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' INITIAL BRIEF ON THE MERITS

On Discretionary Review from a Decision of the District Court of Appeal, Fourth District

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PRELIMINARY STATEMENT

Petitioners, Health Care and Retirement Corporation of America, Inc., and Manorcare Health Services, Inc., d/b/a, Heartland Health Care, are collectively referred to as "Manor Care." Respondent, Peggy Bradley, as Personal Representative of the Estate of Buford Allen Fennell, Jr., is referred to as "Plaintiff" or "Plaintiff Fennell."

The record consists of the petitions for writ of certiorari, responses, and appendices filed by the parties. References to the Appendix served with Manor Care's Second Petition for Writ of Certiorari are indicated as "Ax at y-z," with "x" representing the index number and "y-z" representing the page number(s).

For the convenience of the Court, Manor Care has also prepared a short supplemental appendix. References to the Supplemental Appendix are indicated as "Supp. Ax at y-z," with "x" representing the index number and "y-z" representing the page number(s).

All emphasis in quotations has been added, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Manor Care moved to disqualify its former lawyer, Scott Fischer, seeking to prevent its confidential strategies and defense practices 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, remanding for the trial court to apply the irrefutable presumption that confidences were divulged to Mr. Fischer during his prior representation of Manor Care.

On remand, the trial court stood by its earlier order and again denied disqualification. In Health Care & Retirement Corp. v. Bradley, 961 So. 2d 1071 (Fla. 4th DCA 2007) (Bradley II), the Fourth District affirmed, refusing disqualification on the ground that this nursing home case against Manor Care was not "substantially related" to any of the nursing home cases that Fischer had defended for Manor Care. That decision expressly and directly conflicts with the Third District's decision in Tuazon v. Royal Caribbean Cruise Lines, Ltd., 641 So. 2d 417 (Fla. 3d DCA 1994).

A. Facts And Proceedings Leading To *Bradley I*

Scott Fischer represented Manor Care in nursing home cases from February 2001 to December 2004, participating in his then-firm's defense of Manor Care in over 60 Florida lawsuits, including cases in which he was lead or sole counsel.

A12 at 38, 144-47; A3 at 1; A5; A11 at 7, 16. Fischer admitted there was not "any difference" in how the Manor Care facilities he defended operated. A12 at 166.

Of his Manor Care defense cases, 90% to 95% involved decubitus ulcers or falls, the precise claims in this case. A12 at 177. Several cases involved the defense of the Manor Care Boca Raton facility, the facility at issue in this case. A12 at 169; A8 at 62. The claims in this case arose during the same period of time that Fischer was defending that facility on claims with respect to decubitus ulcers and falls. A7 at ¶¶ 3-4; A9 at 50-51; A20 at 37; A21 at 1; A22 at ¶ 4; A23 at 1; A24.

Fischer left the law firm of Cole, Scott & Kissane, P.A., Manor Care's long-standing counsel, the last week of December 2004, and joined Gordon & Doner, P.A., on January 1, 2005. A3 at 1. On January 13, 2005, Plaintiff, through Gordon & Doner, served notice of intent to file suit on Manor Care. A12 at 34-35. Plaintiff was the Personal Representative of the estate of Buford Fennell, a resident of the Manor Care Boca Raton facility in 2002 and 2003. A12 at 35-37. The claims involved decubitus ulcers, falls, deficient staffing, and violations of Chapter 400, Florida Statutes. A7 at ¶¶ 13-17, 18(a)-(c), (f), 59(c).

Gordon & Doner asked Manor Care to permit Fischer to represent Plaintiff in this suit. A6 at 1. Manor Care refused to waive the conflict. A2 at ex. C.

Fischer thereafter unilaterally submitted a Florida Bar Ethics Opinion Request Form dated April 20, 2005, citing Rule Regulating The Florida Bar 4-1.10(b) as the only relevant ethics rule. A6 at ex. A. Fischer asserted he had no confidential information learned from his prior representation of Manor Care that was material to that case. Id. Accepting Mr. Fischer's stated facts as true for the purpose of providing a response, the Florida Bar's Assistant Ethics Counsel responded by letter dated May 9, 2005, offering a framework for analysis of those facts under Rule 4.10(b), the rule Mr. Fischer relied on, without opining whether he had a conflict of interest warranting disqualification. A6 at ex. B. Manor Care had no opportunity for input into that opinion. A14 at 4.

