

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
08 CVS 18768

THE COTTAGES OF STONEHENGE )  
CONDOMINIUM HOMEOWNERS )  
ASSOCIATION, INC., DAVID MOKRAUER, )  
KAREN C. GEORGE and FORREST )  
HARRELL, )  
Plaintiffs )

v. )

DOMINION MID-ATLANTIC PROPERTIES )  
II, LLC f/k/a DANIEL MID-ATLANTIC )  
PROPERTIES II, LLC, ALEX B. ANDREWS, )  
BRIAN PARKER, KATHERINE S. ADAMS, )  
DONNY M. GRUNDHOEFER, )  
Defendants )

**ORDER ON MOTION  
TO DISQUALIFY**

THIS CAUSE, designated a complex business case by Order of the Chief Justice of the North Carolina Supreme Court, pursuant to N.C. Gen. Stat. § 7A-45.4(b), and assigned to the undersigned Special Superior Court Judge for Complex Business Cases, by order of the Chief Special Superior Court Judge for Complex Business Cases, came before the court on March 23, 2009, for hearing upon the Defendants' Motion to Disqualify Plaintiffs' Counsel (the "Motion"); and

THE COURT, having considered the arguments, briefs, other submissions of counsel and appropriate matters of record, as discussed *infra*, FINDS, for purposes of the Motion:

1. The Cottages of Stonehenge Condominium Homeowners Association, Inc. (the "Association") is a non-profit corporation duly incorporated in the State of North Carolina.

2. David Mokrauer is a citizen and resident of Wake County, North Carolina, and is an owner of a unit in the Cottages of Stonehenge condominium complex (“Stonehenge”) and a member of the Association.

3. Karen C. George is a citizen and resident of Wake County, North Carolina, and is an owner of a unit in Stonehenge and a member of the Association.

4. Forrest Harrell is a citizen and resident of Wake County, North Carolina, and is an owner of a unit in Stonehenge and a member of the Association.

5. Dominion Mid-Atlantic Properties II, LLC, f/k/a Daniel Mid-Atlantic Properties II, LLC (“Dominion”) is a North Carolina Limited Liability Company with its principle place of business in Raleigh, Wake County, North Carolina.

6. Alex B. Andrews is a citizen and resident of Wake County, North Carolina. At times material, he served on the Board of Directors for the Association (the “Board”). He was appointed to the Board by Dominion.

7. Brian Parker (“Parker”) is a citizen and resident of Wake County, North Carolina. At times material, he served on the Board. Parker was appointed to the Board by Dominion.

8. Katherine S. Adams (“Adams”) is a citizen and resident of Wake County, North Carolina. At times material, she served on the Board. Adams was appointed to the Board by Dominion.

9. Donny M. Grundhoefer is a citizen and resident of Wake County, North Carolina. At times material, he served on the Board. He was appointed to the Board by Dominion.

10. Stonehenge is a 188-unit condominium complex located in Raleigh, Wake County, North Carolina. The units originally were constructed as apartments, but were converted into condominiums in July 2004. Dominion was the original declarant for the condominium conversion. In conjunction with formation of the condominium, Dominion also incorporated the Association.

11. Under the Bylaws for the Association, the declarant had the right to appoint the Board members. The number of Board members was three (3) or such greater number as the declarant may determine.

12. Dominion appointed the initial Board of the Association. In August 2006, the Board was comprised of James T. ("Tim") Lake, Adams, Parker, Bill Herpich and Catherine Haskins. Dominion appointed all members of the Board through the fall of 2007. During this time, Tim Lake ("Lake"), Defendant Adams and Defendant Parker were employees of Dominion.

13. On August 1, 2006, Lake contacted the law firm of Jordan Price Wall Gray Jones & Carlton, PLLC ("Jordan Price") for legal advice regarding the Association's responsibility for certain maintenance issues. Thereafter, by letter dated August 3, 2006,<sup>1</sup> Lake sought advice from Jordan Price as to the Association's responsibility for damage inside a condominium unit due to water intrusion from common areas maintained by the Association. At that time, it is apparent that Lake was requesting this advice on behalf of both the Association and Dominion, which still controlled the Association as its declarant. Lake's letter was on "Cottages of Stonehenge" letterhead stationery. The stationery carried a legend at the bottom that read "Cottages of Stonehenge Condominium Homeowners Association, Inc. c/o Dominion Realty

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<sup>1</sup> Aff. Brian Parker, Ex. A.

Partners, LLC (Manager),” and reflected a street address of “8601 Six Forks Road, Suite 270, Raleigh, NC 27615.”

