Health Care & Retirement Corp. v. Peggy Bradley

SC07-1849

THE LAST CASE ON THE COURT'S
DOCKET TODAY, IS HEALTHCARE AND
RETIREMENT CORPORATION OF
AMERICA VERSUS PEGGY BRADLEY.
>> MISS WALBOLTM, YOU MAY
PROCEED.
>> IF IT PLEASE THE COURT,
SILVIA WALBOLT AND MR.^DAVIS
APPEARING ON BEHALF OF THE
PETITIONER.
THE ISSUE UNTIL THIS CASE IS
WHETHER A LAWYER CAN DEFEND A
CLIENT AGAINST A SPECIFIC TYPE
OF STATUTORY CLAIM AND SWITCH
SIDES AND SUE THE CLIENT ON THE
SAME TYPE OF STATUTORY CLAIM
FOR INCIDENTS OCCURRING AT THE
SAME FACILITY, DURING THE SAME
PERIOD OF TIME THE ATTORNEY WAS
ROPE SENTING THE MUCH CLIENT ON
SUCH CLAIMS.
>> BEFORE WE GET TO THAT ISSUE,
AND I KNOW MY FORMER COLLEAGUE,
JUSTICE CANTERO, ASKED,
PROMISED I WOULD ASK
JURISDICTIONAL QUESTIONS IN HIS
BEHALF.
HE HASN'T ASKED ME IN THIS
CASE, BUT ON JURISDICTION, WE
HAVE THE JURISDICTION ON
EXPRESS AND DIRECT CONFLICT.
THAT NOT CERTIFIED CONFLICT.
THE THIRD DISTRICT'S OPINION IN
WHICH THE CONFLICT IS ALLEGED,
WAS A PER CURIAM OPINION WITH
THE TRIAL COURT'S ORDER AND
SUBSEQUENT OPINION AND DOESN'T
INDICATE WHETHER IT'S UNDER A
OR B OF THE RULES.
THEN A SUBSEQUENT OPINION SEEMS
TO CLARIFY IT.
SO GIVE ME YOUR BEST ARGUEMENT
WHY WE SHOULD NOT EXERCISE OUR
JURISDICTION TO DISCHARGE THIS
CASE ON THE BASIS THAT, IF

THERE'S CONFLICT, IT'S FUZZY
AND, IT WAS, THAT CASE WAS
DECIDED BEFORE THE RULES WERE
AMENDED, AND DOESN'T REFERENCE
WHETHER IT'S UNDER A OR B AND
FOR ALL THOSE REASONS.
>> WELL, YOUR HONOR, I WOULD
SAY THAT YOU SHOULD RETAIN THE
JURISDICTION THAT YOU HAVE
PREVIOUSLY ACCEPT IN ORDER TO
ESTABLISH A IT STATEWIDE RULE
WITH SOME CLARITY ON A VERY
IMPORTANT ISSUE OF LAWYER
PROFESSIONALISM AND ON THE
ABILITY OF CLIENTS TO FEEL
SECURE ABOUT THE COMMUNICATIONS
THEY MAKE WITH A LAWYER.
THE RESPONDENT HAS CONCEDED
THAT THERE IS CONFLICT HERE.
UNDER THE FACTS THAT ARE
RECITED IN TUAZON MR.^FISCHER
WOULD HAVE BEEN DISQUALIFIED.
THERE CAN BE NO QUESTION ABOUT
THAT THEY ARE EXACTLY THE SAME
TYPE OF FACTS SO IN THE THIRD
DISTRICT, MR.^FISCHER WOULD BE
DISQUALIFIED FROM BRINGING
THESE CLAIMS AGAINST HIS FORMER
CLIENT, BUT IN THE FOURTH
DISTRICT, HE IS NOT
DISQUALIFIED.
AND THAT CREATES EXACTLY THE
TYPE OF CONFLICT THAT THIS
COURT SHOULD BE CONCERNED
ABOUT, PARTICULARLY CONCERNED
ABOUT, AS AN ETHICAL MATTER FOR
LAWYERS, AND I --
>> YOU DIDN'T ADDRESS THOUGH
THE SUBSEQUENT CASE.
IN OTHER WORDS YOU RELY, THEY
SAID, IN THE THIRD DISTRICT
THEY WOULD BE DISCHARGED OF BUT
THEN, WE'VE GOT THE SUBSEQUENT
THIRD DISTRICT CASE OF ROYAL
CARIBBEAN CRUISE LINES VERSUS
BUENAAGUA, WOULDN'T THAT IN THE
THIRD DISTRICT GIVE THEM BASIS
TO ARGUE --
>> ABSOLUTELY NOT, YOUR HONOR.
THEY DID NOT RECEDE FROM TUAZON
AND BUENAAGUA.
IN FACT THEY MADE THE EXACT
DISTINCTIONS IN BUENAAGUA
ESTABLISHED WHY

