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 FENNELL, JR.,

Respondent.

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

LYNN G. WAXMAN, ATTORNEY
LYNN G. WAXMAN, P.A.
324 Datura Street, Suite 201
West Palm Beach, FL 33401-5415
Florida Bar No. 0795010

DANIEL G. WILLIAMS,ESQ.
GORDON & DONER, P.A.
4114 Northlake Blvd., Second Floor
Palm Beach Gardens, FL 33410
Florida Bar No 0167630

Counsel for Respondent

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PRELIMINARY STATEMENT

Petitioners Health Care and Retirement Corporation of American, Inc., and Manorcare Health Services, Inc., d/b/a, Heartland Health Care will be referred to as "Manor Care." Respondent, Peggy Bradley, as Personal Representative of the Estate of Buford Allen Fennell, Jr., will be referred to as "Bradley."

References will be to the appendices served with the second petition for writ of certiorari. "A" 1-24, 30, and with the response to motion for review of order denying stay, "A" 29.

STATEMENT OF THE CASE AND FACTS

Scott Fischer, Esq., has been an associate of Fennell's law firm, Gordon & Doner, P.A. since January 1, 2005; he previously worked for Manor Care's law firm, Cole, Scott & Kissane (Cole), for three and one-half years. (A 1; A 3; A 12 p. 144-145) Cole is one of four law firms in Florida retained by Manor Care to handle patient care litigation. (A 8 p. 20) At Cole, Mr. Fischer was one of three attorneys assigned to thirty files involving patient care litigation at numerous nursing homes, one of which was Manor Care. (A11 p.146, A12 p. 145-147) The majority of these cases involved ulcers or falls. (A12 p. 177-178)

After initial training, Mr. Fischer became individually responsible for routine pre-trial preparation of Manor Care cases, such as covering depositions and writing reports. (A 11 p. 16-19) He also attended mediations on behalf of Manor Care. (A 11 p. 58) He never participated in trial on any Manor Care case, nor was he ever considered lead counsel in their cases. (A 11 p. 18-19, A 30 p. 41)

His training and representation in nursing home defense was the same for all companies, including Manor Care. (A 12 p.147-148, 164) He evaluated nursing home claims just as he did automobile accident cases. (A 12 p. 151) Manor Care never revealed information about facility or corporate problems to him that could be used to their disadvantage. (A 12 p. 170; A 30 p. 33-37, 51-55, 93-94) Mr. Fischer communicated with Manor Care assistant general counsel, Jeffrey Royer,

only to provide Mr. Royer with specific factual information about his evaluation of a case. (A 30 p. 33) The main information learned by Mr. Fischer from Mr. Royer was whether he accepted Mr. Fischer's evaluation and he authorized settlement. (A 30 p.33-36)

While at Cole, Mr. Fischer visited the Boca Raton Manor Care facility at issue only once, for the DeBurro case involving physical assault. (A 11 p.70-79; A 12 p. 152, 186-189) He spoke to the administrator and some staff members about the case, and was directed to take witnesses' statements under oath. (A 11 p. 70-79; A 12 p.170, 186-188) He acquired no knowledge of Fennell's case while at the facility or when working for Cole. (A1; 12 p. 153) He eventually branched out to other areas of insurance defense at Cole. (A12 p. 148)

In August 2005, eight months after Mr. Fischer joined Gordon & Doner, Bradley on behalf of Fennell brought six causes of action against Manor Care, 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 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 "skin integrity," allowing for the development of

"pressure ulcers," and failed to take adequate measures to prevent falls. *Bradley II.*

A Florida Bar ethics opinion sought by Gordon & Doner concluded, despite the conflict of interests of the two clients, neither Mr. Fischer nor Gordon & Doner were disqualified from representing the plaintiff in this case because while Mr. Fischer was at Cole he acquired no actual knowledge or information about Manor Care material to this suit. (A 6)

Manor Care moved to disqualify both Gordon & Doner and Mr. Fischer, arguing Mr. Fischer's acquisition of pertinent confidential information while at Cole required his and his law firm's disqualification pursuant to Rules Regulating the Florida Bar 4-1.6, 4-1.9, 4-1.10. (A 2) At trial, the judge recognized that the irrefutable presumption was established, but continually reminded Manor Care it needed to establish the second prong of the test, whether the past and present representations were substantially related. (A 12 p. 15, 18, 25, 95)

