has "*served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it.*"

There is no evidence that Your Honor has "*individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding...*".

There is no evidence Your Honor or your spouse "*...or a person within the third degree of relationship to either of them, or the spouse of such a person:*

> *(i) is a party to the proceeding, or an officer, director or trustee of a party;*
>
> *(ii) is acting as a lawyer in the proceeding;*
>
> *(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;*
>
> *(iv) is to the judge's knowledge likely to be a material witness in the proceeding.*"

There is simply no factual basis in this case which requires or mandates Your Honor's disqualification as a judge in this case.

3. **The duty of disclosure.**

While there is a duty of disclosure under *South Carolina Appellate Court Rule* 501, Canon 3, in certain instances, none of those instances apply to the subject case or circumstances.

> Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.
>
> A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. (*South Carolina Appellate Court Rule* 501, Canon 3B, Commentary.)

There is no duty to disclose attenuated relationships or other circumstances which do not require or mandate disqualification. None of the circumstances requiring disclosure or disqualification are present in this case.

For example, if the duty to disclose and/or disqualify was as broad as is apparently perceived by Your Honor in this case, then Chief Justice Jean Toal and Chief Judge Kay Hearn would be required to either disqualify themselves or make disclosure not only in cases where their respective spouses or their spouse's law firms were attorneys of record for a litigant but also in cases where any attorney of record for a litigant had previously been co-counsel with or shared fees with their spouses or their spouse's law firms, irrespective of the fact that the previous case or cases had been concluded and there was no continuing or ongoing relationship. Disqualification and/or

disclosure does not occur in these circumstances because it is not required. Nor is it required under the circumstances presented in this case.

4. **Related South Carolina law.**

As stated in the Commentary to *Carolina Appellate Court Rule* 501, Canon 3E(1)(d):

> **The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge.** Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification. (emphasis added)

The circumstances presented here are far more remote than those described above. No lawyer in this proceeding is "affiliated with a law firm with which a relative of the judge". Mr. McLaren was co-counsel with Mr. Shull (Mark Andrews' law partner) in one personal injury case which was settled and concluded well more than a year ago. No relative of the judge has any interest whatsoever in any law firm that could be "substantially affected by the outcome of the proceeding". There is no ongoing relationship between Mr. McLaren and Andrews and Shull. To the contrary, Mr. McLaren has been opposing counsel in cases before and since that time to litigants represented by both Mr. Shull and Mr. Andrews.

While there are apparently no reported South Carolina cases dealing directly with facts similar to those presented in this case and the issue of judicial disqualification, there are a plethora of analogous cases, all of which support the proposition that disqualification is not required in this case.

In *Doe vs. Howe*, 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2002), Doe sued Howe for legal malpractice. The trial judge then granted summary judgment in favor of Howe. Two days after the summary judgment hearing the trial judge disclosed that he had contacted Howe to inquire about employment for his wife with the Charleston Law School (where Howe was on the Advisory Committee) and that the judge's law clerk had applied for employment with one of Howe's attorneys. Doe moved for disqualification of the trial judge. The trial judge denied that Motion. The Court of Appeal affirmed the denial of disqualification stating:

> "Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." (FN7) "It is not enough for a party to allege bias; a party seeking disqualification of a judge must show some evidence of bias or prejudice."
>
> Because Doe made no showing here of actual prejudice, we find no abuse of discretion in the trial judge's refusal to disqualify himself. If anything, the trial judge demonstrated sensitivity toward any concerns Doe might have had regarding his impartiality by voluntarily making full disclosure of his and his law clerk's contacts with Howe and Howe's counsel. 626 S.E.2d at 630.

In *Ness vs. Eckerd Corp.*, 350 S.C. 399, 566 S.E.2d 193 (Ct. App.2002), a case closely analogous to this case, Judge Harwell denied a Eckerd's Motion to set aside a default judgment. Eckerd filed a Rule 59(e) Motion requesting reconsideration of that ruling.

