

STATE OF NORTH CAROLINA

COUNTY OF DAVIDSON

FERGUSON FIBERS, INC., a North
Carolina Corporation,

Plaintiff,

v.

TONY CRAIG FOSTER,

Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NO. 09-CVS-1400

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO
DISQUALIFY COUNSEL

NOW COMES Defendant Tony Craig Foster (“Foster” or “Defendant”), through counsel, pursuant to BCR 15.5, and hereby submits the foregoing memorandum in support of his motion to disqualify The Law Offices of J. Calvin Cunningham (the “Cunningham Firm”) from serving as counsel for Plaintiff Ferguson Fibers, Inc. (“Ferguson”) in the above-captioned matter.

INTRODUCTION

Ferguson, through its counsel, the Cunningham Firm, filed the instant action based on allegations that Foster, a former Ferguson employee, committed “numerous” and largely untold acts of wrongdoing in assisting Ferguson with its efforts to move a portion of its manufacturing operations to Mexico. Foster, in turn, has asserted counterclaims against Ferguson based on Ferguson’s failure to pay overtime wages during the time of Foster’s employment with Ferguson.

Foster, a former client of the Cunningham Firm, has moved to disqualify the Cunningham Firm as counsel for Ferguson in this matter. In the context of his attorney-client relationship with the Cunningham Firm, Foster shared confidential thoughts and impressions regarding matters that are significantly related to the facts and issues raised by the claims

asserted by the parties in this case. As such, the Cunningham Firm is not qualified to serve as counsel for Ferguson in this matter, and the instant motion should be granted.

STATEMENT OF THE FACTS

Foster was an employee of Ferguson and related entities from on or about 1995 until October 2008. Ferguson is one of several related companies owned, co-owned, and/or operated by an individual named John Ferguson, Jr. that are collectively engaged in the development and distribution of fiberglass-related products. In October 2008, after working for several months to assist with the expansion of Ferguson's operations in Mexico, Foster left his position of employment at Ferguson. This action arises out of the facts and events surrounding Foster's resignation. It is but one in a series of cases in which the Cunningham Law Firm has prosecuted criminal and civil proceedings on behalf of Ferguson against former employees based on allegations that those employees are engaging in wrongful competitive and other activity. A similar motion to disqualify the Cunningham Firm was filed in one of the related actions, involving former employee William Arthur Ramsey.

Ferguson is represented in this matter by the Cunningham Firm, a law firm that, until recently, was comprised of two lawyers—J. Calvin Cunningham (“Cunningham”) and Harvey W. Barbee, Jr.¹—located in Lexington, North Carolina. Until recently, Foster was a long-time client of the Cunningham Law Firm. In or around 2004, Foster retained Cunningham to represent him in a dispute with his ex-wife. (Aff. of Tony Craig Foster ¶ 4 (“Foster Aff.”).) The Cunningham Firm later represented Foster in a dispute arising out of the sale of a business in which the purchaser failed to make payments on the loan that financed the

¹ Ferguson was initially represented in this matter by Mr. Barbee. However, Defendant is informed that Mr. Barbee is no longer employed by or associated with the Cunningham Firm. It appears from Plaintiff's Reply to Defendant's Counterclaims, filed with the Clerk of Superior Court for Davidson County on September 10, 2009, that Plaintiff is now being represented in this matter by Mr. Cunningham.

transaction. (*Id.*) That representation was later broadened to include another dispute with Foster's ex-wife. (*Id.*)

The attorney-client relationship between Foster and the Cunningham Firm was much broader than those matters, however, and extended to matters relating to Foster's employment with Ferguson. On numerous occasions, Foster shared with Cunningham his growing concerns about Ferguson's financial difficulties and his concerns that John Ferguson, Jr. was misusing corporate assets. (*Id.* at ¶ 8.) Foster discussed with Cunningham his business dealings with Ferguson, and on numerous occasions he sought and received advice from Cunningham about his interest in a separate business co-owned by Foster, Ferguson, and others. (*Id.* at ¶ 9.) Foster and Cunningham also had numerous discussions about the terms of his employment with Ferguson and related companies. (*Id.* at ¶ 10.)