Manor Care's argument was centered upon the deposition testimony of its assistant general counsel, who felt he revealed material confidential information when he advised Mr. Fischer on Manor Care's defense strategies and information about the company necessary to defend a case; his "feelings and personal philosophies." (A 8 p. 28, 37, 49-50,79, 94-95, 103-105) Mr. Royer testified he had spoken to Mr. Fischer on numerous occasions and met him once or twice. (A 8 p. 15, 26) Mr. Fischer, as any lawyer representing Manor Care, was allowed

access to each facility's operations and procedures policies. (A 8 p. 40-41) These same policies are, however, available through discovery and on the company internet. (A 8 p. 41, 43) Mr. Fischer was also acquainted with their settlement agreement policies, which were adopted in each case. (A 8 p. 51)

Manor Care argued for Mr. Fischer's disqualification because of his alleged knowledge of confidential arbitration agreement policies. (A 8 p. 51-53) Mr. Royer admitted, however, these agreements were recently quashed by an appellate court. (A 8 p. 98-100) Mr. Royer believed the conversations that defense lawyers had with personnel within each facility were confidential because they were unique, although the legal issues raised were not. (A 8 p. 63, 102, 112)

Manor Care attempted to show Mr. Fischer worked on substantially related matters by questioning him about complaints against the same and other Manor Care facilities involving decubitus ulcers and violations of Chapter 400, Florida Statutes. He testified he signed a report on the Romano case, at a different facility, which was a routine defense firm requirement every ninety days. (A 11p. 77; 12 p. 174; 30 p.98) His involvement in one other same-facility case (Fisher) was minimal. (A 11 p.75-78; 30 p. 83)

The judge repeated throughout the hearing that knowledge of routine defense strategies, acquiring information available through discovery, or filing boilerplate complaints would not satisfy the burden of showing the confidential

information gained was material to the present case. (A 12 p. 56, 59-63, 70-71, 79-81, 88, 96) The judge even explained the type of information required for disqualification:

> if you could show me witnesses in this case that he interviewed or which he learned through the personnel files or something negative for which he was able to keep it out because it was never requested in another file . . . . (A 12 p. 71)
>
> . . . .
>
> They evaluate a claim based upon the facts of the evidence of the case, I would imagine, and that's why I was asking you if they say they have a decubitus ulcer, we don't ever want to take them to trial, that's an inner guideline that basically says you can do all the discovery in the world, but we're not going to take that case to trial, because we've been hammered too many times on it. That's the kind of information, if that's the case and there's similar allegations in this case, yes, he's disqualified, but I haven't heard that. (A 12 p. 72)

The court ruled Mr. Fischer was given advice on "individual pending cases, not on general handling or settling of cases." (A 13, 29) The court adopted the testimony of Mr. Fischer that he "acquired routine information about handling claims in general, and about Manor Care which could be learned in discovery, such as policies and procedures, and staffing information; while no evidence showed he learned unique individual defense strategies of Manor Care." The court found no confidences were revealed to Mr. Fischer which were material to this case. (A 3, 29) The court concluded, "Manor Care has, thus, failed to carry its burden of showing that the newly associated attorney acquired confidential information

during his prior representation of the client in the same or substantially related matter." (A 13, 29)

In *Bradley I* the Fourth District Court of Appeal held the lower court erred as a matter of law in failing to apply Rule Regulating the Florida Bar 4-1.9 and the irrefutable presumption contained therein that confidences were revealed by the former client, Manor Care, to its former attorney whose disqualification is sought. (A 17) On remand, the Fourth District directed the lower court "may hold any additional hearings it deems necessary and allow any additional discovery that would enable it to make any additional findings of fact, and conclusions of law, that will decide" the second prong of Rule 4-1.9 (a) whether the former representation was "in the same or a substantially related matter." *Id.*