DISQUALIFICATION SHOULD BE
REQUIRED IN THIS CASE.
IN BUENAAGUA THEY DIDN'T
DISTINGUISH FROM TUAZON.
UNLIKE TUAZON, LAWYER
ADJUSTING CLAIMS AND DURING
THIS SAME TIME PERIOD THE
INCIDENT OCCURRED HE WAS NOT
SEEKING TO SUE ON, IN
BUENAAGUA.
LAWYERS HAD PASSED.
INCIDENT HAD OCCURRED AFTER THE
LAWYER HAD CEASED TO WORK,
DOING THE ADJUSTING WORK AND
HIS EMPLOYER, THE ADJUSTING
COMPANY WAS NO LONGER DOING
ADJUSTING AND DID NOT ADJUST
THE CLAIMS IT IN THE CASES THAT
WERE AT ISSUE.
SO THEY DREW EXACTLY THE TYPE
OF DISTINCTION ON, THAT WE
WOULD URGE IS CORRECT.
THEY WOULD NOT, WE'RE NOT
BUENAAGUA.
WE'RE TUAZON.
>> MY ISSUE, I WAS THINKING
ABOUT THIS WITH THE STANDARD OF
REVIEW, I THINK IT'S IMPORTANT,
I AGREE ISSUE WHEN
DISQUALIFICATION OCCURS OR
WHETHER THERE IS GOING TO BE
BLANKET DISQUALIFICATION IS A
SIGNIFICANT TO LAWYERS AND, TO
THE JUST DISHRY.
SO I AGREE WITH YOU AS TO THE
OVERALL SIGNIFICANCE OF THIS.
BUT IT APPEARED TO ME IN THIS
CASE THERE WAS RECOGNITION BY
AT LEAST BRADLEY II THERE WAS
PRESUMPTION OF CONFIDENTIAL
COMMUNICATIONS.
AND THEN, THERE WAS THE SECOND
ENQUIREY.
THE TRIAL JUDGE MADE FINDING
OF FACT.
THEN THAT'S WHAT THE FOURTH
DISTRICT RELIED ON.
SO MY CONCERN IS, IS THAT,
WE'RE GETTING INTO, OR ARE WE
GETTING INTO FACT-FINDING AND,
SECOND-GUESSING THE FACTS OR
ARE WE THEN SAYING, WHAT IS THE
BRIGHT LINE RULE IS BECAUSE HE
REPRESENTED THE NURSING HOME A

YEAR BEFORE, THAT HE IS
DISQUALIFIED FROM NURSING HOME
CASES FOR WHAT, HOW MANY YEARS?
THREE YEARS, FOUR YEARS, FIVE
YEARS?
I MEAN WHAT WOULD BE THE RULE?
>> WELL I WOULD SUGGEST WHAT
THE FOURTH DISTRICT DID NOT
LOOK AT THE FACTS.
THEY DIDN'T LOOK AT SPECIFIC
TYPES OF THE CLAIMS.
WHAT THE FOURTH DISTRICT DID
WAS SAY, THERE'S A BIG
DIFFERENCE, THERE IS A BRIGHT
LINE DIFFERENCE BETWEEN A
PRODUCTS LIABILITY CASE, AND
BETWEEN A NEGLIGENT CASE.
ALL NEGLIGENCE CASES TURN ON
THEIR OWN FACTS.
WHAT THEY DID THEN, JUSTICE
PARIENTE, THEY DECLINED TO
FOLLOW THE FIFTH DISTRICT'S
ANALYSIS IN STANSBURY.
IT WAS CITED IN TUAZON AND IN
THE D.A. CASE.
AND GIVEN THIS COURSE I WOULD
SUBMIT ADDITIONAL REASON WHY
YOU SHOULD TAKE THIS CASE.
THERE SHOULD NOT BE A BRIGHT
LINE DISTINCTION BETWEEN
PRODUCTS LIABILITY CASES AND
NEGLIGENCE CASES.
THE FOURTH DISTRICT IN ITS
ANALYSIS IN THIS CASE DECLINED
TO FOLLOW STANSBURY BY SAYING
IN STANSBURY, THE LAWYER WAS
SEEKING TO ESTABLISH THAT A
LAWNMOWER WAS DEFECTIVE, IN HIS
PRIOR CASES HE HAD URGED THE
LAWNMOWER WAS NOT DEFECTIVE.
>> YOU SEE AS A TRIAL LAWYER, I
AGREE IF THE FOURTH DISTRICT
SAID A BRIGHT LINE RULE THAT
WOULD BE WRONG BUT HAVING AS
LAWYER REPRESENTED PLAINTIFFS
SUING HONDA MOTOR COMPANY, OR
YOU TAKE A PRODUCT, YOU LEARN,
IF YOU'RE THE DEFENSE, A LOT OF
INFORMATION ABOUT THAT PRODUCT
THAT YOU THEN KNOW YOU KNOW
WHERE THE SMOKING GUN IS.
YOU KNOW WHAT TO ASK FOR.
IN A NEGLIGENCE CASE, WHAT I'M
TRYING TO FIGURE OUT HERE IS,

