

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

97-CVS-15410A
97-CVS-15401C
97-CVS-15401D
98-CVS-9679

CHARLES E. HERION, et al.,)
Plaintiffs,)

v.)

FIELDCREST CANNON, INC.,)
ARTHUR LEE IVESTER,)
CHARLES KNOX and JOHN)
THOMAS,)
Defendants.)

97-CVS-15401A

CLYDE BAKER, et al.,)
Plaintiffs,)

v.)

ARTHUR LEE IVESTER,)
CHARLES KNOX and JOHN)
THOMAS,)
Defendants.)

97-CVS-15401C

SCOTT HELMS, et al.,)
Plaintiffs,)

v.)

FIELDCREST CANNON, INC.,)
ARTHUR LEE IVESTER,)
CHARLES KNOX and JOHN)
THOMAS,)
Defendants.)

97-CVS-15401D

GARY ROBERT ALBRIGHT, et al.,)
Plaintiffs)

v.)

HNA HOLDINGS, et al.,)
Defendants.)

98-CVS-9679

ORDER

This matter is before the Court in each of the above captioned cases on motions filed by plaintiffs in each case seeking recusal of the Honorable Robert M. Burroughs. The motions were assigned to the undersigned by the Administrative Office of the Courts at the request of the Honorable Shirley L. Fulton, Senior Resident Superior Court Judge for Mecklenburg County. For the reason set forth below, the motions for recusal are denied. The motions for sanctions filed by defendants are also denied.

I.

In 1997 counsel for plaintiffs in these actions filed a substantial number of similar civil actions in Mecklenburg County which arose out of alleged exposure to asbestos. The instant cases were among those filed. Because of the additional burden these asbestos cases would place on the system, the need for some consistency in rulings and the need to see that the cases were expedited, Judge Fulton sought to have the cases assigned to one Superior Court Judge. Plaintiffs' counsel did not object. At that time Judge Burroughs had retired and was serving as a Retired or Emergency Judge. Judge Burroughs voluntarily agreed to undertake supervision and trial of the asbestos cases filed by plaintiffs' counsel. Plaintiffs' counsel did not object to the assignment of the cases to Judge Burroughs. The cases were assigned to Judge Burroughs pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts. Thereafter, Judge Burroughs presided over numerous hearings in the cases, including protracted and bitter discovery disputes between counsel (see, for example, the transcripts of hearings of November 9, 1998 and September 13, 1999 hearings in the *Herion* and *Helms* cases). No objection was raised in connection with Judge Burroughs' management of these cases until November 1999, on the eve of a hearing on defendants' motion for summary judgment in the *Albright* case. Motions for summary judgment in the cases involving Fieldcrest Cannon had

been scheduled for hearing before Judge Burroughs in January 2000. Hearing on all summary judgment motions has been postponed pending the resolution of the motions for recusal.

II.

Plaintiffs assert four grounds for recusal. Although there are some common elements, the Court will address each ground separately. In approaching this motion, the Court has applied the well settled law that

the burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the Judge that he would be unable to rule impartially.

State v. Fie, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987). The Court also considered the principle enunciated in *Ponder v. Davis*, 233 N.C. 699, 65 S.E.2d 356 (1951) that a judge's failure to give the appearance of doing justice could also be a basis for recusal. *See also Fie*, 320 N.C. at 627.

A.

Plaintiffs assert that Judge Burroughs has demonstrated a bias toward defendants in these cases and should be removed because he cannot be impartial. Plaintiffs' position is unsupported by the record in these cases and is without merit. [fn 1]

In order to put the argument in perspective, it is helpful to understand the nature of these cases, in which plaintiffs have asserted essentially two types of claims. First is a premises liability claim based upon alleged exposure to asbestos in defendants' plants. Plaintiffs are employees of third party contractors. Plaintiffs worked in defendants' plants but not for defendants. Second is a wanton and willful negligence claim which plaintiffs, former employees of the defendant corporations, assert against former managers of the defendant corporations and not the corporations themselves. Plaintiffs assert that their claims against the managers are not

barred by the workers' compensation laws under the holding in *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). At the same time, several of these plaintiffs have workers' compensation claims pending against employers. Some, but not all, of those employers are defendants in these cases. The other defendant employers in the worker's compensation cases are the employers who sent the plaintiffs onto the premises of the defendant corporations in these cases.