This suit was thereafter filed, and Manor Care moved to disqualify Fischer. A2. Citing Rule Regulating The Florida Bar 4-1.9, Manor Care asserted that Fischer, in the course of defending Manor Care against claims substantially related to the claims in this lawsuit, learned confidential information he could use to Plaintiff's advantage against Manor Care. A2 at 2-5. As such, under Bar Rule 4-1.10(a), disqualification also must be imputed to Fischer's firm, Gordon & Doner. A2 at 6.

Manor Care's Associate General Counsel Jeffrey Royer testified in deposition that Fischer was privy to Manor Care's defense strategies and its philosophy, policies and procedures for trying and settling nursing home cases. A8

at 27-28, 37-39, 49-50, 91, 94-95. Royer discussed policies and strategies relative to handling claims, mediations, settlement negotiations, and trial preparation with Fischer. A8 at 49. As Royer explained, "my feelings and personal philosophies, those are all part of our strategy, and those are the things that I share with our counsel that I hope aren't shared with the other side." A8 at 94. When asked to tell what those philosophies and strategies are, Royer declined to disclose them precisely because they are confidential. A8 at 95.

Without disclosing specifics, Royer explained that Fischer personally represented Manor Care in mediations and was privy to Manor Care's approach to settlement negotiations, including what items Manor Care considers non-negotiable. A8 at 52, 58-59, 131; A11 at 58-59. Fischer was privy to the strong position Manor Care takes in litigating certain aspects of Chapter 400 claims and negligence claims, as well as Manor Care's weaker positions on other aspects of those claims that it would be less willing to litigate. A8 at 129. Fischer also was privy to who in the Manor Care corporate hierarchy would make a good or bad witness, whom Manor Care would not want to use as a witness. A10 at 12.

Beyond all this, Fischer interviewed employees at the same Boca Raton facility at issue in this case, as part of his representation of Manor Care in defending the DeBurro lawsuit, which alleged the facility's negligence in allowing a resident altercation to occur. A12 at 151-52. Fischer specifically conferred with

Kathleen Marciante, who was the administrator of that facility during the time Fischer's new client, plaintiff Fennell, received care there. A9 at 50; A12 at 35, 170. Although Marciante did not believe there were facility-wide problems, she spoke freely with him about "the good, the bad, and the ugly" of that facility, discussing facility operations not specifically limited to one case. A9 at 22, 53, 55, 61-62. She discussed with him who in the facility would be a good witness and who would not. A9 at 45-46.

In addition to Marciante, Fischer interviewed other employees involved in patient care, speaking to them in an attorney-client privileged context. A12 at 76-77, 188-91. Although Fischer denied obtaining any confidential information about that facility, he did not deny discussing understaffing claims--a specific claim in this lawsuit--with Manor Care employees. A7 ¶ 59(c); A11 at 70-75; A12 at 162, 169, 188-89.

Fischer also denied obtaining any confidential information during his representation of Manor Care in other lawsuits over the years. A11 75-79. Fischer denied that he discussed Manor Care's defense strategies with Royer or others, and he denied having any confidential information about Manor Care. A12 at 162, 182.

Manor Care argued that examining the issues and allegations in cases Fischer defended for Manor Care was necessary to determine whether he was

representing Plaintiff against Manor Care in a "substantially related" matter. A12 at 70-71. The trial court acknowledged that the complaints in Fischer's prior matters for Manor Care contained similar, if not identical, allegations--describing them as "canned"--but nonetheless pressed Manor Care to tell what "special knowledge" Fischer had in order to show why it was "unique." A12 at 72-73, 82. "[T]he question I have is, how is his -- is the information that he obtained from the general counsel or he gave to the general counsel *something unique* that would then spill over into the Bradley case? That's what I'm truly trying to get at, *because I think that's what the substantially similar means* [sic], not that it's the same general allegations." A12 at 70.

Accordingly, the judge wanted to know "the special circumstances and confidences that have been given by this company." A12 at 62. Manor Care argued it was wrongly being required to reveal confidences in order to establish their confidentiality. A12 at 96.

The trial court denied Manor Care's motion to disqualify, ruling that Manor Care "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." A13 at 2. The court found "[t]he evidence showed Mr. Fischer 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." Id.

B. *Bradley I*

Manor Care sought certiorari review in the Fourth District, asserting that, by requiring Manor Care to prove that Fischer actually "acquired confidential information" and "learned of some unique internal defense strategies of Manor Care," the trial court improperly required Manor Care to reveal the very confidential information it sought to protect and avoid being used against it in this nursing home case. A14 at 15-17. Manor Care contended the trial court wrongly failed to apply Rule 4-1.9, under which there is an irrefutable presumption that confidences were disclosed in the former representation, which precludes successive adverse representation in a "substantially related" matter. A14 at 15.

