IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SHERYL FERNANDEZ and ARMANDO FERNANDEZ,	)	
Plaintiffs,	)	
v.	)	C.A. No. 09C-03-008-JRS
ST. FRANCIS HOSPITAL, INC., ST. FRANCIS OB/GYN CENTER, STANLEY R. WIERCINSKI, D.O., JAMES COSGROVE, D.O. and RICHARD LEADER, D.O.,	)	
Defendants.	)	

Date Submitted: May 28, 2009
Date Decided: August 3, 2009

MEMORANDUM OPINION

Upon Consideration of Defendant's Motion to Disqualify.
GRANTED in Part and DENIED in Part.

Robert J. Leoni, Esquire, Gilbert Shelsby, Esquire, SHELSBY & LEONI, Wilmington, Delaware. Attorney for Plaintiff.

Mason E. Turner, Jr., Esquire, PRICKETT, JONES & ELLIOTT, P.A., Wilmington, Delaware. Attorney for Defendant.

SLIGHTS, J.

I.

In this opinion, the Court considers a motion to disqualify opposing counsel brought by defendant, Stanley Wiercinski, D.O. The motion seeks an order from the Court disqualifying Gilbert Shelsby, Jr. and his law firm, Shelsby & Leoni, P.A., from representing the plaintiffs, Sheryl and Armando Fernandez, in this medical negligence case. Mr. Shelsby previously represented Dr. Wiercinski in a case where a plaintiff alleged that Dr. Wiercinski was negligent in performing a gynecologic laproscopic surgery. Dr. Wiercinski has averred that he shared confidential information with Mr. Shelsby during the prior representation which would be relevant and useful in the prosecution of the instant medical negligence claim against him. After carefully considering the briefs and oral arguments, the Court must conclude that Mr. Shelsby's representation of Mr. and Mrs. Fernandez in this case presents a clear and irreconcilable conflict of interest with his former client, Dr. Wiercinski. This conflict can only be cured by disqualifying Mr. Shelsby from further involvement in this case. The conflict does not, however, extend to the entire Shelsby & Leoni firm. Another attorney within that firm can continue the representation if appropriate measures are taken to "wall off" Mr. Shelsby from all aspects of the representation. Accordingly, the motion to disqualify counsel must be **GRANTED in part and DENIED in part.**

II.

In 2004, Mr. Shelsby represented Dr. Wiercinski in a medical negligence action in which the plaintiff alleged that Dr. Wiercinski breached the applicable standard of medical care in his performance of a gynecologic laproscopic surgery and that this breach proximately caused injury to the plaintiff.[1] According to Dr. Wiercinski, the case settled in February 2006 and was subsequently dismissed in March 2006.[2] The record reflects that, prior to the settlement, the only substantive discovery that had occurred was the deposition of Dr. Wiercinski (defended by Mr. Shelsby).[3]

On March 3, 2009, plaintiffs, Sheryl Fernandez and her husband, Armando Fernandez, filed a complaint against Dr. Wiercinski and other defendants alleging medical negligence in the treatment and evaluation of a mass in Ms. Fernandez's breast.[4] Dr. Wiercinski treated Ms. Fernandez from December 1, 2005 through May 25, 2007.[5] On May 28, 2009, prior to the initiation of any substantive discovery, Dr. Wiercinski filed this motion to disqualify Mr. Shelby as plaintiffs' counsel.

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[1] Mot. to Disqualify ¶ 2 (referring to *Carla Sides v. Stanley Wiercinski, D.O.*, Civil Action 04C-05-043-MMJ; Resp. to Mot. to Disqualify ¶ 2.

[2] *Id.* at ¶ 3.

[3] Resp. to Mot. to Disqualify ¶ 2.

[4] *See* Pls.' Compl.

[5] Pls.' Compl. ¶ ¶ 15-16.