During the course of the Cunningham Firm's representation of Foster, Cunningham and Foster had discussions about Foster's role in helping Ferguson move a portion of its business to Mexico and the hardship that caused Mr. Foster and his family. (*Id.* at ¶ 11.) Foster shared with Cunningham his thoughts and impressions about the expansion and about his increasingly strained relationship with Ferguson. (*Id.*) As a result of those discussions, Foster received counsel from Cunningham as he considered his options for parting ways with the company. (*Id.*)

Cunningham was concurrently representing both Foster and Ferguson. For many years, the Cunningham firm has served as corporate counsel representing Ferguson and related entities—including one company in which Foster has a minority ownership interest—in a variety of matters. (*Id.* at 12.) At the time of the communications at issue, however, Cunningham never explained to Foster any distinction between his role as counsel for Foster

from his position as corporate counsel for Ferguson. (*Id.*) Instead, at the time of those communications, Foster believed that his discussions with his attorney were privileged and were to be kept confidential. (*Id.*) Foster never believed that his communications, thoughts, and impressions regarding these matters could be susceptible to being used by his employer to gain an unfair advantage in litigation until this action was filed in April 2009. (*Id.*)²

The Cunningham Firm's representation of Ferguson in litigation against his former client in a matter that substantially relates to his prior representation of Foster is a clear violation of Rule 1.9(a) of the North Carolina Rules of Professional Conduct. As such, for the reasons stated below, the Cunningham Firm should be disqualified from serving as counsel for Ferguson in this action.

DISCUSSION

I. STANDARD OF REVIEW.

This Court has previously outlined the guiding principles that inform the courts' consideration of motions to disqualify counsel. In *Chemcraft Holdings Corp. v. Shayban*, 2006 NCBC 13, ¶ 35 (N.C. Super. Oct. 5, 2006) (Tennille, J.), the Court pronounced that a party seeking to have an adverse attorney disqualified on the basis of a conflict of interest must only show that a reasonable client in his position would be concerned by the potential conflict. *Id.* He need not show negligence or even a violation of a rule of professional conduct. *Id.*

² It is not necessary for Foster to set out either here or in his supporting affidavit the details of his discussions with his former counsel in order to support this motion. As the official comments to Rule 1.9 make clear, "[a] former client is not required to reveal the information learned by the lawyer to establish a substantial risk that the lawyer has information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services." N.C. R. Prof'l Conduct 1.9 cmt. 3.

A motion to disqualify . . . is not a referendum on the trustworthiness of the counsel sought to be disqualified. It is, rather, a motion that should succeed or fail on the reasonableness of a client's perception that confidences it once shared with its lawyer are potentially available to its adversary. Where a reasonable client would be concerned by a potential conflict, a court must err on the side of disqualification.

Id. (quoting *Healthnet, Inc. v. Health Net, Inc.*, 289 F. Supp. 2d 755, 763 (S.D.W. Va. 2003)).

Moreover, “attorneys practicing before the courts bear the burden of ensuring the absence of any conflicts of interest at the very outset of their representation of a client.” *Id.* at 34 (citing N.C. R. Prof'l Conduct 1.7)). All doubts about whether the attorney should be disqualified are to be resolved in favor of disqualification. *Id.* at ¶ 34 (stating that “the goal of maintaining public confidence in our system demands that courts prevent even the appearance of impropriety and this resolve any and all doubts in favor of disqualification” (citing *U.S. v. Clarkson*, 567 F.2d 270, 273 n. 3 (4th Cir. 1977))).

II. THE CUNNINGHAM FIRM SHOULD BE DISQUALIFIED FROM REPRESENTING PLAINTIFF IN THIS ACTION BECAUSE OF DUTIES OWED TO FOSTER UNDER RULE 1.9 OF THE NORTH CAROLINA RULES OF PROFESSIONAL CONDUCT.

Rule 1.9(a) of the North Carolina Rules of Professional Conduct (“Rule 1.9(a)”), entitled “Duties to Former Clients,” contains an express prohibition against representing a client in a matter in which the client's interests are materially adverse to those of a former client. The rules states:

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.