Plaintiffs' counsel argues that the record in three separate hearings supports a finding that Judge Burroughs is biased. Those hearings were held on November 9, 1998, September 13, 1999 and November 17, 1999. The Court has reviewed the transcripts of the hearings in their entirety.

Turning first to the November 9, 1998 hearing, the Court observes that it has taken counsel over a year to reach the conclusion that the hearing contained evidence of bias on the part of Judge Burroughs. The hearing dealt with discovery disputes. It followed an August 4, 1998 hearing at which the court spent hours trying to resolve discovery disputes. The court made no substantive law rulings at the November 1998 hearing. The rulings from the bench at the conclusion of the hearing were far more favorable for the plaintiffs than the defendants. The court granted plaintiffs extensive discovery over the vehement objection and argument of defense counsel. Plaintiffs' motion to compel discovery was granted and defendant's motion for protective order was denied. (Transcript of November 9, 1998 hearing, pp. 40-41, 48.) While the court expressed some amazement that the case could involve discovery of records that were over thirty years old and spread out over thirty different locations, he nonetheless gave plaintiffs access to those records.

The one statement in the entire hearing which could be argued to be an expression of opinion involved a general statement about the current breadth of products liability litigation.

The judge said:

I am amazed at the way these suits have come online from either OSHA -- I don't know who is doing this, whether it's the State allowing these things to go on or whether it's OSHA. But she's got the client and you've got the employer. Obviously there is some sort of social statement that's being made.

They are now suing Smith & Wesson, Mossberg. And gun manufacturer who manufactures a gun in which someone gets hurt, there is somebody who has filed a lawsuit against the manufacturer for putting an inherently dangerous instrument into interstate commerce. Whoop-de-do; here we go.

Do you know who is going to be next? Ford and General Motors. They do, too.

(Tr. of November 9, 1998 hearing, p. 49.)

The Court does not find this statement standing alone to support a finding of bias or partiality which would serve as grounds for recusal. Obviously, plaintiffs were not concerned enough about the statement at the time it was made to file a motion for recusal. Given Judge Burroughs' rulings on the discovery motions, it is clear that his sentiments about suits against gun manufacturers did not cause him to restrict plaintiffs' discovery. Nor would his attitude towards the subject matter of the case or the merits of plaintiffs' case serve as a basis for disqualification. A judge may be disqualified on the basis of bias or prejudice if such bias or prejudice, for or against a party, renders the judge unable to act impartially in the particular case. "The words 'bias' and 'prejudice' refer to the mental attitude or disposition of the judge toward a party to the litigation, and not to any views that he may entertain regarding the subject matter involved." 46 Am. Jur. 2d Judges § 151 (1969), citing *Hudspeth v. State*, 67 S.W.2d 191, *cert. denied*, 296 U.S. 642 (1935); *State ex rel. Mitchell v. Sage Stores Co.*, 143 P.2d 652 (Kan. 1943), *aff'd* 323 U.S. 32 (1944); *Nelson v. Dodge*, 68 A.2d 51 (R.I. 1949).

The possession of definite views regarding the law or the conduct of a party, or even the prejudgment of the matters in controversy does not result in disqualification of a trial judge for bias and prejudice. Bias or prejudice does not refer to any views a judge may entertain towards

the subject matter involved in the case. See *State v. Kennedy*, 110 N.C. App. 302, 429 S.E.2d 449 (1993); *State v. Mills*, 370 P.2d 946 (Ariz. 1962). See also *Ramirez v. Bureau of State Lottery*, 463 N.W.2d 245 (Mich. 1990) (where fact that judge expressed personal disdain for gambling did not affect ability to impartially hear a case brought against the bureau of state lotteries).

