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May 8, 2006

VIA FACSIMILE
Scott L. Robinson, Esquire
Steven S. McKenzie, Esquire
Johnson, McKenzie & Robinson, LLC
16 North Brooks Street
Manning, South Carolina 29102

RE: *William Simpson, Jr. v. Becky Simpson*
2004-DR-14-0315, 243

Gentlemen:

Please find enclosed a draft of the proposed Order in connection with the above matter. Please review and advise of any revisions you may have. I would like to transmit the Order on to Judge Segars-Andrews as quickly as possible.

With kindest regards, I am

Very Truly Yours,

McLAREN & LEE

James T. McLaren

JTM/mms
Enclosure
cc: Jan L. Warner, Esquire

10
EXHIBIT
12.2.09 SB

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 **ORDER**

Hearing Date:	April 13, 2006
Presiding Judge:	Frances P. Segars-Andrews
Plaintiff's Attorneys:	Steven S. McKenzie Scott L. Robinson
Defendant Simpson's Attorneys:	Jan L. Warner James T. McLaren Carrie A. Warner
Guardian *ad Litem*:	James A. Stoddard
Court Reporter:	Sandra McGarry

This matter was heard before the undersigned at Sumter, South Carolina on April 13, 2006. Plaintiff was represented by his attorney Steven S. McKenzie. Defendant Simpson was represented by her attorneys Jan L. Warner and James T. McLaren. The hearing was conducted at Sumter rather than in Manning with the consent and agreement of counsel for both parties and as an accommodation to the Court which was sitting in Sumter on the hearing date.

This matter was before the Court for a hearing on Plaintiff's "*Notice of Motion and Motion for a New Trial Based Upon Failure of the Defendants' Counsel to Disclose the Court's Conflict of Interests*" dated March 28, 2006.

At the hearing on April 13, 2006 the Court also raised, *sua sponte*, the question of whether the Court should disqualify itself and grant a new trial based upon the fact that Mr. McLaren, one of the Defendant's attorneys, had been co-counsel with Lon Shull, a partner in the Mt. Pleasant law firm of Andrews and Shull[1], in a personal injury case settled in late 2004 which resulted in a six-figure contingency fee being paid to Andrews and Shull and then divided, per their partnership agreement, between Lon Shull and Mark Andrews. At the hearing the Court requested that each party submit any Memorandum or other documentation which they desired for the Court to consider on this issue. Defendant has submitted a Memorandum of Law dated April 24, 2006 with an attached Affidavit from Nathan M. Crystal, a Professor at the University of South Carolina School of Law. Plaintiff has submitted a letter dated April 25, 2006. The Court has considered these submissions as well as the balance of the record before the Court in reaching its decision on the matters addressed in this Order. For the reasons set forth hereinafter the Court finds and concludes that there is no conflict of interests or other reason why it should disqualify itself or grant a new trial in this case and thus denies Plaintiff's Motion for a New Trial.

BACKGROUND

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

This case was heard on its merits 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. On March 13, 2006 the Court issued

[1] Mark Andrews, the other partner in Andrews and Shull, is the husband of the undersigned.

five (5) pages of written instructions for a Final Order on all remaining issues and requested that Mr. Warner and Mr. McLaren prepare and submit a proposed Order consistent with those instructions.

On March 28, 2006, after the Court's written instructions had been issued, Plaintiff filed his *Notice of Motion and Motion for a New Trial Based upon Failure of Defendant's Counsel to Disclose the Court's Conflict of Interests* asserting, in substance, that he should get a new trial because Lon Shull[2] 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. William R. Simpson, Jr. was named as a party defendant in the Simpson, Sr. case. Plaintiff's Motion contends that Mr. Shull having given an affidavit on the issue of attorneys fees in the Simpson Sr. case (heard and decided by Judge Turbeville) creates a conflict of interests preventing the Court from hearing this case and that Defendant Becky H. Simpson's attorneys should have disclosed this alleged conflict of interests to Plaintiff and his attorneys. Plaintiff's Motion did not allege any prejudice or bias resulting from the asserted conflict of interests nor was any evidence or argument of prejudice resulting from the asserted conflict of interests presented.

A hearing was conducted on Plaintiff's Motion for a New Trial at Sumter on April 13, 2006. At that hearing the Court, acting *sua sponte*, raised the question of whether it

[2] As previously noted Mr. Shull is a partner in the Mt. Pleasant law firm of Andrews and Shull. Mark Andrews, the other partner in that law firm, is the undersigned's husband.

should disqualify itself and grant a new trial on the grounds the Court had not previously disclosed the fact that James T. McLaren had been co-counsel with Lon Shull in a personal injury case which concluded in late 2004 or early 2005[3]. As the Court stated at the April 13, 2006 hearing, the Court did not have a conscious awareness that Mr. McLaren had been co-counsel with Mr. Shull in that case prior to Plaintiff filing the Motion for a New Trial and, as a result, had not disclosed that fact previously.