In support of his motion, Dr. Wiercinski has averred by affidavit that he provided confidential information to Mr. Shelsby in connection with the prior representation regarding his standards of care and the general operations of his medical practice.[6] He acknowledged, however, that he was unable to remember any specific confidential information he shared with Mr. Shelsby beyond what would generally have been required to defend the prior action.[7]

Mr. Shelsby has submitted an affidavit of his own in opposition to the motion in which he denies that Dr. Wiercinski provided him with any confidential information in the prior representation that could be used against Dr. Wiercinski in this action.[8] Here again, neither Mr. Shelsby in his affidavit nor defense counsel at oral argument could provide any specifics regarding the extent of the information supplied to Mr. Shelsby by Dr. Wiercinski during the prior representation.[9]

Based on the record *sub judice,* the Court is left to consider whether a general exchange of information between attorney and client, as described with respect to Mr. Shelsby's prior representation of Dr. Wiercinski, is sufficient to create an incurable

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[6] *See* Aff. of Stanley R. Wiercinski, D.O., attached as Ex. A to Def.'s Mot. to Disqualify.

[7] *Id.*

[8] *See* Aff. of Gilbert F. Shelsby, Jr., attached as Ex. A to Pl.'s Resp. to Mot. to Disqualify.

[9] *Id.*

conflict of interest with respect to Mr. Shelsby's current representation of a client (Mr. and Mrs. Fernandez) directly adverse to his former client (Dr. Wiercinski). For the reasons set forth below, the Court concludes that Mr. Shelsby's duty to his former client precludes him from further involvement in this case.

III.

A. The Disqualification Standard

An attorney has a continuing duty to protect the confidentiality of his previous clients when representing new clients with adverse interests.[10] The Delaware Lawyers' Rules of Professional Conduct, Rule 1.9, sets forth the lawyer's duties to his former clients.[11] Rule 1.9(a) provides: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or 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,

[10] *Satellite Fin. Planning Corp. v. First Nat'l Bank*, 652 F.Supp. 1281, 1283 (D. Del. 1987) ("The underlying purpose for the rule is to ensure that a client's confidential communications to his lawyer are not used against that client when his lawyer later represents a party adverse to the former client.").

[11] *See* PROF. COND. R. 1.9 (textual references to the rules hereinafter will be to the rule number).

confirmed in writing."[12] When a lawyer undertakes to represent a client in a matter that is "substantially related" to a prior representation and "adverse to the interests" of a former client, disqualification of counsel in the subsequent adverse representation is a remedy which, *inter alia*, protects the former client's confidential and/or privileged information from being used against him in subsequent litigation, maintains public confidence in the integrity of the bar, and fulfills a client's rightful expectation of loyalty from his attorney in the moment of the representation and beyond.[13]

In the instant case, it is undisputed that Mr. Shelsby previously represented Dr. Wiercinski, that the instant action is materially adverse to Dr. Wiercinski's interests, and that Dr. Wiercinski did not consent to Mr. Shelsby's current representation of Mr. and Mrs. Fernandez. For obvious reasons, Dr. Wiercinski does not argue that the current medical negligence action, and the former medical negligence action in which

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[12] *Id.* *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 (2000) ("[A] lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of the former client are materially adverse.").

[13] *In re Corn Derivatives*, 748 F.2d 157, 162 (3d Cir. 1984) (affirming lower court's decision to grant disqualification in an antitrust action). *See also Madukwe v. Del. State Univ.*, 552 F. Supp. 2d 452 (D. Del. 2008) (granting motion to disqualify plaintiffs' counsel from representing employees in employment discrimination suits); Geoffrey C. Hazard, Jr. & W. William Hodes, 1 *The Law of Lawyering* § 13.3 (2007) ("Thus, the chief office of rules like Model Rule 1.9 is to provide clients with assurance *during the representation* that they have no need to fear suffering adverse consequences *later* because of having retained a lawyer currently.") (citations omitted) (emphasis supplied).