In comparison, an attitude of personal enmity toward the party seeking to disqualify amounts to a bias which would support disqualification. See *State v. Case*, 676 P.2d 241 (N.M. 1984), *Brown v. State*, 816 P.2d 818 (Wyo. 1991). Thus, the personal bias or prejudice must be directed toward one of the parties. While the record reveals that Judge Burroughs was often frustrated with both plaintiff and defense counsel, plaintiffs have submitted no evidence of personal enmity directed toward them by Judge Burroughs.

Plaintiffs also argue that Judge Burroughs' bias was revealed by his statement that individuals who developed cancer from working in a plant contaminated with uranium could not sue twenty years later. The exchange between counsel and the court cited by plaintiffs involves a hypothetical question that the judge asked in order to understand plaintiffs' position on the application of the statute of limitations. (Tr. of November 9, 1998 hearing, pp.46-47.) It would not be appropriate to base a recusal on a hypothetical question asked by a judge in open court. Such questions are frequently used by judges to test the outer limits of theories put forth by counsel. The judge indicated a disagreement with plaintiffs' counsel about the application of the statute. If expression of disagreement with counsel over substantive law issues were a ground for recusal, the administration of justice would be substantially impaired. That is true whether the court is right or wrong in its interpretation of the law. In this case, the final result of the hearing was that despite Judge Burroughs' questions about the application of the statute of limitations, he let plaintiffs have the full discovery they sought.

The next hearing at which Judge Burroughs is asserted to have demonstrated his bias is the September 13, 1999 hearing. Plaintiffs' counsel argue that the manner in which he dealt with documents for which the attorney-client privilege had been asserted demonstrated his bias. Judge Burroughs reviewed the documents in open court. He asked questions about them so he could understand them and identify the authors and recipients. At times he cut off plaintiffs' counsel when she interrupted what he was trying to do. In the end, he explained on the record what he had done and made sure that the record was preserved for appeal. This ground for recusal is no more than an argument that the court erred as a matter of law in either the procedure or substantive ruling with respect to whether the attorney-client privilege applied. Error is a matter for appeal, not recusal. Judge Burroughs took the time to review each document and make a determination as to whether he thought it was privileged. It is clear that he did not let plaintiffs' counsel argue as much as she wanted to about the issues; however, that is not sufficient to establish bias. Judge Burroughs had devoted an extensive amount of time to resolving discovery disputes on a very detailed basis. Rather than make generic determinations of privilege, he took the time to review each and every document.

It is worthy of note that at this stage Judge Burroughs had spent many hours, even days, resolving discovery disputes in these cases. It appears from the record that counsel for both sides had been unable to resolve many discovery disputes and repeatedly turned to the court for rulings. The case was over two years old, and Judge Burroughs was obviously frustrated with counsel for all the parties. Discovery disputes were overlapping with discovery in other related cases such as workers' compensation cases. Judge Burroughs was trying to get the case moving and get it to trial. He was at times short with all counsel. (Tr. of September 13, 1999 hearing, p. 65.) Plaintiffs' counsel also complain about Judge Burroughs' rulings requiring the parties to identify their witnesses earlier than plaintiffs' counsel believed was possible. Again, this issue is

grounds for appeal if the rulings were in error. The case has not even been called for trial and there is no way to know what Judge Burroughs would have done in the future. Judge Burroughs was doing what most trial judges do: he was trying to get the lawyers to move on, get the case out of the discovery bog and get it ready for trial. His language and his rulings in that regard were directed to counsel for both sides, not just plaintiffs' counsel. Whether the judge's rulings at the September 13, 1999 hearing were erroneous is a matter for the appellate courts. He was equally demanding of both sides. The judge's actions are not grounds for recusal based upon bias or sympathy for any party. Since the cases have not been set for trial, the record is incomplete on how he would have ultimately handled the pretrial order.