DISCUSSION

1. Mr. Shull's Affidavit in the Simpson Sr. case.

There is no contention by Plaintiff that Mr. Shull has been an attorney, witness or otherwise involved directly or indirectly in this case (*W. R. Simpson, Jr. vs. Becky H. Simpson*, Docket Nos. 2004-DR-14-243 & 315). Mr. Shull's sole involvement in the Simpson Sr. case, heard and decided by Judge Turbeville, was as a witness, via affidavit, on the single issue of attorney fees. Mr. Shull did not appear as an attorney in that case and had no other involvement in that case. The Court was completely unaware that Mr. Shull had given an affidavit in the Simpson Sr. case until that fact was presented to the Court as part of Plaintiff's "*Notice of Motion and Motion for a New Trial Based Upon Failure of the Defendants' Counsel to Disclose the Court's Conflict of Interests*".

The Court has carefully reviewed and considered Canon 3 the Code of Judicial Conduct and finds no basis in that Canon or elsewhere under the law of the State of South Carolina which would require the Court to disqualify itself in this case based upon Mr. Shull's limited involvement, as a witness, in the divorce case of Plaintiff's parents.

[3] In approximately 2003 Mr. McLaren and Mr. Shull began representing a Plaintiff in a wrongful death case. That case was settled in December 2004. The settlement was paid in early 2005. At that time Andrews and Shull received a six figure contingency fee which was divided between Mr. Shull and Mr. Andrews per their partnership agreement.

Plaintiff does not argue or suggest or contend that the Court "....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;". [Canon 3E(1)(c)]. There is no evidence or argument that Mr. Shull has any economic interest in the outcome of this case (the Simpson, Jr. case). Further, it appears that Mr. Shull was not paid or otherwise compensated for his affidavit in the Simpson, Sr. case, thus Mr. Shull neither has or had an economic interest in the outcome of either Simpson case.

Plaintiff does not suggest or contend that the Court ".....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." [Canon 3E(1)(d)]. To the contrary there is no evidence or even a suggestion that Mr. Shull has had any involvement whatsoever in the Simpson, Jr. case.

Finally, there is no evidence, argument or even suggestion by Plaintiff that Mr. Shull's limited involvement in the Simpson Sr. case in any way resulted in the Court having a bias or prejudice against Plaintiff in this case. The Court heard and decided this case fairly and completely without bias or prejudice for or against either party. As stated previously, the Court was completely unaware that Mr. Shull had given an affidavit in the Simpson Sr. case until it received Plaintiff's "*Notice of Motion and Motion for a New*

Trial Based Upon Failure of the Defendants' Counsel to Disclose the Court's Conflict of Interests". That Motion was not made until March 28, 2006, more than a month after the Court heard the evidence in this case and almost two (2) weeks after the Court issued it memorandum ruling in this case.

Based on the foregoing the Court finds that Mr. Shull's limited involvement in the Simpson Sr. case was not something which either the Court or Defendant's attorneys were required to disclose to the Plaintiff nor does Mr. Shull's limited involvement in the Simpson Sr. case warrant granting a new trial in this case. Accordingly, the Court concludes that Plaintiff's "*Notice of Motion and Motion for a New Trial Based Upon Failure of the Defendants' Counsel to Disclose the Court's Conflict of Interests*" should be denied.

2. The "Duty to Sit"

South Carolina law, like that of most other 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. The Court's disqualification is not required in this case.

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 the Court's disqualification in this case.

There is no evidence that the Court 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 bias or prejudice been suggested, alleged or argued.

There is no evidence, argument or suggestion that the Court 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, argument or suggestion that the Court 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, argument or suggestion the Court or my husband "*...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 thew Court'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 or requirement to disclose attenuated relationships or other circumstances which do not reasonably form a basis for disqualification. No circumstances reasonably forming a basis for disqualification are present in this case.

For example, if the duty to disclose and/or disqualify was as broad as is suggested by Plaintiff, then Chief Justice Jean Toal of the South Carolina Supreme Court and Chief Judge Kay Hearn of the South Carolina Court of Appeals would be required to either disqualify themselves or make disclosure in all cases where their respective spouses or their spouse's law firms had previously been co-counsel with or shared fees with any attorney or law firm representing a litigant before those Courts, 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 *South 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 is affiliated". 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 before this case was heard. No relative of the Court has any interest whatsoever in any law firm that could be "substantially [or even minimally] 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 neither disqualification nor disclosure is 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 somewhat analogous to this case, Judge Harwell denied 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.*, the Court made a decision in this case before recalling the basis now asserted for the Court'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 judge's 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)*

Here, there is no basis asserted under Cannon 3 or otherwise in existence requiring or mandating the Court's disqualification in this case. Further, there is no reason the Court's impartiality can reasonably be questioned in the decision making process in this case. The Court was completely unaware that Mr. McLaren had been co-counsel with Mr. Shull in the subject personal injury case until after her husband reminded it of that fact several days before the April 13, 2006 Motion hearing.

The Court heard and decided this case fairly without any bias or prejudice for or against either party. The "duty to hear and decide" cases as is set forth in Canon 3B(1) controls the Court's decision to deny disqualification and a new trial.

Based on the foregoing, it is, accordingly,

ORDERED AS FOLLOWS:

1. Plaintiff's "*Notice of Motion and Motion for a New Trial Based Upon Failure of the Defendants' Counsel to Disclose the Court's Conflict of Interests*" is hereby denied.

2. The foregoing findings and conclusions of the Court are hereby rendered the Order of the Court as to the issues addressed herein.

IT IS SO ORDERED.

FRANCES P. SEGARS-ANDREWS, JUDGE
FAMILY COURT FOR THE
THIRD JUDICIAL CIRCUIT

Charleston, South Carolina

Dated: _____, 2006