> *In an order dated July 13, 1998, Judge Harwell stated "[he] discovered that one of the [his] brothers has a relationship to the corporate defendant which was unknown [to me] at the time this Court heard the Motions in question and entered the Order of May 28, 1998." He then vacated his earlier order and recused himself from the case.* 566 S.E.2d at 195

The case was assigned to Judge Smoak who then set aside the default. Ness appealed. The Court of Appeals reversed Judge Harwell setting aside his Order stating in relevant part:

> .....**On realizing there might be a problem, Judge Harwell properly declined to take any further action in the case, but he should not have vacated his earlier order.** Rule 63, SCRCP, directs as follows: If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then the resident judge of the circuit or any other judge having jurisdiction in the court in which the action was tried may perform those duties....
>
> We construe the language "other disability" to include disqualification of the trial judge. Therefore, the Rule 59(e) motion should have been heard by another circuit judge. (emphasis added) 566 S.E.2d at 196

Here, like in *Ness vs. Eckerd Corp.*, Your Honor made a decision in this case before recalling the basis now asserted for Your Honor's disqualification. Even more compellingly, the grounds for disqualification in *Ness vs. Eckerd Corp.* mandated or required disqualification under Canon 3E(d)(iii) as Judge Harwell's brother had more than a *de minimus* interest in the defendant corporation that could be substantially affected by the proceeding. There is no basis for a required or mandatory disqualification in this case.

In *Murphy vs. Murphy*, 319 S.C. 324, 461 S.E.2d 39 (1995), the husband sought disqualification of the trial judge on the grounds that the judge has represented the wife's attorney in a prior legal matter. The trial judge denied disqualification. The Supreme Court affirmed the denial of disqualification noting there was "no evidence of judicial prejudice". 461 S.E.2d at 42

In *Lyvers vs. Lyvers*, 280 S.C. 361, 312 S.E.2d 590 (Ct. App.1984), after entry of the Order the wife moved for disqualification of the trial judge upon learning that the judge had represented the husband's attorney in his divorce case four years earlier. The trial judge denied the Motion. The Court of Appeals affirmed the denial of disqualification stating:

> *Finally, Mrs. Lyvers argues that the court erred in denying her motion to reconsider its order after she learned the judge had represented counsel for Mr. Lyvers in a domestic action four years previously. She asserts that the judge should have disqualified himself under the dictates of Canon 3(C)(1) of the Code of Judicial Conduct.*
>
> *Canon 3(C)(1) of the Code of Judicial Conduct provides:*
>
> *(C) Disqualification.*
>
> *(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned*
> ...
>
> *In applying Canon 3(C)(1), the South Carolina Supreme Court has stated that the movant or petitioner must show some evidence of the bias or prejudice of the judge. Rogers v. Wilkins, 275 S.C. 28, 267 S.E.2d 86 (1980). As in Rogers, the record before us is totally devoid of any evidence of judicial prejudice against Mrs. Lyvers, or bias in favor of Mr. Lyvers. Thus, it was not error for the trial judge to deny Mrs. Lyvers's motion for reconsideration.* 312 S.E.2d at 594

Also see *Townsend vs. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996) affirming trial judges denial of the father's disqualification motion where the judge was a childhood acquaintance of the mother.

South Carolina Judicial Advisory Opinion No. 2-1990:

> *There is no conflict of interest or impropriety in a judge presiding over a trial in which one of the attorneys represented him in past litigation, provided that litigation is over, that their relationship was strictly an arms length lawyer-client relationship and there is no debt or financial obligation still outstanding.*

South Carolina Judicial Advisory Opinion No. 28-1996:

> *A Family Court Judge should recuse himself/herself from all cases involving the attorneys and their firms who are concurrently representing a judge's relatives in a divorce proceeding, particularly if the divorce case is expected to be highly confrontational.....However, upon* ***termination of the divorce proceeding, the rules would not mandate that the judge recuse himself/herself.*** *(emphasis added)*

CONCLUSION

Here, there is no basis asserted under Cannon 3 or otherwise in existence requiring or mandating Your Honor's disqualification in this case. Further, there is no reason Your Honor's impartiality can reasonably be questioned in the decision making process in this case. According to Your Honor's own statements at the hearing on April 13, 2006, Your Honor was completely unaware that Mr. McLaren had been co-counsel with Mr. Shull in the subject personal injury case until after your husband reminded you of that fact several days earlier and Your Honor expressly stated that you had tried and decided the case fairly without bias or prejudice.

Even if your husband was "affiliated" with McLaren & Lee, which he is not, that fact would not require Your Honor's disqualification in this case.

This case has been through a lengthy trial at great expense, financially and emotionally, to both parties. Defendant Becky Simpson has since relocated to the State of Texas and recently suffered a broken back. Substantial sums have already been spent to prepare and present her case at the trial in February 2006. If a retrial is ordered there will be great prejudice to Defendant Becky Simpson.

