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' REPLY BRIEF ON THE MERITS

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

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ARGUMENT

Plaintiff's restatement of the facts fails to address certain evidence presented to the trial court and materially understates other facts. Manor Care will not address all the points of disagreement, but does want to address three issues.

First, Plaintiff states that, in August 2005, "eight months after Mr. Fischer joined Gordon & Donor, Bradley on behalf of Fennell brought six causes of action against Manor Care . . . ." A.B. 3.[1] Plaintiff ignores that her statutory notice of intent to file those suits was served within two weeks of Fischer leaving the law firm defending Manor Care in such cases. A3 at 1-2. That notice asserted negligent acts during the same time period Fischer represented Manor Care and the Boca Raton nursing home facility at issue here. Thus, within two weeks of the time he was defending Manor Care against claims due to understaffing and improper policies and procedures at that facility, Fischer was asserting those exact same claims against Manor Care.

Second, Plaintiff contends that during the initial hearing on Manor Care's motion to disqualify, 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

[1] 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). References to Plaintiff's Answer Brief are indicated as "A.B. y-z," with "y-z" representing the page number(s).

related." A.B. 4. To the contrary, the Fourth District reversed the trial court's initial order precisely because it failed to apply the irrefutable presumption and instead demanded that Manor Care disclose the specific confidential information it shared with Fischer. See Health Care & Retirement Corp. v. Bradley, 944 So. 2d 508, 512 (Fla. 4th DCA 2006) ("Bradley I").

Lastly, while Plaintiff pays lip service to the irrefutable presumption that confidential information was disclosed to Fischer, she spends much of her answer brief asserting Fischer learned nothing confidential during all the years he was "individually responsible for routine pre-trial preparation of Manor Care cases, such as covering depositions and writing reports." A.B. 2. Manor Care showed otherwise through the testimony of Manor Care's Associate General Counsel Jeffrey Royer and the administrator of the Boca Raton facility, both of whom testified that confidential defense strategies and information were shared with Fischer, including information about who would be a good witness and who would not. A8 at 52, 58-59, 129-131; A9 at 53-55; A11 at 58-59. Any competent lawyer defending an institutional client against common statutory claims learns information that the opposing party does not know.

Of more importance, given the irrefutable presumption that confidential information was disclosed to Fischer, Fischer's "saw nothing, heard nothing, and knew nothing" stance is irrelevant. See Government of India v. Cook Indus., Inc.,

422 F. Supp. 1057, 1060 (S.D.N.Y. 1976) (if two actions are substantially related, court will not require proof that attorney had access to confidential information, nor give weight to attorney's assertion that he had no access to and did not possess confidential information), cited with approval in, State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 633 (Fla. 1991). The rule presumes Fischer received confidential information in defending Manor Care against these statutory claims; given that presumption, the only issue is whether the Chapter 400 and negligence claims Fischer currently is prosecuting against Manor Care are substantially related to the Chapter 400 and negligent services claims he previously defended for Manor Care. They are.

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

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.

In her answer brief, Plaintiff now concedes the Fourth District's decision directly conflicts with the Third District's decision in Tuazon v. Royal Caribbean Cruise Lines, Ltd., 641 So. 2d 417 (Fla. 3d DCA 1994), and asks this Court to disapprove Tuazon. A.B. 10-11, 15. Plaintiff contends the Fourth District correctly applied Rule 4-1.9 in holding that a negligent services case, as opposed to a products liability case, is not substantially related to another negligent services

case because each case "turns on its own facts." A.B. 14, 17; Health Care & Retirement Corp. v. Bradley, 961 So. 2d 1071, 1073-74 (Fla. 4th DCA 2007) ("Bradley II") Plaintiff then attempts to diminish the far-reaching impact of the Fourth District's decision by asserting that "all products liability cases have not been distinguished from all negligence services cases for purposes of disqualification of counsel under Rule 4-1.9." A.B. 14.

That, however, is exactly what the Fourth District has done in holding that:

> Unlike two product liability cases involving the identical product, each negligence case turns on its own facts. Therefore, the work in this case does not involve Fisher (sic) "attacking [the] work that [Fischer] performed for the former client."

Bradley II, 961 So. 2d at 1074. The court created a bright-line rule that negligence services cases turn on their "own facts" and thus are not "substantially related" to other negligence services cases, even where they raise the same statutory and common law claims as a result of the same "type of problem." See id. at 1073-74.

Plaintiff argues that the Fourth District correctly reasoned that a "lawyer would not be attacking the representation of his former client [in a negligent services case] because occurrences of pressure ulcers and falls in nursing homes are factually distinct." A.B. 14; Bradley II, 961 So. 2d at 1074. Certainly there may be differences in the facts, just as any case, but the alleged cause of the injuries is the same: alleged understaffing, lack of training, and improper policies

and procedures at the facility. That is why the trial court characterized these cases as “canned” cases. A12 at 81-82.