he was represented by Mr. Shelsby, are "the same" for purposes of Rule 1.9(a).[14] Rather, he argues that the two actions are "substantially related" as that term is used in Rule 1.9(a) because both involve allegations of medical negligence and both turn on the basic question of whether Dr. Wiercinski complied with applicable medical standard(s) of care. The Court's task, therefore, is to determine whether Mr. Shelsby's former representation *of* Dr. Wiercinski, and his current representation of Mr. and Mrs. Fernandez *against* Dr. Wiercinski, are "substantially related" under Rule 1.9(a).[15]

The moving party bears the burden of establishing a "substantial relationship" in support of an application to disqualify opposing counsel.[16] According to Comment 3 of Rule 1.9, matters are "substantially related" if they "involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."[17] When analyzing the question of "substantial relationship," courts must consider: (1) the nature and

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[14] *See* PROF. COND. R. 1.9, cmt. 2.

[15] *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953) (implementing the "substantial relationship" test).

[16] *Satellite Fin. Planning*, 652 F.Supp. at 1282 (citing *INA Underwriters v. Nalibotsky*, 594 F.Supp. 1199, 1206 (E.D. Pa. 1984)); *Conley v. Chaffinch*, 431 F. Supp. 2d 494, 497 (D. Del. 2006).

[17] *See* PROF. COND. R. 1.9, cmt. 3.

scope of the prior representation; (2) the nature and scope of the current representation; and (3) whether during the prior representation, the client might have disclosed confidences to his attorney which could be relevant to the current action and could be detrimental to the former client in the course of the current litigation.[18]

B. Application of the Disqualification Standard

First, with respect to the nature and scope of the prior representation, both parties agree that the case in which Mr. Shelsby formerly represented Dr. Wiercinski involved allegations of medical negligence arising from a gynecologic laproscopic surgery in 2001 that resulted in injuries to a patient.[19] That litigation lasted for almost two years and in that time Mr. Shelby met with his client to prepare defense strategy, prepared his client for deposition, defended his client while the deposition was taken, and ultimately negotiated a settlement of the action on his client's behalf. Thus, while it is clear that the case did not advance to trial, or even perhaps to expert discovery, it is also clear that Mr. Shelsby was fully engaged in his representation of Dr. Wiercinski and that, in the "normal" course of such an engagement, at least some

[18] *Kanaga v. Gannett*, 1993 WL 485926, at *2 (Del. Super.) (laying out the history of the three-step "substantial relationship" analysis in Delaware).

[19] Mot. to Disqualify ¶ 2; Resp. to Mot. to Disqualify ¶ 2.

confidential information would have been exchanged between lawyer and client.[20]

In the current representation, Mr. Shelsby represents plaintiffs in their allegations of medical negligence Dr. Wiercinski arising from his treatment and evaluation of a mass in Ms. Fernandez's breast.[21] Mr. Shelsby has represented the plaintiffs from the outset of the litigation and has filed several documents with the Court on their behalf. As best as the Court can discern from the docket, fact discovery has not yet commenced in earnest. While the specific allegations of medical negligence are different from those confronting Dr. Wiercinski when Mr. Shelsby represented him, the gravamen of the claim is the same: plaintiffs allege that Dr. Wiercinski failed to comply with applicable standards of medical care in a manner that proximately caused injury to a patient, in this case Mrs. Fernandez.

Next, the Court must make a "realistic appraisal of the possibility that confidences had been disclosed in the one matter which will be harmful to the client in the other."[22] In this regard, the moving party need not reveal the specific facts

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[20] *See* Rule 1.9(a) (focusing on the exchange of "confidential factual information as would ***normally have been obtained in the prior representation.***") (emphasis supplied).

[21] *See* Pl.'s Compl. ¶ 43.

