

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION - CIVIL**

<p><b>JOHN BROWN AND RDS VENDING, L.L.C.,</b></p> <p style="text-align: center;"><b>v.</b></p> <p><b>ALAN SIMONS,</b></p>	<p><b>Plaintiffs,</b></p>   <p><b>Defendant.</b></p>	<p><b>March Term 2019 No. 3075</b></p> <p><b>Commerce Program</b></p> <p><b>Control Number 21044953</b></p> <p><b>71 EDA 2022</b></p>
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**OPINION**

**Nina Wright Padilla, S.J.**

**March 21, 2022**

Defendant Alan Simons (“Simons”) appeals this court’s order dated and docketed December 13, 2021, denying his motion to disqualify Buchanan Ingersoll & Rooney, P.C. (“Buchanan”). For the reasons discussed below, this court’s order should be affirmed.

Plaintiff John Brown (“Brown”) is an adult individual and a 50% member of Plaintiff RDS Vending, LLC. (“RDS”).<sup>1</sup> RDS is a Delaware limited liability company with its principal place of business at 220 East Washington Street, Norristown, Pennsylvania 19401.<sup>2</sup> RDS is engaged in the business of selling food, beverages, and tobacco products to the public through vending machines at various locations throughout the Philadelphia region.<sup>3</sup> Simons is an adult

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<sup>1</sup> Complaint ¶ 2.

<sup>2</sup> *See id.* ¶ 1.

<sup>3</sup> *See id.* ¶ 6.

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individual and a 50% member and the manager of RDS.<sup>4</sup> Simons as the manager of RDS controlled daily operations of RDS, while Brown has not participated in its day-to-day operations.<sup>5</sup>

On January 1, 2007, Simons executed an employment agreement with RDS providing that Simons should serve as the President, CEO, and the manager of RDS.<sup>6</sup> In September 2011, Simons and RDS executed an amended employment agreement.<sup>7</sup> In October 2015, Simons and RDS executed the second amended employment agreement.<sup>8</sup>

In 2012, Brown and Simons formed a limited liability company called “Rite-Vend, LLC” (“Rite Vend”).<sup>9</sup> For the task of forming Rite Vend, in 2012 RDS retained Buchanan.<sup>10</sup> All invoices for Buchanan’s legal services were directed to and paid by RDS, and not Simons.<sup>11</sup>

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<sup>4</sup> *See id.* ¶ 3.

<sup>5</sup> *See* Memorandum of Law in Opposition to Defendant’s Second Motion to Disqualify and in Support of Cross-Motion for Sanctions, p. 3.

<sup>6</sup> *See* Employment Agreement as Exhibit A to the Complaint.

<sup>7</sup> *See* Amendment to Employment Agreement as Exhibit B to the Complaint.

<sup>8</sup> *See* Second Amendment to Employment Agreement as Exhibit C to the Complaint.

<sup>9</sup> *See* Operating Agreement of Rite-Vend, LLC. as Exhibit 2 to the Motion to Disqualify Buchanan Ingersoll & Rooney, PC. filed on Aril 29, 2021; *see also* Memorandum of Law in Opposition to Defendant’s Second Motion to Disqualify and in Support of Cross-Motion for Sanctions filed on May 19, 2021, pp 6-7.

<sup>10</sup> *See* Memorandum of Law in Opposition to Defendant’s Second Motion to Disqualify and in Support of Cross-Motion for Sanctions filed on May 19, 2021, p 7.

<sup>11</sup> *See id.* (The invoices were dated from September 2012 through February 2016); *see also* Invoices for Rite-Vend, LLC. related work as Exhibit 1 to Memorandum of Law in Opposition to Defendant’s Second Motion to Disqualify and in Support of Cross-Motion for Sanctions filed on May 19, 2021.

Buchanan claimed that it has done no legal work for RDS regarding Rite-Vend, since January 2016.<sup>12</sup>

In 2013, RDS retained Buchanan again, in order to form Regal Vending (“Regal”).<sup>13</sup> On October 16, 2013, Buchanan and RDS executed an agreement, entitled “Engagement Agreement” (“Agreement”).<sup>14</sup> The Agreement provides as follows: “The Company is our sole client with respect to this engagement. Individuals or entities that are affiliated with the Company, such as its equity owners, members, officers, directors...or other affiliates, are not clients of the Firm, unless we otherwise agree in writing”.<sup>15</sup> Buchanan issued invoices dated November 2013 through March 2015, and the invoices were billed to RDS.<sup>16</sup>

On March 25, 2019, Brown and RDS filed a complaint against Simons for breach of the Employment Agreement, breach of the Operating Agreement, breach of the implied covenant of good faith and fair dealing, conversion, and accounting. On April 16, 2019, Simons filed preliminary objections to the complaint. The preliminary objections were overruled by this court’s order dated October 4, 2019, and docketed October 8, 2019. On October 16, 2019, Simons filed a notice of appeal from the order overruling the preliminary objections. On October 17, 2019, this court ordered Simons to file a concise statement of the errors complained of on

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<sup>12</sup> See Memorandum of Law in Opposition to Defendant’s Second Motion to Disqualify and in Support of Cross-Motion for Sanctions filed on May 19, 2021, p. 8.

