IN THE SUPREME COURT OF FLORIDA

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 FENNELL, JR.,

Respondent.
_____/

Case No. SC07-1849

L.T. Case No. 4D07-437

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Manor Care moved to disqualify its former lawyer, seeking to prevent its confidential strategies and policies from being used to Plaintiff's advantage in her lawsuit against Manor Care. In Health Care & Retirement Corp. v. Bradley, 944 So. 2d 508 (Fla. 4th DCA 2006) (Bradley I), the district court quashed the trial court's denial of Manor Care's motion to disqualify. On remand, the trial court again denied Manor Care's motion, leading to the district court's decision in Health Care & Retirement Corp. v. Bradley, 961 So. 2d 1071 (Fla. 4th DCA 2007) (Bradley II), which expressly and directly conflicts with a decision of another district court on the same question of law. The facts are as follows.

From February 2001 to December 2004, Scott Fischer defended Manor Care in nursing home cases as an associate with the law firm of Cole, Scott & Kissane. Bradley II, 961 So. 2d at 1072. Fischer billed in excess of 2,100 hours to Manor Care in at least 60 nursing home cases. Id. At the end of December 2004, Fischer began to work for the plaintiffs' firm of Gordon & Doner. Id.

On September 13, 2003, while Fischer was still defending Manor Care in nursing home cases, a resident's death at a Manor Care nursing home gave rise to Plaintiff's lawsuit, alleging violations of Chapter 400, Florida Statutes, and negligence involving pressure ulcers and falls. Id. Fischer now represents Plaintiff in prosecuting those claims against Manor Care. Id.

Manor Care's motion to disqualify Fischer was denied. The Fourth District reversed because the trial court "erred in failing 'to apply the irrefutable presumption' of Florida Rule of Professional Conduct 4-1.9 that confidences were disclosed between a client and its former attorney." Id. (quoting Bradley I, 944 So. 2d at 513). The Court remanded for a determination of whether "the former representation was 'in the same or substantially related matter.' " Id. (quoting Bradley I, 944 So. 2d at 513).

On remand, the trial court was required to presume that Fischer, as Manor Care's lawyer, "was fully apprised of Manor Care's internal strategies in handling the types of claims in this suit" and "was supplied confidential information about the operations of Manor Care facilities as well as specific internal claim evaluations and defense strategies for cases such as this." Bradley I, 944 So. 2d at 510. Nevertheless, "without taking any additional evidence," the trial court again denied the motion. Bradley II, 961 So. 2d at 1072.

On certiorari review, the Fourth District held "this case was not 'substantially related' to the earlier representation under the rule." Bradley II, 961 So. 2d at 1071. In so holding, the court made a broad distinction between (1) negligence cases involving products, which are "substantially related," requiring disqualification, and (2) negligence cases involving services, such as this case, which are not "substantially related."

The court cited Sears, Roebuck & Co. v. Stansbury, 374 So. 2d 1051 (Fla. 5th DCA 1979), a products liability case in which Sears' former lawyer, who had defended Sears in a lawnmower case, was disqualified from representing the plaintiff in a suit alleging defects in that product. Declining to follow Stansbury, however, the Fourth District stated: "Unlike two products liability cases involving the identical product, each negligence case turns on its own facts." Bradley II, 961 So. 2d at 1074. The court acknowledged Fischer had handled a "type of problem" for Manor Care, namely, claims of negligence in nursing home services, but held Plaintiff's nursing home claim is not "substantially related" to Fischer's prior defense of Chapter 400 nursing home claims against Manor Care. Id. at 1073-74.

SUMMARY OF ARGUMENT

This Court has jurisdiction because the Fourth District's decision expressly and directly conflicts with Third District's decision in Tuazon v. Royal Caribbean Cruise Lines, Ltd., 641 So. 2d 417 (Fla. 3d DCA 1994). Art. 5, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). Tuazon holds that cases are substantially related, warranting disqualification under Rule 4-1.9, where they involve an organization client, a uniform statutory cause of action, the existence of confidential policies and strategies for handling claims of that type, and a former attorney with presumed knowledge of such confidences. Bradley II reaches the

opposite result. This creates confusion in the law and frustrates the purpose and proper effect of Rule 4-1.9.