[22] *Bowden v. Kmart*, 1999 WL 743308, at *1 (Del. Super. 1999) (citing *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978)) (disqualifying plaintiff's attorney in a slip and fall case who had previously defended Kmart against another slip and fall plaintiff).

communicated in the prior representation that will be relevant to the present case.[23] Rather, "[t]he Court should consider whether a client ought to have discussed the relevant facts or whether it would not have been unusual for the lawyer and client to have discussed the relevant facts."[24] The Court may conclude that confidential information was possessed by the attorney "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."[25] It is enough to justify disqualification if the movant raises a "common-sense inference that what the lawyer learned from his former client will prove useful in his representation of another client whose interests are adverse to those of the former client."[26]

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[23] *See* PROF. COND. R. 1.9, cmt. 3. *See also Sanchez-Caza v. Whetstone*, 2004 WL 2087922, at *3 (Del. Super.) ("[A] former client is not required to reveal the specific details of information shared with the lawyer.").

[24] *Kanaga*, 1993 WL 485926, at *2; *Conley*, 431 F. Supp. 2d at 498.

[25] *See* PROF. COND. R. 1.9, cmt. 3. *See also* Geoffrey C. Hazard, Jr. & W. William Hodes, 1 *The Law of Lawyering* § 13.5 (2007) ("[T]he presumption that the lawyer did learn what he could (reasonably) have learned in the first representation is an irrebutable one. This is a necessary corollary, for if the lawyer was permitted to contest the point, the former client would have to reveal the very information that he sought to protect."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 (2000), cmt. d(iii) ("When the prior matter involved litigation, it will be conclusively presumed that the lawyer obtained confidential information about the issues involved in the litigation. When the prior matter did not involve litigation, its scope is assessed by reference to the work that the lawyer undertook and the array of information that a lawyer ordinarily would have obtained to carry out that work.").

[26] *Madukwe*, 552 F. Supp. 2d at 458 (finding the "length and breadth" of the prior representation especially compelling to infer that counsel possessed information that could be used against his prior client in a subsequent matter).

In its assessment of the nature and scope of the prior representation for purposes of the first prong of the "substantial relationship" test, the Court already has concluded that it is reasonable to infer that at least some confidential information would have been exchanged between Dr. Wiercinski and his lawyer (Mr. Shelsby) in connection with the former representation.[27] Now, with respect to the third prong of the test, the Court must engage in a realistic appraisal of the likely substance of that confidential information to determine if it would have been of such a nature as to justify disqualification of Mr. Shelsby from his current representation of Mr. and Mrs. Fernandez here. In this regard, the Court cannot help but recognize that both cases involve allegations of medical negligence which, in turn, implicate more general questions of a doctor's training and experience and his usual and customary practices with respect to standards of care, office protocols and patient interactions. Over the almost two years that Mr. Shelsby represented Dr. Wiercinski, it "would not have been unusual for the lawyer and client to have discussed the relevant facts" relating to these issues and perhaps others that may well be useful in the prosecution of this

[27] *See, e.g.*, Geoffrey C. Hazard, Jr. & W. William Hodes, 1 *The Law of Lawyering* § 13.7 (2007) ("[A]s the range and total amount of confidential information to which the lawyer has been exposed increases, there is a corresponding increase in the occasions for possible adverse use of the information to further the cause of a new client. This is simply an application of the conventional confidentiality-based substantial relationship test. . . .").

medical negligence action against Dr. Wiercinski.[28]

Moreover, between December 2005 and March 2006, Mr. Shelsby's representation of Dr. Wiercinski overlapped with the doctor's treatment of Sheryl Fernandez, which treatment, of course, is at issue in this case.[29] Accordingly, the information Dr. Wiercinski gave Mr. Shelsby regarding his "practice, professional ability, and standards of medical care" at the time of the previous litigation would be directly relevant to this litigation.[30] But for Mr. Shelsby's currently adverse relationship with Dr. Wiercinski, such matters would be protected in the cradle of the attorney-client privilege. They would not be so protected, however, to the extent Mr. Shelsby is permitted to continue to prosecute this action against Dr. Wiercinski.

