

EXHIBIT F

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-07-3145

STEVEN AND JEANEEN TUCKER)
CHARLES AND STEPHANIE)
DAVIS, TIMOTHY AND JANIE)
P. TREON, P. JENNINGS SCEARCE)
and JOHN DOE and JANE DOE)
individually and on behalf of others)
similarly situated in the State of)
South Carolina,)

Plaintiffs,)

v.)

LEATH, BOUCHE & CRAWFORD, LLP,)
W. JEFFERSON LEATH, JR., WILLIAM)
DIXON ROBERTSON, III, MICHAEL)
S. SEEKINGS, FRANK E.)
GRIMBALL & MULLEN WYLIE, LLC)
formerly, MULLEN, WYLIE &)
SEEKINGS, LLC, JOHN CARDAMONE)
and his wife SALLY CARDAMONE,)
BENJAMIN T. CLARK and his wife)
DIANE M. CLARK, RAMONA GIANNI,)
NATHAN W. GORDON,)

Defendants.)

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DEPARTMENT OF PROBATION
CLERK OF COURT

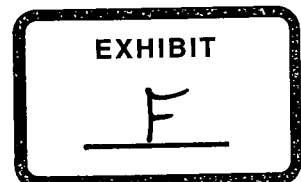
STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-07-0774

TIMOTHY TREON and P. JENNINGS)
SCEARCE, individually and on behalf of)
others similarly situated in the State of)
South Carolina,)

Plaintiffs,)

v.)



exterior cladding on our home, known as an Exterior Insulated Finish System ("EIFS"). The Cardamones were represented in the Lawsuit by the law firm of Mullen Wylie & Seekings ("Mullen Wylie"). Thomas J. Finn, Esquire ("Finn") was an attorney employed by Mullen Wylie while the Lawsuit was pending. Finn actively represented the Cardamones, including, among other thing, signing pleadings, attending a deposition, and receiving correspondence in the Lawsuit.

While the Lawsuit was pending, the Cardamones were named as class representatives in a class action suit against Dryvit Systems, Inc. ("Dryvit"), styled "*John and Sally Cardamone, et al. vs. Dryvit Systems, Inc., et al.*," Civil Action No. 2002-CP-07-1377 (the "Class Action") for EIFS-related problems. In 2003, while both the Lawsuit and the Class Action were pending, the Cardamones settled the Lawsuit against all of the Defendants against whom they had individually brought a claim.

In September 2005, Plaintiffs' Counsel ("Counsel") intervened and were appointed class counsel in the underlying Class Action. On March 7, 2008, Counsel sued the Cardamones in Beaufort County in the above captioned action, Civil Action No. 08-CP-07-00774 ("Treon suit"), for allegedly breaching fiduciary duties owed to the class in the Class Action by settling the Lawsuit. Included in the allegations in the Treon suit was that Defendants settled their individual cases for extraordinarily high, or inflated amounts because Dryvit allegedly paid them a "bonus" as part of the settlement of their individual claims. On August 26, 2008, Counsel filed essentially the same suit against the Cardamones again in Beaufort County in the above captioned action, Civil Action No. 08-CP-07-3145 ("Tucker suit"), for allegedly breaching fiduciary duties owed to the class in the Class Action by settling the Lawsuit. After the Cardamones settled their individual lawsuit, new individuals were substituted as class

representatives in the Class Action. In both the Treon and Tucker suits, it is alleged the Cardamones' breach of fiduciary duty to the class has essentially ruined the Class Action, as well as the ability for that class to effectively settle its claims. The Class Action is still pending.

Similarly, in 2001 Defendant Ramona Gianni ("Gianni") filed a lawsuit in the Circuit Court of Horry County, South Carolina, styled "*Ramona Gianni v. Regal Corporation of Myrtle Beach, Dryvit Systems, Inc., Commercial System Inc. and Best Exterminating, Inc.*" Civil Action No. 2001-CP-26-5153 (the "Gianni Lawsuit") due to EIFS-related problems. Gianni was represented by Mullen Wylie. Finn was employed by Mullen Wylie while the Gianni Lawsuit was actively litigated. Like the Cardamones, in 2003, while both the Gianni Lawsuit and the Class Action were pending, Gianni settled the Gianni Lawsuit against all of the Defendants whom she had individually brought a claim. After Gianni settled her individual lawsuit, new individuals were substituted as class representatives in the Class Action. Gianni was also named as a Defendant in the Treon suit and the Tucker suit for allegedly breaching fiduciary duties owed to the class in the Class Action by settling the Gianni Lawsuit.