Applying this rule, an attorney should be disqualified from representing a party in litigation if: (1) a past attorney-client relationship existed between the attorney and one of the parties in the case; (2) the current lawsuit is substantially related to a matter in which the attorney represented the former client; and (3) the former client's interests in the instant litigation are materially adverse to those of the attorney's current client. *See Ferguson v. DDP Pharmacy, Inc.*, 174 N.C. App. 532, 536, 621 S.E.2d 323, 327 (2005). As set forth below, all of these requirements are met here.

A. An Attorney-Client Relationship Existed Between the Cunningham Firm and Foster.

The initial inquiry for the Court is whether an attorney-client relationship existed between Foster and the Cunningham Firm. The existence of an attorney-client relationship is determined by “whether the parties’ conduct ‘was such that an attorney-client relationship could reasonably be inferred.’” *Flick Mortgage Investors, Inc. v. Epiphany Mortgage, Inc.*, 2006 NCBC 3, 2006 WL 401675 at *2 (N.C. Super. Feb. 1, 2006) (Diaz, J.) (quoting *Ferguson*, 174 N.C. App. at 327, 621 S.E.2d at 327). Here, there can be no dispute that Foster and the Cunningham Firm had an attorney-client relationship. Over the years, the Cunningham Firm has represented Foster in a number of matters, including a dispute arising out of the sale of an unrelated business, a dispute over with his former wife, and various matters relating to Foster's employment with Ferguson. (Foster Aff. at 3-4.) Foster was billed for those services, and in January 2009, J. Calvin Cunningham sued Foster and his wife in an effort to collect amounts allegedly owed for the representation. (*Id.* at 6.) In the complaint filed by Cunningham in that action, Cunningham conceded that an attorney-client relationship was formed between Cunningham and Foster. (*Id.* at Ex. A.)

The attorney-client relationship between Foster and Cunningham, along with any associated conflicts of interest, is imputed to all attorneys associated with the Cunningham Firm. *See* N.C.R. Prof'l Conduct 1.10(a) (stating the general rule for imputation of conflicts of interest that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9"). Therefore, while the confidential communications at issue were primarily between Foster and Cunningham, that relationship is imputed to the entire law firm, and any conflicts with Cunningham would prevent the Cunningham Firm from representing Ferguson in this action through any other attorney associated with the firm.³ The "imputation" rule is particularly appropriate in cases such as this where the law firm at issue is comprised of a small number of attorneys. *See Flick Mortgage Investors, Inc. v. The Epiphany Mortgage, Inc., et al.*, 2006 NCBC 3, at ¶¶ 15, 21 (N.C. Super. Feb. 1, 2006) (granting a motion to disqualify counsel for the one of the defendants based on the attorney's former law firm's prior representation of the plaintiff and citing the small size of the former law firm as one of the factors giving rise to the inference that the attorney had access to confidential information when employed with that firm).

B. This Action is Substantially Related to Matters in Which the Cunningham Firm Represented Foster.

Next, the scope of the attorney-client relationship between Foster and the Cunningham Firm included matters substantially related to the facts and allegations at the center of this case. Under Rule 1.9(a), an attorney is prohibited from representing an adverse

³ As noted above in Footnote 1, counsel for Defendant is informed that Mr. Barbee is no longer associated with the Cunningham Firm. Nonetheless, at this time Mr. Barbee has not formally withdrawn from this case and is still listed as counsel of record for Ferguson.

former client in a matter that is the same, or substantially related to, that of a former client. *Ferguson*, 174 N.C. App. at 537, 621 S.E.2d at 327. The official comments to the rule clarify that in examining the “substantially related” requirement, “[t]he underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.” N.C.R. Prof’l Conduct 1.9 cmt. 2.

The Cunningham Firm represented Foster in a number of matters, including those directly at issue in this case. Initially, Foster retained the Cunningham Firm to represent him in a dispute with his ex-wife. (Foster Aff. at 4.) That representation was later broadened to include representation in a dispute arising out of the sale of a business in which the purchaser failed to make payments on the loan that financed the transaction. (*Id.* at 5.)