The Court has reviewed the transcripts in the *Albright* case provided to the court by defense counsel. Plaintiffs' counsel did not tender any transcripts from the *Albright* case for review. Transcripts reviewed include those of hearings held on August 26, 1999, September 23, 1999 and October 1, 1999. Plaintiffs' counsel argues that Judge Burroughs erred in requiring one of the plaintiffs in that case to accept a settlement. That order has been appealed, and no facts surrounding that ruling have been presented to this Court. By Order dated October 1, 1999, Judge Burroughs granted plaintiffs' motion to stay trial of the remaining claims in *Albright* until the appeal was heard. Appeal, not a motion for recusal, is the proper means to redress perceived legal error under those circumstances.

At the September 30, 1999 hearing concerning a motion to compel filed by plaintiffs in *Albright*, Judge Burroughs again became frustrated with the inability of all counsel to work out discovery disputes. He evidently ordered counsel for all parties to meet and confer and called bailiffs into the courtroom with an indication that he might use his contempt powers if they were unable to reach agreement. His comments and directions were not aimed solely at plaintiffs' counsel, but covered defense counsel as well. Plaintiffs' counsel cites this activity as evidence of

bias or partiality because the judge did not do what plaintiffs' counsel wanted him to do or what she thought he should do. Again, counsel has improperly substituted the recusal process for the appellate process. The judge's actions do not support a finding of bias or partiality. If he overreacted to the squabbling among counsel (and this Court makes no determination that he did), that is a matter for appellate review. His frustration was vented equally on both sides.

In summary, a review of the transcripts and record available to this Court does not support a finding that a reasonable person would believe that a fair and impartial trial is impossible due to the actions, beliefs or conduct of Judge Burroughs. If anything, his rulings on discovery issues have been more favorable to plaintiffs than defendants in these cases. He has tried to move the cases toward trial. The grounds for recusal set forth by plaintiffs' counsel are similar to the complaints lodged in *Lowder v. All Star Mills*, 60 N.C. App. 699, 300 S.E.2d 241 (1983), (in which the Court of Appeals upheld the denial of the recusal motion).

After the September 13, 1999 hearing in the *Herion* case, Ms. Wallace, lead counsel for plaintiffs in all the asbestos cases, came to believe that Judge Burroughs was biased against plaintiffs and commenced an investigation to determine the basis of this perceived bias. Her investigation focused on Judge Burroughs' mediation practice. On November 5, 1999 she received a phone call from Jason Mundorf of Resolute, Systems, Inc. concerning scheduling mediation for an insurance carrier in a workers' compensation case involving one of Ms. Wallace's clients. In response to Ms. Wallace's request for information about mediators, Mr. Mundorf mentioned three retired Superior Court Judges: Burroughs, Kirby and Collier. Ms. Wallace told Mr. Mundorf that she did not know Judge Burroughs, and the next day one of the lawyers in Ms. Wallaces' firm called Resolute to get more information on Judge Burroughs. Mr. Mundorf responded by letter dated November 9, 1999. On November 17, 1999, just before defendant's motion for summary judgment was to be heard by Judge Burroughs in the *Albright*

case, plaintiffs filed this motion to recuse Judge Burroughs, citing his work as a mediator as one of the grounds for recusal. Counsel for plaintiffs point to actions by Judge Burroughs after the motion was filed as further evidence of his bias.

Specifically, at page 9 of their supplemental brief, counsel state: "When the Motion for Recusal was presented to the Judge, he reviewed it and stated to defense counsel: 'Ms. Hicks, if you see something in here that needs to be answered, just let me know and I'll get an [sic] answer together. We'll go from there.'" This quote is taken out of context and distorts Judge Burroughs' reaction to the motion. It occurred well into the hearing after questions from Ms. Hicks about what procedure would be followed. A thorough review of the transcript of the November 17, 1999 hearing at pages 9 and 10 shows that Judge Burroughs was simply responding to counsel's inquiry about proper procedure. He had stated that he would respond to any inquiry from Judge Fulton as well. When he reviewed the motion, Judge Burroughs' response was:

Okay. You'll need to take it to Judge Fulton and let Judge Fulton look at it. And she'll sort of decide what, if anything, needs to be done.