CONCLUSIONS OF LAW

The American judicial system functions only because of public trust in the system. The assurance of the public in the system's integrity is paramount. In this regard, it does not matter only what an attorney knew or did not know of the former clients' confidences; it matters also whether or not there was access to those confidences and whether or not those confidences could have been shared with those associated in the new case. The assurance of the public in the system's integrity includes the notion that, if allowance of the potential conflict cannot be easily explained to a layman, it cannot stand. This situation cannot be easily explained to a layman.

Although there has been no specific allegation or evidence of actual betrayal of any former clients' confidences by Finn, it is clear to the Court that Plaintiffs' counsel not only had access to former clients' confidences, but *could* have shared them with those associated in the new case as well. As a result, although I specifically make no finding of any ethical breach by any attorney in this case, I find an impermissible conflict of interest exists that mandates disqualification of Plaintiffs' counsel.

AN IMPERMISSIBLE CONFLICT OF INTEREST EXISTS WITH FORMER CLIENTS

1. Defendants were formerly represented by Mullen Wylie and its former associate, Thomas J. Finn.

The Cardamones and Gianni were formerly represented by Mullen Wylie. It is undisputed that Finn was an associate at Mullen Wylie during the pendency of the Lawsuit and Gianni Lawsuit. South Carolina Rules of Professional Conduct Rule 1.9(b)¹, "DUTIES TO FORMER CLIENTS" states:

[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." (emphasis added).

¹ SCRPC Rule 1.9(a), "Duties to Former Clients", provides:

"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." SCRPC Rule 1.9(a).

I find that SCRPC Rule 1.9(b) is controlling; however, the analysis and result would be the same under either rule.

I take particular note that the applicable rules in this matter use the imperative "shall not" as opposed to the permissive "may not", which appears in other parts of the rules.

I find the cases before the court involve a lawyer suing former clients of a firm by which he was employed, for settling the individual cases in which the firm previously represented them (allegedly in violation of a breach of fiduciary duty in a subsequent class action suit). I further find that Finn was actively engaged in the representation of the Cardamones in the Lawsuit. Defendants submitted uncontroverted evidence that Finn signed the Second Amended Complaint in the Cardamone Lawsuit.² Finn was counsel of record in at least one deposition in the Cardamone Lawsuit. He was sent and copied on correspondence in the Cardamone Lawsuit. He is now suing the Cardamones for settling the Cardamone Lawsuit.

Similarly, Finn was an attorney employed by Mullen Wylie during the active representation and litigation of the Gianni Lawsuit. This is demonstrated by various correspondence submitted in support of Defendants' Motion in the Gianni Lawsuit on Mullen Wylie letterhead and the undisputed overlap of time involving the respective actions.

I find Finn was associated with Mullen Wylie during its representation of the Cardamones and Gianni in their respective individual lawsuits, and also actively participated in the representation of the Cardamones. As such, his conduct constitutes a previous representation of the Cardamones and Gianni that falls within the purview of SCRPC Rule 1.9(b) and creates an impermissible conflict of interest.

² Our courts have recognized a signing of a pleading is an appearance of record:

"The language of Rule 11(b) is clear. Once an attorney has made a formal appearance and become attorney of record in an action, withdrawal can only be accomplished by order of the court. *Id.*; *Culbertson v. Clemens*, 322 S.C. 20, 471 S.E.2d 163 (1996). A formal appearance by an attorney is most commonly made by the signing of pleadings. Rule 11(a), SCRCP; *Culbertson, supra.*"

Ex parte Strom, 334 S.C. 605, 609, 514 S.E.2d 599, 600 (S.C.App., 1999) (emphasis added). There is no doubt Finn signed a pleading, thereby making a formal appearance in the Cardamone Lawsuit.

2. Finn's Actions in the Present Case are Materially Adverse to the Cardamones and Gianni.

A materially adverse conflict is defined by the South Carolina Court of Appeals in Madison v. Graffix Fabrix, Inc., 304 S.C. 321, 404 S.E.2d 37 (Ct. App. 2001), as follows:

Generally, an attorney cannot, on termination of employment, represent one whose interest in the transaction is adverse to that of his former client. However, an attorney is not prevented from representing a subsequent client against a former client, where the duties required of him do not conflict with those required in the first employment. *The test of whether the attorney's employment is inconsistent with his duty to a former client is whether acceptance of the new retainer will require him, in forwarding the interest of the new client, to do anything that will injuriously affect a former client in any matter in which he formerly represented him, and also whether the attorney will be called on, in his new relation, to use against a former client any knowledge or information acquired in the former relationship.* (emphasis added).