During the course of the representation and on numerous occasions, Foster and Cunningham discussed Foster’s growing concerns about the Ferguson’s financial difficulties and his concerns that John Ferguson, Jr. was misusing corporate assets. (*Id.* at 8.) Furthermore, Foster and Cunningham discussed Foster’s business dealings with Ferguson, and Cunningham advised Foster regarding his interest in a separate business co-owned by Foster, Ferguson, and others. (*Id.* at 9.) Foster and Cunningham also discussed the terms of Foster’s employment with Ferguson. (*Id.* at 10.)

Cunningham and Foster also had conversations about Foster’s role in Ferguson’s efforts to move a portion of its business to Mexico and the hardship that caused Mr. Foster. (*Id.* at 11.) As a result of those discussions, Foster sought and received counsel from Cunningham as he considered his options for parting ways with the company. (*Id.*) At no time in his discussions with Foster did Cunningham distinguish between his role as counsel

for Foster and as corporate counsel for Ferguson. (*Id.* at 12.) Instead, at the time of those communications—the subject of which is directly at issue in this case—Foster believed that his discussions with his attorney were privileged and that they would not be susceptible to being used by his employer to gain an unfair advantage in litigation. (*Id.*)

C. Ferguson’s Interests in This Case Are Materially Adverse to Foster’s.

Finally, Rule 1.9(a) precludes an attorney from representing a client in litigation where the current client’s interests in the matter are materially adverse to those of the former client. There can be no dispute as to this requirement. Ferguson named Foster as the defendant in this suit and seeks damages from him for several causes of action. Foster denies any liability to Ferguson and likewise has asserted counterclaims against and seeks to recover damages from Ferguson based on those claims. Ferguson’s and Foster’s interests are therefore clearly adverse. As such, the Cunningham Firm should be disqualified from serving as counsel for Ferguson in this action.

CONCLUSION

For the foregoing reasons, Defendant Foster respectfully requests that this Court GRANT his Motion to Disqualify Counsel. Mr. Foster further requests an award of his fees and expenses in pursuing this Motion.

This 11th day of September, 2009.

/s/ Bradley A. Roehrenbeck
Richard S. Gottlieb (NCSB # 23131)
RGottlieb@KilpatrickStockton.com
Bradley A. Roehrenbeck (NCSB # 34180)
BRoehrenbeck@KilpatrickStockton.com

Kilpatrick Stockton LLP
1001 West Fourth Street
Winston-Salem, North Carolina 27101-2400
Telephone: (336) 607-7300
Facsimile: (336) 607-7500

Counsel for Defendant
Tony Craig Foster

CERTIFICATION

The undersigned hereby certifies that the foregoing brief complies with Business Court Rule 15.8.

This the 11th day of September 2008.

/s/ Bradley A. Roehrenbeck
Richard S. Gottlieb (NCSB # 23131)
RGottlieb@KilpatrickStockton.com
Bradley A. Roehrenbeck (NCSB # 34180)
BROehrenbeck@KilpatrickStockton.com
Kilpatrick Stockton LLP
1001 West Fourth Street
Winston-Salem, North Carolina 27101-2400
Telephone: (336) 607-7300
Facsimile: (336) 607-7500

Counsel for Defendant
Tony Craig Foster

CERTIFICATE OF SERVICE

I, Bradley A. Roehrenbeck, hereby certify that on this date I served the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISQUALIFY COUNSEL** upon counsel of record by depositing a copy thereof in the United States mail, postage prepaid and addressed as follows:

Harvey W. Barbee, Jr., Esq.
J. Calvin Cunningham, Esq.
Law Offices of J. Calvin Cunningham
Eighteen South Main Street
Lexington, North Carolina 27292

Counsel for Plaintiff/Counterclaim Defendant

This the 11th day of September 2009.

/s/ Bradley A. Roehrenbeck

Bradley A. Roehrenbeck

Counsel for Defendant

Tony Craig Foster

Kilpatrick Stockton LLP
1001 West Fourth Street
Winston-Salem, North Carolina 27101
Telephone: (336) 607-7300