WHAT WAS IT THAT -- YOU KNOW, RELATED, A SLIP AND FALL IN A NURSING HOME IS PRETTY GENERIC. YOU KNOW IF YOU REPRESENTED SHOPPING CENTER, COULD YOU NEVER SUE THE SHOPPING CENTER OR, SLIP AND FALLS BECAUSE YOU ALREADY KNEW WHAT WENT ON? I MEAN THAT'S, YOU KNOW, FOR A PERIOD OF TIME.
THAT IS TROUBLE I'M HAVING SEEING NOT A BLACK LINE RULE BUT A DIFFERENCE IN A PRODUCTS CASE FROM THE DIFFERENCE IN NEGLIGENCE CASE.
MAYBE TO SAY EACH TURN ON ITS FACTS.
THAT MAY NOT BE THE CASE.
BUT HERE THE JUDGE SEEMED TO FEEL THAT THESE WERE, YOU KNOW, DISTINGUISHABLE FOR THAT REASON.
AND YOU ONLY, YOU RELY ON A, NOT B OF THE RULE, CORRECT?
YOU'RE NOT SAYING HE GOT SOME CONFIDENTAL INFORMATION SEPARATE BUT THAT A WOULD IT REQUIRE A BLANKET DISQUALIFICATION?
>> WE'RE RELYING ON THE PRESUMPTION THAT HE ACQUIRED CONFIDENTIAL INFORMATION.
AND I WOULD SUBMIT, JUSTICE PARIENTE, THAT NURSING HOME CASES THAT ASSERT VIOLATIONS OF CHAPTER 400 ARE VERY MUCH LIKE A LAWYER ASSERTING THAT A LAWNMOWER IS DEFECTIVE AND NOW ASSERTING A LAWNMOWER ISN'T DEFECTIVE.
WHAT MR.^FISCHER WAS SAYING IN DECEMBER OF '02 WAS THAT THE STAFFING POLICIES, THAT THE TRAINING POLICIES, THAT THE PATIENT CARE POLICIES, AT THESE FACILITIES, DURING THE PERIOD OF TIME HE REPRESENTED THEM WERE ADEQUATE AND THEY DIDN'T VIOLATE CHAPTER 400.
TWO WEEKS HE IS LATER ASSERTING THOSE SAME POLICIES, SAME STAFFING SAME TRAINING WERE INADEQUATE AND DID VIOLATE CHAPTER 400.

AND THAT IS A SWITCH OF THE SIDE OF THIS DISPUTE.
IN THE COMMENT TO THE RULE, IN THE COMMENT TO RULE 4.1-9, THEY SAY, THE UNDERLYING QUESTION IS WHETHER THE LAWYER WAS SO INVOLVED IN THE MATTER, THAT THE SUBSEQUENT REPRESENTATION CAN BE JUSTLY REGARDED AS A CHANGING OF SIDES IN THE MATTER IN QUESTION.
THAT'S THE TEST THAT THE COMMENT POSES.
AND THAT'S EXACTLY WHAT HAPPENED HERE.
>> DON'T YOU SEE A DIFFERENCE BETWEEN THE BLADE ON THE LAWNMOWER IS DEFECTIVE, IN ONE CASE, AND YOU REPRESENT THE MANUFACTURER ON BLADE IS DEFECTIVE, AND IN CASE B, YOU REPRESENT THE PLAINTIFF THAT BLADE IS DEFECTIVE? I MEAN IT'S CLEARLY THE SAME THING BUT IN CONNECTION WITH EACH PATIENT AND DIFFERENT TREATMENT, DIFFERENT CARE, DIFFERENT THINGS HAPPENING, TOTALLY DIFFERENT PERIOD OF TIME, DIFFERENT MEDICAL CONDITIONS, THAT IS NOT DIFFERENT THAN THE SAME BLADE CASE?
>> BUT IT'S THE SAME POLICIES.
>> WELL NO, IT'S JUST AS APPLIED TO THE INDIVIDUALS.
THIS IS NOT A POLICY CASE.
YOU'RE NOT HELD THEM RESPONSIBLE.
A NURSING HOME IS NOT RESPONSIBLE FOR NEGLIGENT POLICIES.
THEY'RE RESPONSIBLE FOR INJURIES CAUSED TO EACH INDIVIDUAL.
EACH INDIVIDUAL MAY BE TREATED DIFFERENTLY.
THERE HAVE ARE NO TWO INDIVIDUALS, UNFORTUNATELY NURSING HOME, THERE ARE NO TREATED IDENTICAL THAT ARE IN NURSING CARE FACILITY.
NO TWO OF THEM HAVE THE SAME CONDITIONS, AND THE SAME SUSCEPTIBILITIES I MEAN IT'S