At the hearing on remand, Manor Care moved into evidence four complaints and notices of intent which it alleged Mr. Fischer worked on while at Cole, one of which (Fisher) was at the same facility. (A 19 p. 6-28) The evidence had not been provided to Bradley prior to the hearing, and Mr. Fischer was not present to defend himself against the accusations. (A 19 p. 30) Bradley, however, waived all timeliness objections to expedite the matter. (A 19 p. 32-40) The court admitted into evidence a notice of intent, answers to interrogatories, and the complaints in

both Romano cases. (A 19 p. 41)[1] Manor Care argued this evidence was necessary for consideration on remand because of the irrefutable presumption that arose from Mr. Fischer's exchange of information with its general counsel. (A 19 p. 19) The court stated she considered such information from the complaints and related arguments that were introduced into evidence at the first trial. (A 19 p. 19)

At the conclusion of the argument, the judge reiterated that she considered Rule 4-1.9 and 4-1.10 in her prior ruling and stated:

> THE COURT: My basis for my ruling was in part exactly what I said in the transcript when I made my ruling that I do not believe, based upon the evidence that was presented at the last hearing and the evidence that's been presented at this hearing with regard to these complaints and the interrogatories that the second prong of the test has been made to show that the former representation was in the same or substantially related matter as I understand that to be defined not only by what's stated in the annotations and comments to the rule but as I understand the evidence that was presented to me during the last hearing and today.
>
> I agree that there are many a time that people pick up the form book, it's in the rule book, it's right over there, they pick it up and they do a replevin complaint. They're identical in all of them.
>
> It is not uncommon in the nursing home arena to have decubitus ulcers and slip and falls be the mainstay of that type of litigation. As it is in medical malpractice, while each type of injury may be different, the allegations against the hospital are clearly identical each

[1] The Bulger and Fischer complaints, (A 20, 22) referred to in Manor Care's statement of case and facts, (Initial Brief p. 11) appendix, and the basis of Manor Care's chart (A 24, Supp. A3) were marked for identification only. (A 19 p. 40-41)

> and every time they file against the hospital, as I have experienced in 20 years of practicing law.
>
> So there are similarities, and I don't think just because the complaints are similar that that necessarily is the type of substantially related matter that they were trying to identify.
>
> So I stand by my earlier decision, I clarify it for the Fourth, but the second prong has not been met in my opinion. (A 1; A 19 p. 51-53,)

The court ruled an irrefutable presumption arose that confidence were revealed to Mr. Fischer by his client, but that Manor Care had failed to carry its burden of showing that the current case concerns the same transaction or legal dispute involved in Mr. Fischer's prior representation, and was, thus, substantially related. (A 1)

The Fourth District Court of Appeal, relying upon the Comment to Rule 4-1.9, approved the order on remand. *Bradley II.* The court found the rule is not to be broadly applied to require disqualification: "[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),[2] finding the result in that case would be the same under

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

the 2006 amended Comment to Rule 4-1.9 because the second suit required the attorney to " '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 "wholly 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 negligence cases are factually specific and this case did not involve "the lawyer attacking work that the lawyer performed for the former client." Rule 4-1.9 cmt. (2006). *Id.*

This Court has now accepted jurisdiction to review *Bradley II*, based upon express and direct conflict with *Tuazon v. Royal Caribbean Cruises, Ltd.*, 641 So.2d 417 (Fla. 3d DCA 1994). Art. V, § (3)(b)(3), Fla. Const., Fla. R. App. P. 9.030(a)(2)(A) (iv).

SUMMARY OF ARGUMENT

Health Care and Retirement Corp. of America, Inc. v. Bradley, 961 So.2d 1071, 1072-1074 (Fla. 4th DCA 2007) should be approved by this Court because it applies the correct analysis from Rule Regulating the Florida Bar 4-1.9 cmt. (2006) in determining whether the past and present professional relationships involved substantially related matters to require disqualification of counsel due to an alleged

conflict of interest: whether negligence cases involving patients who suffered from pressure ulcers or falls were the same type of problem the lawyer handled for his former client or were a "wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client."

Tuazon v. Royal Caribbean Cruises, Ltd., 641 So.2d 417 (Fla. 3d DCA 1994) should be disapproved by this Court because it applied an incomplete analysis of the Rule Commentary by examining only whether the attorney handled some claims in the prior representation which were of the type involved in the case, but failed to determine whether the case involved "a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client," as required.