Applying this test, I find Finn's actions could create a conflict of interest under SCRPC 1.9(b). Finn is undertaking to affect his former clients, the Cardamones and Gianni, in a matter arising out of his and his firm's former representation of them. Comment 3 to SCRPC Rule 1.9 gives an example of an action by a lawyer that would be materially adverse to the interests of his former clients: "[A] lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations..." This is analogous to Finn's actions in the case at bar. Finn helped the Cardamones and Gianni sue for damage to their homes, yet now on behalf of his new clients he is seeking to disgorge the settlement funds the Cardamones and Gianni received for settling those same claims. Finn's actions in the Treon and Tucker suits are materially adverse to the interests of the Defendants, which creates an impermissible conflict of interest.

3. Finn's Prior Representation of the Cardamones and Gianni is the Same or Substantially Related Matter as the Present Case.

The previous representation of the Cardamones and Gianni in their individual lawsuits is the "same or substantially related matter" under SCRPC Rule 1.9(b) as the Treon and Tucker suits.

"In determining whether the matter is 'substantially related,' one should consider, among other things, whether the affected lawyer 'would have or reasonably could have learned confidential information in the first representation that would be of significance in the second.' 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 1.9:104, at 293 (1996)." Townsend v. Townsend, 323 S.C. 309, 317-318, 474 S.E.2d 424, 429 - 430 (S.C., 1996). In Townsend, an attorney served as the *guardian ad litem* for a minor in a domestic-relations action between the parents and later represented the father in an action to reduce support for the same minor ward for whom he had previously served as guardian ad litem. Id., at 323 S.C. 316. The Court concluded that the matters were substantially related and that such representation would completely undermine the trust and confidence necessary to an informed recommendation by the *guardian ad litem*. Id., at 323 S.C. 316.

As in Townsend, Finn *would have or reasonably could have* learned confidential information in the previous representation of the Cardamones and Gianni that would be of material significance in the current cases against the Defendants. This is further illustrated by Comment 6 to SCRPC Rule 1.9 (under the caption "Lawyers Moving Between Firms") which states, "[a] lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; *it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients.*" The Cardamones and Gianni were represented by Mullen Wylie during Finn's tenure with the firm, and accordingly it must be inferred that he was

privity to everything in their individual lawsuits (he was actively involved with the Cardamone Lawsuit, creating the possibility that he had actual access to confidential factual information related to the Cardamones and their individual lawsuit). Finn reasonably would and could have learned confidential and material information such as: the value of the Cardamones/Gianni's property, the extent and amount of damage to their respective homes, the scope of repairs necessary to their homes, the proposed settlement values of the Cardamone Lawsuit and Gianni Lawsuit, case strategy, and personal financial information. Any of this information could be materially significant and relevant to the Treon and Tucker suits, since the basis for the alleged wrongdoing by the Cardamones and Gianni is settling their individual suits (in which Finn and his former firm were involved). This is particularly true in light of the Plaintiffs' allegations that the Cardamones and Gianni allegedly received a bonus for settling their individual suits in recognition of their status as class representatives and desire to disgorge those settlement monies.

I further find no evidence of any screening methods employed to shield Finn from access to Gianni's (or the Cardamones') confidential information.³ Nor is there any evidence that Finn did not have access to any confidential information related to the Gianni Lawsuit or Cardamone Lawsuit.

I find that since Finn was in a position where he would have or reasonably could have learned confidential information in the first representation that would be of significance in the second, the Treon and Tucker suits are the "same or substantially related matter" under SCRPC

³ Nor would they necessarily have done much good, as many jurisdictions favor disqualification when there is a question about the effectiveness of measures taken (Court resolving conflict of interest in favor of disqualification when effectiveness of the screening procedures employed by a law firm to avoid the appearance of impropriety and preserve the public's trust and confidence in the judicial system was questionable), Burgess-Lester v. Ford Motor Co., 2008 WL 4643362, 8 (N.D.W.Va.) (N.D.W.Va.,2008).

Rule 1.9(b) as the Cardamone Lawsuit and Gianni Lawsuit, and creates an impermissible conflict of interest requiring this Court to grant Defendants' Motion to Disqualify.

4. There was no Informed Consent or Waiver of the Conflict of Interest.

South Carolina Rules of Professional Conduct Rule 1.0(f) define "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." I find no informed consent or waiver was given by the Cardamones or Gianni to this conflict of interest.

