IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1849

District Court of Appeal No.: 4D07-437

HEALTH CARE AND RETIREMENT CORPORATION OF AMERICA, INC.; MANORCARE HEALTH SERVICES, INC., d/b/a, HEARTLAND HEALTH CARE,

Petitioners,
v.

PEGGY BRADLEY as Personal Representative of the Estate of BUFORD ALLEN FENNEL, JR.,

Respondent.

RESPONSE TO BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

In August 2005, Respondent Bradley brought six causes of action, including claims arising under Chapter 400, Florida Statutes, wrongful death and general negligence counts for incidents which occurred from January 25, 2002 to September 13, 2005 at the Manor Care Boca Raton facility. *Health Care and Retirement Corp. of America, Inc. v. Bradley*, 961 So.2d 1071, 1072-1074 (Fla. 4th DCA 2007) (*Bradley II*); *Health Care and Retirement Corp. of America Inc. v. Bradley*, 944 So.2d 508, 509-513 (Fla. 4th DCA 2006) (*Bradley I*). Bradley alleged the facility failed to monitor the decedent's Askin integrity,@ allowing for the development of Apressure ulcers,@ and failed to take adequate measures to prevent falls. *Bradley II*. Bradley, as personal representative of the decedent's estate, was represented by the law firm of Gordon & Doner, P.A. *Bradley I, id.*

From February 2001 to December 2004, Scott Fischer, Esq., worked as an associate with the law firm of Cole, Scott & Kissane, P.A. in defense nursing home litigation. *Id.* He defended Manor Care in cases involving similar allegations, and against the same facility, but he never defended the same facility against the type of negligence allegations in this case. *Id.* In December 2004, he left Cole, Scott and the next week began working for Gordon & Doner. *Id.* Because Fischer was involved in litigating Bradley's suit against his former client, Manor Care filed a motion to disqualify him and Gordon & Doner. *Id.*

The district court reversed the order denying disqualification because the trial court had not applied the irrefutable presumption that confidences were disclosed between client and attorney. Regulating Fla. Bar 4-1.9. *Id.* The district court approved the order on remand which found the representation was not substantially related. *Bradley II.* Relying upon the Comment to Rule 4-1.9, the court found the rule is not to be broadly applied to require disqualification. (A[A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client@). *Id.* The court compared the leading case of *Sears, Roebuck & Company v. Stansbury,* 374 So.2d 1051 (Fla. 5th DCA 1979),[1] finding the result in that case would be the same under the 2006 amended Comment to Rule 4-1.9 because the second suit required the attorney to A>attack [ ] work that the lawyer performed for the former client[s]=@ the defectiveness of the same lawnmower that the lawyer defended from the same attack in the first lawsuit. *Bradley II.* The opinion reasoned this case, in contrast, represented a Awholly distinct problem of [the] type@ of problem the lawyer previously handled for Manor Care, relying again upon Rule 4-1.9 cmt. (2006). *Id.* The court concluded the past and present representations were not substantially related because

[1] Approved by this court in *State Farm Mutual Automobile Insurance v. K.A.W.*, 575 So.2d 630, 633 (Fla.1991).

negligence cases are factually specific and this case did not involve Athe lawyer attacking work that the lawyer performed for the former client.@ Rule 4-1.9 cmt. (2006). *Id.*

SUMMARY OF ARGUMENT

The face of the opinion in *Tuazon v. Royal Caribbean Cruises, Ltd.*, 641 So.2d 417 (Fla. 3d DCA 1994) does not address the legal principles which the court applied to form a sufficient basis for direct and express conflict review. The dicta in *Tuazon* at 418 n. 1. explaining the requirements of Rule 4-1.9 is a mere observation, rather than application of a principle of law.

In *Royal Caribbean Cruises, Ltd. v. Buenaagua,* 685 So.2d 8 (Fla.3d DCA 1996), involving the same lawyer and client as *Tuazon,* the court explained and superseded *Tuazon,* thereby eradicating any potential conflict or confusion in the law between two district courts of appeal. *Buenaagua* recognized general similarities in cases do not require disqualification, and held, contrary to *Tuazon,* the lawyer=s access to confidential information involving similar seamen=s injuries did not provide him with an advantage over his former client. The lack of factual specificity in *Tuazon* also distinguishes it from the negligence allegations in the complaint in *Bradley II* which lead the court to conclude this case represented a Awholly distinct problem of [the] type@ of problem from the lawyer=s previous representation of his client.