14. In response to his letter of August 3, 2006, Lake received an opinion letter (the “Opinion Letter”),<sup>2</sup> dated September 5, 2006, from Brian S. Edlin, Esq. (“Edlin”), of Jordan Price. The Opinion Letter set forth legal advice and opinions as to “the maintenance responsibilities between Unit Owners and the Association.” It was addressed to “Tim Lake” at “8601 Six Forks Road, Suite 270, Raleigh, North Carolina 27615.”

15. In November 2007, the unit owners elected an owner-controlled Board at the annual meeting of the Association.

16. In October 2008, Dominion received a letter, dated October 13, 2008, from Edlin,<sup>3</sup> on behalf of Plaintiffs. The letter threatened to file suit against Dominion and the original Board members of the Association based on alleged breach of fiduciary duties for failing to set adequate reserves for common area expenses and maintenance. The letter from Edlin was addressed to three disparate physical addresses. One of those was “8601 Six Forks Road, Suite 270, Raleigh, NC 27605,” the same address (except for its postal zip code<sup>4</sup>) to which Edlin’s September 5, 2006 Opinion Letter was sent.

17. On November 18, 2008, Plaintiffs filed this civil action. Jordan Price, through Edlin, is counsel of record for Plaintiffs. Dominion filed its Answer on January 16, 2009. On January 28, 2009, Defendants filed the Motion; and on April 23, 2009, the individual Defendants each filed their Answers.

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<sup>2</sup> *Id.*, Ex. B.

<sup>3</sup> *Id.*, Ex. D.

<sup>4</sup> Although the street address is the same, Edlin’s Opinion Letter was addressed to zip code 27615.

BASED UPON the foregoing FINDINGS, the court CONCLUDES:

1. In North Carolina, the question of whether to disqualify counsel is within the sound discretion of the trial court. *Robinson & Lawing, LLP v. Sams*, 161 N.C. App. 338, 339 (2003). In addressing the issue of disqualification, “the goal of maintaining public confidence in our system of justice demands that courts prevent the appearance of impropriety and thus resolve any and all doubts in favor of disqualification.”

*Chemcraft Holdings Corp. v. Shayban*, 2006 NCBC 13 (N.C. Super. 2006). Further, in preventing the appearance of impropriety, the client’s reasonable perception of events is of paramount importance and overshadows the details of his attorney’s conduct. *Id.*

2. Defendants argue that Plaintiffs’ counsel should be disqualified due to the contended prior representation of Dominion by Jordan Price and Edlin (collectively referred to as “Jordan Price”) arising from the legal advice sought from Jordan Price by the Association and Dominion in August and September of 2006. In support of their Motion, Defendants point to Rules 1.6 and 1.9 of the North Carolina Rules of Professional Conduct (“Rule(s)”).

3. Rule 1.6 provides that:

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent . . . .<sup>5</sup>

4. Rule 1.9 provides that:

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

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<sup>5</sup> The duty of confidentiality continues after the attorney-client relationship has terminated. RPC, Rule 1.6, Comment 19; and Rule 1.9(c).

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- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
  - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known;
  - or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

5. While the Rules do not always preclude a lawyer from suing a former client, they do provide protection to the former client so that information shared with the attorney cannot later be used to the former client's detriment. In order for an attorney to be precluded from a current representation, the scope of the earlier matter must be "the same or . . . substantially related" to the current representation. Matters are considered substantially related under Rule 1.9 if there is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. RPC, Rule 1.9, Comment 3. The underlying pragmatic issue is whether the current representation by an attorney who was involved as counsel in a prior matter reasonably can be viewed as a change in sides by the attorney with regard to the matter in question. *Id.*

6. The issues presented in the instant civil action involve whether Dominion adequately set aside reserves for the repair and maintenance of the common areas of the Association. The prior representation by Jordan Price arose from Lake's August 3, 2006 request for legal advice regarding the responsibilities of the Association for repair and maintenance of condominium units and common areas. As Defendants correctly point out, both instances of representation by Jordan Price involve issues concerning

common areas, maintenance requirements, and the relationship of costs and potential liability between the Association and unit owners. Defendants argue that due to this common scope of representation, there is substantial risk that information obtained by Plaintiffs' counsel in their prior representation of Dominion could be used to materially advance Plaintiffs' position and to Dominion's detriment; and that this presents an irreconcilable conflict of interests for Plaintiffs' counsel.