The "duty to hear and decide" set forth in Canon 3B(1) should control Your Honor's decision.

For the reasons set forth above, both individually and collectively, Defendant Becky Simpson respectfully submits that Your Honor should not disqualify herself in this case or require a retrial of the issues.

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BECKY H. SIMPSON

Columbia, South Carolina

Dated: April 24, 2006

STATE OF SOUTH CAROLINA COUNTY OF CLARENDON William R. Simpson, Jr., Plaintiff vs. Becky H. Simpson and Wade Ingle, Defendants	IN THE FAMILY COURT FOR THE THIRD JUDICIAL CIRCUIT DOCKET NO: 2004-DR-14-315, 243 AFFIDAVIT OF NATHAN M. CRYSTAL

PERSONALLY APPEARED before me the undersigned, Nathan M. Crystal, who provides the following affidavit under oath:

1. I am offering this affidavit as an expert witness on behalf of the defendant, Becky H. Simpson.

2. My qualifications to give expert testimony include the following: I am the Class of 1969 Professor of Professional Responsibility and Contract Law at the University of South Carolina School of Law. I have taught professional responsibility, judicial ethics, and related subjects for more than 25 years. I am the author or coauthor of three books on Professional Responsibility and Legal Ethics, along with numerous articles in this field. One of my books, THE ANNOTATED SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT (SC Bar 2005 ed.) (with Professor Robert Wilcox), is the leading work on professional ethics in this state. Another of my books, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION (3rd ed. Aspen 2004), contains extensive coverage of judicial ethics and disqualification. Id. at 547-573. I have been a member of the South Carolina Bar's Ethics Advisory Committee for more than 15

nmc

years and have authored a number of opinions that were adopted by the Committee on issues of legal ethics. I was appointed by the President of the South Carolina Bar as chair of the committee from 2002-2003. I also represented the South Carolina Bar in its petition to the Supreme Court in 1990 to adopt the South Carolina Rules of Professional Conduct. I have delivered more than 100 speeches, presentations, and continuing legal education programs to law firms, bar organizations, and other groups, both in South Carolina and nationally. I have appeared as an expert witness by way of testimony, deposition, or affidavit in more than 30 cases involving questions of professional responsibility and legal ethics.

3. My opinion is based on the statement of facts set forth in defendant's memorandum of law filed with the court on April 24, 2006, and attachments thereto. I have also reviewed defendant's Return and Memorandum of Law dated April 13, 2006, with attachments. In forming my opinion I have taken into account relevant authorities, including the South Carolina Code of Judicial Conduct, SCACR 501, case law, and legal literature. This factual and legal material is of a type reasonably relied on by experts in the field of professional responsibility and judicial ethics in forming their opinions.

4. I offer the following opinions:

(a) Judge Segars-Andrews is not disqualified from hearing this case because Lon H. Shull, Esq., who is a partner with her husband, Mark Andrews, (1) submitted an affidavit on the issue of attorney fees and costs in the divorce action between Daisy Wallace Simpson and William R. Simpson, Sr., the father of the plaintiff in this case, tried before Judge Turbeville, when counsel for Daisy Wallace Simpson (Mr. McLaren and Mr. Warner) also represent the defendant Becky H. Simpson in this case, or (2) because Mr. Shull was co-counsel with Mr.

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McLaren, one of the lawyers for defendant Simpson in this case, in a personal injury case that ended about a year ago.

(b) Judge Segars-Andrews is not disqualified in this case because she failed to disclose either of the matters referred to above at the beginning of this case when she was unaware of Mr. Shull's involvement in the prior case and did not recall the co-counsel relationship between Mr. Shull and Mr. McLaren until after she had heard the evidence, issued her ruling, and directed defense counsel to prepare an order.

I.

Judge Segars-Andrews is not disqualified from hearing this case (1) because Mr. Shull submitted an affidavit on attorney fees and costs in the divorce action between plaintiff's father and Daisy Wallace Simpson or (2) because Mr. Shull was co-counsel with Mr. McLaren in a personal injury case that ended about a year ago.