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[28] *See* PROF. COND. R. 1.9, cmt. 3. *See also*, *Kanaga*, 1993 WL485926, at *3 (finding a reasonable possibility that the prior client "would engage in open discussion with her attorney on many issues connected with the [medical malpractice] lawsuit . . . [and conceivably] information which fell outside such a scope" which would impact the subsequent litigation).

[29] *Madukwe*, 552 F. Supp. 2d at 459 (finding that the prior matters are not entirely "factually distinct" from the subsequent matters because "some of the alleged discrimination claimed by Plaintiffs occurred during a time [the attorney] was representing [Defendant]").

[30] *Compare Crawford W. Long Mem'l Hosp. of Emory Univ. v. Yerby*, 258 Ga. 720, 751 (Ga. 1988) (disqualifying attorney because "representing a client against a former client in an action that is of the same general subject matter and grows out of an event that occurred during the time of such representation, creates an impermissible appearance of impropriety"), *with Focht v. Bryn Mawr Hosp.*, 1992 WL 551116, at *2 (Pa. Com. Pl.) (refusing to conclude that all medical malpractice cases are the same). Note that *Focht* did not mention any overlap in the time frame of the matters at issue and the representations.

Furthermore, the former representation ended three years ago. This separation in time presents the distinct possibility that further contact with Dr. Wiercinski in this case could remind Mr. Shelsby of more specific confidential factual information shared with him by Dr. Wiercinski which, at the moment, he may have forgotten. Similarly, in *Uberti v. Kutcher*, the Connecticut Superior Court found that the "cross-examination refreshed [the attorney's] recollection of his long representation of the[] defendant[]" fifteen years prior.[31] Such refreshed memories that come later in the litigation would be detrimental to both plaintiffs and defendants as a later disqualification of counsel would cause more significant disruption, delay and expense. As explained in *Uberti,* "[w]here the former relationship is close, substantial and extensive, the increased risk of disadvantage to the previous client caused by knowledge garnered from that relationship may outweigh the right of the new client to counsel of its choice."[32]

Finally, the Court is satisfied that Mr. Shelsby and the plaintiffs here would unfairly benefit from Mr. Shelsby's knowledge of Dr. Wiercinski's litigation

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[31] *Uberti v. Kutcher*, 2003 WL 22961694, at *3 (Conn. Super. Ct.) ("Their practices, procedure, defenses, vulnerabilities and strengths were all developed in the prior representation which allowed that law firm to obtain an intimate understanding of the organization and operation of the defendants and their organization.").

[32] *Id.* (citing *Am. Heritage Agency, Inc. v. Gelinas*, 62 Conn. App. 711, 727, 744, *cert. denied*, 257 A.2d 903 (Conn. 2001)) (granting motion to disqualify).

tendencies and his settlement philosophy.[33] In *Bowden v. Kmart*, the court weighed these factors as "indirect advantages which might flow from the prior representation."[34] The court cited a case from the District of Delaware suggesting that there would be an advantage in knowing "what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack . . . to pursue, what settlements to accept and what offers to reject."[35] The same concerns exist here.

In sum, the conflict of interest presented by Mr. Shelsby's former representation of Dr. Wiercinski in a medical negligence action, and his current representation of Mr. and Mrs. Fernandez against Dr. Wiercinski in a medical negligence action, is irreconcilable. The two actions in which Mr. Shelsby has served as counsel are substantially related and the current representation is adverse to the interests of Mr. Shelsby's former client (Dr. Wiercinski). Under these circumstances,

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[33] Courts waiver on the extent to which "playbook" information plays a role in disqualification. *See, e.g.*, Charles W. Wolfram, *Former-Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677 (1997). This Court considers it as a limited but not deciding factor pointing towards disqualification.

[34] *Bowden v. Kmart*,1999 WL 743308, at *2 ("In applying such concerns to the instant case, it is possible that [the attorney's] former representation of [defendant] might cast a substantial threat of taint over the integrity of this litigation.").