<sup>13</sup> See *id.* p. 11; see also Motion to Disqualify Buchanan Ingersoll & Rooney, PC. filed on April 29, 2021, ¶ 34.

<sup>14</sup> See Engagement Agreement – RDS Vending, LLC. as Exhibit 9 to the Memorandum of Law in Opposition to Defendant’s Second Motion to Disqualify and in Support of Cross-Motion for Sanctions.

<sup>15</sup> See *id.* RDS was referred to as “the Company”.

<sup>16</sup> See Invoices as Exhibit 10 to the Memorandum of Law in Opposition to Defendant’s Second Motion to Disqualify and in Support of Cross-Motion for Sanctions.

appeal. On November 1, 2019, Simons filed a concise statement of issues on appeal. On December 17, 2019, Simons filed a praecipe to withdraw the notice of appeal.

On July 23, 2019, the Plaintiffs filed a motion for preliminary injunction. The motion was denied without prejudice by this court's order dated October 4, 2019, and docketed October 8, 2019. On March 9, 2020, Simons filed an answer with new matter to the complaint.

On April 13, 2020, Simons filed a petition to disqualify Buchanan Ingersoll & Rooney, P.C.<sup>17</sup> On May 4, 2020, the Plaintiffs filed the memorandum of law in opposition to the Defendant's petition to disqualify. On October 20, 2020, this court ordered that the Defendant's petition to disqualify was withdrawn without prejudice.

On May 14, 2020, the Plaintiffs filed a renewed motion for preliminary injunction. On June 3, 2020, Simons filed a response in opposition to the Plaintiff's renewed motion. On December 31, 2020, this court denied the renewed motion.

On April 29, 2021, Simons filed both the Motion to Disqualify Buchanan Ingersoll & Rooney, P.C. ("Motion") and a memorandum of law in support of the motion. On May 19, 2021, the Plaintiffs filed both the Response in Opposition to Defendant's Second Motion to Disqualify ("Response") and the Memorandum of Law in Opposition to the Defendant's Second Motion to Disqualify and in Support of Cross-Motion for Sanctions ("Memo"). On November 18, 2021, a hearing on the Motion was held. On December 13, 2021, this court entered the order denying the Motion.

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<sup>17</sup> Simons filed a motion to disqualify Buchanan two times. On April 13, 2020, he filed the first motion, which he withdrew on the ground of insufficient evidence in support of the motion. (N.T. November 18, 2021, 16:7-18). On April 29, 2021, he filed the second motion to disqualify Buchanan, which was denied by this court's order dated December 13, 2021. Simons appealed from the order denying the second motion.

On December 14, 2021, Simons filed a notice of appeal from this court's order docketed December 13, 2021. This opinion is submitted in support of this court's order docketed December 13, 2021.

## DISCUSSION

### **1. The Motion to Disqualify Buchanan Ingersoll & Rooney, P.C. was properly denied.**

A former client seeking to disqualify a law firm representing an adverse party on the basis of its past relationship with the law firm has the burden of proving: (1) that a past attorney-client relationship existed which was adverse to a subsequent representation by the law firm of the other client; (2) that the subject matter of the relationship was substantially related; (3) that a member of the law firm, as attorney for the adverse party, acquired knowledge of confidential information from or concerning the former client, actually or by operation of law.<sup>18</sup> Here, Simons failed to meet the three-prong test under *Estate of Pew*, by failing to establish a past attorney-client relationship.<sup>19</sup>

#### **1.1. No Express Attorney-Client Relationship Exists.**

Simons failed to establish an express attorney-client relationship between Simons and Buchanan. First, regarding Buchanan's legal services for the formation of Rite-Vend, there is no express agreement indicating that Simons retained Buchanan. Although Buchanan issued

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<sup>18</sup> See *Estate of Pew*, 655 A.2d 521, 545 - 46 (Pa. Super. Ct. 1994) (citation omitted).