And at the same time, if you [addressing Ms. Hicks] want to answer anything in here, you probably ought to answer it within two weeks, if there is anything in there you want to respond to.

(Tr. of November 17, 1999 hearing, pp.3-4.)

Judge Burroughs' response to the Motion to Recuse at the November 17, 1999 hearing was entirely appropriate and did not demonstrate any bias or indicate that he expected defense counsel to provide him with a defense. He correctly turned the matter over to the Senior Resident Judge.

When Judge Burroughs filed his statement of sources of income after the recusal motion was filed, he sent a copy to Ms. Hicks. Ms. Hicks sent a copy to Ms. Wallace. As far as the record shows, Judge Burroughs did not send a copy to Ms. Wallace. However, he omitted Ms.

Whitfield also. It would have been preferable for Judge Burroughs to send copies of his filing to all counsel in all the cases. It should be noted, however, that the document is a public record. The record is devoid of any other contact or communication (outside open hearings) between the judge and defense counsel. Plaintiffs' allegations of ex parte communications between the judge and defense counsel are unsupported by the record in this case. His failure to send Ms. Wallace a copy of what he had filed is not a basis for recusal.

Finally, plaintiffs point to Judge Burroughs' responses to their request for information after the motion to recuse was filed as further evidence of bias. Defendants had obtained an affidavit from Resolute Systems containing specific information about Judge Burroughs' mediation practice. Most of that information was generic and did not contain specific information about Judge Burroughs' income or the names of parties for which he had acted as a neutral mediator. The affidavit was provided after Judge Burroughs consented to its release, but without any contact between defense counsel and the judge. Thereafter, plaintiffs' counsel requested additional information from Judge Burroughs and Resolute. The information requested was not narrowly defined, but broad in its scope. (Letter from Pauley to Burroughs of 1/5/00.) He did not seek the *same* information obtained by defense counsel, but asked for different and far more detailed information and asked Judge Burroughs to sign a release. Judge Burroughs replied promptly by fax that the release language was unacceptable and too broad. Having explained his position, Judge Burroughs ended his message with a cryptic, "Try again." While a more polite phrase may have been preferable, the fact that he did not agree with the proposed release language and may not have been pleased about his personal financial information being made part of the public record could easily explain the cryptic nature of his message. When he received another communication from plaintiffs' counsel the next day, he bowed out of what had then become a discovery process and directed plaintiffs' counsel to

confer with counsel for Resolute, rather than directly with him. That was a practical and, in this Court's view, preferable way to handle a difficult situation. There were interests at stake beyond those of Judge Burroughs, and he should not have been in the middle of the discovery process. Resolute and its clients had interests to be protected as well. In the end, plaintiffs' counsel were able to take a deposition, subject to confidentiality restrictions, and obtained all the information they wanted. Judge Burroughs' handling of the requests made directly to him by plaintiffs' counsel was proper and does not support a finding of bias on his part.

The Court has reviewed the other factors that plaintiffs argue support a finding of bias and determined them to be without merit. For the most part, they consist of disagreements with Judge Burroughs' rulings on discovery matters. Such discretionary rulings are best left to the appeal process and are not appropriate subjects for recusal motions. *See In re LaRue*, 113 N.C. App 807 (1994).

B.

Plaintiffs next contend that Judge Burroughs should be removed because he has violated two of the Canons of Judicial Conduct. First, they contend that Judge Burroughs has failed to file the annual statement of sources of income required by Canon 6, Section C, which provides: "A judge shall report the name and nature of any source or activity from which he received more than \$1,000.00 in income during the calendar year for which the report is filed."

It is clear that at the time the Motion to Recuse was filed, Judge Burroughs had not filed the annual statement for the years following his retirement in 1995, even though he continued to act as an emergency judge. He did so when this failure was brought to his attention. There is no evidence in the record to support a finding that his failure to do so was intentional.

The Canons are unclear with respect to the Application of Canon 6, Section C to emergency judges. However, it is the better practice for emergency judges to file the annual

statement. See Memo from Clifton E. Johnson, Chairman of the Judicial Standards Commission, to Members of the Judiciary (Active and Retired) (March 24, 1993) (attached hereto).

