IN THE SUPREME COURT OF FLORIDA

CASE No.: SC12-988
L.T. Nos. 3D11-2129 &
3D11-2141

PATRICIA YOUNG, et. al.,

Petitioners,

vs.

NORVA L. ACHENBAUCH, et al.,

Respondents.

_________________________________/

ON NOTICE OF DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION - CASE 3D11-2141

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STATEMENT OF THE CASE AND FACTS

The only relevant facts are those contained within the four corners of the Third District's opinion.[1] See *Broin v. Philip Morris Cos., Inc.,* (Fla. 3d DCA Case Nos. 3D11-2129, 3D11-2141, March 21, 2012) (hereinafter "Op."). Those facts are as follows.

This case arises from a 1991 class action brought by numerous flight attendants against several tobacco companies. The case was to be tried in two stages with the first stage deciding the common class questions, (Stage I), and in the second stage, individual trials would determine each plaintiff class members' damages (Stage II). (Op. 2). Ultimately, the parties entered into a settlement agreement, which included payment by the tobacco companies of a $300 million settlement fund. The trial court later approved the settlement and that ruling was ultimately affirmed in *Ramos v. Philip Morris Co.* 743 So.2d 24 (Fla. 3rd DCA 1999). The Flight Attendant Medical Research Institute, (FAMRI), was then formed with several flight attendant plaintiffs in the original *Broin* Stage I action becoming members of FAMRI's Board. (Op. 3).

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[1]As this Court has repeatedly stressed, "[F]or purposes of determining conflict jurisdiction, this Court is limited to the facts which appear on the face of the opinion." *Hardee v. State*, 534 So.2d 706 *(Fla. 1988); (citing, *White Const. Co. v. Dupont*, 455 So.2d 1026 (Fla. 1984)).

Subsequently, Steven K. Hunter, Esq. and Philip Gerson, Esq. counsel for numerous flight attendants, ("Respondents"), became concerned that FAMRI's activities were unsupervised by the court and they requested, amongst other relief, an accounting from the foundation. However, after the petition was filed, FAMRI and two flight attendant board members, Blissard and Young, ("Petitioners"), objected and moved to disqualify Hunter and Gerson on the grounds of conflict of interest. (Op. 3.).

Specifically, Petitioners contended that Hunter and Gerson had a conflict of interest with current and former clients, and should be disqualified pursuant to Florida Rules of Professional Conduct 4-1.7 and 4-1.9. (Op. 4). In moving for disqualification the Petitioners filed affidavits alleging that all the lawyers representing flight attendants in the original *Broin* Stage II suits for damages, including Hunter and Gerson, "[W]orked closely together and jointly were considered their attorneys in the original [*Broin*] action regardless of individual representation." Hunter and Gerson "[D]enied currently representing any of the objectors and either denied former representation or alleged that upon learning of their objections, they withdrew from representation of the objecting clients." (Op. 3-4). After the trial court granted the motion to disqualify, Respondents petitioned the Third District for certiorari review.[2]

[2]The trial court also disqualified the Respondents' additional counsel, Alexander Alvarez,

In granting the petition, and quashing the order of disqualification, the Third District outlined the applicable Rules Of Professional Conduct as follows:

> If a rule 4-1.7 conflict arises "after representation has been undertaken, the lawyer should withdraw from the representation." Rule 4-1.7. cmt; see also, R. Regulating Fla. Bar 4-1.16(a)(1) ("[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of the Rules of Professional Conduct or law. . . ."). Afterward, whether the lawyer may continue to represent the other client is determined according to Rule 4-1.9.
>
> Rule 4-1.9 governs conflicts with former clients and states that "[a] lawyer who has formerly represented a client in a matter shall not thereafter . . . represent another person in the same or a substantially related matter in which that person's interests are material adverse to the interests of the former client once the former client gives informed consent." Accordingly, a party seeking disqualification under this rule must show that "(1) an attorney - client relationship existed, thereby giving rise to a nearly irrefutable presumption that confidences were disclosed during the relationship, and (2) the matter in which the [lawyer] subsequently represented the interest adverse to the former client [is] the same or substantially related to a matter in which it represented the former client." *State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630, 633 (Fla. 1991).[3]

Ramon Abadin, Philip Freiden, Hector Lombana and H.T. Smith, although only Hunter and Gerson sought review on behalf of the Respondents.

[3]As the comment to Rule 4-1.9 further indicates, matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client.

