

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

BEFORE THE NORTH CAROLINA BUSINESS COURT

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)

**PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO
DISQUALIFY PLAINTIFFS'
COUNSEL**

NOW COMES the Plaintiffs, Cottages of Stonehenge Condominium Homeowners Association, Inc., David Mokrauer, Karen C. George and Forest Harrell (collectively, "Plaintiffs") and moves this Court for an Order denying the Defendants' Motion to Disqualify Plaintiffs' Counsel and shows unto the Court as follows:

PROCEDURE

The Cottages of Stonehenge Condominium Homeowners Association, Inc. ("Association") and David Mokrauer, Karen C. George and Forest Harrell filed this lawsuit on 18 November 2008. The lawsuit was filed against the original Declarant of a condominium community, Dominion Mid-Atlantic Properties II, LLC, f/k/a Daniel Mid-Atlantic Properties II, LLC ("Declarant") and certain former Declarant-controlled Board

members alleging, *inter alia*, that these Defendants failed to properly and adequately set assessments and allocate reserves for the future needs of the Association. The Declarant filed its Answer on 22 January 2009 and on 28 January 2009, Defendants' filed their Motion to Disqualify Plaintiffs' Counsel. The individual Defendants have not been served, however, summons are still outstanding for such individual Defendants. This matter is currently before the Court upon Defendants Motion to Disqualify Plaintiffs' Counsel from further representation in this case on the basis of an alleged conflict of interest.

FACTS

The Cottages of Stonehenge condominium community is a 188-unit condominium complex located in Raleigh, Wake County, North Carolina. This property was originally constructed as an apartment complex, but then converted into a condominium in or about July of 2003. [Complaint, ¶16] As part of its conversion from apartments to condominiums, the Declarant filed a Declaration of Condominium for Cottages of Stonehenge was recorded at Book 10273, Page 249 of the Wake County Register of Deeds ("Declaration") and also incorporated the Association, a non-profit corporation that would administer the condominium. In or about July 2003, the Declarant apparently retained Donna Blumberg of Ellers & Winters to draft and file the Declaration for the community.

On or about August 1, 2006, Tim Lake contacted the firm of Jordan Price Wall Gray Jones & Carlton, PLLC for legal advice, on behalf of the Association, regarding the Association's responsibility for certain maintenance issues, specifically the Association's responsibility (if any) for damage inside a condominium Unit due to water intrusion from common areas maintained by the Association. At that time, Mr. Lake was requesting this legal advice on behalf of the Association, as evidenced by Mr. Lake's letter itself which

plainly states, “on behalf of the Executive Board for the Cottages of Stonehenge Condominium Homeowners Association, Inc., we would like to solicit your firm’s expertise on how to address certain maintenance issues we have been having on site.” [Parker Affidavit, Exhibit A] On September 5, 2006, the Association received an opinion letter from Brian Edlin of Jordan Price Wall Gray Jones & Carlton (“Jordan Price”) which set forth his legal advice and opinions as to “the maintenance responsibilities between Unit Owners and the Association.” [Parker Affidavit, at ¶ 9 & Exhibit B] The opinion letter to the Association was “limited to the maintenance responsibilities between Unit Owners and the Association and [did] not include any advice pertaining to construction defect or claims.” Id. The letter authored in 2006 was limited to the division of responsibilities between the Unit Owners of the Association and insurance requirements of the Association. Currently, Jordan Price represents the Association and David Mokrauer, Karen C. George and Forest Harrell with respect to claims against the Declarant and certain individual Defendants unrelated to the opinions rendered to the Association in 2006.