Second, plaintiffs contend that Judge Burroughs violated Canon 5, Section C(2) by becoming an employee of Resolute. Canon 5 prevents a judge from becoming an officer, director, manager, advisor or employee of a company while serving as a judge or an emergency judge.

The Court has reviewed all the information supplied by counsel in connection with Judge Burroughs' affiliation with Resolute Systems, Inc. and, were it required to do so, it would conclude that he was not, as a matter of law, an employee of Resolute as contemplated by the Canons of Judicial Conduct. However, the Court believes that those kinds of determinations are policy questions more appropriately made by the Judicial Standards Commission rather than a court on a motion for recusal.

The Court has viewed plaintiffs' position on two different levels. First, the Court concludes as a matter of law that a simple violation of one of these two Canons would not in and of itself constitute grounds for recusal. Plaintiffs argue that their violation would amount to an impropriety and that any impropriety is grounds for recusal in any case. The Judicial Standards Commission was created and exists for the purpose of determining when judges violate the Canons of Judicial Conduct. Motions to recuse are not the appropriate means for deciding questions of judicial ethics unless the violations are directly related to a ground for recusal in a particular case. Accordingly, the Court has reviewed plaintiffs' position on a second level. Specifically, the Court has considered whether there is any connection between Judge Burroughs' failure to file his annual report and his relationship with Resolute that would provide a basis for his recusal in this case. This determination also involved inquiry into Judge

Burroughs' mediation practice, which plaintiffs assert creates a conflict of interest in these cases.

C.

Mediation is a relatively new process in North Carolina. Many retired judges on both the district and superior court levels have turned to mediation practices after leaving their permanent seats on the bench. In most instances, and in Judge Burroughs' situation in particular, the financial rewards of mediating far exceed those provided to emergency judges for holding court. Were it not for their commitment to public service, many retired judges would choose to spend their time more profitably conducting mediations instead of holding court. The availability of retired or emergency judges is important to the efficient administration of justice in this state. On the other hand, justice must be administered in a way that does not cause the public to lose confidence in the fairness and impartiality of the system. The Canons of Judicial Conduct recognize these competing interests.

Canon 5(E) provides in pertinent part: "an Emergency Judge of the . . . Superior Court . . . may serve as an arbitrator or mediator when such service does not conflict with or interfere with the . . . judge's judicial service in emergency status."

Counsel for plaintiffs agree that there is no prohibition against an emergency judge acting as a mediator. Instead, their position is that Judge Burroughs' activities as a mediator conflict with his duties as an emergency judge in these cases. The Court finds that they do not.

Turning first to the question of whether Judge Burroughs' failure to timely file his annual statement of income sources serves as a basis for recusal, the Court finds no specific reason why the failure to file demonstrates bias in this case. At oral argument, former Justice Harry Martin appeared as counsel for plaintiffs. Justice Martin agreed with the Court that had Judge Burroughs filed his report, he need only have disclosed that he had received more than \$1,000

from his mediation activities. Justice Martin suggested to the Court that Judge Burroughs should have disclosed his mediation practice to the parties prior to undertaking to handle these cases on an emergency basis and that the annual report would have accomplished that purpose. However, this record discloses that counsel for plaintiffs knew Judge Burroughs had a mediation practice because they had participated in mediations in which he acted as the neutral. (Tr. of November 17, 1999 hearing, p. 6.) The fact that Judge Burroughs had acted as a neutral in cases in which Wallace & Graham appeared did not raise any question of impropriety in counsel's mind. The fact that Judge Burroughs had a mediation practice was widely known in the community. As the record discloses, he had conducted mediations with over 120 different law firms in the past year alone. (Plaintiffs' Supplemental Brief in Support of Motion for Recusal, Ex. A.) Plaintiffs' counsel did not look for Judge Burroughs' annual statement when he was appointed to their case. They were not misled or unable to find the information. They only went to the Clerk's office looking for the report after Ms. Wallace had become concerned that the judge was biased and she began considering a motion for recusal. In summary, the Court concludes that Judge Burroughs' failure to timely file his statement of sources of income does not provide grounds for recusal in the specific circumstances of this case.