5. There was no Allegation of or Actual Betrayal of Former Client Confidences.

Though the conflict may have unintentionally arisen, the outcome remains the same—there exists an unquestionable conflict of interest which not only gives the appearance of impropriety, but precludes the tainted attorneys from further representation of the Plaintiffs. Despite this, I find that there were neither allegations made, nor any evidence of actual betrayal of confidences of the former clients.

CONFLICT IMPUTED TO ALL PLAINTIFFS' COUNSEL

1. Public policy dictates a presumption of conflict of interest to avoid the appearance of impropriety.

The most important underlying consideration to the Court in analyzing the Motion to Disqualify Plaintiffs' Counsel is the assurance of the public in the judicial system's integrity. This Court has determined Finn's conduct created a conflict of interest that is materially adverse to the Defendants in a substantially related matter. When determining whether to disqualify counsel for conflicts of interest, courts should prevent the "the appearance of impropriety," by

resolving all doubts in favor of disqualification. Donaldson v. City of Walterboro Police Dept. 2008 WL 906707, 4 (D.S.C.) (D.S.C.,2008) (internal citations omitted).

It is the view of this Court that all doubts should be resolved in favor of disqualification to avoid the appearance of impropriety (much less any actual impropriety). In Donaldson, the plaintiff sued the Police Departments of the City of Walterboro and the Town of Ridgeland for violation of 42 U.S.C. § 1983, assault and battery, malicious prosecution and negligence. Counsel for the defendant moved to disqualify plaintiff's attorney because a different attorney in the law firm (who did not even work out of the same office of the law firm as the attorney actually representing the plaintiff) of plaintiff's counsel had done work for the Town of Ridgeland. The plaintiff argued that since this attorney 1) did not get a regular retainer from the Town, 2) did not engage in litigation on behalf of the Town, and 3) her work was limited to primarily real estate matters, then her work for the Town would not interfere with the representation of the plaintiff nor be adverse to the Town. The Donaldson Court disagreed, finding that "this court is not to 'weigh the circumstances 'with hair-splitting nicety' but, in the proper exercise of its supervisory power over the members of the bar and with a view of preventing 'the appearance of impropriety,' it is to resolve all doubts in favor of disqualification." Donaldson v. City of Walterboro Police Dept., 2008 WL 906707, 4 (D.S.C.) (D.S.C.,2008) (internal citations omitted).⁴

This presumption of disqualification is also evident in Townsend, supra. By disqualifying the attorney *guardian ad litem*, the Townsend Court sought to eliminate conflicts of interest- whether real or potential- when an attorney is put in a position where s/he *could have* obtained information that would be relevant to the second:

⁴ Although Donaldson involves the analysis of concurrent representation, presumably under SCRPC Rule 1.8, this Court finds the logic and analysis applicable to the present case.

Nevertheless, in evaluating the lawyer guardian ad litem's potential conflict of interest in subsequent representations, it seems reasonable to find that matters are "substantially related" when the guardian ad litem reasonably could have gained information in the first matter that will be relevant in the second matter. Such a construction of the phrase "substantially related" furthers the policy rationale of encouraging candid disclosure to the guardian ad litem by all parties to a custody dispute. Here, although he claims none of the same information was actually used in the two matters, Lawyer should have recognized the risk that information he gained during the custody matter in which he was Daughter's guardian ad litem might prove relevant to the child support claim and particularly to the college support claim in the action in which he represented Father. *Id.*, at 317-318. (emphasis added).

The Court's positions in Donaldson and Townsend underscore the foundation of our legal system - the confidence clients place in their attorney. Lawyers have a duty to refrain from disclosing the confidences of their clients, and courts have gone to great lengths to protect the attorney-client privilege. The use and disclosure of any such confidential information is expressly prohibited by South Carolina Rules of Professional Conduct Rule 1.6(a):

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Much like judges must recuse themselves for the appearance of impropriety or conflict of interest, Townsend recognized that lawyers *must* be disqualified if they, by virtue of previous representation, put themselves in a position where they *could have* obtained confidential information. The Court in Townsend stated that the judge "had ample authority, and, in fact, a duty to remove Lawyer from his representation of Father. The family court must ensure the integrity of the proceedings before it." Townsend, 323 S.C. at 316.

The Court finds Counsel's reliance on State v. Smart, 278 S.C. 515, 299 S.E. 2d 686 (S.C., 1982) for the proposition that the analysis for disqualification of counsel is whether any material or confidential information *was actually* learned by Finn that could be used against the

Defendants in the present case unpersuasive.⁵ Smart is a criminal case that was decided eight years prior to the enactment of SCRCP 1.9, and accordingly offers no guidance, much less authority, on the issue.⁶ Moreover, I find Smart does not comport with South Carolina case law and public policy in preserving the public's trust in the American legal system.