Jordan Price has never represented the Defendants with respect to their standard of care as a developer for this condominium association with respect to assessments and reserves; has never represented the Defendants with respect to their fiduciary duties in setting and establishing assessments at a reasonable rate; has never represented the Defendants with respect to their obligation under the Declaration to fund the reserve account for the Association; and Jordan Price’s representation of the Association in 2006 was limited to the specific maintenance responsibilities as between the Unit Owners and the Association as indicated in the affidavit offered by the Plaintiffs in support of their

Motion to Disqualify Plaintiffs Counsel. In fact, Jordan Price has never represented the Declarant at all. [Aff. of Edlin, ¶ 6; Aff. of Hulse, ¶ 5] Conflicts check ran on 1 October 2008 and, again, recently on 3 February 2009, reveal that Jordan Price has never represented the Declarant or Alex B. Andrews, Brian Parker, Katherine S. Adams or Donny M. Grundhoeffler. [Aff. of Hulse ¶5]

ARGUMENT

Defendants' argument that it represented Dominion in August 2006 is completely without merit.

In August 2006, Jordan Price was approached by a representative of the Association for a legal opinion which was "limited to the maintenance responsibilities between Unit Owners and the Association and [does] not include any advice pertaining to construction defects or claims." Jordan Price was provided with a copy of the Declaration, Articles of Incorporation, Bylaws and Public Offering Statement from the Association. Jordan Price rendered an opinion on 5 September 2006 which opinion was addressed to Tim Lake, who at the time indicated he was the President of the Association. Jordan Price did not represent Tim Lake in his individual capacity, nor has Jordan Price ever represented any of the Defendants in this case according to the conflicts check run in the ordinary course of business. [Aff. of Edlin, ¶ 6; Aff. of Hulse, ¶ 5] Jordan Price's client has been the Association and currently, is the Association, David Mokrauer, Karen C. George and Forest Harrell. The invoice for our services in August 2006 was sent to the Association via Mr. Lake, Jordan Price's principal contact for the Association at the time.

Assuming *arguendo* that Jordan Price represented the Declarant in 2006, which it did not, Jordan Price did not represent the Declarant or such individuals with respect to the

“same or substantially similar matter” as contemplated in Rule 1.9 of the Rules of Professional Conduct. Rule 1.9 states as follows:

- (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.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;unless the former client gives informed consent, confirmed in writing.
- (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.”

For purposes of the Rules of Ethics a matter is “substantially related” “if they involve the same transaction or legal dispute or if there is otherwise a substantial risk that information as would normally be obtained in the prior representation would materially advance the client’s position in the subsequent matter.” See, Comment 3, Rule 1.9, N.C. Rules of Professional Conduct. Jordan Price did not acquire any information from Mr. Lake that would materially advance the Plaintiff’s position in the current matter. Based on our review of the file we maintain for the Association, our representation of the Association in

2006 was limited to the maintenance obligations of the Unit Owners versus the Association and the insurance requirements of the Association based on our review of the Declaration and Bylaws of for the Association. In short, the advice rendered in 2006 to the Association was not substantially related to funding of reserves and fiduciary issues related to the duty of the Board to set assessments at a rate sufficient to cover anticipated Association expenses, the main thrust of the claims in this lawsuit.

Simply put, Jordan Price's representation in 2006 was limited to the Association as an organization. Further, Jordan Price's representation in 2006 did not relate to the fiduciary duties of Board members with respect to setting assessments, funding of reserve accounts and the sufficiency of assessments to cover anticipated Association expenses, the main issues in this lawsuit. Nor does this firm have any factual information related to the current lawsuit that deals with any contested issues to be tried in the current case that could prevent any attorney in our firm from advocating for the Plaintiffs at the trial of this matter under Rule 3.7. Contrary to the Defendants arguments, Jordan Price has no material information which they could offer at trial to "counter" evidence of the Defendant's breach of fiduciary duties in that nobody from this firm was ever consulted about the issues in this lawsuit. In fact, the advice rendered to the Association in 2006 specifically excluded advice with respect to construction claims and defects and largely pertained to the Association's responsibility for water leaks inside Units. [Aff. of Edlin, ¶ 5] As such, none of the attorneys for Jordan Price would have any relevant testimony to offer in this case.