As such, a lawyer who uses a client's confidential strategies and his own work product (including interviews of staff protected by the attorney-client privilege) in defending nursing homes against claims of understaffing and inadequate training of staff, and then prosecutes the same type of claims against the former client, necessarily is directly attacking the work he previously performed and the defenses he previously asserted on behalf of that client. The lawyer who previously asserted the facility was properly staffed now asserts it was not.

Over a three-year period, Fischer defended the Boca Raton facility where his current client resided, as well as other Manor Care facilities, in lawsuits asserting allegations strikingly similar to the lawsuit Fischer now prosecutes against Manor Care and asserting 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). In her answer brief, Plaintiff ignores the remarkable similarity in these claims, which are more than "merely . . . the same general type of claims . . . ." 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. As in Tuazon, the cases should have been deemed "substantially related."

Acknowledging that the Bradley II and Tuazon decisions conflict, Plaintiff argues that Tuazon was incorrectly decided because the Third District supposedly ignored the portion of the comment to Rule 4-1.9 that states:

> On the other hand, a lawyer who recurrently handled a type 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.

A.B. 16. Plaintiff argues this means that, although Fischer defended Manor Care against Chapter 400 and negligent staffing claims, he is not precluded from prosecuting such claims for another client against Manor Care as to that client's injury from the same alleged negligent conduct. Plaintiff is incorrect.

The comment appears to address situations in which an attorney has handled types of claims on behalf of a client and then represents another client against a different defendant in a matter involving a positional conflict with the former client. See generally Douglas R. Richmond, Choosing Sides: Issue or Positional Conflicts of Interest, 51 Fla. L. Rev. 383, 385 (1999) ("An issue or positional conflict of interest arises when clients have opposing interests in unrelated matters. Though the clients' interests do not directly conflict, they differ on what the law or

public policy ought to be."). If Fischer had sued a non-Manor Care nursing home and asserted understaffing and inadequate staffing claims, the above comment reflects that Fischer might not be precluded from that representation merely because he may take a position adverse to the position he supported in representing Manor Care. In that instance, however, the subsequent representation against a wholly different entity does not raise the grave concern presented here that confidential information will be used to the former client's disadvantage.

In this case, Fischer is not simply suing another nursing home and taking positions adverse to those advanced by Manor Care. He is suing his own former client regarding injuries occurring at its Boca Raton facility during the same time period that he represented that facility and conducted confidential, attorney-client privileged interviews with that facility's administrator and staff members about staffing claims and other "canned" claims. Thus, this case does not involve a mere positional conflict. Rather, Fischer is seeking to represent a client who is attacking the same exact staffing practices and policies he previously defended at the exact same facility in which potentially the exact same witnesses may be called to testify.

Of equal importance, even if the above comment applied when an attorney sued his former client directly, the Third District properly recognized that the analysis under Rule 4-1.9 is primarily focused on whether the confidential

information the attorney is presumed to have obtained puts the former client at an unfair disadvantage. See Tuazon, 641 So. 2d at 418 n.1. In that circumstance, the lawyer is not merely taking a position adverse to the client, but rather is violating his duty of loyalty and his obligation to maintain the confidences of his former client. See R. Reg. Fla. Bar. 4-1.6 and 4-1.9. Such representations, as this Court noted in K.A.W., are "rife with the possibility to discredit the bar and the administration of justice." K.A.W., 575 So. 2d at 634 (citing Rotante v. Lawrence Hospital, 46 A.D.2d 199, 200 (1974)). Such dangers can occur regardless of whether the underlying claims are for the negligent design of a product or the negligent performance of the same service in the same manner at all facilities.

Plaintiff incorrectly suggests that the Third District implicitly overruled Tuazon in its subsequent decision in Royal Caribbean Cruises, Ltd. v. Buenaagua, 685 So. 2d 8 (Fla. 3d DCA 1996). Buenaagua is fully consistent with Tuazon and highlights the error in Bradley II. In Buenaagua, attorney Luis Perez, the same attorney disqualified in Tuazon, again sued his former client for violations of the Jones Act. Buenaagua, 685 So. 2d at 9. The Third District concluded disqualification of Perez in the new cases was not warranted due to the substantial change in circumstances since Tuazon was decided. The accidents now at issue all occurred more than a year after Perez stopped working as an adjuster, and his former employer was not involved in adjusting those new claims. Id. at 11.

In short, the Third District did not recede from Tuazon in Buenaagua. To the contrary, it again recognized that, even in non-products cases, when the claims involve the same issues regarding injuries that occurred during the time that the lawyer represented the former client, the cases are "substantially related" for purposes of Rule 4-1.9. Id. at 10. The Third District merely concluded that, in light of the changed circumstances regarding the new cases, there was no "*substantial relationship* between cases Perez may have had access to [in the past] and the cases at issue today." Id. at 11 (emphasis in original). The facts here are those in Tuazon, not Buenaagua.