JUST TOTALLY DIFFERENT.
>> THE RECORD IS UNDISPUTED THAT 95% OF MR.^FISCHER'S CASES INVOLVED CLAIMS OF INADEQUATE SKIN CARE LEADING TO ULCERS AND FALLS.
AROUND IN THOSE CASES WOULD RECITE --
>> YOU'RE TELLING ME ANY SLIP AND FALL BASED UPON SPILLING BEANS ONE DAY, SPILLING WATER THE NEXT DAY, NOT CLEANING IT, THEN ALL THOSE CASES THEN YOU ARE, YOU'RE EXCLUDED FROM?
>> AND IF THEY ARE BROUGHT ON THE BASIS OF THE SPECIFIC FACTS IN THE SPECIFIC CASE, THEN YOU WOULD BE RIGHT BUT THAT'S NOT HOW THESE NURSING HOME CASES ARE TRIED.
THEY ARE TRIED BY ALLEGING THAT THE IMPROPER PATIENT CARE AND THAT THE FALL OCCURRED BECAUSE OF INADEQUATE STAFFING, INADEQUATE TRAINING AND INADEQUATE POLICIES.
SO THEY ARE --
>> DOES THAT MAKE THEM, IS THAT ISSUE WITH REGARD WHETHER THEY ARE RELATED OR WHETHER THIS IS SOME TYPE OF KNOWLEDGE UNDER B THAT IS COMMON KNOWLEDGE?
BECAUSE WE DIDN'T GO THERE IN THIS CASE AS TO WHETHER THERE IS SOMETHING KNOWN IN THE COMMUNITY OR THROUGH DISCOVERY AS SOME SECRET.
THAT SEEMS TO BE WHERE YOU'RE GOING, RATHER THAN WHETHER THEY'RE REALLY RELATED?
>> NO, YOUR HONOR.
I'M SAYING THEY'RE SUBSTANTIALLY RELATED.
LAWYER IS NOW SAYING THAT FACILITY POLICIES AND FACILITY STAFFING DURING THE SAME PERIOD OF TIME, REMEMBER THIS IS THE SAME PERIOD OF TIME, THIS INCIDENT OCCURRED THE SAME PERIOD OF TIME MR.^FISCHER WAS SAYING THAT THE STAFFING AND TRAINING AND THE PATIENT CARE POLICIES WERE ADEQUATE.
AND THEY WERE PROPER AND DIDN'T

VIOLATE CHAPTER 400.
NOW HE'S SAYING THOSE POLICIES WERE INADEQUATE, DID VIOLATE CHAPTER 400 AND IT WAS THOSE VIOLATIONS THAT CAUSED THE INJURY.
THAT IS WHAT MAKES THEM SUBSTANTIAL --
>> HOW MUCH OF A RECORD DO WE HAVE MAKES WHAT YOU'RE SAYING CLEAR? THAT IS, DO WE HAVE A RECORD WHERE THERE IS TESTIMONY DURING A HEARING THAT SAYS, IN THE PREVIOUS CASES, THAT THE LAWYER DEFENDED THE NURSING HOME, ALL OF THOSE CASES ATTACKED THE POLICIES, THE STANDARDS OF THE NURSING HOME, AND NOW, IN THIS CASE, WHERE HE IS SWITCHING SIDES, THE SAME ATTACK ON THE POLICIES AND STANDARDS OF THE NURSING HOME ARE BEING MADE?
DO WE HAVE A CLEAR RECORD OF THAT?
>> I BELIEVE WE DO, YOUR HONOR.
>> WHAT IS THAT RECORD?
WAS IT AT A HEARING OR HOW WAS THAT ESTABLISHED?
>> IT WAS AT THE HEARING ON THE REMAND FROM THE SECOND WRIT WHICH THE JUDGE ANNOUNCED AT THE BEGINNING SHE WAS STILL GOING TO DENY DISQUALIFICATION BUT ALLOWED US TO PUT INTO EVIDENCE THE COMPLAINT IN THE PRIOR CASES THAT MR.^FISCHER HAD DEFENDED, AND WHEN YOU TAKE THOSE COMPLAINTS, THOUGH THEY ARE IN THE RECORD BEFORE YOU, WHEN YOU TAKE THOSE COMPLAINTS AND COMPARE THEM TO THE COMPLAINT IN THIS CASE, YOU WILL SEE THAT THE CLAIMS ARE THE SAME CLAIMS ATTACKING THESE STAFFING, TRAINING AND PATIENT CARE POLICIES.
>> CLARIFY FOR ME, BECAUSE I WAS A LITTLE CONFUSED BY THE DISTRICT COURT OPINION THAT SUGGESTED WE SENT THIS CASE BACK SO THERE COULD BE AN ADDITIONAL EVIDENTIARY HEARING.
BUT THE TRIAL JUDGE DID NOT