The Fourth District issued the writ, holding Rule 4-1.9 applied and that the trial court departed from the essential requirements of the law by requiring Manor Care to prove that Fischer received confidential information. "This was error, as the law required the trial court to apply the irrefutable presumption" that confidences were disclosed. Supp. A2; Bradley I, 944 So. 2d at 512 (recognizing that "[t]his 'irrefutable presumption' is critical in such cases because it 'protects the client by not requiring disclosure of confidences previously given to the attorney' to prove that such confidences were disclosed").

Because the trial court made its findings on disqualification without applying the irrefutable presumption to which Manor Care was entitled, the Fourth District remanded to the trial court, requiring it now to presume that confidences were disclosed when it determined whether the former representations were "in the same or a substantially related matter." Id. at 513. Recognizing that the trial court's findings and conclusions as they stood did not justify denying Manor Care's motion, the Fourth directed the lower court "to make any *additional* findings of fact, and conclusions of law, that will decide the motion to disqualify." Id.

C. Remand And Persistence Of Error

At a case status hearing on remand, Plaintiff argued that Manor Care's motion should be summarily denied because the trial court already had ruled that the prior cases were not "substantially related" matters. A18 at 3-4. Plaintiff quoted the court's earlier statement that it did "not find that the case which the law firm has subsequently represented another plaintiff against the former client was, 'the same or substantially' related to the matters in which Mr. Fischer represented the former client," just as Plaintiff had quoted to the Fourth District in the certiorari proceeding. A18 at 3-4; A15 at 6.

The trial judge was "surprised" that the Fourth District had remanded for a determination of the "substantially related" issue. A18 at 5. "I have already ruled on that." A18 at 8. The trial court believed no further hearing was required, but

acceded to Manor Care's request for a hearing because the Fourth District had "given you [Manor Care] that option on my dime and my calendar." Id.

At the hearing, the trial court reiterated that it had previously ruled the cases were not substantially related. A19 at 9. The court complained, "I don't know why the Fourth DCA didn't see it." Id. "I don't know how much clearer I could have been to the Fourth DCA." A19 at 10. The trial court was "confused" as to "why they sent this back down for a second hearing," and it repeated its original ruling that this lawsuit was not substantially related to the lawsuits in which Fischer previously represented Manor Care. A19 at 11-12.

Manor Care explained that the Fourth District's concern was that the trial court's prior findings were based on the wrong law, as the trial court had focused on whether Fischer actually gained "knowledge that was unique." A19 at 17-18. As the Fourth District held, there was an irrefutable presumption the confidences were disclosed, and hence it was necessary to examine the claims in prior nursing home lawsuits Fischer defended for Manor Care to determine whether they were "substantially related" to this suit. A19 at 19-21.

As Manor Care further explained, the DeBurro lawsuit involved this same Boca Raton facility, as to which Fischer conducted privileged interviews with facility personnel about the facility's operations during the same time frame the claims here arose. A12 at 151-52. In addition, Manor Care relied on evidence of

the claims in Fischer's prior defense of the Fisher lawsuit, also involving the same facility, as well as other cases involving other Manor Care facilities, which Fischer admitted were all operated in the same way. A20; A24; Supp. A3.

Briefly summarized, the claims Fischer defended as counsel for Manor Care were as follows:

Claims in This Lawsuit	**Same Claims in Other Lawsuits Against This Facility**	**Same Claims in Other Lawsuits Against Other Manor Care Facilities**
Failure to adequately care for skin integrity.	Fisher Lawsuit	J. Romano Lawsuit, Bulger Lawsuit
Failure to provide minimum staffing levels	Fisher Lawsuit	H. Romano Lawsuit
Failure to prevent and care for pressure ulcers.	Fisher Lawsuit	J. Romano Lawsuit
Failure to maintain medical records.	Fisher Lawsuit	J. Romano Lawsuit, Bulger Lawsuit, H. Romano Lawsuit
Failure to provide care consistent with care plan.	Fisher Lawsuit	J. Romano Lawsuit, Bulger Lawsuit, H. Romano Lawsuit
Violation of § 400.022 right to be informed of medical condition.	Fisher Lawsuit	J. Romano Lawsuit, Bulger Lawsuit, H. Romano Lawsuit
Violation of § 400.022 right to be treated with full measure of dignity.	Fisher Lawsuit	J. Romano Lawsuit, Bulger Lawsuit, H. Romano Lawsuit