ARGUMENT

A. Dicta in a Footnote Does Not Provide Conflict Jurisdiction

Although a district court need not explicitly identify conflicting district court or supreme court decisions in its opinion in order to create Aexpress@conflict under Art. V, ' (3)(b)(3), Fla. Const., the opinion, at a minimum, must address the legal principles which the court applied to form a sufficient basis for conflict review. *Ford Motor Co. v. Kikis,* 401 So.2d 1341, 1342 (Fla. 1981). This Court, in turn, must review the face of the decisions, rather than conflict in the opinions, to determine the presence or absence of conflict necessary for review. *Niemann v. Niemann,* 312 So.2d 733 (Fla. 1975)

This Court has recognized remarks contained in a footnote, rather than in the face of the opinion, which were dicta, were not pronouncements of law but merely observations, and did not satisfy the basis for conflict jurisdiction. *Withlacoochee River Elec. Co-op., Inc. v. Tampa Elec. Co.*, 158 So.2d 136, 137 (Fla.1963); *see also White Const. Co., Inc. v. Dupont,* 455 So.2d 1026, 1030 (Fla.1984) (Ehrlich, J., dissenting) (footnote statement by district court that point on appeal was raised but without merit not basis for going into record to determine conflict jurisdiction.) The inclusion of the term Aexpress@ in Article V, ' 3(b)(3) was to require a written opinion from the district court on a point of law as predicate for supreme court review. *White Const. Co., id.*

In *Tuazon,* the court in a brief opinion, without factual findings, approved an

order disqualifying counsel from representing the plaintiff in a Jones Act case against the cruise line because the lawyer had access to confidential information on substantially similar matters brought by other seamen while previously acting as an adjuster for the cruise line, relying upon *State Farm v. K.A.W.*, *id.*; *Lackow v. Walter E. Heller & Co. Southeast,* 466 So.2d 1120 (Fla. 3d DCA 1985); *Stansbury, id.;* and *American Motors Corp. v. Huffstutler,* 61 Ohio St.3d 343, 575 N.E.2d 116 (1991). *State Farm* and *Lackow* involve professionals representing both sides within the same law suit, are factually distinguishable, and, thus, not the basis for conflict. *Stansbury*, as shown in *Bradley II,* is also factually distinguishable, and, as recognized by Manor Care, not a basis for conflict jurisdiction. Furthermore, the last authority cited in the opinion is foreign and, obviously, does not satisfy conflict jurisdiction.

In *Tuazon*, the court=s reference to Rule 4-1.9, and the finding that the prior negligence cases were of the type involved in the case, are discussed only in footnote 1., not in the face of the opinion. This dicta does not represent application of a recognized rule of law to satisfy the basis for direct and express conflict jurisdiction. *Withlacoochee River Elec., id.*

B. *Tuazon* Has Been Distinguished and Superseded

Supreme Court jurisdiction based upon conflict may be asserted when a district court of appeal has applied a recognized rule of law to reach a conflicting conclusion in a case involving substantially the same controlling facts as were involved in the

allegedly conflicting prior decision of another appellate court. *Nielsen v. City of Sarasota,* 117 So.2d 731, 734 (Fla.1960). If, however, a decision which provided the basis for conflict review was repudiated before the Supreme Court=s jurisdiction was invoked, the Court has limited power to exercise discretionary review when the conflict was resolved. Art. V, ' 3(b)(3), Fla. Const.; *see e.g. Robertson v. Robertson*, 593 So.2d 491 (Fla.1991) (Supreme Court would render decision in case even though reversed en banc when jurisdiction had been accepted when there was conflict, and important issue involved).