Reviewing the record before the Court, I find more than an "appearance of impropriety" by Finn. By virtue of the former representation of the Cardamones and Gianni as set forth above, Finn was in a position where he would have and could have obtained confidential information (despite his assertion that he did not), which is enough to create not only an appearance of impropriety, but also an actual conflict of interest. Townsend, 323 S.C. at 317.

2. Finn Law Firm, P.C. is Disqualified.

South Carolina Rules of Professional Conduct Rule 1.10(a), "IMPUTATION OF CONFLICTS OF INTEREST" states:

While 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, 1.8(c), or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Finn and Thomas E. Williams ("Williams") are partners in the Finn Law Firm, P.C. Finn clearly has a conflict of interest with the Defendants as a result of his subsequent lawsuits against them arising out of the same or substantially related matter in which he and his former firm previously represented them. Because SCRCP Rule 1.10 expressly prohibits a lawyer associated in a firm (Williams) from representing a client when one of the lawyers associated with that firm

⁵ Counsel also relies on Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2nd Cir. 1975), a case from another jurisdiction predating the adoption of the applicable South Carolina Rules of Professional Conduct by fifteen years.

⁶ Even Counsel acknowledges as much on page 7 of their Supplemental Response: "Prior to adoption of Rule 1.9, no specific rule covered the duty owed to former clients..."

is prohibited from doing so under Rule 1.9 (Finn), the conflict of interest is imputed to the Finn Law Firm, P.C., and Williams.

3. Finn's Involvement has Tainted all Plaintiffs' Counsel, Requiring Disqualification.

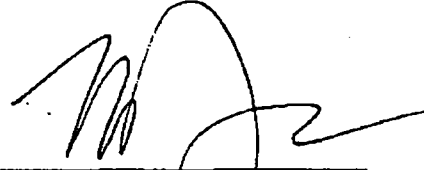
The Court concludes it must be assumed that under SCRPC Rule 1.10 those associated with a conflicted lawyer, in the same matter, share the conflict. SCRPC Rule 1.0(d) defines "firm" or "law firm" as a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship *or other association*, or in a legal services organization; lawyers employed in the legal department of a corporation, government, or other organization; and lawyers associated with an enterprise who represent clients within the scope of that association (emphasis added). Comment 2 to SCRPC Rule 1.0 states that "the terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, *as is the fact that they have mutual access to information concerning the clients they serve.* The evidence presented to the Court, including the Affidavits of Fees and Costs in the underlying Class Action and appearances by Finn and Williams, demonstrate that Counsel had mutual access to information. By meeting, conferring and strategizing in their representation, all Counsel necessarily shared information by often meeting, conferring and strategizing in their representation. Consequently, the conflict is imputed to all Counsel.

CONCLUSION

For the foregoing reasons, this Court then finds that Counsel is hereby disqualified from further representation of the Plaintiffs in the above-captioned cases. In recognition of the problems this disqualification may create, Plaintiffs are hereby granted ninety (90) days from the date of entry of this Order to obtain new counsel. Any existing Scheduling Orders shall be

subject to modification upon hiring new counsel. Moreover, Counsel is prohibited from conferring or sharing any information with newly hired counsel, lest the conflict be imputed to them.

IT IS SO ORDERED!



Marvin H. Dukes, III
Master-in-Equity and Special Circuit Judge

Beaufort, SC
Monday, February 01, 2010

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DRYVIT SYSTEMS, INC.; JOHN)
CARDAMONE and his wife, SALLY)
CARDAMONE; BENJAMIN T. CLARK)
And his wife, DIANE M. CLARK;)
RAMONA GIANNI; NATHAN W.)

GORDON; and JOHN DOE AND MARY)
ROE,)
)
Defendants.)
_____)

CERTIFICATE OF SERVICE

Pursuant to Rule 5(a) of the South Carolina Rules of Civil Procedure, I hereby certify that a copy of the attached Order Granting Defendants' Motion to Disqualify Plaintiffs' Counsel of The Honorable Marvin H. Dukes, III, dated February 1, 2010 and filed with the Court on February 2, 2010, has been served via U.S. Mail, Postage Prepaid this 5th day of February, 2010 as follows:

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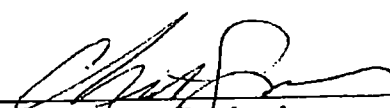
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