The Court next turns to Judge Burroughs' business relationship with Resolute. The Court concludes that there is no basis on the record in this case to find that Judge Burroughs had any financial interest in Resolute that would impair his ability to be fair and impartial in these cases. Even if Judge Burroughs' business relationship with Resolute had crossed over some line and constituted impermissible employment under the canons, such status would not have and did not impact his ability to handle these cases on an emergency basis. As a mediator, Judge Burroughs is required to act solely as a neutral. The Court either appoints him, or the parties must agree to use him. In either case, his ability to act as a mediator is dependent upon his objectivity and

neutrality. His contractual arrangement with Resolute did not impair his ability to fulfill his function as a judge, nor did it create a conflict with his ability to handle these cases.

Finally, the Court turns to specific issues raised by plaintiffs' counsel in connection with Judge Burroughs' mediation practice. Plaintiffs had unprecedented access to Judge Burroughs' mediation practice history. There are no disputed facts. Plaintiffs assert four grounds for recusal based upon Judge Burroughs' mediation practice.

First, Judge Burroughs handled two mediations in which Ms. Hicks, counsel for HNA Holdings in this case, participated. Those mediations occurred prior to the time that Ms. Hicks was aware of Judge Burroughs' assignment to the asbestos cases. The mediated cases in which she participated did not involve any parties to or issues presented in the asbestos cases. There is no evidence in the record that those cases had any relationship whatsoever to the asbestos cases. The Court finds as a fact and concludes as a matter of law that no conflict was created by Judge Burroughs' handling those two mediations after the asbestos cases were assigned to him.

Second, plaintiffs assert that the fact that Judge Burroughs conducted other mediations in which other lawyers from firms representing the defendants in these cases participated on behalf of other clients constitutes grounds for recusal. It is undisputed that during the period of time the asbestos cases have been assigned to him, Judge Burroughs has conducted mediations in which lawyers from Smith Helms Mulliss & Moore and Parker, Poe, Adams & Bernstein represented clients. Again, the evidence in this record discloses that those cases involved unrelated parties and unrelated issues. No aspect of those mediations created a conflict with or impaired Judge Burroughs' ability to be fair and impartial in the asbestos cases. However, plaintiffs point to the number of matters Judge Burroughs has handled for one of the law firms, Smith Helms Mulliss & Moore, as grounds for recusal. Specifically, plaintiffs point to the fact that between December 1997 and December 1999 Judge Burroughs has received income of \$17,907.81 from twenty

mediations in which Smith Helms represented a party. (Plaintiffs' Supplemental Brief in Support of Motion for Recusal, Ex. A.) The Court has carefully reviewed the exhibit attached to plaintiffs' supplemental brief. Based upon its own review of the exhibit, the Court's familiarity with synthetic stucco litigation, and the representation of Mr. Connors in open court, the Court concludes that most of the mediated cases in which Smith Helms has participated were multiparty cases involving synthetic stucco. Such cases generally involve as many as nine parties and take longer to mediate. They are therefore more costly. It has not been uncommon for parties in the synthetic stucco cases to try to reduce costs by using mediators who are familiar with the issues and have experience mediating these types of claims. All parties must agree to the mediator, and it would be impossible for one firm to dictate the selection of the mediator under those circumstances. The total mediation costs are split among the many parties, thus making the \$17,907.81 figure used by plaintiffs somewhat misleading. Smith Helms' clients would have paid a small portion of that total. After careful and thorough analysis of the financial records provided by Resolute, the Court finds as a fact and concludes as a matter of law that Judge Burroughs had no financial interests which created an improper conflict of interest in these cases.