Because the Third District Court of Appeal distinguished and expanded upon *Tuazon* in *Buenaagua,* the alleged conflict and confusion in the law between two district courts of appeal does not exist. In *Buenaagua,* at 10, the court rejected the argument made in *Tuazon* that the past and present representations by the same lawyer were substantially related requiring disqualification merely because the cases all involved seaman=s injuries and all Jones Act cases are similar. Although *Buenaagua* recognized circumstances had changed because four years had passed since the lawyer=s previous work, these distinguishing facts bore no relationship to the court=s denying disqualification.

Both *Buenaagua* and *Bradley II* recognize a basic principle of our jurisprudential system, that many types of cases, including negligence, are similar, and all cases of any Asingular type@ share elements in common, but these general

similarities do not require disqualification. *Buenaagua*, at 11. *Buenaagua* held, contrary to *Tuazon,* the lawyer=s access to confidential information involving similar seamen=s injuries did not provide him with an advantage over his former client. When *Buenaagua* and *Tuazon* are, thus, read together, the position of the Third District is harmonious with the Fourth District in *Bradley II* on the issue of whether a lawyer=s past and present representation of a client were substantially related to require his disqualification.

Furthermore, the circumstances of *Tuazon* and *Bradley II* are distinguishable, thereby leading to opposite results. *Tuazon,* contains general allegations that all Jones cases are similar, which led the court to find some of the lawyer=s past work was of the type involved in the case, and put the cruise line at an unfair disadvantage. *Bradley II,* in contrast, contains specific factual findings about the negligence allegations in the complaint which lead the court to conclude this case represented a Awholly distinct problem of [the] type@ of problem the lawyer previously handled for Manor Care. Rule 4-1.9 cmt. (2006). *Id.*

The absence of factual specificity in *Tuazon* also defeats Manor Care=s argument that the distinction in *Bradley II* between negligence and products liability cases such as *Stansbury* is arbitrary, conflicting and, thus, requires Supreme Court review. *Stansbury* is replete with factual findings describing the substantial relationships between the past and prior representations; both suits involved trade

secret information relating to design, engineering and testing of a Craftsman rotary power lawnmower.

In conclusion, the Third and Fourth Districts do not disagree as to whether a lawyer who acquires knowledge by defense of an organizational client can subsequently prosecute negligence actions against the same client, as argued by Manor Care. Both districts correctly interpret Rule 4-1.9 to not require disqualification of the lawyer merely because of general similarities in the types of suits, but recognize a conflict of interest arises when the lawyer attacks the work he performed for the organizational client, or when his knowledge of confidential information places the organizational client at disadvantage. Furthermore, Manor Care inaccurately and misleadingly characterizes this case as appropriate for review because it exemplifies potential harm an organizational client can suffer when its former lawyer prosecutes the same type of negligence claims against the facility he defended when his client=s injuries occurred. The record clearly shows Fischer never defended the Boca Raton facility for the type of negligence claims at issue; this case did not involve his attacking the work he performed for Manor Care but was a Awholly distinct problem of [the] type@ of problem he handled for his previous client. *Bradley II, id.*

Furthermore, this case does not involve an abuse of trust against a former client which impairs the public=s trust in the fairness of the administration of justice, as argued by Manor Care. To the contrary, this case exemplifies the court=s proper

interpretation of Rules Regulating the Florida Bar to balance the competing rights of protecting the integrity of the legal system against a party=s important right to choose one=s own counsel. *Bradley I.*

CONCLUSION

WHEREFORE, based upon the arguments and authorities cited herein, respondent requests that this Court decline to exercise its conflict jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing response to petitioners= brief on jurisdiction has been furnished by U.S. Mail to: Barry A. Postman, Esq., Lee M. Cohen, Esq., COLE, SCOTT & KISSANE, P.A., 1645 Palm Beach Lakes Blvd., 2nd Floor, West Palm Beach, FL 33401; and Sylvia H. Walbolt, Atty., Christopher J. Kaiser, Esq., Carlton Fields, P.A., P.O. Box 2861, St. Petersburg, FL 33731, counsel for petitioners, on this 19th day of November, 2007.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing initial brief is submitted in Times New Roman 14 point font, Fla. R. App. P. 9.210(a)(2).

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Counsel for Respondent