Violation of § 400.022 duty of facility to appropriately train staff.	Fisher Lawsuit	J. Romano Lawsuit, H. Romano Lawsuit[1]

Manor Care argued that all of the prior complaints were relevant to demonstrate that the issues involved in Fischer's prior representation of Manor Care were "virtually the same" as those raised in the suit he is now prosecuting against Manor Care. E.g., A19 at 36. Although the trial court admitted the two Romano complaints, it refused to admit the Fisher and Bulger complaints into evidence, sustaining Plaintiff's conclusory "relevance" objection; at the same time, the court stated it had considered evidence of all these suits in making its original ruling. A19 at 19, 41-42. "I did consider it. That's what I'm saying. Go ahead and make your record with the next four complaints but the bottom line is all the evidence you presented to me at that hearing I considered in making my ruling." A19 at 19.

The court immediately denied Manor Care's motion to disqualify. In its subsequent order, it ruled that Fischer's prior representation of Manor Care did not involve substantially related claims. A1 at 2; A19 at 53. *Exactly* as it had done in its original order, the court stated that "Mr. Fischer acquired routine information about handling claims in general, and about Manor Care which could be learned in

1 See Chart of Substantially Related Matters at A24 and Supp. A3 for a summary of the claims asserted in the suits identified in this table, with full citations to the record.

discovery such as policies and procedures, and staffing information, while no evidence showed he learned unique individual defense strategies of Manor Care." A1 at 2; Compare A13 at 2.

On this basis, the court ruled that "Manor Care has failed to carry its burden of showing that the current case concerns the same transaction or legal dispute involved in Mr. Fischer's representation of Manor Care." A1 at 2. As the court explained, "*I stand by my earlier decision*, I clarify it for the Fourth, but the second prong has not been met in my opinion." A19 at 53.

D. *Bradley II*

Manor Care again sought certiorari review in the Fourth District, asserting that the trial court ignored the Fourth District's directions on remand, and instead merely concluded that it was correct in its prior ruling denying disqualification. On remand, the trial court expressly stood by its prior ruling, A19 at 51-53, even though that ruling was based on a legal standard specifically held by the Fourth District to be incorrect.

On certiorari review, the Fourth District noted the trial court's "oral ruling correctly applied the 'irrefutable presumption' and focused on the issue identified in our earlier opinion; *however, the order supplied by counsel and signed by the court appears to contradict the presumption*." Supp. A1; Bradley II, 961 So. 2d at 1072 (emphasis added). The Fourth District nonetheless denied the writ, stating

"this case was not 'substantially related' to the earlier representation under the rule." Id. 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 it held are not "substantially related." Id. at 1073-74.

The Fourth District specifically declined to follow 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. Stansbury was followed in Tuazon v. Royal Caribbean Cruise Lines, Ltd., 641 So. 2d 417 (Fla. 3d DCA 1994), a non-products suit against a cruise liner, and was cited by this Court with approval in K.A.W., another non-products case.

In declining to apply the analysis in Stansbury requiring disqualification, 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, but held Plaintiff's negligence and Chapter 400 nursing home claims against Manor Care are not "substantially related" to Fischer's prior defense of such claims against Manor Care. Id. at 1073-74.

Manor Care timely sought review to this Court citing an express and direct conflict between the Fourth District's holding in Bradley II and the Third District's decision in Tuazon, which applied Stansbury in a non-products case. Art. 5, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). On May 1, 2008, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

In Tuazon v. Royal Caribbean Cruise Lines, Ltd., 641 So. 2d 417 (Fla. 3d DCA 1994), the Third District correctly determined that cases are substantially related, requiring disqualification of an attorney under Rule 4-1.9, where the cases involve a former organizational 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.

In Health Care & Retirement Corp. v. Bradley, 961 So. 2d 1071 (Fla. 4th DCA 2007), the Fourth District reached the opposite conclusion, creating an artificial and arbitrary distinction between (1) negligence cases involving products, which it agreed would be "substantially related," and (2) negligence cases involving services, such as this case, which it concluded, as a matter of law, turned on their "own facts" and hence were not "substantially related." The Fourth District's creation of a bright-line rule that *negligence claims involving services* are "wholly distinct" from each other, and thus not substantially related, not only

conflicts with Tuazon, it is contrary to the requirements and prophylactic purpose of Rule 4-1.9, which codified the test for disqualification established by this Court in State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 633 (Fla. 1991).