Moreover, the Defendants reliance on the unpublished decision in *Chemcraft Holdings v. Shayban* 2006 WL 2839255 (N.C.B.C. 2006) is completely misplaced. In

Chemcraft, Mr. Rossabi of the Greensboro firm of Forman Rossabi Black, P.A. was disqualified from representing one of the Plaintiffs in a dispute over an operating agreement where one of the defendants had previously approached Mr. Rossabi about defending him in the case. In that case, the defendant had emailed sensitive documents (specifically a memorandum from the defendant containing all his (the defendant's) thoughts and strategies about the specific case) to Mr. Rossabi and Mr. Rossabi had those documents in his possession for months. Ultimately, Mr. Rossabi informed the defendant he could not represent him the case because of a conflict, however, eventually stepped back in the case and represented another one of the Plaintiffs against the Defendants. The thrust of the Court's decision to disqualify Mr. Rossabi was that he had in his possession specific sensitive documents from the opposing party relating to the exact issues in dispute in the lawsuit. Clearly, this is not the case here. Had Dominion or Mr. Lake consulted anyone at Jordan Price about the subject matter of this litigation, *Chemcraft* would be analogous. However, the facts are clearly distinguishable so the Defendant's reliance on *Chemcraft* is misplaced.

As a result of the foregoing, Plaintiffs respectfully request that the Defendants Motion to Disqualify Plaintiffs' Counsel be denied.

Pursuant to Local Rule 15.4, Plaintiffs request oral argument on the Defendants Motion to Disqualify Plaintiffs' Counsel.

This 17th day of February 2009.

JORDAN PRICE WALL GRAY JONES & CARLTON

By: /s/ Hope D. Carmichael
Hope Carmichael
N.C. State Bar No.: 18146

By: /s/ Brian S. Edlin
Brian S. Edlin
N.C. State Bar No.: 29194
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*Counsel for the Plaintiffs, Cottages of Stonehenge
Condominium Homeowners Association, Inc., David
Mokrauer, Karen C. George and Forest Harrell*

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing response to motion to disqualify plaintiffs' counsel was served upon counsel for the Defendants in this action on this date, by regular U.S. Mail, addressed as follows:

R. Scott Brown
Andrew A. Vanore, III
Brown, Crump, Vanore & Tierney, LLP
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Gavin B. Parsons
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Raleigh, North Carolina 27602

David S. Wisz
Bailey & Dixon, LLP
P.O. Box 1351
Raleigh, North Carolina 27602

Dated this 17th day of February 2009.

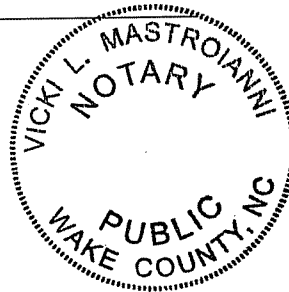
/s/ Brian S. Edlin
Brian S. Edlin

**CERTIFICATION OF COUNSEL PURSUANT TO RULE 15.8 OF THE GENERAL
RULES OF PRACTICE AND PROCEDURE FOR THE NORTH CAROLINA
BUSINESS COURT**

This is to certify that I, Brian S. Edlin, do certify that I have reviewed the above brief and believe it to be in compliance with Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

This the 17 day of February, 2009.


Brian S. Edlin



Sworn to and subscribed before me

this 17 day of February, 2009.

Vicki L. Mastroianni

Notary Public

My Commission Expires: October 22, 2013

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KATHERINE S. ADAMS, DONNY M.)
GRUNDHOEFER,)

Defendants)

**AFFIDAVIT OF BRIAN S.
EDLIN**

I, Brian S. Edlin, first being duly sworn, do hereby state as follows:

1. I am a citizen and resident of Raleigh, Wake County, North Carolina.
2. I am over the age of 18 years and competent to testify as to the matters stated herein. I have personal knowledge of all matters stated herein. I am a member of the law firm of Jordan Price Wall Gray Jones & Carlton ("Jordan Price") and currently counsel of record for the Plaintiffs, Cottages of Stonehenge Condominium Homeowners Association, Inc., David Mokrauer, Karen C. George and Forest Harrell (collectively, "Plaintiffs") in the above action.
3. In October 2006, our firm was approached by the Cottages of Stonehenge Condominium Homeowners Association, Inc. ("Association") to render an opinion with respect to the certain maintenance obligations of the Association versus certain Unit

Owners, specifically with respect to sewer and roof leaks and water intrusion into the interior of Units. We were also asked about what responsibilities the Association had with respect to filing insurance claims on behalf of Unit Owners.