CONDUCT AN ADDITIONAL
EVIDENTIARY HEARING.
>> SHE DID ALLOW --
>> THAT CONFUSES ME THEN IN
REFERENCE TO THE JUDGE ALLOWING
SOME LIMITED EVIDENCE TO GO IN
THAT YOU DESCRIBED.
IS THAT WHAT HAPPENED?
IN OTHER WORDS, ON THE ONE HAND
THE APPEARANCE IS THAT WHEN IT
WAS SENT BACK THE JUDGE JUST
STUCK TO THE SAME RULING.
>> SHE DID --
>> AND DIDN'T TAKE THE
INVITATION OF THE DISTRICT
COURT TO HAVE AN ADDITIONAL
HEARING, OR WAS THERE AN
ADDITIONAL HEARING?
>> AND STUCK, IF I MAY SAY SO,
TO THE SAME REFUSAL TO GIVE
CREDENCE TO THE PRESUMPTION OF
CONFIDENTIAL INFORMATION HAD
BEEN EXCHANGED.
SHE JUST CONTINUED TO SAY, I
FIND THAT HE DIDN'T LEARN
ANYTHING UNIQUE.
>> YOU'RE NOT -- YOU'RE NOT
SAYING THAT, IN ANOTHER CASE
INVOLVING NEGLIGENCE CLAIMS
THAT THE RULING COULD BE
DIFFERENT, ARE YOU?
I'M THINKING OF, LET'S SAY. A
LAWYER REPRESENTS A TRUCKING
COMPANY --
>> I THIS THERE WAS A
DOUBLE-NEGATIVE IN THERE.
>> LET'S SAY A LAWYER
REPRESENTS A TRUCKING COMPANY
AND HAS DEFEND THE TRUCKING
COMPANY WHEN THE TRUCKS HAVE
ACCIDENTS.
AND IN EACH CASE THEY'RE
CLAIMING THE OPERATOR OF THE
TRUCK NEGLIGENTLY OPERATED THE
TRUCK AND HE REPRESENTED 20
DIFFERENT ONES WHERE THERE WAS
A CLAIM OF NEGLIGENCE BY THE
OPERATOR OF THE TRUCK.
BUT NOW HE GOES AND HE BECOMES
A CLAIMANT'S LAWYER, AND
THERE'S ANOTHER ACCIDENT WITH
THAT COMPANY, WHERE THE DRIVER
OF THE TRUCK IS CLAIMED TO BE
NEGLIGENT.

NOW, THERE WOULDN'T BE ANY CONFLICT IN THAT SITUATION, WOULD THERE?
>> PROBABLY NOT.
AND I THINK --
>> YOU AGREE THAT WOULD TURN MORE ON EACH INCIDENT OF THE CLAIM OF NEGLIGENCE?
>> I ONLY SAY PROBABLY NOT BECAUSE THERE COULD BE IN A PARTICULAR INSTANCE, PARTICULAR CONFIDENTIAL INFORMATION THAT WAS EXCHANGED.
BUT AS A GENERAL RULE, I WOULD SAY YES AND I WOULD SAY THAT MAKES OUR POINT.
>> WHAT YOU WOULD SAY IS, IF THEY ARGUED OR IF THEY ALLEGED A POLICY OR PROCEDURE, IT WOULD THEN PRODUCE THE CONFLICT ON HIS, IN THE CASE JUSTICE ANSTEAD GAVE YOU, IF THEY MAKE THAT ALLEGATION?
>> I THINK SO, JUSTICE LEWIS.
IF THE ARGUMENT WAS THIS TRUCKING COMPANY DID NOT TRAIN ITS TRUCKERS BECAUSE IT DID, A, B, C AND D, SO IT DIDN'T TRAIN THEM PROPERLY AND THE LAWYER IS DEFENDING THAT, AND SAY ABSOLUTELY THE TRUCKING COMPANY DEFENDED IT, TRAINED ITS PEOPLE PROPERLY AND ITS POLICIES FOR TRAINING ITS OPERATORS WERE OF PROPER.
AND THEN, TWO WEEKS LATER TURNS AROUND AND SAYS, THOSE POLICIES WERE INADEQUATE, THOSE POLICIES SHOULD HAVE HAD A, B, C AND D THEN I THINK YOU WOULD BE THE SAME.
I THINK YOUR EXAMPLE KIND OF MAKES THE POINTS.
MOST NEGLIGENT CASES DO TURN ON THEIR OWN FACTS.
WHAT CAUSED THE INJURY IS UNIQUE TO THE FACTUAL CIRCUMSTANCE.
>> LET'S BE CLEAR ONCE MORE, YOU ARE NOT RELYING ON THE PART OF THE RULE THAT TALKS ABOUT ACCESS TO CONFIDENTIAL INFORMATION?
>> ARE YOU --

