

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

REPLY BRIEF IN SUPPORT OF
DEFENDANT'S MOTION TO
DISQUALIFY COUNSEL

NOW COMES Defendant Tony Craig Foster (“Foster” or “Defendant”), through counsel, pursuant to BCR 15.7, and submits the foregoing reply brief 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. (“FFI”).

INTRODUCTION

This case is a clear illustration of the care that counsel must take when concurrently representing a corporate entity and one of its employees to ensure that the boundaries of that relationship are clearly defined and that the client has a clear understanding of which party the attorney is representing when discussing matters with the employee-client. Plaintiff’s counsel failed to do so here. Had he made clear to Foster the division between his role as counsel for FFI and his role as Foster’s attorney, privileged conversations that now impair his qualification to serve as counsel in this case may never have occurred. Those privileged discussions, however, did occur, and as the parties prepare to engage in discovery, Mr. Foster does so at a considerable disadvantage. His adversary now has full access to those

conversations and may depose Foster armed with his counsel's full understanding of Mr. Foster's thoughts and impressions regarding the facts and circumstances surrounding many of the issues involved in this litigation.

Much of the materials submitted in support of Plaintiff's opposition brief has little or nothing to do with the issues involved in this motion. Statements about a long-standing personal relationship between FFI, its President John H. Ferguson, Jr. ("Ferguson"), and Calvin Cunningham ("Cunningham") (Ferguson Aff. ¶ 3); an alleged agreement by FFI to pay certain of Mr. Foster's attorneys' fees to Cunningham in a prior representation¹ (*id.* ¶ 4); Ferguson's own suspicions as to the reasons for Foster's resignation from FFI (*id.* ¶ 6); an alleged break-in at Ferguson's facilities (*id.* at ¶ 8); some alleged criminal conduct by another former Ferguson employee (*id.* ¶ 10); and accusations that Foster was known as a "whiner" (*id.* ¶ 11) have nothing to do with the instant motion. Nor does Plaintiff's brief link any of this irrelevant information to any of the issues presently before the Court. Instead, it appears only to be a thinly-veiled effort to color the Court's impressions of Mr. Foster at the outset of the litigation with scant evidentiary support.

At the outset, Cunningham concedes his attorney-client relationship with Mr. Foster, (Pl.'s Br. at 2). Rather than focusing on the nature of that relationship, however, he faults Foster for failing to bring this motion earlier in the litigation (*id.* at 1-2). As is evident from the initial pleadings filed by FFI, including the Complaint, FFI was initially represented in this matter by Harvey Barbee, an associate with the Cunningham Firm. Noting the association between Mr. Barbee and Cunningham in July, Foster's counsel began drafting a

¹ The assertion that FFI or Ferguson was on the hook for Foster's legal fees is remarkable given that Cunningham recently sued Foster based solely on allegations that Foster failed to pay attorneys' fees. (*See* Sept. 2, 2009 Aff. of Tony Craig Foster ("Foster Aff.") at ¶ 6 & Ex. A.)

motion to have Mr. Barbee disqualified based on a conflict of interest imputed to him by Cunningham's prior representation of Foster. *See* N.C.R. Prof'l Conduct 1.10(a). However, in August, Mr. Barbee contacted Foster's counsel, and informed them that he would soon be withdrawing from the case. Counsel therefore held off on filing the instant motion hoping the matter would be directed to a different firm. In fact, Cunningham Firm had recently withdrawn from a separate suit involving another former FFI employee who Cunningham had also represented,² and counsel anticipated that FFI would likely proceed with the new counsel it had obtained in that action.³ That unfortunately did not occur. Cunningham made his initial appearance in this case on September 10, 2009. The instant motion was filed the next day.

Several key issues are not in dispute. For instance, the parties agree that the three-prong test set out in *Ferguson v. DDP Pharmacy, Inc.*, 174 N.C. App. 532, 536, 621 S.E.2d 323, 327 (2005) applies and, if satisfied, would bar the Cunningham Firm from representing FFI in this matter. *Id.* (recognizing that an attorney should be disqualified 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). Furthermore, there is no dispute that two of the three prongs of this test are satisfied. First, the parties agree that an attorney-client

² An order was entered on August 24, 2009 in the action titled *Ferguson Fibers, Inc., et al. v. William Arthur Ramsey* (08 cvs 00209) (the "Ramsey Case"), another lawsuit brought by FFI against one of its former employees. (*See* Exhibit A, attached hereto.) That withdrawal was requested and allowed after the defendant in that case filed a motion to disqualify based on Cunningham's past representation of the former employee, Mr. Ramsey.

³ FFI is now represented in the Ramsey Case by Darrell Whitley of the Law Firm of Nachamie & Whitley, PLLC, who made an appearance on FFI's behalf on August 10, 2009. (*See* Exhibit B, attached hereto.)

relationship existed between Foster and the Cunningham Firm. (Pl.'s Br. at 2.) Second, there can be no dispute that Foster's and Ferguson's interests are materially adverse in this case. (*See generally* Compl.; Answer & Countercl.)

