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IN THE SUPREME COURT OF FLORIDA

PATRICIA YOUNG, et al.,

Petitioners,

v.

Case No. SC12-988
L.T. No. 3D11-2129 & 3D11-2141

NORVA L. ACHENBAUCH, et al.,

Respondents.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF FLORIDA

REPLY BRIEF OF FLIGHT ATTENDANT MEDICAL RESEARCH INSTITUTE

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STATEMENT REGARDING SEPARATE BRIEFS

Petitioners FAMRI, Young, and Blissard joined in a single initial brief, but find separate reply briefs necessary to address the nearly 100 pages of separate answer briefs. They have coordinated to avoid duplication and thereby lessen the burden on the Court. The reader will likely find the three reply briefs most helpful by reading FAMRI's reply brief first, Young's brief second, and Blissard's brief last.

ARGUMENT

The answer briefs pillory FAMRI and its board through ad hominem attacks that not only lack record support, but are false. This brief focuses on those issues truly related to the disqualification issue and trusts that the Court will not consider the failure to refute others as an admission that they are true.[1]

I. THE PETITION THREATENS THE SETTLEMENT AGREEMENT.

Though Gerson and Hunter suggest that they are only trying to "enforce" the settlement agreement and that dissolution of FAMRI is just one of many "potential" or "possible judicial reliefs" (Gerson Br. at 10, 24), that is all contrary to what they told their clients and what their petition actually seeks. (R3:511-19, 522-25.) In their petition and their "dear client" letters, they made clear that they are seeking to modify the settlement agreement so that "the settlement funds" are taken from FAMRI and given to flight attendants because research can no longer benefit the flight attendants in light of their advancing age and the ban on smoking on planes imposed after the tobacco companies supported it pursuant to the settlement agreement. (R3:515, 518.)

[1] One issue too spurious to ignore is the suggestion that the *Broin* trial court must supervise FAMRI *ad infinitum* to make sure its funding decisions comply with the settlement agreement. The trial court expressly approved FAMRI's formation and released any restrictions on its funds in 2000, and the case file was destroyed in 2004. (R12:2293; R17:3186, 3274.) The petition below is, therefore, an attempt to appeal this order over a decade too late.

Even their request for an "accounting" is an attempt to modify the settlement agreement to retroactively determine that funds spent sponsoring research related to diseases associated with cigarette smoking that did not directly benefit flight attendants was improperly spent. And now Hunter suggests for the first time in his answer brief that they are also seeking to have FAMRI pay for medical treatment for the flight attendants (as opposed to treatment incidental to scientific research). (Hunter Br. at 5-9.) In short, they seek to modify the agreement to both require FAMRI to pay class members money directly or indirectly through paid treatment and to retroactively require FAMRI to limit its funding only to research that directly benefits a defined class. But because the laws governing non-profit organizations prohibit FAMRI from doing that, *e.g.*, 28 U.S.C. § 4945 (2012); section 617.0835, Florida Statutes (2012), this relief does require the destruction of FAMRI and, therefore, the end of the leading-edge research it has been funding.

Perhaps more importantly, that relief would also be a material modification of the settlement agreement, which could entitle the tobacco companies to rescind the agreement, deny the litigation benefits, and recoup funds not yet spent. The key provision in the settlement agreement that is ignored in the answer briefs provides that if any part of the agreement is modified by the courts, the entire agreement "shall be canceled and terminated, and shall become null and void, and the parties shall be restored to their original positions." (R1:110-11.) As regards FAMRI, the

settlement agreement provides that the $300 million paid by the defendants must be used "**solely** to establish a Foundation whose purpose will be to sponsor scientific research with respect to the early detection and cure of **diseases associated with cigarette smoking**." (R1:103 (emphases added).)

Contrary to Gerson's brief, the trial court never "narrowed" this provision to research benefitting class members and the Third District never made "further refinements" to require the foundation to "provide treatment" to class members. (Gerson Br. at 3-5.) Those courts never claimed to be modifying the agreement, and the Third District has made clear that the agreement had been approved "without modification." *Philip Morris Inc. v. French*, 897 So. 2d 480, 482 (Fla. 3d DCA 2004).[2] It is Gerson and Hunter who seek to modify the sole purpose outlined in the agreement to both (1) expand it to include paying money to flight attendants (and according to the new argument in Hunter's brief pay for medical treatment) and (2) restrict it to retroactively prohibit the very research provided for in the agreement (i.e., research related to "diseases associated with cigarette smoking").