<sup>19</sup> Most of Simons' arguments in the Motion is focused on the second prong of the test: the subject matter of the relationship was substantially related. However, regardless of whether the Simons' arguments prevail or not, he cannot prove that Buchanan should be disqualified without establishing the attorney-client relationship.

invoices for the legal services, these invoices cannot be evidence for an express attorney-client relationship.<sup>20</sup>

Second, regarding Buchanan's legal services for the formation of Regal, an express agreement demonstrates that it was RDS, not Simons, that retained Buchanan.<sup>21</sup> On October 11, 2013, Buchanan sent RDS a letter containing the Agreement.<sup>22</sup> The Agreement was signed by Simons on October 16, 2013. The letter begins with the following:

Dear Alan:

Buchanan Ingersoll & Rooney PC ("Buchanan Ingersoll & Rooney" or the "Firm") is pleased to **accept the request of RDS Vending, LLC. (the "Company") for legal representation**...this engagement agreement (the "Agreement") confirms the terms on which **Buchanan Ingersoll & Rooney will provide legal services to the Company** in connect with pursuing vending opportunities with the Philadelphia Airport and other matters as to which we accept your request for legal representation.<sup>23</sup>

The Agreement further provides that the scope of the representation is expressly limited to the representation of RDS alone.<sup>24</sup>

#### Scope of Representation

**The Company is our sole client** with respect to this engagement. **Individuals or entities that are affiliated with the Company, such as its equity owners, members, officers, directors, parent entities, joint ventures, subsidiaries or other affiliates, are not clients of the Firm, unless we otherwise agree in writing.**<sup>25</sup>

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<sup>20</sup> See Invoices for Rite-Vend, LLC. related work as Exhibit 1 to the Memo.

<sup>21</sup> See Engagement Agreement – RDS Vending, LLC. as Exhibit 9 to the Memorandum of Law in Opposition to Defendant's Second Motion to Disqualify and in Support of Cross-Motion for Sanctions.

<sup>22</sup> See *id.*

<sup>23</sup> *Id.* (bold added).

<sup>24</sup> See *id.*

<sup>25</sup> *Id.* (bold added).

The Agreement expressly precludes the representation of RDS's equity owners, members, officers, and other individuals or entities affiliated with RDS. Here, Simons is both a manager and owner of RDS.<sup>26</sup> Pursuant to the Agreement, the representation of Simons is out of the scope of the agreed representation, because Simons falls into the category of individuals affiliated with RDS. In addition, Simons failed to provide any evidence demonstrating that Buchanan separately agreed to represent Simons in writing. Therefore, Simons failed to prove the existence of a prior express attorney-client relationship with Buchanan.

### **1.2. No Implied Attorney-Client Relationship Exists.**

When no express attorney-client relationship exists, a party seeking to disqualify counsel should establish the existence of an implied attorney-client relationship.<sup>27</sup> An implied attorney-client relationship will be found if 1) the purported client sought advice or assistance from the attorney; 2) the advice sought was within the attorney's professional competence; 3) the attorney expressly or impliedly agreed to render such assistance; and 4) it is reasonable for the putative client to believe the attorney was representing him.<sup>28</sup>

Pennsylvania courts considered the following factors in determining whether an implied attorney-client relationship exists: 1) whether a fee arrangement was entered into between an alleged attorney and alleged client; 2) whether the attorney's services were billed to the client; 3) whether the client paid fees for the services; 4) whether the client expressly requested the

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<sup>26</sup> See the Motion, ¶¶ 6, 8.

<sup>27</sup> See *Johnson v. Buchanan Ingersoll & Rooney, P.C.*, 2013 WL 11272844 \*4.

<sup>28</sup> See *Atkinson v Haug*, 622 A.2d 983, 986 (Pa. Super. Ct. 1993) (citing *Sheinkopf v. Stone*, 927 F.2d 1259 (1st Cir. 1991)).

counsel to represent her or his individual interests; 5) whether the attorney represented the client in particularized or individual matters; and so on.<sup>29</sup>

*Johnson* concluded that no implied attorney-client relationship existed on the following grounds: no fee arrangement was entered into; no retainer or fees were paid; and there was no discussion of the legal implications of the issue at hand.<sup>30</sup> *Johnson* held that merely working toward the common goal of consummating the transaction does not give rise to an attorney-client relationship.<sup>31</sup> *Johnson* found no attorney-client relationship when the alleged client failed to establish that the counsel agreed to furnish any legal assistance to him “in addition to and separate from” the counsel’s duties to his client.<sup>32</sup>

Here, Simons failed to provide evidence that there was an implied attorney-client relationship. No fee arrangement was entered into between Buchanan and Simons. Buchanan’s services were not billed to Simons individually. Rather all the invoices for Buchanan’s services were directed to RDS.<sup>33</sup> There is no evidence that Simons paid fees to Buchanan for Buchanan’s legal services. Here the mere fact that Simons, as the manager of RDS, worked toward the goal of forming Rite-Vend or Regal does not give rise to an attorney-client relationship. Simons failed to establish that Buchanan Ingersoll agreed to provide legal services to him in addition to and separate from Buchanan’s already existing duties to RDS.