Plaintiff simply argues that Cunningham did not represent Foster in a matter that is substantially similar to the facts and issues involved in the instant litigation. As discussed below, Ferguson's position requires an overly narrow reading of the rule and fails to consider that in resolving a disagreement over whether the former attorney of a party may represent his adversary in litigation, the Court must err on the side of disqualification. As such, Cunningham and the Cunningham Firm should be disqualified from representing Plaintiff in this action.

I. THE CUNNINGHAM FIRM REPRESENTED FOSTER IN MATTERS THAT BEAR A SUBSTANTIAL RELATIONSHIP TO THE INSTANT DISPUTE.

As discussed in the opening brief, over a period of several years, Cunningham represented Foster in pending litigation involving three separate disputes. Defendant does not argue that those specific cases involved the same facts or issues as this case. However, Defendant does argue that over the course of that representation, Cunningham advised Foster on numerous other issues, including Foster's employment relationship with FFI, his business dealings with Johnny Ferguson (FFI's President), and concerns about how that business was being run and its assets managed. (Def.'s Br. in Supp. at 8.) Those matters bear a substantial relationship to the dispute involved in this lawsuit.

Plaintiff attempts to narrow the court's inquiry by narrowly defining the scope of the prior representation to include only the *actual litigation* in which Cunningham appeared on Foster's behalf. In doing so, Plaintiff's brief misstates the standard. In determining whether

counsel may proceed with litigation against a former client on behalf of another client, courts do not merely consider the issues involved in any prior *litigation*—instead, courts examine the scope of the *matters* for which the attorney provided legal counsel. *See* N.C. R. Prof'l Conduct 1.9(a) & cmt. 2 (stating that the “scope of a ‘matter’ for purposes of this Rule depends on the facts of a particular situation or transaction”). The scope of Cunningham’s prior representation of Foster was much broader than just the claims asserted in any given piece of litigation. It also involved consultation and advice on Foster’s employment with FFI, his plans to terminate that relationship, his business dealings with FFI’s President, and his concerns about how FFI and other related businesses were being operated. (Foster Aff. ¶¶ 7-11)

Finally, Plaintiff suggests that Foster could not have had an expectation that his conversations with Cunningham were privileged because he was also aware that Cunningham represented FFI and its President Johnny Ferguson. (Pl.’s Br. at 4.)⁴ However, where counsel represents both a corporation and one or more of its constituents, the burden is on counsel to clearly discuss the potential conflicts that may arise in such a dual relationship and to make clear to the employee-client the extent of that relationship and any constraints on his ability to keep conversations confidential. *See* N.C. R. Prof. Conduct 1.13(f)-(g) & cmts. 10-12. Cunningham never did so in any of his discussions with Foster. (Foster Aff. ¶ 12.) Regardless, although Cunningham has served as Ferguson and FFI’s counsel for many years, his attorney-client relationship with Foster was longstanding as well, as Cunningham

⁴ Ferguson’s testimony that he “do[es] not find it to be a credible statement that . . . [Foster] would have discussed his employment with FFI with Cunningham should carry little weight. Such testimony is clearly self serving. Moreover, only Foster and Cunningham can offer first-hand knowledge about the substance of conversations they held in private.

represented Foster in numerous disputes and advised him on a broad range of issues over a period of several years.

It is notable that Cunningham does not assert anywhere either in his affidavit or in the opposition brief that he ever explained to Foster that at any given time he was speaking to Foster as counsel for the company or that any discussions with Foster would not be kept confidential. In cases where counsel represents both an entity and one or more of its constituents, it is incumbent upon counsel to explain the potential conflict to the client and to explain the effect of the dual representation on his ability to keep those discussions confidential. *See* N.C. R. Prof. Conduct 1.13(f)-(g) & cmts. 10-12. He failed to do so here. As a result, Foster believed at all times that he was speaking to his attorney as his attorney and that Cunningham would not disclose the contents of those discussions with other clients, including FFI and Ferguson. (Foster Aff. ¶¶ 12-13.)

II. THIS MOTION SHOULD BE RESOLVED IN FAVOR OF DISQUALIFICATION.

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. *Chemcraft Holdings Corp. v. Shayban*, 2006 NCBC 13, ¶ 35 (N.C. Super. Oct. 5, 2006) (Tennille, J.) In making that determination, “[w]here 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)). This satisfies the broader “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” *Id.* (citing *U.S. v. Clarkson*, 567 F.2d 270, 273 n. 3 (4th Cir.

1977)).