The tobacco companies are paying attention. Philip Morris responded to the petition below by filing a statement of its position that the limitations on the

[2] The language from the trial and appellate orders quoted by Gerson merely demonstrates how the research funded by FAMRI can provide indirect benefits to class members; in no way does it provide that FAMRI can **only** fund research that directly benefits the class or that FAMRI can or must provide direct benefits like treatment to class members.

settlement funds to only pay for research relating to "diseases associated with cigarette smoking" and not to be paid to class members "was a material term of the settlement" to which Philip Morris objects. (R6:1119-20.) Gerson and Hunter, therefore, have created a very real risk that the settlement agreement itself will be voided, placing their self-interests above those of their clients. If that happens, all members of the class, including their current and former clients, will lose the "abundant" benefits extolled in *Ramos v. Philip Morris Cos., Inc.*, 743 So. 2d 24 (Fla. 3d DCA 1999).

Not only will they lose the indirect benefit of FAMRI funding research for smoking-related diseases, but they will lose the direct litigation benefits that led the courts to approve the settlement. They will be back to square one: a class action where the class faces "a less than 50/50 chance of success" on the non-intentional torts and "a genuine and real reason to fear directed verdict" on the intentional torts and where even if the class succeeds on the common issues, "most, and close to all of class members" will ultimately lose on the statute of limitations defense that the defendants' had given up as part of the settlement. *Id.* at 31-32.

Indeed, Gerson and Hunter claim that litigating these claims even with the benefits of the settlement agreement "has turned out to be unproductive, expensive and time consuming." (R3:517.) Their suggestion that this is FAMRI's fault for not producing enough scientific studies to prove causation, harkens to the conspiracy

among the tobacco industry and its sham organizations to fund "research" with a predetermined goal. Regardless, they have sold out their clients who want to pursue difficult, but winnable individual litigation, *see French*, 897 So. 2d 480 (affirming $500,000 judgment to class member), in favor of whatever clients they have convinced that the only hope to get money is to liquidate FAMRI and hope the tobacco companies do not get the funds instead.

II. FAMRI PROPERLY JOINED THE MOTION TO DISQUALIFY.

As they must, Gerson and Hunter reluctantly acknowledge that FAMRI had standing to move to disqualify them based on conflicts of interest with current or former clients who are non-parties. (Gerson Br. at 37-38; Hunter Br. at 39-40.) Both the comments to the rules of professional conduct and this Court's case law recognize that opposing counsel may properly raise a conflict that "is such as clearly to call into question the fair or efficient administration of justice." R. Regulating Fla. Bar 4-1.7 comment; *see also State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630, 631-32 (Fla. 1991) (holding that this can be true even where the client has waived the conflict).

The conflicts were initially raised with Gerson and Hunter not by FAMRI, but by many of their clients who caught wind of their plans to attack FAMRI in early 2010, including Blissard, Young, Waerness, Spurgeon, and later Chambers. These flight attendants never consented to the conflicts; to the contrary, they

provided materials in support of the motion to disqualify and, in the case of Blissard and Young, retained counsel to file the motion. With the conflict issue already being litigated through a number of lawyers, it would be absurd to suggest that hundreds of other Gerson and Hunter clients who did not consent to the petition would have to hire lawyers and come to Florida to protect their interests.

Moreover, the proper administration of justice cries out for resolution of the conflicts at issue here because Gerson and Hunter took the improper step of filing the petition without the consent of any clients and without identifying the petitioners. As detailed in the initial brief, the record before the trial court showed that they prepared and filed the petition before they had consent from any of their clients. (Init. Br. at 15-19.) Indeed, because it opened by saying it was "brought on behalf of flight attendant class members" and ended by seeking relief simply for "class members" (R3:708, 719), the petition was designed to make it appear to be filed on behalf of the entire class. Moreover, because FAMRI's board includes the counsel to that former class as well as a number of named plaintiff representatives of that class and FAMRI itself is one of the benefits these individuals obtained for the class members, FAMRI is ideally suited to bring the conflicts to the trial court's attention.