By adopting the construction of Rule 4-1.9 in *Bradley II*, and rejecting that in *Tuazon*, this Court will correctly balance the competing interests of maintaining an attorney's professional conduct, preserving client confidences, and permitting parties to hire counsel of their choice.

ARGUMENT

I. THE FOURTH DISTRICT CORRECTLY CONSTRUED RULE REG. FLA. BAR 4-1.9 BY EXAMINING THE TYPE OF PROBLEM INVOLVED IN THE NEGLIGENCE CASES TO DETERMINE WHETHER THEY WERE SUBSTANTIALLY RELATED, DISTINGUISHING SUCH CASES FROM PRODUCTS LIABILITY CASES INVOLVING THE SAME PRODUCT

The certified conflict issue involves interpretation of the Rules Regulating the Florida Bar and is, thus, a question of law subject to de novo review. *Jones v. State*, 966 So.2d 319, 326 (Fla. 2007); *Saia Motor Freight Line, Inc. v. Reid*, 930 So.2d 598, 599 (Fla. 2006). The rules promulgated by this Court are construed in accordance with the principles of statutory construction. *Id.*

"Cases which seek the disqualification of a party's chosen counsel present complicating issues that oftentimes result in conflict between important rights: (1) the right to choose one's own counsel, and (2) the protection of the judicial system's appearance of fairness." *Bradley I,* at 510. Such motions are viewed with skepticism because disqualification impinges on a party's right to employ a lawyer of choice and are often brought for tactical purposes. *Id.*, at 511; *Alexander v. Tandem Staffing Solutions, Inc.*, 881 So.2d 607 (Fla. 4th DCA 2004). " '[T]he ability to deny one's opponent the services of capable counsel is a potent weapon,'" which often causes considerable expense and delay in securing and educating counsel about the merits of the suit. *Alexander, id.* (quoting *Manning v. Waring, Cox, James, Sklar & Allen,* 849 F.2d 222, 224 (6th Cir.1988)). Because disqualification strikes at the heart of one of the most important associational rights, it should be employed only in extremely limited circumstances. *Bradley I, id.* In determining a motion to disqualify, the court must balance the competing interests of requiring an attorney's professional conduct and preserving client

confidences against permitting a party to hire counsel of their choice. *Alexander*, *id.*

The alleged conflict of interest at issue is controlled by Bar Rule 4-1.9 which provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) 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; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

The application of this rule to the facts of this case creates an "irrefutable presumption that confidences were disclosed" between the client and the attorney. *Bradley I; Gaton v. Health Coal., Inc.*, 745 So.2d 510, 511 (Fla. 3d DCA 1999). To prevail on disqualification, Manor Care, as the moving party, is, thus, required to show " 'the matter in which the law firm subsequently represented the interest adverse to the former client is the same matter or substantially similar to the matter in which it represented the former client.' " *Bradley I,* at 511-512 (quoting *Junger Util. & Paving Co. v. Myers*, 578 So.2d 1117, 1119 (Fla. 1st DCA 1989)).

Manor Care first argues *Bradley II* should be quashed because it established

the unprecedented principle that cases involving negligence services, such as nursing homes, in comparison to products liability cases, are factually specific and, hence, "wholly distinct" from each other and not "substantially related." (Initial brief p. 20) According to Manor Care, the Fourth District decision established a precedent which will allow all lawyers who once defended nursing homes to subsequently prosecute cases involving the same exact claims, facilities, employees, and time frames, in derogation of Rule 4-1.9. (Initial brief p. 20-21)

Manor Care's argument, first, ignores the specific distinction in *Bradley II* between negligence cases and "products liability cases involving the identical product." *Id.* The decision compared the facts of *Stansbury*, involving a lawyer with knowledge of a trade secret, to show how under such circumstances it was "obvious" he would be attacking the defectiveness of the exact product he previously defended. *Bradley II*, *id.* The decision then reasoned, in this case, in contrast, the lawyer would not be attacking the representation of his former client because occurrences of pressure ulcers and falls in nursing homes are factually distinct. *Id.* There is, thus, absolutely no credence to Manor Care's argument that all products liability cases have been distinguished from all negligent services cases for purposes of disqualification of counsel under Rule 4-1.9.