4. On or about 21 August 2006 a file was opened for Cottages of Stonehenge Condominium Homeowners Association, Inc. ("Association") for our firm to review the governing documents for the Association and to render advice to the Association with respect to these two discreet issues.

5. On 5 September 2006 we rendered an opinion to the Association on these two issues. The vast majority of the opinion letter to the Association deals with the potential liability exposure to the Association for water intrusion and leaks into the interior of Units. Our opinions expressly excluded any advice with respect to construction defects or claims. See, Exhibit B Parker Affidavit.

6. Based routine conflicts checks performed in the ordinary course of business at our firm, our records show that Jordan Price has never represented Dominion Mid-Atlantic Properties II, LLC, f/k/a Daniel Mid-Atlantic Properties II, LLC, Alex B. Andrews, Brian Parker, Katherine S. Adams or Donny M. Grundhoefer.

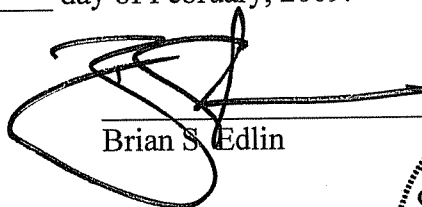
7. Our firm has no files opened for any of the Defendants in this case, nor do we have any closed files for the Defendants to my knowledge as we have not represented this company or these individuals in the past.

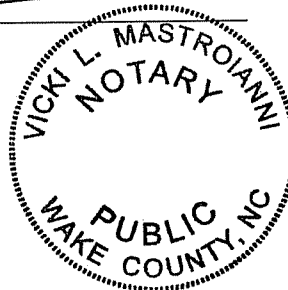
8. Prior to the demand from our firm 13 October 2006, no advise had been rendered by our firm with respect to any of the material contested issues in this lawsuit, to wit: the obligation of the Board members appointed by the Declarant to set assessments at a reasonable rate; the obligation by the Board members and the Declarant to fund a

sufficient reserve account for the future needs of the Association; and the obligation for the Declarant to budget and set assessments and pay expenses of the Association in a manner consistent with the Public Offering Statement.

Further affiant sayeth not.

This the 17 day of February, 2009.


Brian S. Edlin



Sworn to and subscribed before me

this 17 day of February, 2009.



Notary Public

My Commission Expires: October 22, 2013

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Defendants)

**AFFIDAVIT OF MARY K.
HULSE**

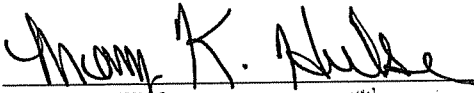
I, Mary K. Hulse, first being duly sworn, do hereby state as follows:

1. I am a citizen and resident of Raleigh, Wake County, North Carolina.
2. I am over the age of 18 years and competent to testify as to the matters stated herein. I have personal knowledge of all matters stated herein. I am the controller of Jordan Price Wall Gray Jones & Carlton ("Jordan Price")
3. In my capacity as controller of Jordan Price, I oversee the opening of new files and running of conflicts checks for our firm for all new files opened.
4. On or about 21 August 2006 a file was opened for Cottages of Stonehenge Condominium Homeowners Association, Inc. ("Association").
5. Based on a search of our computer database which we keep in the ordinary course of business, our records show that Jordan Price has never represented Dominion

Mid-Atlantic Properties II, LLC, f/k/a Daniel Mid-Atlantic Properties II, LLC, Alex B. Andrews, Brian Parker, Katherine S. Adams or Donny M. Grundhoefer. We have no current files opened for this company or these individuals and we do not have any closed files for this company or these individuals to my knowledge.

Further affiant sayeth not.

This the 16th day of February, 2009.



Mary K. Hulse

Sworn to and subscribed before me

this 16 day of February, 2009.



Vicki L. Mastroianni

Notary Public

My Commission Expires: October 22, 2013