It was not until later that it became clear that Gerson and Hunter not only represented but a fraction of the former *Broin* class, but only a minority of their

direct clients actually (though belatedly) authorized their actions. Indeed, only one of Hunter's more than 400 direct clients (Judith Adams) apparently authorized him to challenge the disqualification order.[3] Even if one accepts the list of 260 names on the caption of the certiorari petition filed by Gerson below, then he still only has the support of a minority of his more than 600 clients.

Moreover, there is every reason to believe that Gerson is misleading the courts with regard to his authority. The record contains letters from several of his clients listed on his certiorari petition who had disavowed his authority to file the petition against FAMRI on their behalf. (R20:3917, 3920, 3925, 3931, 3937, 3950.) It also contains evidence that at least two more were deceased before he listed him in the caption. (R20:3940-49.) Determining whether the clients listed by Gerson really did authorize his actions, from beyond the grave or otherwise, are

[3] Hunter's claim that Blissard and Chambers were the only ones to disagree and that there was "near unanimous support for the petition" against FAMRI (Hunter Br. at 37) finds no support in the record and is demonstrably false based on the affidavits of McGrane, Young, Chambers, Waerness, and Blissard and the verified motion of Weinstein. (R3:498-R4:678.) Violating one of the most fundamental aspects of appellate practice (not to mention mistaking 37% for "near unanimous support"), he includes in his appendix a list he filed after the disqualification order and never presented to the Third District in which he purports to provide "a complete list of all of his clients (151) who were supporting the petition." (Hunter Br. at 16 and App. 11.) *E.g.*, *Altchiler v. State Dep't Prof'l Reg'n*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983) ("That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court.").

best resolved in a different forum. The point for present purposes is that any notion of the fair administration of justice cries out for these conflicts to be addressed.

III. THE FEDERAL BALANCING TEST IS CONTRARY TO SETTLED FLORIDA LAW.

For the most part, Gerson and Hunter have stuck to the ostrich-like position from their response to the motion for rehearing in the Third District that the court really did not apply the balancing test set forth in its opinion and instead simply applied the Florida Rules of Professional Conduct. But perhaps recognizing how unlikely this Court should be to accept that when the Third District said those rules were "inadequate" and that the trial court erred in not applying the balancing test, they also claim that Florida really should follow the federal balancing test after all. (Gerson Br. at 40-44; Hunter Br. at 30-31.)

They rely on a handful of federal trial court cases (but not a single appellate opinion) that purportedly stand for the proposition that "disqualification is never automatic" even for a conflict that violates the applicable ethical rules. (Gerson Br. at 41.) But Florida law is to the contrary and does require disqualification based upon a violation of the rules. *See K.A.W.*, 575 So. 2d at 633 (holding that applicable rules of professional conduct provide "the appropriate standard to determine whether [a lawyer] should be disqualified"); *Lincoln Assocs. & Const., Inc. v. Wentworth Const. Co.*, 26 So. 3d 638, 639 (Fla. 1st DCA 2010) (rejecting lower tribunal's conclusion that the conflict must be "material" because "Rule 4-

1.7 leaves no room for a 'materiality' analysis"); *Morse v. Clark*, 890 So. 2d 496, 497 (Fla. 5th DCA 2004) ("An order involving the disqualification of counsel must be tested against the standards imposed by the Rules of Professional Conduct."); *Hilton v. Barnett Banks, Inc.*, No. 94-1036-CIV-T24, 1994 WL 776971 (M.D. Fla. Dec. 30, 1994) (holding that a "firm is per se ineligible to participate in an action" if there is a conflict under Rule 4-1.7 or 4-1.9).