(Op. 6-7).

Applying the aforementioned rules to the facts, the court then indicated:

> Here, Rule 4-1.7 does not apply because there is no evidence that Mr. Gerson and Mr. Hunter currently represent the respondents. Regarding Rule 4-1.9, except for one flight attendant, from whom they withdrew representation upon notice of the client's objection, there is also no evidence that Mr. Gerson or Mr. Hunter personally represented the respondents.

(Op. 10).

Finally, with respect to the one former client and thus, with respect to Rule 4-1.9, the Third District concluded "[A]lthough arising from the prior litigation, the present action involves a different issue." (Op. 11). In sum, the Third District found that the trial court departed from the essential requirements of law in disqualifying Respondents' counsel, pursuant to either Rule 4-1.7 or 4-1.9, since there was no conflict with either current clients or with the single Petitioner, who was a former client.[4]

[4]Clearly, Respondent's counsel did not represent FAMRI, which nonetheless moved for disqualification.

SUMMARY OF THE ARGUMENT

There is no basis for conflict jurisdiction since the Third District properly applied the controlling case law and the Rules Of Professional Conduct in concluding that the trial court departed from the essential requirements of law in disqualifying Respondents' counsel. On pages 4 through 7 of the its opinion, the court explains, in detail, both Rule 4-1.7 and 4-1.9 and on pages 10 and 11, the court correctly concludes, that neither Rule 4-1.7 nor 4-1.9 justify disqualification because there is no evidence that either Gerson or Hunter currently represent any of the Petitioners and that while they may have earlier represented one Petitioner, in her Stage II personal injury action, "[T]he present litigation involves a different issue." (Op.11). Further, in reaching these conclusions, the court also properly applied this Court's decision in *State Farm Mut. Auto. Ins. Co. V. K.A.W.*, the controlling Florida case which determines whether a conflict exists with a former client.

Finally, because this was not a class action, the Third District's decision did not turn on the application of a "new balancing test" applicable to issues of disqualification involving class counsel. The Petition should therefore be denied.

ARGUMENT

THERE IS NO DIRECT AND EXPRESS CONFLICT JURISDICTION, AS REQUIRED BY ARTICLE V §3(B)(3) FLA. CONST., SINCE THE THIRD DISTRICT'S OPINION CORRECTLY APPLIES RULE 4-1.7 AND 4-1.9, AS INTERPRETED BY THIS COURT'S DECISION IN *STATE FARM MUT. AUTO. INS. CO. V. K.A.W.*

Petitioners suggest that this Court has conflict jurisdiction under Article V, §3(b)(3) Fla. Const., based on three separate arguments. These arguments are addressed as follows.

A. The Decision Below Does Not Conflict With Decisions Regarding Whether The Rules Of Professional Conduct Provide The Exclusive Standard For Disqualifying Counsel Based On Conflicts Of Interest

Only the most warped reading of the Third District's opinion could lead to the conclusion that the Third District, in some manner, abandoned the Rules of Professional Conduct. To the contrary, and as previously demonstrated, the court went to great lengths outlining Rules 4-1.7 and 4-1.9, as well as this Court's controlling decision in *State Farm Mut. Auto. Ins. Co. v. K.A.W.*, ultimately concluding that the rules did not warrant disqualification because there is no evidence that Hunter or Gerson currently represent any Petitioner and that with respect to the sole Petitioner ex-client, the former representation involved a different issue.

All parties agree, as the Third District recognized, that Hunter and Gerson did not represent a class and this is not a class action. Accordingly, the Third

District's reference, in its opinion, to *Lazy Oil Co. v. Witco Corp.* 166 F. 3d 581 (3rd Cir. 1999), is dicta.[5] Without question, since Hunter and Gerson were not class counsel there would be no basis for disqualification based on conflicts with other class members they have never represented. In sum, contrary to Petitioners' argument, the Third District's decision was based exclusively on the Rules Of Professional Conduct and this Court's decision in *State Farm Mut. Auto. Ins. Co. v. K.A.W.*, which interprets those rules in the context presented by this case. There is therefore no conflict with the controlling authorities of this Court or any district court of appeal.