>> B, SUBSECTION B.
>> SECTION, B, NO, WE'RE RELYING --
>> IN OTHER WORDS, THIS IS NOT A CLAIM WHILE HE WAS THE LAWYER, THAT HE HAD ACCESS TO THE CONFIDENTIAL SECRET INFORMATION THAT HE OTHERWISE WOULDN'T HAVE ACCESS TO?
>> WELL, THERE WAS TESTIMONY TO THAT EFFECT, JUSTICE ANSTEAD. THE GENERAL COUNSEL FOR THE NURSING HOME TESTIFIED TO EXACTLY THAT.
AND SAID THAT MR.^FISCHER WAS PRIVY TO CONFIDENTIAL INFORMATION, ONLY ABOUT THE KIND OF DEFENSE STRATEGIES BUT IN ADDITION THERE WAS AN, AS A PART OF THE DEPOSITIONS WERE TAKEN THAT WERE PRESENTED TO THE JUDGE, THERE WAS EVIDENCE THAT MR.^FISCHER HAD INTERVIEWED THE FACILITY ADMINISTRATOR WHEN HE WAS DEFENDING THE FACILITY AGAINST CLAIMS OF UNDERSTAFFING AND TRAINING.
AND SHE TESTIFIED THAT SHE DID HAVE, PROVIDE HIM WITH CONFIDENTIAL INFORMATION ABOUT THINGS SUCH AS, WHO SHE WOULDN'T WANT TO BE A WITNESS IN A CASE AND WHO MIGHT BE A GOOD WITNESS.
SO THERE IS EVIDENCE IN THIS RECORD THAT CONFIDENTIAL --
>> IS THAT THE CONFLICT THAT YOU'RE ASSERTING?
>> NO, SIR, THAT IS NOT.
BECAUSE THE FOURTH DISTRICT DID CORRECTLY RECOGNIZE, YOU ALMOST EVEN DON'T HAVE TO GET INTO THAT WE GOT INTO THAT BECAUSE THE TRIAL JUDGE KEPT PRESSING FOR, WHAT UNIQUE THING DID HE LEARN?
AND THE PETITIONER WOULD NOT DISCLOSE IT BECAUSE THEN IT'S NOT CONFIDENTIAL ANYMORE.
>> I'M -- YOU'RE IN YOUR REBUTTAL, THIS BRINGS ME BACK TO THE JURISDICTIONAL ISSUE.
WHAT I'M GETTING WHAT I'M

UNDERSTANDING YOU SAYING IS
THAT THE FOURTH DISTRICT ERRED
BECAUSE THEY DIDN'T RECOGNIZE
THIS IS NURSING HOME CASE WITH
STATUTORY VIOLATIONS, AND THAT
THERE WERE GOING TO BE POLICIES
AND PROCEDURES INVOLVED, AND IN
LOOKING AT THE FOURTH DISTRICT
OPINION, THAT'S NOT IN THERE,
AND THAT'S DIFFERENT THAN THE
THIRD DISTRICT OPINION.
SEW THAT, MY CONCERN IS, THERE
MAY BE CONFLICTS SOMEWHERE DOWN
THE ROAD BUT I DON'T SEE IT ON
THE FACE OF WHAT YOU'RE SAYING
ABOUT THAT DISTINCTION BEING ON
THE FACE OF THIS OPINION.
AM I JUST MISSING IT?
>> I THINK IT IS TO THE EXTENT
THAT THE FOURTH DISTRICT SAYS
WE'RE DRAWING, THIS ISN'T A
PRODUCTS CASE.
THIS IS STATUTORY CASE.
IT INVOLVES NEGLIGENCE AND
HENCE IT TURNS ON ITS OWN
FACTS.
IF THAT WERE THE RULE, TUAZON
WOULD NOT HAVE HAD
DISEQUALCATION.
WHEN YOU PUT THE FACTS
TOGETHER --
>> YOU DON'T LOOK AT THEM THEY
WERE DECIDING A SPECIFIC CASE?
THEY WERE WITH A RECORD, AGAIN
ON REMAND YOU WERE ALLOWED TO
PUT IN OTHER COMPLAINTS HE HAD
HANDLED, SO THERE WAS A LIMITED
HEARING FOR JUDGE LEWIS.
>> YES.
>> BUT YOU'RE SAYING NO, THEY
ANNOUNCED A MUCH BIGGER RULE
THAN JUST THIS CASE?
>> EXACTLY. EXACTLY.
AND THAT RULE STANDS ON THE
FACE NOW OF THAT OPINION.
AND SO, ANYBODY, ANY TRIAL
JUDGE IN THE FOURTH DISTRICT
NOW, WHEN THEY GET A NEGLIGENCE
CASE, IS GOING TO SAY,
NEGLIGENCE CASES TURN ON THEIR
OWN FACTS, SO THE LAWYER CAN
SWITCH SIDES AND SUE THE FORMER
CLIENT.
>> THANK YOU, MISS WALBOLT.