[35] *Webb v. E.I. DuPont de Nemours & Co. Inc.*, 811 F.Supp. 158, 162 (D. Del. 1992) (quoting *Ulrich v. Hearst Corp.*, 809 F. Supp. 229, 235-36 (S.D.N.Y. 1992) (explaining that adverse use of confidential information is not limited to disclosure to subsequent client)).

in the absence of client consent, disqualification is the only appropriate remedy.

C. Imputed Disqualification

Having determined that Mr. Shelsby's representation of Mr. and Mrs. Fernandez violates Rule 1.9(a), the Court must now determine whether his law firm is vicariously disqualified. Neither party has submitted compelling arguments on this issue. Delaware Lawyers' Rules of Professional Conduct Rule 1.10 provides that no lawyer in a firm "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."[36] Rule 1.10(c) carves out an exception to imputed disqualification when "the personally disqualified lawyer is timely screened from any participation in the matter."[37] Given the very early stage of the litigation in which this motion has been presented, the Court is satisfied that Shelsby & Leoni may continue with their representation of Mr. and Mrs. Fernandez if the firm: (a) submits an affidavit from Mr. Leoni or the attorney who will be responsible for the representation confirming that the responsible attorney has not learned of any confidential information regarding Mr. Shelsby's prior representation of Dr. Wiercinski; and (b) submits a plan by which Mr. Shelsby will be appropriately

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[36] *See* PROF. COND. R. 1.10. *See also Satellite Fin. Planning Corp.*, 652 F.Supp. at 1283, n.4.

[37] *See* PROF. COND. R. 1.10(c).

"screened" from this case as required by Rule 1.10(c)(1).[38] Both shall be submitted within fourteen (14) days of this order.

IV.

The Court recognizes that disqualification of counsel is an extreme remedy that should be employed only when necessary to ensure the fairness of the litigation process. Generally, a litigant should be entitled to be represented by the counsel of his or her choice.[39] After balancing the right of the plaintiffs to choose their counsel against Dr. Wiercinski's right to expect that his former attorney will not utilize confidential information from a prior representation against him in a subsequent adverse representation, the Court finds, in this case, that the interests of the former client must prevail. And while the plaintiffs may suffer some burden as a result of Mr. Shelsby's disqualification, this step is necessary to maintain fairness and integrity in the litigation process, both generally and in this case.[40] Other attorneys at Shelsby

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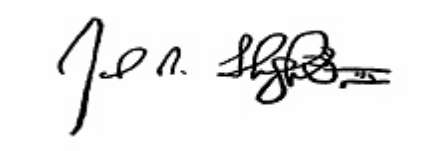
[38] *See, e.g.*, *Bowden*, 1999 WL 743308, at *3 (referring to the "cone of silence" and finding that the continued representation of plaintiff by other attorney's at the law firm would help minimize the prejudice to plaintiff and would not compromise the fairness of the proceeding). *See also Nemours Found. v. Gilbane, Aetna Fed. Ins. Co.,* 632 F. Supp. 418, 428 (D. Del. 1986) (discussing generally the appropriate means by which to implement a "cone of silence.").

[39] *See Satellite Fin. Planning Corp.*, 652 F. Supp. at 1283 ("[A] litigant should, as much as possible, be able to use the counsel of his choice."); *Kanaga*, 1993 WL 485926, at *3.

[40] *Sanchez-Caza*, 2004 WL 2087922, at *4 ("To ensure that disqualification motions are not granted liberally, the Court reviewing the motion must weigh the effect of any alleged conflict on the fairness and integrity of the proceedings before disqualifying the challenged counsel.")

& Leoni may continue with the representation provided that Mr. Shelsby has not and will not divulge any confidential information obtained from his former representation of Dr. Wiercinski. Based on the foregoing, plaintiffs' Motion to Disqualify is **GRANTED in part and DENIED in part**.

IT IS SO ORDERED.



Judge Joseph R. Slights, III

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