B. The Decision Below Does Not Conflict With Any Decision Addressing Conflict With Current Or Former Clients

The Third District's decision does not conflict with this Court's holding in *The Florida Bar v. Adorno* 60 So. 3d 1016 (Fla. 2011) nor *The Florida Bar v. St. Louis,* 967 So.2d 108 (Fla. 2007), both of which dealt with conflicts with current clients and Rule 4-1.7. As the Third District's opinion expressly recognizes and states, "Here 4-1.7 does not apply because there is no evidence that Mr. Gerson and Mr. Hunter currently represent the respondents [Petitioners]." (Op. 10).

[5]As emphasized in *Baez v. State*, 814 So. 2d 1149, 1152 (Fla. 4th DCA 2002), a conflict by virtue of dicta does not present a conflicting decision.

C. <u>The Decision Below Does Not Conflict With Decisions Regarding The Standard Of Review From Orders Disqualifying Counsel</u>

The Third District did not reverse the trial court based on the application of some "new balancing test." Rather, as emphasized above, the court reversed based on the conclusion that the trial court's order disqualifying Respondents' counsel, pursuant to Rules 4-1.7 and 4-1.9, departed from the essential requirements of law. If this was a class action, if Hunter and Gerson were class counsel, and if their class member clients had filed a motion for disqualification, then Petitioners' argument that the Third District's decision was based on the application of some "new balancing test" may have some merit.

However, as stressed by this Court in *State Farm Mutual Auto Ins. Co. v. K.A.W.* at 633, in conflict of interest cases, one seeking to disqualify opposing counsel must show, at a minimum, that an attorney-client relationship existed. As the Third District indicated, Hunter and Gerson did not have an existing attorney-client relationship with any Petitioner and they had a former attorney-client relationship with a single individual Petitioner. The court then found that because the prior representation concerned a different issue than that presented by the present action, disqualification under 4-1.9 constituted a departure from the essential requirements of law. This is the proper standard of review and the one that was actually applied by the Third District. See generally, *Alto Construction*

Co. Inc. v. Flagler Construction Equipment LLC, 22 So.2d 726 (Fla. 2nd DCA 2009); (a misapplication of the Rules of Professional Conduct constitutes a departure from the essential requirements of law); *Akrey v. Kindred Nursing Centers East, LLC*, 837 So.2d 1142 (Fla. 2nd DCA 2003) (same); *City of Lauderdale Lakes v. Enterprise Leasing Co.*, 654 So. 2d 645 (Fla. 4th DCA 1995) (same).

Finally, in their Argument II, Petitioners set forth various reasons why this Court should exercise its discretion to resolve "these conflicts." As demonstrated above, contrary to Petitioners' argument, the Third District's decision does not reject, but rather reinforces, the applicability of Rules 4-1.7 and 4-1.9 and this Court's decision in *State Farm Mut. Auto Ins. Co. v. K.A.W.*, the authorities on which the Third District's decision is based. Thus, to assert that the Third District rejected this Court's rules of professionalism and its holding in *State Farm Mut. Auto. Ins. Co. v. K.A.W.* ignores the unambiguous language of the Third District's decision.

The Respondents also reluctantly feel compelled to address the final paragraph of the Petitioners' Argument II. Petitioners' argue that:

> For thirty percent of the take Messrs. Gerson and Hunter seek to destroy a Florida non-profit foundation . . . based on claims that their former clients . . . are breaching some duty to the long certified class. And these clients previously had shared confidences related to the many

> reasons why FAMRI cannot provide the very relief that their former lawyers now seek - distribution of settlement funds to class members"…

This statement is far outside the four corners of the Third District's opinion, is inaccurate, and at best, unprofessional. As the Third District's opinion amply demonstrates, hundreds of flight attendants who recovered a settlement fund, now under the custody and control of Petitioners, seek an accounting of what is rightfully theirs, the settlement funds. It is inconceivable that the custodians of these funds could somehow have confidences *vis a vis* the beneficiaries of the fund, that they are resisting the underlying petition and that a single ex-client, who was represented by Respondents' counsel in an entirely different matter, can sabotage this relief. Respondents therefore request that the Court deny this Petition so that they may proceed in the underlying claim.

CONCLUSION

For the reasons set forth above, the Third District opinion does not present a direct and express conflict with any decision of this Court or another district court of appeal. The Petition should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by U.S. Mail and e-mail, pursuant to Rule 2.516, Florida Rules of Judicial Administration, on this 25th day of July, 2012 upon counsel listed on the attached service list.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, that the foregoing complies with the font requirements of the rule, having been prepared in 14 point Times New Roman font.

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