5. Canon 3(E) of the Code of Judicial Conduct, SCACR 501, deals with disqualification of judges. That Canon sets forth specific grounds for disqualification: (a) personal bias or prejudice by the judge or personal knowledge of disputed evidentiary facts, (b) prior involvement by the judge or the judge's former law partner in the matter before the judge, or participation by the judge as a material witness, (c) economic interest of the judge or of close family members in the outcome of the case or in one of the parties to the case, and (d) four specific disqualifying relationships. Canon 3(E)(1)(a)-(d).

Based on the materials I reviewed, there is no basis for disqualification of Judge Segars-Andrews under any of these specific grounds. In particular, I note the following:

- There is no allegation that Judge Segars-Andrews harbors any personal bias or prejudice in favor of or against any of the parties or lawyers in this proceeding.

mmc

Further, she has stated on the record that she was unaware of the claimed grounds for disqualification until after she had issued her ruling and that she decided the case fairly on the merits.

- Her husband and her husband's partner do not have any economic interest, direct or otherwise, in this case, nor do they have any other interest that could be substantially affected by her ruling in this case.

6. In addition to the specific grounds for disqualification set forth in Canon 3(E)(1)(a)-(d), Canon 3(E) provides a general standard for disqualification: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." In my opinion, neither of the matters creates a reasonable question about Judge Segars-Andrews' impartiality.

When judges are elected to the bench, they come with extensive professional and personal relationships. Judges who are married to lawyers have additional professional and personal relationships through their spouses. When judges or their spouses practice in law firms, those professional and personal relationships are further multiplied through the former partners of the judges or the current and former partners of their spouses. For two reasons, generally none of these relationships is a basis for disqualification. First, in almost all of these situations the relationships are too tenuous to have any impact on a judge's decision in a specific case, particularly because in many instances the judge will be unaware of the relationship when hearing the case, as is true in this matter. Second, as a practical matter, disqualification on the basis of such tenuous relationships would interfere with the administration of justice because

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judges would be disqualified too often, sometimes in the middle of a case.[1]

7. Under South Carolina case law a mere allegation of some tenuous prior relationship is insufficient to justify disqualification. The decision whether to grant a motion for recusal rests with the sound discretion of the trial judge. See *State v. Cheatham*, 349 S.C. 101, 111, 561 S.E.2d 618, 624 (Ct. App. 2002). The supreme court has stated on numerous occasions that a judge's decision to deny a motion for disqualification is not reversible unless there is some evidence of judicial prejudice. See *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004): "Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Accord *Ellis v. Procter & Gamble Distributing Co.*, 315 S.C. 283, 284-285, 433 S.E.2d 856, 857 (1993).

South Carolina cases have found that a judge is not disqualified in situations involving much more significant relationships than involved in this case. For example, in *Murphy v. Murphy*, 319 S.C. 324, 461 S.E.2d 39 (Ct. App. 1995), the court of appeals found that the trial judge in a domestic case was not disqualified because counsel for the wife had previously

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[1] Cf. *Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 504 S.E.2d 311 (1998), where the supreme court held that a special referee (Fallon), who was subject to the Code of Judicial Conduct, was not disqualified because Fallon had received an award similar to the one issued by Fallon in a previous case (the *Leasure* case) in which the referee was one of the lawyers who represented the plaintiff Roche in the case before referee Fallon. The court said:

> [R]eferees will invariably be appointed who were involved in prior, unrelated legal matters with the attorneys appearing before them. If this were the sole basis for disqualification, such counties would be severely hampered in their ability to appoint special referees. Young Brothers nevertheless suggests that a *quid pro quo* was implicit because the damages award in this case was similar to the award in the *Leasure* matter. We, however, find no evidence of bias or prejudice on the part of the special referee. The record clearly supports the special referee's factual findings and award of damages. Id. at 84-85, 504 S.E.2d at 316.

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represented the judge in a matter. Similarly, in *Lyvers v. Lyvers*, 280 S.C. 361, 312 S.E.2d 590 (Ct. App. 1984), the court of appeals held that the trial judge was not disqualified because the judge had represented the counsel for the husband in a domestic action four years earlier. See also *Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 504 S.E.2d 311 (1998) (referee, who was "judge" under Code of Judicial Conduct, not disqualified when referee issued award to plaintiff similar to award plaintiff's attorney, serving as referee in prior case, had issued to referee); *State v. Jackson*, 353 S.C. 625, 578 S.E.2d 744 (Ct. App. 2003) (judge not disqualified even though he was deputy solicitor at time defendant allegedly committed offenses).

II.