Moreover, the federal courts are far from uniform in suggesting that a conflict under the ethical rules does not always require disqualification, and those that do generally limit exceptions to disqualification to instances where the conflict could not be foreseen from the outset. *See, e.g., El Camino Resources v. Huntington Nat'l Bank*, 623 F. Supp. 2d 863, 884 (W.D. Mich. 2007) ("Those few federal courts that have followed the 'flexible approach' have done so only when the conflict of interest arises from an unforeseen merger that impacts a long-pending case …."). Indeed, the main case on which Gerson relies notes "that this decision may be viewed by some as a departure from the norm. Many courts, having determined that a conflict of interest exists, will automatically disqualify." *SWS Fin. Fund A v. Salomon Bros. Inc.*, 790 F. Supp. 1392, 1403 (N.D. Ill. 1992).

And where these few courts believe the "purposes behind the ethical rules favor an approach which does not automatically require disqualification" and instead balances the prejudice that would be suffered by each client, *Research*

Corp. Technologies, Inc. v. Hewlett-Packard Co., 936 F. Supp. 697, 701, 703 (D. Ariz. 1996), this Court has eschewed such an approach and held that a violation of the rules requires disqualification without any "actual proof of prejudice." *K.A.W.*, 575 So. 2d at 634. In Florida, a violation of the rules creates an "irrefutable presumption" of prejudice that will not be tolerated. *Id.* at 633-34. This should be especially true where the conflict deals not simply with the duty of confidentiality, which is the lynchpin for former client conflicts, but also the duty of loyalty.

IV. DISQUALIFICATION IS REQUIRED DUE TO CONFLICTS WITH CLIENTS AS OF THE TIME THE PETITION WAS CONCEIVED.

All of the clients at issue were current clients of Gerson and Hunter when these attorneys took on the matter of trying to get compensation from FAMRI in violation of the *Broin* settlement agreement in early 2010. This posed a clear conflict under Rule 4-1.7 because this course of conduct threatened to cost all of their clients the ability to continue their individual lawsuits (because without the settlement agreement, most if not all their claims would be time barred). For these purposes, their clients fall into one of four categories.

First, there are the flight attendants like Young, Blissard, Waerness, and Chambers that the trial court found were clients of Gerson and Hunter who had the temerity to demand their lawyers not take such action against their interests. Gerson and Hunter's defense as to these clients is that they evaded Rule 4-1.7's prohibition by withdrawing and thereby converting them to "former client" status

governed by Rule 4-1.9. They rely on a comment to Rule 4-1.7 that, by its own terms, only applies where a conflict among clients "arises after representation has been undertaken." While Gerson and Hunter seem at places to suggest that the representation of flight attendants in their individual actions was the same thing as representation in the petition against FAMRI,[4] that is simply not true.

Nothing about the individual lawsuits required an attack against FAMRI; especially one that threatens to undermine the lawsuits. Instead, the record is clear that Gerson and Hunter created the conflict by undertaking new representation against FAMRI at the expense of existing representation against the tobacco companies. This Court has clearly held that this is prohibited. *See, e.g., The Florida Bar v. Adorno*, 60 So. 3d 1016, 1025 (Fla. 2011) (suspending lawyer for violating Rule 4-1.7 by creating a conflict of interest among several clients); *The Florida Bar v. St. Louis*, 967 So. 2d 108, 111 (Fla. 2007) (suspending lawyer for violating Rule 4-1.7 where he "created a conflict of interest" by taking on a new engagement against the interest of existing clients); *The Florida Bar v. Rodriguez*, 959 So. 2d 150, 156, 160-01 (Fla. 2007) (disbarring a lawyer for withdrawing from clients who opposed a settlement that put his interests over other clients).

[4] Ironically, when they address Rule 4-1.9, they argue that these matters bore no substantial relationship to each other.

Second, there are the hundreds of flight attendants directly represented by attorneys McGrane and Weinstein who reasonably believed Gerson and Hunter were their attorney's, too, based on the team approach among the *Broin* progeny plaintiff's lawyers. They, too, voiced their objection (through McGrane and Weinstein), and Gerson and Hunter's only defense is to deny that the team effort they touted in the "Dear Clients" letters actually existed. This joint representation issue is addressed in more detail in Young's reply brief.

Third, there are the majority of Gerson and Hunter's direct, active clients who refused to sign the "Dear Client" letters that would have belatedly authorized the petition. Gerson and Hunter simply ignore them in their answer briefs and offer no reason why the Court should disregard the conflicts as to their interests.