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<sup>29</sup> See *Sebia v McNeese Wallace & Nurick, LLC*, 2014 WL 10965705; see also *Johnson*, 2013 WL 11272844 \*6; see also *First Republic Bank v. Brand* 2001 WL 1112972 \*6.

<sup>30</sup> See *Johnson*, 2013 WL 11272844 \* 6.

<sup>31</sup> See *id.* \*5.

<sup>32</sup> See *id.*

<sup>33</sup> See Invoices for Rite-Vend, LLC. related work as Exhibit 1 to the Memo; see also Invoices as Exhibit 10 to the Memo.



As grounds for an implied attorney-client relationship between Simons and Buchanan, Simons argued: 1) Buchanan negotiated and created the documents concerning the ownership structure and the later changes thereto; 2) Simons directly communicated with Buchanan on many legal issues by email and telephone; 3) Simons sought the advice of counsel of Buchanan on the Rite-Vend transaction and the counsel provided advice within their spheres of practice; 4) under *Kirschner v. K & L Gates, LLP*, 46 A.3d 737 (Pa. Super. Ct. 2012), the court should conclude that Buchanan and Simons have an implied attorney-client relationship; and so on.<sup>34</sup>

Simons' arguments do not prevail. First, an attorney-client relationship is not based on the work of creating documents for an underlying transaction.<sup>35</sup> *Sebia* held that drafting documents is not a sufficient ground for such a relationship and that the establishment of the relationship requires an attorney to counsel the client "specifically and particularly".<sup>36</sup> *Sebia* held that if an attorney-client relationship comes into existence merely because the attorney provides a person some indirect benefits, then an attorney representing one party in a commercial transaction would almost invariably end up representing all of the parties in the transaction, an untenable situation.<sup>37</sup>

Unlike Simons' argument, *Kirschner* is distinguished from the instant matter. In *Kirschner*, the court found an implied attorney-client relationship between counsel and Le Nature, i.e., the company, although the engagement agreement was entered into between the

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<sup>34</sup> See Memorandum of Law in Support of the Motion to Disqualify Buchanan Ingersoll & Rooney, PC., pp13 – 15.

<sup>35</sup> See *Sebia*, 2014 WL 10965705 \*6.

<sup>36</sup> See *id* (citing *First Republic Bank v. Brand* 2001 WL 1112972).

<sup>37</sup> See *id*.

counsel and the Special Committee of the company. *Kirschner* found an implied relationship between the counsel and the company, because The Special , owing a fiduciary duty to RDS, was authorized to retain counsel to investigate fraud “on behalf of the company”.<sup>38</sup> The purpose of retaining counsel in *Kirschner* was to serve Le Nature’s interests. Unlike *Kirschner*, here the purpose of retaining Buchanan was to serve the interests of RDS, and not Simons’ interests.<sup>39</sup> RDS also doesn’t owe a fiduciary duty to Simons.

In addition, the counsel in *Kirschner* agreed to bill the company for its services and the company paid for the services.<sup>40</sup> Here Buchanan did not bill Simons. It was RDS that Buchanan billed for its legal services and that paid for the services.

### **1.3. Where No Attorney-Client Relationship Exists, the Motion to Disqualify Buchanan Was Properly Denied.**

Under *Estate of Pew*, a party seeking disqualification should prove, among others, the existence of a past attorney-client relationship.<sup>41</sup> Here Simons, while seeking the disqualification of Buchanan, argued that Buchanan represented Simons through RDS, and there is at least an implied attorney-client relationship. However, the Agreement demonstrates that there was no express attorney-client relationship between Simons and Buchanan. Also, Simons failed to provide evidence demonstrating that there was an implied attorney-client relationship. Since Simons failed to establish an attorney-client relationship with Buchanan, under *Estate of Pew* the Defendant’s Motion to Disqualify was properly denied.

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<sup>38</sup> *Kirschner v. K & L Gates, LLP*, 46 A.3d 737, 749 (Pa. Super. Ct. 2012).

<sup>39</sup> See Exhibit 9 to the Memo (bold added).

<sup>40</sup> See *Kirschner*, 46 A.3d at 755.

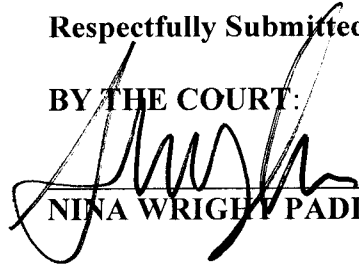
<sup>41</sup> See 655 A.2d 521, 545 - 46 (Pa. Super. Ct. 1994).

**CONCLUSION**

For the foregoing reasons, this court's order dated December 13, 2021 denying Defendant's motion to disqualify Buchanan Ingersoll & Rooney, P.C. should be affirmed.

**Respectfully Submitted,**

**BY THE COURT:**



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**NINA WRIGHT PADILLA, S.J.**