7. In response to the Motion, Plaintiffs contend that Jordan Price has no such conflict of interest. They argue that in August 2006, when Lake contacted Jordan Price, he was requesting legal advice on behalf of the Association, not Dominion. They point out that Lake's August 3, 2006 letter, for example, specifically states that Lake was writing "on behalf of the Executive Board for the Cottages of Stonehenge Condominium Homeowners Association, Inc.,"<sup>6</sup> and that the substance of Edlin's responsive Opinion Letter dealt with the maintenance responsibilities between unit owners and the Association. Plaintiffs also emphasize that Jordan Price's prior representation was limited to the maintenance responsibilities between unit owners and the Association and did not include any advice pertaining to construction defects or claims. They contend that the advice given in 2006 by Jordan Price is unrelated to Plaintiffs' claims in the instant matter against Dominion and the other Defendants. They argue that therefore, Plaintiffs' counsel's earlier representation cannot be considered "substantially related" to the current matter and that Plaintiffs' counsel does not run afoul of Rule 1.9.

8. Defendants say that the argument by Plaintiffs' counsel that they did not represent Dominion in the prior matter, but rather just the Association, is without merit. In further support of their argument, Defendants point out that at the time Lake sought

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<sup>6</sup> Aff. Brian Parker, Ex. A.

legal advice from Jordan Price, he was both an employee of Dominion and President of the Association; and that the August 3, 2006 letter from Lake to Edlin was on letterhead carrying the legend of “Cottages of Stonehenge Condominium Homeowners Association, Inc. c/o Dominion Realty Partners, LLC.”<sup>7</sup>

9. While Lake’s August 3, 2006 letter requested information about the duties and obligations of the Association as an entity, it also sought advice that “would provide the *board* guidelines” (emphasis added) as to the Association’s various responsibilities with regard to maintenance and related financial issues. Defendants say that the opinion and advice rendered by Jordan Price clearly recognized that the Association acted only through its Board; and they argue that in his Opinion Letter, Edlin was in fact giving professional advice to some of the same Board members -- concerning substantially related issues -- against whom, as counsel for Plaintiffs, Jordan Price now seeks to prosecute this action.

10. The North Carolina State Bar has taken a position that an attorney cannot defend an action brought by a former client when confidential information obtained during the prior representation would be relevant to defense of the current action.<sup>8</sup> Although the representation is reversed in the instant matter, the same would hold true here; and would apply whether the information gained by Plaintiffs’ counsel in prior representation of Dominion involves (a) specific facts or (b) knowledge as to the overall sophistication and general practices of Dominion on matters concerning the Association’s responsibility and obligations relative to Stonehenge common areas.

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<sup>7</sup> *Id.*

<sup>8</sup> N.C. State Bar Ethics Opinion, CPR 147.

11. Here, Defendants find themselves in a position in which the very lawyer who advised one or more of them with respect to duties and obligations relating to budgeting for and maintaining Stonehenge common areas now seeks damages against them for breaching their duty to adequately set aside fiscal reserves for the repair and maintenance of those same common areas. The court is forced to conclude that the two are inextricably and substantially related.

12. The court observes that there is no evidence of conscious or purposeful wrongdoing in this matter on the part of Jordan Price or Edlin; and there is no evidence that Plaintiffs or their counsel have sought to take advantage of the prior representation by Jordan Price of one or more Defendants. However, the prior representation of Dominion by Plaintiffs' counsel, coupled with the nature of the allegations of Plaintiffs' Complaint, creates the substantial risks contemplated under Rule 1.9; and it is the court's duty to resolve any and all such risks in favor of disqualification.

13. Accordingly, the Defendants' Motion should be GRANTED, and Plaintiffs' counsel should be disqualified and prohibited from further representation of the Plaintiffs in this matter.

NOW THEREFORE, based upon the foregoing CONCLUSIONS, it is ORDERED that:

1. Defendants' Motion to Disqualify Plaintiffs' Counsel in this civil action is GRANTED.

2. The law firm of Jordan Price Wall Gray Jones & Carlton, PLLC, and any attorney currently a member or employee of that law firm, is prohibited from any further representation of the Plaintiffs in this civil action.

3. Further proceedings in this matter shall be held in abeyance for a period of thirty (30) days, during which time Plaintiffs may seek new counsel of record.

4. The court will hold a case management conference relative to this matter at 11:00 a.m. on Monday, June 29, 2009, at the North Carolina Business Court, 227 Fayetteville Street, Fourth Floor, Raleigh, NC 27601.

5. Attendance at the case management conference shall be governed by Rule 17.3 of the General Rules of Practice and Procedure for the North Carolina Business Court.

This the 14th day of May, 2009.

/s/ John R. Jolly, Jr.  
John R. Jolly, Jr.  
Special Superior Court Judge for  
Complex Business Cases