>> MAY IT PLEASE THE COURT.
>> MISS WAXMAN.
>> THANK YOU.
I'M LYNN WAXMAN.
I REPRESENT THE RESPONDENT, PEGGY BRADLEY, WHO IS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MR.^FENNELL.
SHE IS THE RESPONDENT IN THIS COURT AND SHE WAS THE PLAINTIFF IN THE TRIAL COURT.
>> WHY DON'T WE JUST GET RIGHT TO MISS WALBOLT'S ARGUMENT SEEMS TO BE BECAUSE THE COMPLAINT HERE CONCERNS THE PROCEDURES AND THE POLICIES AND THOSE KINDS OF THINGS OF THIS NURSING HOME, THE SAME PROCEDURES AND POLICIES WERE IN EFFECT WHEN THIS ATTORNEY WAS REPRESENTING THE NURSING HOME, THAT WE DO HAVE A PROBLEM HERE UNDER, UNDER THE RULE?
>> YOUR HONOR, I CAN BEST ANSWER THAT QUESTION BY ADDRESSING JUSTICE PARIENTE'S QUESTION ABOUT JURISDICTION.
AND I THINK, THE ISSUE, FIRST OF ALL, TO ANSWER YOUR QUESTION, AND TO SHOW WHY THERE IS A DIFFERENCE IN THE TWO THIRD DISTRICT CASES, THE RULE WAS AMENDED ON TUAZON WAS DECIDED IN 1992.
AND AS JUDGE GROSS RECOGNIZES, THE RULE WAS AMENDED IN 1996, AND IN 1996, THE FOLLOWING COMMENT WAS ADDED.
IN THE CASE OF AN ORGANIZATIONAL, ORGANIZATIONAL CLIENT, GENERAL KNOWLEDGE OF THE CLIENT'S POLICIES AND PRACTICES ORDINARILY WILL NOT PRECLUDE A SUBSEQUENT REPRESENTATION.
ON THE OTHER HAND, KNOWLEDGE OF SPECIFIC FACTS GAINED IN SUCH PRIOR REPRESENTATION, THAT ARE RELEVANT TO THE MATTER IN QUESTION, ORDINARILY WILL PRECLUDE, WILL PRECLUDE SUCH REPRESENTATION.
NOW IN '92 THE COURT, WHEN IT

WAS DECIDING TUAZON DID NOT
HAVE THIS.
IN '96, WHEN THE COURT, THE
THIRD DISTRICT DECIDED
BUENAAGUA, ADMITTEDLY BUENAAGUA
IS FACTUALLY DISTINCT.
IT'S FOUR YEARS LATER AND
LAWYER WHO WAS ADJUSTER IS NO
LONGER AT THE FIRM.
>> BUT THE FACTS MADE ALL THE
DIFFERENCE IN THESE CASE, YOU
WOULD AGREE WITH THAT?
>> YES, YOUR HONOR.
>> WHAT BOTHERS ME IS, SEEMS TO
ME THAT THIS COURT IN KAW,
ANNOUNCED A POLICY, BEHIND THIS
RULE, WHICH SEEMS TO BE TO --
ME TO BE VERY SOUND FROM THE
STANDPOINT OF THE PUBLIC AND
PROFESSION.
THAT IS THAT THE PURPOSE OF THE
REQUIREMENT IS THAT THE CLIENT,
THAT AN ATTORNEY MAINTAIN
CLIENT CONFIDENCE, IN ADVANCE
INTEREST OF THE CLIENT BY
ENCOURAGING FREE FLOW OF
INFORMATION AND DEVELOPMENT OF
TRUST, ESSENTIAL TO AN
ATTORNEY/CLIENT RELATIONSHIP.
NOW I HOPE, WHEN WE APPROVED AN
AMENDMENT TO THE RULE IN 1996,
THAT WE WERE NOT STRIKING AT
THAT PURPOSE BEHIND THIS RULE.
YOU DON'T THINK WE WERE, DO
YOU?.
>> CERTAINLY NO.
>> AND ISN'T, ISN'T THE BROAD
POLICY HERE THAT IF A LAWYER
REPRESENTS A CLIENT IN THE AREA
OF TORT, AND BECAUSE OF THAT
REPRESENTATION LEARNS HOW THAT
CLIENT DEFENDS THE CASES,
PREPARES THE CLIENT FOR
DEPOSITION, MANAGING PEOPLE FOR
DEPOSITION, LOOKS OVER ALL OF
THEIR BOOKS AND RECORDS AND,
GENERALLY BECOMES KNOWLEDGEABLE
ABOUT HOW THE CLIENT'S GOING TO
GO ABOUT DEFENDING A CLAIM, AND
THEN, A CLAIM AGAINST THE VERY
SAME FACILITY INVOLVING THIS
VERY SAME TIME PERIOD, COMES UP
AFTER THE CLIENT'S LEFT THAT,
AFTER THE LAWYER HAS LEFT THAT