Here, the issue is whether *Foster* has reason to believe that he and Cunningham had privileged discussions and a reasonable concern that those conversations give rise to a potential conflict of interest. Foster and Cunningham's attorney-client relationship lasted a number of years and encompassed several matters, including discussions that Foster believed to be confidential relating to his employment and business dealings with Plaintiff throughout and leading up to the time of the events at issue in this case. (Foster Aff. ¶¶ 4, 7-13.) Cunningham did not disabuse Foster of his expectation that those discussions were privileged and would be kept confidential. (Foster Aff. ¶ 12.) Though the parties clearly dispute the exact nature and substance of those conversations, the above-referenced authority makes clear that the Court should err on the side of disqualification in resolving this motion. Foster's belief that his former attorney's continued representation of FFI in this case gives rise to a conflict of interest is clearly reasonable. Therefore, this Court should grant the instant motion and disqualify the Cunningham Firm from serving as counsel for FFI in this case.

CONCLUSION

For the foregoing reasons and for the reasons stated in the opening brief, 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 13th day of October, 2009.

/s/ Bradley A. Roehrenbeck
Richard S. Gottlieb (NCSB # 23131)
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Bradley A. Roehrenbeck (NCSB # 34180)
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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 13th day of October 2008.

/s/ Bradley A. Roehrenbeck
Richard S. Gottlieb (NCSB # 23131)
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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 **REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISQUALIFY COUNSEL** electronically pursuant to BCR 6.5 to counsel of record as follows:

J. Calvin Cunningham, Esq.
Email: jcclaw@lexcominc.net
Law Offices of J. Calvin Cunningham
Eighteen South Main Street
Lexington, North Carolina 27292

Counsel for Plaintiff/Counterclaim Defendant

This the 13th day of October 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

EXHIBIT A

10/09/2009 10:19 FAX

02

NORTH CAROLINA
DAVIDSON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CVS 00209

FERGUSON FIBERS, INC.,)
A North Carolina Corporation)
FERGUSON INDUSTRIES, INC.,)
A North Carolina Corporation, and)
PIPELINE POWDER COATINGS, INC.,)
A North Carolina Corporation)

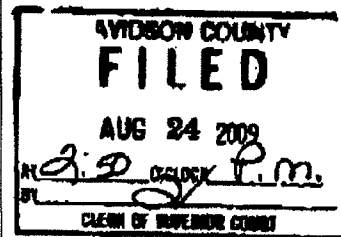
Plaintiffs,)

vs.)

WILLIAM ARTHUR RAMSEY,)

Defendant.)

ORDER



The undersigned Superior Court Judge presiding, having entertained counsel's Consent Order in open court, finds that, although counsel denies that there is a conflict of interest pursuant to Rule 1.9, Defendant's counsel, to avoid even the appearance of impropriety, is allowed to withdraw; and it hereby enters the following ORDER:

That J. Calvin Cunningham and the Law Offices of J. Calvin Cunningham, Attorneys for all Plaintiffs, be allowed to withdraw as attorney of record effective from the date of this Order.

Entered this the 24th day of August, 2009.


Honorable Mark E. Klass
Superior Court Judge Presiding

CONSENTED TO:



John H. Ferguson
President of Plaintiff's Companies:
FERGUSON FIBERS, INC.,
FERGUSON INDUSTRIES, INC.,
PIPELINE POWDER COATINGS, INC.,
August 24, 2009

EXHIBIT B

Aug. 11. 2009 12:05PM

ATTORNEY J CALVIN CUNNINGHAM

No. 2056 P. 9

NORTH CAROLINA
DAVIDSON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CVS 00209

FERGUSON FIBERS, INC.
A North Carolina Corporation,
FERGUSON INDUSTRIES, INC.,
A North Carolina Corporation, and
PIPELINE POWDER COATINGS, INC.,
A North Carolina Corporation,

Plaintiffs,

vs.

WILLIAM ARTHUR RAMSEY,

Defendant.

FILED
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NOTICE OF APPEARANCE

NOW COMES Darrell Whitley for himself and the Law Firm of Nachamie & Whitley, PLLC, Attorneys at Law, and files this Notice of Appearance as co-counsel with the Law Offices of J. Calvin Cunningham on behalf of the Plaintiff in this action.

This the 10th day of August, 2009.

[Handwritten signature]

Darrell Whitley
Nachamie & Whitley, PLLC
Attorneys for Defendant
23 West Second Street
Lexington, North Carolina 27292
Telephone (336)-249-7054

Aug. 11. 2009 12:05PM

ATTORNEY J CALVIN CUNNINGHAM

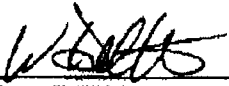
No. 2056 P. 10

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the forgoing Notice of Appearance on the following named individual(s) by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office, or by hand-delivery, properly addressed to:

Mr. Bradley J. Gardner
Attorney at Law
Bowden & Laws, PC
119 Brookstown Avenue, Suite 401
Winston Salem, North Carolina 27101

This the 10th day of August, 2009.



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