ARGUMENT

Applying Rule 4-1.9 of the Rules of Professional Conduct, the Third District in Tuazon v. Royal Caribbean Cruise Lines, Ltd., 641 So. 2d 417 (Fla. 3d DCA 1994), held an attorney was properly disqualified from representing a plaintiff in a negligence case. The attorney had previously defended the cruise line on negligence claims by crew members under the Jones Act, and was privy to the cruise line's "confidential policies and procedures" for defending such claims. The Third District held that the attorney's prior negligence cases were substantially related to the negligence case he now was prosecuting against his former client because the prior claims "were of the type involved in this case." Id. at 418 n.1 (emphasis added). For this reason, the Third District held that disqualification was justified under Rule 4-1.9, citing as authority Sears, Roebuck & Co. v. Stansbury, 374 So. 2d 1051 (Fla. 5th DCA 1979).

The Fourth District's decision cannot be reconciled with Tuazon. In each case, the former attorney defended a type of non-products claims brought under a uniform statutory scheme. In each case, the former attorney was privy to confidential strategies and policies for defending such claims. The Fourth District concluded that Fischer's representation of Plaintiff prosecuting such a claim does

not require disqualification under Rule 4-1.9. Although the court acknowledged that "Fischer handled a 'type of problem' for Manor Care," it viewed this case as a "wholly distinct problem of that type." Bradley II, 961 So. 2d at 1074.

By contrast, the Third District holds that a lawyer's representation of a plaintiff prosecuting such a statutory negligence claim does require disqualification under Rule 4-1.9 because the lawyer had "handled claims on behalf of the Defendant, some of which were of the type involved in this case." Tuazon, 641 So. 2d at 418 n.1 (emphasis added). Under the decision below, however, the Tuazon attorney would not be disqualified because non-products negligent services cases -- even those involving a statutory cause of action -- are not "substantially related." The Fourth District's decision cannot exist side-by-side with Tuazon.

Adding to the confusion now created in the case law is that Fourth District declined to follow Stansbury in non-products, negligent services case. By contrast, the Third District specifically relied on Stansbury in such a case. Consequently, similarly situated parties in different appellate districts now are subject to different standards governing the disqualification of their former counsel under the same rule.

By making an arbitrary distinction between (1) products cases on one hand and (2) negligent services cases on the other, Fourth District is at odds with the analysis supplied by the Third District: "The issue is, to paraphrase the rule, does

the information (not generally known) put the Defendant at an unfair disadvantage?" Tuazon, 641 So. 2d at 418 n.1. The Third District's approach is consistent with the rule's Comment, which explains that disqualification is warranted where there is "a substantial risk that the lawyer has confidential information to use in the subsequent matter."

The Fourth District ignores this portion of the Comment, focusing instead on its statement that disqualification is required where the "current matter would involve the lawyer attacking the work that the lawyer performed for the former client." Bradley II, 961 So. 2d at 1073. However, a lawyer employing a client's confidential strategies to defend negligence claims, and then using that confidential knowledge to prosecute the same type of negligence claims against the former client, necessarily is attacking the work he previously performed. This is especially true when the former lawyer previously was defending the same nursing home during the precise time his current client's injuries occurred. Indeed, that is exactly what happened in this case. Fischer was defending the Boca Raton facility during the same time his new client resided and allegedly was injured there. Bradley I, 944 So. 2d at 509-10.

This conflict in how the rules governing the conduct of lawyers are to be applied is important and warrants this Court's acceptance of jurisdiction. Rules that protect client confidences are essential to the public's confidence in the

integrity of the legal system. "Our legal system cannot function fairly or effectively if an attorney has an informational advantage in the form of confidences gained during a former representation of his client's current opponent." State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 632 (Fla. 1991).

The Third and Fourth Districts now differ sharply as to whether such an advantage occurs where a statutory claim against an organizational client is at issue. In the Fourth District, there is nothing to prevent a lawyer from defending a nursing home for years against Chapter 400 claims that ulcers or falls are negligently caused by understaffing, lack of training, and inadequate policies, and then the next day prosecuting those same exact claims against the same exact nursing home as to the same employees and policies during the same time frame. That is not the law in the Third District and should not be the law in Florida.

Lawyers are already commonly held in poor esteem by the public. Permitting a lawyer to use the trust placed in him against his former client after switching sides on the issue impairs the public's trust in the fairness of the administration of justice.

CONCLUSION

This Court should exercise its jurisdiction and resolve the conflict created by the Fourth District's decision.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was served via U.S. Mail to Daniel G. Williams, GO RDON & DONER, P.A., 4114 Northlake Blvd., 2nd Floor, Palm Beach Gardens, FL 33410, and Lynn G. Waxman, LYNN G. WAXMAN, P.A., 324 Datura St., Suite 201, West Palm Beach, FL 33401, Attorneys for Respondent, this 16th day of October, 2007.

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CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY that the type size and style used throughout the foregoing is Times New Roman, 14-Point Font.

Christopher J. Kaiser