The Third District properly applied Rule 4-1.9, recognizing that when an attorney has handled and investigated statutory negligence claims for a client, there is a substantial risk the attorney has confidential information that might be used against that same client in a subsequent representation of another person on those same statutory claims. Consequently, an attorney cannot be allowed to switch sides and sue his former client on the same type of statutory claim. This is especially true when the lawyer previously was defending the *same nursing home during the precise time his current client's injuries occurred*. This is exactly what the Fourth District permitted in this case. Under Tuazon, this lawyer would have been disqualified.

This Court should approve Tuazon and quash the decision below. Permitting a lawyer to turn against his former client in the same type of case creates a real, as well as perceived, risk that the former client's confidences will be unfairly used in the subsequent representation against the former client. This not only chills the confidentiality of attorney-client communications, it impairs the public's trust in the fairness of the administration of justice.

STANDARD OF REVIEW

The issue in this case is whether the Fourth District properly interpreted Rule 4-1.9 of the Rules Regulating The Florida Bar in a manner contrary to the decision of the Third District in Tuazon. As that issue involves the interpretation of this Court's rules, the standard of review is de novo. See Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598, 599 (Fla. 2006) ("The certified conflict issue involves the interpretation of the Court's rules and is a question of law subject to de novo review.").

ARGUMENT

"The obligation of an attorney to preserve the confidences and secrets of a client lies at the very foundation of the attorney-client relationship . . . ." Sears, Roebuck & Co. v. Stansbury, 374 So. 2d 1051, 1053 (Fla. 5th DCA 1979) (cited with approval by State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 633 (Fla. 1991)). Maintaining these confidences promotes "a free flow of information and the development of trust essential to an attorney-client relationship." K.A.W., 575 So. 2d at 632. For this reason, this Court prohibits an attorney from using a confidence or secret of a client to the client's disadvantage in a subsequent representation. See R. Reg. Fla. Bar. 4-1.6 and 4-1.9.

As this Court has declared, "[o]ur 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." K.A.W., 575 So. 2d at 632. To allow such an advantage would "undermin[e] the loyalty and trust upon which an attorney-client relationship is based." Brent v. Smathers, 529 So. 2d 1267, 1270 (Fla. 3d DCA 1988) (cited with approval by K.A.W., 575 So. 2d at 633). Disqualification in such circumstances is required to "avoid the appearance of impropriety." Id.

The rule of confidentiality "applies not merely to matters communicated in confidence by the client but also to *all* information relating to the representation, whatever its source." See R. Reg. Fla. Bar. 4-1.6 (cmt.) (emphasis added). The duty of confidentiality continues after the client-lawyer relationship is terminated. Id.

This Court has set forth a two-part test for determining if disqualification is required when an attorney seeks to represent a person in a subsequent matter that is adverse to the former client's interest. Disqualification is required when: (1) an attorney-client relationship existed, and (2) the matter in which the attorney subsequently represented the interest adverse to the former client was the same or "substantially related" to the matter in which he represented the former client. See K.A.W., 575 So. 2d at 633. This test is codified in Rule 4-1.9 of the Rules Regulating the Florida Bar.

It is undisputed that an attorney-client relationship existed for many years between Fischer and Manor Care. Fischer represented Manor Care for four years defending negligence and Chapter 400 claims in at least 60 different cases, including a case involving the exact same nursing home that is the subject of this plaintiff's suit against Manor Care and asserting claims arising during the same time Fischer was representing Manor Care. The Fourth District correctly recognized that Manor Care satisfied the first prong of the Rule 4-1.9(a) test. See Bradley I, 944 So. 2d at 511.

The Fourth District also properly determined that Manor Care was entitled to an irrefutable presumption that confidences were divulged to Fischer during his representation of Manor Care. See Bradley I, 944 So. 2d at 511-12; see also Junger Util. & Paving Co. v. Myers, 578 So.2d 1117, 1119 (Fla. 1st DCA 1989) ("the former client need show only that an attorney-client relationship existed, thereby giving rise to the irrefutable presumption that confidences were disclosed during the course of that relationship"). This "irrefutable presumption" is essential in disqualification cases because it "protects the client by not requiring disclosure of confidences previously given to the attorney" to prove that such confidences were disclosed. See K.A.W., 575 So. 2d at 634.