A. Disqualification Was Not Required When There Was No Evidence Confidential Information Obtained by

the Attorney in His Prior Representation Was Substantially Related to this Case

Manor Care argues this Court should quash *Bradley II* and approve the standard for disqualification applied in *Tuazon* and *Trautman v. General Motors Corp.*, 426 So.2d 1183 (Fla. 5th DCA 1983) which supports its position that Mr. Fischer's prior representation was "substantially related" to the case he now is prosecuting because he worked on claims which "were of the type involved in this case." (Initial brief p. 21-23) *Tuazon,* undoubtedly, conflicts with *Bradley II* because it misapplies Rule 4-1.9. *Trautman* follows *Stansbury* and is, however, consistent with the holding of *Bradley II.*

The Comment to Rule 4-1.9 at issue in *Bradley II* and *Tuazon* states:

> The scope of a "matter" for purposes of rule 4-1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, 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. [3]

In *Tuazon,* at 418 n.1, the court, construing Rule 4-1.9 and its commentary, approved an order disqualifying counsel from representing the plaintiff in a Jones

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3The portion of the rule commentary discussed in *Tuazon* was unchanged in the 2006 amendment discussed in *Bradley II.*

Act[4] case against the defendant cruise line because the lawyer adjusted, evaluated, investigated and handled claims on behalf of the defendant, "some of which claims were of the type involved in the case." The court, therefore, concluded the plaintiff's attorney's knowledge of the defendant's confidential procedures and policies placed the defendant at an unfair disadvantage. *Id.* The opinion is incomplete, however, because it ignores the remainder of the sentence cited therein from the commentary; whether the representation of the new client involved "a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client." R. Reg. Fla. Bar. 4-1.9 cmt.

As subsequently explained by the Third District in *Royal Caribbean Cruises, Ltd. v. Buenaagua*, 685 So.2d 8, 10 -11 (Fla. 3d DCA 1996),[5] the standard for disqualification requires more than mere allegations that the cases involved in the past and present representations involve the same injuries and causes of actions. The party moving for disqualification cannot also rely upon practices and procedures which can be obtained by counsel through discovery. *Id.* For disqualification under this rule, the substantial similarities between the suits must be established with specificity, and it must be determined "'whether the

4 Personal Injury to or Death of a Seaman, 46 U.S.C.A. § 30104.
5 Involving the same lawyer as in *Tuazon*, same defendant, and basis for disqualification four years after the lawyer left the adjusting firm.

lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.'" *Buenaagua,*, at 11 (quoting Rule 4-1.9 cmt. 1992*)*. The court recognized a basic principle of our jurisprudential system, that many types of cases, such as eviction, negligence and immigration, are similar, and all cases of any singular type share elements in common, but these general similarities do not require disqualification. *Id*

Bradley II, in contrast to *Tuazon,* applies the proper analysis from the pertinent provision of the rule commentary: determination of whether negligence cases involving patients who suffered from pressure ulcers or falls were the same type of problem the lawyer handled for this former client or were a "wholly distinct problem of that type." Rules Reg. Fla. Bar 4-1.9 cmt. *Bradley II*, as *Buenaagua*, examines the facts of each case and requires more than mere allegations of similarity to require disqualification. *Tuazon* clearly fails to correctly construe the rule, and, for this reason lacks this factual specificity demanded for disqualification in both *Buenaagua* and *Bradley II*. Furthermore, despite Manor Care's continual reliance on *Tuazon* in the proceedings below, it was not even recognized by the Fourth District as binding precedent or as a case worth distinguishing for its factual content. For these reasons, *Tuazon* is incorrect and should be disapproved of by this Court.

Trautman also does not support Manor Care's argument. (Initial brief p. 24) In *Trautman,* as in *Stansbury,* the attorney's disqualification in a plaintiff's negligent design case was based upon an uncontroverted affidavit that he learned trade secrets about his client's products while general counsel for the automotive truck division. He handled design defects suits and worked closely with engineering consultants and experts. *Id.* The affidavit showed his division produced and managed technical and engineering materials, internal memoranda, correspondence and other confidential documents. *Id.* The decision followed *Stansbury* mainly because the affidavits of disqualification in both cases were unrefuted and did not, thus, satisfy the elevated standard of a departure from the essential requirements of law.