Finally, there are the minority of direct clients who allegedly signed the letters to authorize the petition after the fact. While "informed consent" is an exception to the prohibitions of Rule 4-1.7, there is no evidence they gave informed consent. All the record discloses is that they may have signed "Dear Client" letters full of false statements (e.g., that the Rosenblatts were the reason settlement funds were not being paid to the flight attendants) or material omissions (e.g., the risk that the tobacco companies would void the settlement agreement if it were modified as requested).

V. DISQUALIFICATION IS REQUIRED DUE TO CONFLICTS WITH ANY FORMER CLIENTS.

Even if they were allowed to drop their objecting clients like "hot potatoes" as they assert with no supporting case law and even as to any clients who truly were former clients (e.g., clients whose individual cases had been resolved on the merits), disqualification is warranted as to them as well under Rule 4-1.9. Gerson and Hunter's only defense to this contention is that the individual actions governed by the settlement agreement were not substantially related to the petition to modify the settlement agreement. To make this disingenuous claim, they rely on the Third District's observation that the two matters involve "a different issue." But nothing in the case law or logic indicates that matters involving different issues cannot be substantially related. Indeed, in the lead case of *K.A.W.*, the two matters (an auto accident case followed by an insurance bad faith action) involved very different issues, but were still substantially related. 575 So. 2d at 633-34.

For example, a federal court in Florida disqualified counsel even though "the legal theories giving rise to this cause of action are distinct from those of the previous litigation [because] the facts of the two cases are clearly intertwined" in that the subsequent action was the result of the lawyer finding little success in the first action. *Florida Realty Inc. v. General Dev. Corp.*, 459 F. Supp. 781, 784 (S.D. Fla. 1978). The same thing is true here. Gerson and Hunter brought the petition specifically because, as they told the whole world in their petition, the individual

litigation against the tobacco companies "has turned out to be unproductive, expensive and time consuming." (R4:717.) In order to prove this, Gerson and Hunter are going to have to explain exactly why they have found their clients' cases to be so weak. Indeed, they told their clients that the petition against FAMRI was the "best way [to] bring this litigation [against the tobacco companies] to a successful conclusion." (R3:540.) If the petition against FAMRI is a way to conclude the individual actions against the tobacco companies as Gerson and Hunter told their clients, then the two actions are necessarily substantially related, or as they told the trial court, "directly related." (R12:2368.)

VI. GERSON AND HUNTER WAIVED THE RIGHT TO PRESENT FURTHER EVIDENCE.

Gerson and Hunter's claim that they were denied discovery on the disqualification issue and an evidentiary hearing are false. The record contains no indication of discovery being requested, much less denied regarding disqualification. And at the hearing on the motion to disqualify, Petitioners offered and the court accepted the affidavits and other exhibits into evidence without objection (R5:839), and the trial judge noted that he was "prepared to take testimony" (R5:860). He was willing to give the parties as much time as they needed to litigate the disqualification issue. (R5:860.) In a follow up letter, counsel for all disqualified counsel indicated that they would "rest on the entire transcript …, the prior submissions, and of course, the governing law as espoused in our

argument and prior submissions." (R20:3910.) They never once asked to put on live testimony or objected that they were deprived of the opportunity to do so. *See Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved."). In any event, the evidence was largely undisputed here on all but a few minor points..

VII. THE CONFLICTS WERE TIMELY ASSERTED.

Finally, Gerson and Hunter contend that even though the motion to disqualify was filed a few months after the petition, before discovery or substantive developments, and as soon as the correct division and trial judge were determined, the trial court was required to deny the motion as untimely. They rely on cases involving both much longer delays and instances where the subject lawyers had no advance notice of the asserted conflict. But where, as here, the conflicts should be apparent to the lawyers (they were repeatedly brought to their attention before the petition was even filed), they cannot be waived without the clients' consent no matter how much time goes by before the motion is filed. *The Florida Bar v. Dunagan*, 731 So. 2d 1237, 1241 (Fla. 1999); *Synderburn v. Bantock*, 625 So.2d 7, 13 (Fla. 5th DCA 1993).

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following persons by e-mail on May 13, 2013:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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