Once it is established that an attorney-client relationship existed and the irrefutable presumption is applied, "the only matter left for the trial court to

consider [is] whether the instant case is substantially [related] to the [prior representation]." Stansbury, 374 So. 2d at 1054. This is where the Fourth District departed from established precedent. The Fourth District adopted an unprecedented principle that *cases involving negligent services*—as opposed to *negligent products*—turn on their "own facts" and hence are "wholly distinct" from each other and not "substantially related." See Bradley II, 961 So. 2d at 1073-74. Thus, in the Fourth District, disqualification is not required in such cases, despite the "irrefutable presumption" that Fischer had confidential information from his former client Manor Care.

This artificial and arbitrary distinction conflicts with decisions of other district courts and fails to give effect to the standard for disqualification set forth by this Court in K.A.W., 575 So. 2d 630, which preserves the confidentiality of attorney-client communications.

I. The Fourth District Erroneously Held that Non-Product Negligence Cases Are Not "Substantially Related" As a Matter of Law.

The Fourth District has created a bright-line rule that every negligence services case "turns on its own facts," and thus, is not "substantially related" to another negligence services case raising the same claims. In the Fourth District, there accordingly 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 practices during the same time frame. This is not the law in Florida, nor should it be.

A. As in Tuazon, Disqualification is Required Where the Presumed Confidential Information Obtained by the Attorney Places the Former Client at an Actual And Perceived Unfair Disadvantage in "Substantially Related" Nursing Home Cases.

To determine whether a case is "substantially related" to prior cases, it is essential under Rule 4-1.9 to compare the actual issues in such cases. The focus is not on whether the case "turns on its own facts." Every case always "turns on its own facts." If that were enough to preclude disqualification, no lawyer ever would be disqualified in any case, no matter how similar the claims themselves were.

Instead, the test is whether, given the irrefutable presumption that confidences were divulged, the confidential information obtained by the defendant's former lawyer in prior cases puts the defendant at an unfair disadvantage on the claims now prosecuted against it by its former lawyer. See Tuazon, 641 So. 2d at 418 n.1. If there is a substantial risk that the presumed confidential information could be used against the defendant in the subsequent case due to the nature of the claims asserted against it, the cases are deemed "substantially related." See R. Regulating Fla. Bar 4-1.9 (cmt.); see also K.A.W., 575 So. 2d 630, 634 (Fla. 1991).

The correct legal standard was applied in Tuazon v. Royal Caribbean Cruises, Ltd., 641 So. 2d 417 & n.1 (Fla. 3d DCA 1994). In Tuazon, an attorney was disqualified from representing a plaintiff in a negligence case under the Jones Act. The attorney previously had investigated and handled such claims against the cruise line as an adjuster and was privy to the cruise line's "confidential policies and procedures" for defending such claims. Id. at 418 n.1. The Third District held that the attorney's prior involvement with such cases was "substantially related" to the case he now was prosecuting against his former client, because the prior claims "were of the type involved in this case." Id. (emphasis added).

Unlike the Fourth District here, the Third District did not consider the fact that the claims arose from non-product negligent acts or statutory violations--as opposed to a product--as precluding disqualification. Instead, the court properly recognized that statutory claims share common elements. When an attorney has obtained confidential information that would be advantageous in prosecuting the same type of claim against the defendant, the matters are "substantially related" under Rule 4-1.9. See id.

In contrast, the Fourth District determined that, even though these nursing home cases involved the same "*type of problem*," no two negligent services claims are "substantially related" since they "turn[] on [their] own facts." This misses the point. Under that narrow reasoning, product liability cases likewise would not be

"substantially related" since factual issues such as comparative negligence and misuse of the product can dominate the claim; nonetheless, if the presumed confidential information gained by the attorney during the prior representation places the defendant at an unfair disadvantage, or the possibility or appearance of an unfair disadvantage, disqualification is required. See K.A.W., 575 So. 2d at 634; Tuazon, 641 So. 2d at 418 n.1. Such an unfair disadvantage can occur regardless of whether the underlying claims are for the negligent design of a product or the negligent performance of an act or service.

The Third District correctly recognized this reality. Under Tuazon, Fischer would have been disqualified because he 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, Fischer was not disqualified, based on the Fourth District's view that non-products negligent cases—even those involving the same statutory claims and the same "*type of problem*"—are not "substantially related." See Bradley II, 961 So. 2d at 1073-74 (emphasis added). The Fourth District's decision cannot exist side-by-side with Tuazon. Since the analysis in Tuazon carries out the prophylactic purpose and proper effect of Rule 4-1.9, it should be approved by this Court to eliminate confusion on this key aspect of professional responsibility of Florida lawyers.