Judge Segars-Andrews in not disqualified from hearing this case because she failed to disclose either of the alleged "conflicts" at the beginning of the case.

8. Under the Code of Judicial Conduct a judge should promptly disclose any information that may be relevant to disqualification, even if the judge believes that there is no basis for disqualification. The commentary to Canon 3(E)(1) states:

> A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

For three reasons in my opinion Judge Segars-Andrews is not disqualified for failing to disclose the alleged conflicts of interest at the beginning of the case.

9. First, Judge Segars-Andrews did not know nor did she have a duty to know about the alleged conflicts of interest at the beginning of the case. Judge Segars-Andrews has said that she did not know about the alleged conflicts until after she had heard the evidence, decided the case, and directed defendant's counsel to prepare an order. Obviously, a judge cannot be faulted

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or disqualified for failing to disclose information about which she was unaware. Moreover, Judge Segars-Andrews did not violate any duty by not knowing about the alleged conflicts at the beginning of the case. Under the Code of Judicial Conduct a judge has a duty to "keep informed" about personal economic interests and the economic interests of her spouse and minor children residing in her home. Canon 3(E)(2) states:

> (2) A judge shall keep informed about the judge's personal and fiduciary* economic interests,* and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

Quite clearly Judge Segars-Andrews did not violate the duty to "keep informed." The duty only applies to economic interests of the judge, the judge's spouse, and minor children. The claimed conflict in this case does not involve an economic interest of any such person. Moreover with regard to a spouse, the judge only has an obligation to keep reasonably informed. A judge would not normally be expected to know about the expert witness or legal work done by the partner of the judge's spouse with regard to cases that were not before the judge and did not involve her husband.

10. Second, Judge Segars-Andrews' failure to disclose is, at worst, harmless error. The purpose of the disclosure obligation set forth in the commentary is to enable counsel to raise an issue of disqualification. As discussed above, however, the alleged "conflicts of interest" are not grounds for disqualification. In *Hathcock v. Southern Farm Bureau Cas. Ins. Co.*, 912 So.2d 844 (Miss. 2005), the judge's son was employed in a supervisory capacity by Southern. In addition, twenty years earlier the judge had represented Southern in all of the counties of the district. The judge had failed to disclose this information on the record. The court held that the

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judge was not disqualified because any failure to disclose was harmless error:

> Even had Judge Terry made the disclosure, the ultimate result would be no different because there is no real basis for disqualification. Assuming arguendo that Judge Terry's failure to disclose would be error, it would be de minimus at best, and therefore, harmless, as had Hathcock been informed of the son's employment and/or Judge Terry's prior representation was neither a basis for disqualification or recusal. In the case sub judice, there are two undisputed facts, (1) Judge Terry's prior representation of Farm Bureau, and (2) Judge Terry's son's employment with Farm Bureau in an unrelated capacity. Hathcock has offered this Court no additional facts. Accepting those two facts together, does not create a reasonable doubt as to Judge Terry's impartiality. Id. at 853.

11. Finally, as discussed above, South Carolina courts have held that a judge's decision on whether to recuse herself rests with the sound discretion of the judge. Here, in my opinion Judge Segars-Andrews should exercise her discretion against recusal, especially since the case has been litigated and a decision rendered. All of the equitable factors involved in this case point against recusal. From the plaintiff's perspective, Mr. Simpson has not been prejudiced in any way. Judge Segars-Andrews decided this case fairly without any knowledge of the alleged conflicts of interest. Judge Segars-Andrews did not violate a duty to disclose the alleged conflicts because she did not know about the conflicts at the beginning of the case. Nor did she violate her duty to "keep informed" about information that would be the basis of disqualification. Moreover, on the merits, the alleged conflicts of interest are not grounds for disqualification. From the defendant's perspective, disqualification would require a time consuming, expensive retrial before another judge. From the perspective of the fair administration of justice, disqualification should be denied. Both parties received a fair hearing before an impartial judge. There is no reason to think that a trial before another judge would be fairer. Retrial of the case before another judge would, however, unquestionably expend judicial resources.

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For the foregoing reasons, in my opinion Judge Segars-Andrews is not required to recuse herself in this case and should not do so on her own motion.

Further the affiant sayeth not.

Matthew M. Gould

Affiant

SWORN TO AND SUBSCRIBED BEFORE ME
this 24th day of April, 2006

Notary Public
My Commission expires: 9-25-10