Finally, the Court turns to plaintiffs' arguments that are addressed directly to Judge Burroughs' integrity. Plaintiffs argue that (a) Judge Burroughs will never try the cases because it will be to his financial advantage not to do so, and (b) he will favor defense counsel in his substantive rulings in this case in order to get more mediation business from them in the future. Such allegations are unfounded and meritless. They are not unsupported by the record in this case. In fact, they are contradicted by it.

Plaintiffs' assertion that Judge Burroughs *might* put his own financial interest ahead of the interest of the plaintiffs is belied by the record. Plaintiffs offer no evidence that he has

already done so. Judge Burroughs agreed to handle these cases at a time when it would have been more financially advantageous for him to devote himself fully to mediation. He accepted these cases as a public service. There is no indication that, since he has undertaken management of these difficult and complex cases, any hearing has been delayed or continued because of his unavailability. Judge Burroughs has gone out of his way to assist counsel, even traveling to Salisbury for one hearing to resolve discovery disputes. He has spent hours going over individual interrogatories and looking at documents. He has presided over lengthy hearings to resolve discovery disputes. The summary judgment hearings in *Albright* were scheduled to be heard the day the motion for recusal was filed. The summary judgment motions in *Herion* had been scheduled for hearing in January, and it was Judge Burroughs who was pushing for a trial date. (Tr. Of September 13, 1999 hearing, pp. 172-73.) To ask this Court to speculate that Judge Burroughs *might* decide in the future that he could make more money mediating, and therefore will grant summary judgment to free his schedule, is to ask this Court to assume a motive of greed for which there is not one scintilla of support in this record. Every indication in the record is to the contrary. Likewise, plaintiffs' argument that Judge Burroughs *might* favor defendants because the lawyers in firms representing defendants *might* send him more mediation business is totally unsupported by the record and defies logic. It is equally true that he *might* rule in favor of plaintiffs so that plaintiffs' lawyers *might* send him more business. That possibility exists in all cases in which the emergency judge also mediates. The state has determined that serving in the dual role of judge and mediator does not on its face create an appearance of influencing the judge in his judicial duties or give the appearance of impropriety. The Canons simply provide that a judge may not let his or her mediation practice interfere with his or her work as a judge; there is no evidence in this record that Judge Burroughs has done so.

Finally, defendants have moved for sanctions in connection with this motion. The Court

should be extremely reluctant to enter sanctions on a motion for recusal because doing so could have a chilling effect on counsel in the future filing motions for recusal. The questions regarding the relationship between an emergency judge's dual role as judge and mediator are new and not fully addressed in the Canons of Judicial Conduct. For that reason, the Court, in its discretion, has determined that sanctions should not be imposed in this situation.

Conclusion

The Court has concluded that there has been no objective showing that Judge Burroughs was biased or prejudiced concerning a party to this litigation. Nor has there been any objective showing that he has a financial or other interest that could be substantially affected by the outcome of these proceedings. Furthermore, the Court is of the opinion that Judge Burroughs has engaged in no conduct from which this Court could conclude that its failure to disqualify would create an appearance of impropriety. There is no basis for a finding that Judge Burroughs' impartiality could reasonably be questioned. The Court is left with the impression that plaintiffs took some of the judge's comments about the merits of the case to be an indication that he might not rule favorably on the substantive issues raised in the motions for summary judgment. Plaintiffs viewed this failure to agree with their perception of the law as evidence of "bias" and began an investigation of Judge Burroughs to determine if there were grounds for recusal.

Plaintiffs' investigation led to the decision to assert the mediation issues set forth above as grounds for recusal. Since the question of conflicts created by mediation practices of emergency judges is relatively new, the Court does not find that the assertion of the grounds for recusal were pretextual, and therefore the imposition of sanctions is not warranted.

Based upon the foregoing, it is hereby Ordered:

1. Plaintiffs' motions for recusal in the above captioned cases are denied.

2. Defendants' motions for sanctions in the above captioned cases are denied.

This 23rd day of February, 2000.

A handwritten signature in cursive script that reads "Ben F. Tennille". The signature is written in black ink and is positioned above a horizontal line.

Ben F. Tennille
Special Superior Court Judge
For Complex Business Cases