The flaw and danger in the Fourth District's novel distinction is highlighted by Trautman v. General Motors Corp., 426 So. 2d 1183, 1184-85 (Fla. 5th DCA 1983). In Trautman, a General Motor's former lawyer in products liability cases "was privy to discussions on techniques and tactics" used by General Motors in products cases, worked closely with the "experts available in defense" of General Motors in those cases, and was privy to the "defense strategies and techniques" and "procedures and practices" of the products section of General Motors' general counsel's office. In a subsequent products liability action, that attorney was precluded from representing the plaintiff against General Motors because of the "substantial relationship" with the issues and subject matter of the prior representation. Id. at 1185.

In Trautman, the court focused not simply on whether there was a similar product, but rather on whether the conflicted attorney's presumed knowledge of confidential defense strategies and practices in the type of claim at issue was related to the present litigation. The Trautman court recognized that the defendant was placed at an unfair disadvantage in having to defend against claims brought by its former attorney, who had previously defended the same type claims on the defendant's behalf and was intimately familiar with the defendant's defense strategies and tactics as well as the defense experts and witnesses likely to be used. Id. at 1184-85.

So too here, Fisher is intimately familiar with the witnesses employed at the facility. He was their lawyer when he defended them at deposition in prior cases involving decubitus ulcers and falls and asserting claims of understaffing and lack of training. Now he will be deposing those witnesses, including Kathleen Marciante, the administrator of the facility, whom he consulted closely with in defending the facility in a prior case involving policies and practices during the same time period as this case. Having defended these employees in prior cases gives Fischer special knowledge and an unfair advantage in now taking their depositions.

Moreover, as in Trautman, not only was Fischer privy to Manor Care's confidential defense strategies, many of the experts retained by Manor Care with whom Fischer worked are the same experts available for Manor Care's defense of this case. A19 at 34-35. Fischer's continued representation of Plaintiff places Manor Care in the untenable position of having either to not use any expert witness with whom Fischer worked in a Manor Care case, or to face the substantial risk that Fischer will use his knowledge about those experts to Manor Care's disadvantage in this case.

These actual and perceived disadvantages are precisely the reason disqualification is required when an attorney attempts to represent a person in litigation against his former client in matters raising the same claims that the

attorney defended against in his prior representation, regardless of whether the matters address products liability claims. A different panel of the Fourth District recognized this point in Brown ex rel. Preshong-Brown v. Graham, 931 So. 2d 961, 964 (Fla. 4th DCA 2006).

In Graham, the plaintiff sought to recuse the judge (the same judge presiding in this case) because she previously had represented the defendant hospital in medical malpractice cases. Plaintiff alleged that the judge represented the defendant hospital for two years *at the same time this incident occurred* and during that time the judge allegedly "'had privileged and confidential contact'" with the lawyers, risk managers and insurance adjusters for [the hospital]." Id. at 963. While the panel stated that prior representation, in and of itself, does not automatically mandate recusal, "[h]ere, however, as Petitioners argued, the judge would have had a conflict of interest preventing her, if she had remained in practice, from representing [the plaintiffs] given her prior representation . . . and, therefore, should not be deemed impartial." Id. at 964. For this reason, recusal was required.

In Graham, the Fourth District properly recognized that an attorney's privileged and confidential contact with the lawyers, risk managers and insurance adjusters for a hospital in past medical malpractice cases during the same period of time as the incident at issue is substantially related to subsequent representation

against the same defendant for similar medical malpractice claims. That is exactly the case here. The presumed confidential information that Fischer obtained was related to Manor Care's defense and settlement strategies during the same time period and relating to the same facility.

Under Trautman and Graham, just as in Tuazon, this alone requires the disqualification of Fischer.

B. The Fourth District's Ruling Conflicts with the Third District's Decision in Tuazon Applying the Fifth District's Seminal Decision In Stansbury.

Adding to the confusion and uncertainty now created in the case law, the Fourth District specifically declined to follow Sears, Roebuck & Co. v. Stansbury, 374 So. 2d 1051, 1153 (Fla. 5th DCA 1979), in non-products cases. By contrast, the Third District specifically relied on Stansbury in a non-product 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.