In this case, in contrast, Manor Care argues the past and present representations are substantially similar because Mr. Fischer interviewed employees at the same Manor Care facility on a patient assault case, and discussed staffing problems with the administrator. (Initial brief p. 25) According to Manor Care, Mr. Fischer defended their employees at depositions in prior cases involving decubitus ulcers and falls, and in cases asserting claims of understaffing and lack of training.

These allegations were refuted by Mr. Fischer's testimony that his only involvement at the facility in question was in the DeBurro case when he spoke to

the administrator and some staff members about the incident and later took their statements under oath. (A 11 p. 70-79; A 12 p. 152, 170, 186-188) He acquired no knowledge of Fennell's case while at the facility or when working for Cole. (A1; 12 p. 153) The other same-facility case (Fisher), and pressure ulcer cases (Bulger and Romano), referred to in Manor Care's chart, were assigned to him after another attorney left the firm, but he never worked them up. (A 11 p.75-78; 30 p. 83) This case does not, thus, involve uncontroverted evidence that a lawyer was attacking the trade secrets learned while working for the defense, as in *Trautman.*

Manor Care next argues the past and present representations were substantially related because Mr. Fischer learned confidential defense strategies and worked with their defense experts. (Initial brief p. 25) This is also refuted by the record. Manor Care's assistant general counsel testified he advised Mr. Fischer on Manor Care's defense strategies and information about the company necessary to defend a case; his "feelings and personal philosophies." (A 8 p. 28, 37, 49-50,79, 94-95, 103-105) Mr. Fischer was allowed access to each facility's operations and procedures polices, but these were available through discovery and on the company internet. (A 8 p. 41, 43)

This evidence was insufficient to require disqualification. R. Reg. Fla. Bar 4-1.9 cmt. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later

representing another client. *Supra*. Generally known information is that which would be obtained by any reasonably prudent lawyer who had never represented the former client. *Supra.*

Furthermore, there was absolutely no proof that Mr. Fischer worked with expert witnesses for Manor Care, or acquired an expertise on decubitus ulcers from them, as argued by Manor Care. This argument is clearly refuted by the judge's question to Manor Care at trial to show proof of witnesses Mr. Fischer interviewed or something unique to show how the representations were substantially related. (A 12 p. 71) Manor Care was also unable to satisfy the judge's request for evidence of whether Mr. Fischer was ever informed of specific decubitus ulcer guidelines, which would have bolstered their argument for disqualification. (A 12 p. 72)

Manor Care next relies upon *Brown ex rel. Preshong-Brown v. Graham*, 931 So.2d 961, 963 (Fla. 4th DCA 2006) in support of their argument that an attorney's privileged and confidential contract with lawyers, risk managers, and insurance adjusters during the same time period as the incident at issue demonstrates the past and present representations are substantially related to create a conflict of interest. (Initial brief p. 26) *Brown* is, however, clearly factually distinguishable from the case at issue. *Brown* involves a former defense lawyer who was both personal counsel and counsel of record for the hospital/defendant in

litigation for two years at the same time the alleged malpractice incident occurred and the suit was pending. She, additionally, had previous professional relationships with a co-defendant and a law firm representing an additional defendant in the case. The reasons for disqualification were obvious, and the factual circumstances not relevant to the case at issue.

B. *Bradley II* Does Not Conflict with *Stansbury*

Manor Care's argument is premised upon the assumption that *Stansbury* was not followed by the Fourth District in *Bradley II,* a non-products case, but was correctly applied by the Third District in *Tuazon,* another non-products case. (Initial brief p. 27-28) According to Manor Care, *Stansbury* is not limited to products cases and supports Rule 4-1.9 commentary that disqualification is required where there is "a substantial risk that the lawyer has confidential information to use in the subsequent matter." Manor Care also argues the Fourth District approach in *Bradley II* ignores the fact that a lawyer gains confidential defense strategies and mental impressions in his representation of a client which places him at an unfair advantage when prosecuting a case against his former client. (Initial brief p. 29)

Manor Care's argument refutes the standard for disqualification in Rule 4-1.9 and quotes it out of context. The Comment states, "A former client is not required to reveal the confidential information learned by the lawyer in order to

establish a substantial risk that the lawyer has confidential information to use in the subsequent matter." Manor Care's argument that knowledge, itself, of a former client's confidential defense strategies, and the resultant work product, satisfy the requirement of attacking the lawyer's work on behalf of the former client, misinterprets the requirements of Rule 4-1.9. The risk of dissemination of confidential information in itself does not require disqualification. As recognized by *Bradley II,* the burden is more substantial and requires proof the present representation involves "the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." R. Reg. Fla. Bar 4-1-9(a).