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," and those claims of understaffing and inadequately trained staff involved injuries that occurred during the time he was representing Manor Care. Tuazon, 641 So. 2d at 418 n.1 (emphasis added). Under the decision below, Fischer was not disqualified, based on the Fourth District's view that services 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). 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 the confusion created by the decision below 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). Plaintiff attempts to distinguish Trautman by asserting that the disqualification was based "upon an uncontroverted affidavit that [the attorney] learned trade secrets about his client's products while [acting as] general counsel for the automotive truck division." A.B. 18. The court did not, however, focus solely on that fact, but also noted that the lawyer "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 its general counsel's office. Id. at 1184. The defendant was placed at an unfair disadvantage in having to defend against claims brought by its former lawyer, who had previously defended the same type claims on its behalf and was familiar with its defense strategies as well as the defense experts and witnesses likely to be used.

So too here, Fischer is familiar with the witnesses employed at the Boca Raton facility who are likely to be used in this case. He was their lawyer when he defended them at deposition in prior cases 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 the same staffing issues during the same time period as this case. Having defended these employees in prior Chapter 400 cases gives Fischer special knowledge and an unfair advantage in now taking their depositions in such cases.

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

Plaintiff incorrectly asserts the Fourth District followed the holding in Sears, Roebuck & Co. v. Stansbury, 374 So. 2d 1051, 1153 (Fla. 5th DCA 1979) and, thus, there is no conflict with that seminal decision. Although citing Stansbury, the Fourth District improperly read Stansbury as holding that disqualification is warranted only when the former and current representations involve a product. See Bradley II, 961 So. 2d at 1073. While Stansbury involved cases addressing the same product, the court's holding did not rest on that fact. Rather, the issue was whether there were sufficient similarities between the cases, such that there was a risk confidential information the lawyer was presumed to have obtained during the representation might be used to the former client's disadvantage. Id. at 1053-54.

Such a disadvantage can exist in negligent services cases as well as product liability cases. Indeed, in State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d

630, 633 (Fla. 1991), a non-products case involving negligence in an automobile accident, this Court specifically cited Stansbury with approval. See K.A.W., 575 So. 2d at 633. Moreover, the Third District, in citing Stansbury as authority for its decision in Tuazon, correctly recognized that the Stansbury analysis of Rule 4-1.9 is not limited to product liability 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. But, a lawyer employing a client's confidential strategies to defend specific type of nursing home claims and then, prosecuting the same type of claims against the former client, necessarily is attacking the work he previously performed on behalf of that client, and the fact these claims arise out of services that are the same at each facility, rather than a product, does not alter that.

This Court should reject the bright-line rule adopted by the Fourth District, which will have a chilling effect on clients' trust in their ability to share their confidential defense strategies and talk confidentially 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.

As previously noted, Plaintiff spends much of her answer brief arguing that Fischer learned nothing that was confidential and that Manor Care never pointed out what confidences were shared. But the whole "rationale for [the] irrefutable presumption is that to allow the litigants, attorneys and Court to become embroiled in a controversy over whether confidences have been reposed and whether the attorney is consciously or subconsciously making use of such confidences would thwart . . . [the] ultimate objective of promoting an attorney-client relationship of trust and candor through preservation of clients' and former clients' confidences." See Government of India v. Cook Indus., Inc., 422 F. Supp. 1057, 1060 (S.D.N.Y. 1976), cited with approval in, K.A.W., 575 So. 2d at 633. Indeed, the Fourth District did not deny disqualification based on a conclusion Fischer had not

received any confidences; it properly applied the irrefutable presumption that confidences were disclosed to him.

Where the Fourth District went wrong is in its conclusion that this nursing home case is not substantially related to any of the nursing home cases Fischer defended because each case "turns on its own facts." It is undisputed that Fischer defended this particular nursing home facility against Chapter 400 and negligence claims and in doing so, he denied that it was understaffed, its staff was inadequately trained, or that there were improper policies and procedures, all of which were alleged to be the cause of injuries to the residents. Fischer now claims this same facility was in fact understaffed and had inadequately trained staff and improper policies and procedures during the same time period and that this was the cause of Fennell's injuries.

Although Plaintiff repeatedly characterizes the former case involving the Boca Raton facility as a "patient assault" case, the fact remains that in both cases, the injured residents alleged that their injuries resulted from a lack of training and understaffing at the Boca Raton facility. In the prior case, Fischer denied those claims. He now seeks to assert those claims against this same facility, even though it is undisputed that Fischer conducted privileged interviews with the Boca Raton facility staff during the time period his current client was a resident at that facility.

Furthermore, Plaintiff ignores that Fischer defended other Manor Care nursing homes against claims involving ulcers and falls—the exact same injuries Fennell suffered—that were also allegedly caused by understaffing, lack of training, and improper practices and policies. Since Fischer admits the nursing homes all operated in the same manner and since the same core allegations of statutory violations and negligence are asserted in all of them, those "canned" claims are substantially related.

There is a very real risk that confidential information, which Fischer is presumed to have received, will be used to Manor Care's disadvantage in this case attacking the staffing and other policies of the Boca Raton facility Fischer represented at the same time his current client was a resident at that facility. This Court should disapprove the bright-line rule adopted by the Fourth District, and quash the decision below and direct 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 6th day of July, 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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Henry G. Gyden