In Stansbury, a former client alleged that its attorney obtained certain confidential information relating to design, engineering and testing techniques used in the manufacturing of its lawnmowers during his prior representation of the client in a negligent design case. Id. at 1152-53. The attorney subsequently sought to represent a plaintiff in a suit against the former client based on alleged defects in

the same type lawnmower. The Fifth District determined that common issues were present in both cases and the confidential information the attorney was presumed to have received required his disqualification. Id. at 1153-54. In K.A.W., a non-products case, this Court specifically cited Stansbury with approval. See K.A.W., 575 So. 2d at 633.

In citing Stansbury as authority in non-products cases, this Court and the Third District correctly recognized that the Stansbury analysis of Rule 4-1.9 is not limited to products cases. This approach is entirely consistent with the rule's Comment, which does not rest on the particular type of case at issue but rather explains that disqualification is required where there is "a substantial risk that the lawyer has confidential information to use in the subsequent matter." See R. Reg. Fla. Bar. 4-1.9 (cmt.).

Contrary to that approach, which protects the public trust and the confidentiality of a client's communications and disclosures to its lawyer, the Fourth District placed its focus on the Comment's 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. This limited view ignores that a lawyer employing a client's confidential strategies to defend nursing home claims, and then using that confidential knowledge and the attorney's prior work product (which he could not erase from his mind) to

prosecute the same type of claims against the former client, necessarily is attacking the work he previously performed and the defenses he previously asserted on behalf of that client.

Simply put, the Fourth District failed to recognize there were confidential defense strategies and mental impressions gained through Fischer's prior representation, which he would not have had but for that representation. Not only does this place Manor Care at an unfair disadvantage in the present lawsuit involving the same type of "canned" statutory claims, even though services, rather than a product, are at issue, it most assuredly creates the appearance that an advantage exists for the plaintiff who is now represented by Manor Care's own former attorney. See Kenn Air Corp. v. Gainesville-Alachua County Regional Airport Authority, 593 So. 2d 1219, 1223 & n.4 (Fla. 1st DCA 1992) ("Actual violation of the ethics rules is not a prerequisite to the granting of a motion for disqualification to avoid the appearance of impropriety . . . " when an attorney switches sides).

This Court should reject the bright-line rule adopted by the Fourth District, which will have a chilling effect on litigants' trust in their ability to share their confidential defense strategies with their attorney. That rule conflicts with precedent in the Third District applying precedent from the Fifth District cited by this Court in K.A.W. It also contravenes the policies in K.A.W. regarding the

importance of preserving the confidentiality of attorney-client privileged disclosures.

II. The Nursing Home Claims Asserted Against Manor Care in this Case Are Substantially Related to Fischer's Prior Representation of Manor Care in Nursing Home Cases.

Over a four-year period, Fischer defended the Boca Raton facility where his current client resided, as well as other Manor Care facilities, in lawsuits involving allegations strikingly similar to the lawsuit Fischer now prosecutes against Manor Care and including the exact same alleged violations of Chapter 400, such as understaffing and lack of training of the staff. A7 ¶¶ 17(a), (e), 18(a), (b), (f), (j); A20 ¶¶ 31(b), (d), (p), (r); 42(c), (e), 43; A21 ¶¶ 25(a), (b), (h), (m), (o), (q); A22 ¶¶ 8-10 (citing resident rights, § 400.022(j), (l), (n) (o)); A23 ¶¶ 18(a), (e), 19(l). This is far more than "merely showing the same general type of claims are at issue." R. Reg. Fla. Bar. 4-1.9 (cmt.). Rather, these are specific allegations about Manor Care facilities made in lawsuits in which Fischer defended those facilities, which--by Fischer's own admission--all operate in the same manner. A12 at 166.

Even a cursory comparison of the claims in this lawsuit to the claims in the lawsuits Fischer defended establish that the claims are "substantially related." Fischer is improperly seeking to pursue against Manor Care the same allegations--such as understaffing and lack of training at the Boca Raton facility--that he

defended on his former client's behalf, necessarily requiring him to attack his prior denials of those claims made when he was counsel for Manor Care.

Under Tuazon, as well as the proper analysis under Rule 4-1.9 as set forth in K.A.W, Stansbury, and Trautman, these cases are "substantially related."

CONCLUSION

This Court should disapprove the bright-line rule adopted by the Fourth District, which conflicts with the Third District's holding in Tuazon, and quash the decision below and direct that an order be entered disqualifying Scott Fischer and his new law firm, Gordon & Doner, P.A., from this case.

Respectfully submitted,

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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, GORDON & 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 27th day of May, 2008.

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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.

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