As explained previously, Manor Care's argument that *Bradley II* conflicts with *Stansbury* and "will have a chilling effect on litigants' trust in their ability to share their confidential defense strategies with their attorney," (Initial brief p. 29), is not supported by the decision's plain words. *Bradley II* relies upon *Stansbury* to show how a lawyer's uncontroverted knowledge of trade secrets in a products liability case involving the identical product would require disqualification, while knowledge of handling negligence cases involving ulcers and falls presents factually diverse and "wholly distinct" problems. Furthermore, *Buenaagua*, supports the distinction in *Bradley II*, between negligence cases and products

liability design cases involving the same exact product, *Stansbury* and *Trautman*, which are relied upon by Manor Care.

II. THE NURSING HOME CLAIMS ASSERTED AGAINST MANOR CARE IN THIS CASE ARE NOT SUBSTANTIALLY RELATED TO MR. FISCHER'S PRIOR REPRESENTATION OF MANOR CARE IN NURSING HOME CASES

As argued previously, the fact that Mr. Fischer had conversations with the Boca Raton facility staff and administrator, and took their statements in a patient assault case, does not satisfy the burden of showing that representation was substantially related to the present six count complaint for negligence and claims under Chapter 400, for failure to monitor the decedent's "skin integrity," development of "pressure ulcers," and failure to take adequate measures to prevent falls. *Buenaagua, id.*

Furthermore, as explained by Mr. Fischer, he was one of three attorneys at Cole who handled approximately thirty nursing home cases, including Manor Care, many of which involved falls and ulcers. (A11 p.146, A12 p. 145-147, 177-178) He was individually responsible for routine pre-trial preparation of Manor Care cases, such as covering depositions, writing reports, and attending mediations. (A 11 p. 16-19, 58) He never participated in trial on any Manor Care case, nor was he ever considered lead counsel in their cases. (A 11 p. 18-19, A 30 p. 41)

His felt his training and representation in nursing home defense was the same for all companies, including Manor Care. (A 12 p.147-148, 164) He evaluated nursing home claims just as he did automobile accident cases. (A 12 p. 151) Manor Care never revealed information about facility or corporate problems to him that could be used to their disadvantage in his subsequent representation of clients against them. (A 12 p. 170; A 30 p. 33-37, 51-55, 93-94) He communicated with Manor Care assistant general counsel only to provide specific factual information about his evaluation of a case. (A 30 p. 33)

Under the standard for disqualification established by *Stansbury, Trautman, Buenaagua,* and *Bradley II,* this was insufficient to establish the past and present representations were substantially related under Rule 4-1.9.

CONCLUSION

WHEREFORE, based upon the arguments and authorities cited herein, Respondent requests that this Honorable Court approve *Bradley II* and its denial of the petition for writ of certiorari to quash the lower tribunal's order denying the disqualification of Respondent's counsel, Scott Fischer, Esq., and the law firm Gordon & Doner, P.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing answer brief 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., Henry G. Gyden, Esq., CARLTON FIELDS, P.A., 4221 W. Boy Scout Blvd., Suite 1000, Tampa, FL 33607, counsel for petitioners, this _____ day of June, 2008.

DANIEL G. WILLIAMS, ESQ.
GORDON & DONER, P.A.
4114 Northlake Blvd., Second Floor
Palm Beach Gardens, FL 33410
Telephone (561) 799-5070
Florida Bar No 0167630

LYNN G. WAXMAN, ATTORNEY
LYNN G. WAXMAN, P.A.
324 Datura Street, Suite 201
West Palm Beach, FL 33401-5415
Telephone: (561) 659-2036
Florida Bar No. 0795010

/s/ Lynn G. Waxman
Counsel for Respondent

CERTIFICATE OF COMPLIANCE

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

_____
Counsel for Respondent