FIRM AND THEN HE SUES THE CLIENT, TAKES THE SAME PEOPLE'S DEPOSITION, THAT HE'S BEEN PREPARING FOR DEPOSITION, I MEAN THAT'S, SEEMS TO ME, THAT THE RULE IS INTENDED TO PROHIBIT THAT KIND OF CONDUCT IF NOTHING ELSE, FOR THE APPEARANCE OF IT?
>> WE, YOUR HONOR, IT'S MY POSITION THAT YOU'RE TAKING WAY TOO BROAD AN APPLICATION OF THE RULE.
>> WE CAN BE TOO BROAD IN OUR APPLICATION OF THE ETHICS OF THIS MATTER?.
>> NO.
BUT, THE CASES SAY THAT THERE IS ANOTHER RIGHT THAT HAS TO BE RESPECTED AND THAT'S THE RIGHT OF A PARTY TO CHOOSE THEIR ATTORNEY.
AND THEREFORE, DISQUALIFICATION IS A VERY NARROW REMEDY TO BE USED IN EXTREME CASES.
I THINK TO ANSWER YOUR QUESTION, THAT IS THE REASON THERE IS CLARIFICATION OF THE RULE.
YOU CAN'T SAY JUST BECAUSE POLICIES ARE OF SAME THAT THE MATTERS ARE SUBSTANTIALLY RELATED.
AND I WOULD LIKE TO ASK YOU --
>> SAY ONE THING, TO ME, AT LEAST, IF THE PERSON WAS OUT DRIVING A TRUCK, AND GOT INTO AN AUTOMOBILE ACCIDENT, BUT, A VERY DIFFERENT THING IF YOU'RE DEALING WITH WHAT THE LAWYER WAS DOING DURING THE SAME PERIOD OF TIME, DEFENDING THIS CLIENT.
I MEAN, SEEMS TO ME THAT WHAT WE'VE GOT TO BE CONCERNED ABOUT HERE, FIRST OF ALL, IS THE MAINTENANCE OF THE CONFIDENTIALITY AND CONFIDENCES OF PEOPLE THAT HIGHER US TO REPRESENT THEM.
NOT FEARING THAT WE'LL GO OUT AND BREACH THAT AT SOME POINT IN TIME.
ISN'T THAT THE ESSENCE OF THIS

MATTER?
>> YES, YOUR HONOR, I'M SYMPATHETIC TO THAT.
THAT IS THE PURPOSES OF THE RULE.
BUT IN FIGURING OUT THE SOLUTION, WHAT THE RULE TELLS US IS THAT YOU HAVE TO DETERMINE WHETHER THE PAST, AND PRESENT REPRESENTATIONS ARE SUBSTANTIALLY RELATED.
THAT'S WHY YOU CAN'T JUST SAY, HE WORKED IN A NURSING HOME, AND THEREFORE HE CAN'T SUE A NURSING HOME.
TO DETERMINE WHETHER SOMETHING IS SUBSTANTIALLY RELATED YOU HAVE TO LOOK AT THE FACTS OF THE CASE.
THAT IS WHAT THE COMMENT TELLS US.
>> BUT, ANOTHER PART TO THAT COMMENT THAT YOU KEEP TALKING ABOUT, AND IT SAYS, SUBSTANTIALLY RELATED WHAT MATTERS ARE SUBSTANTIALLY RELATED, IF THE CURRENT MATTER WOULD INVOLVE THE LAWYER ATTACKING WORK THAT THE LAWYER PERFORMED WITH A FORMER CLIENT.
SO, IF THE LAWYER PERFORMED WORK FOR THE FORMER CLIENT, THAT INVOLVED THE LAWYER DEFENDING THESE POLICIES, AND PROCEDURES, WHY ISN'T THAT, WHY DOESN'T THAT FALL UNDER THAT DEFINITION OF SUBSTANTIALLY RELATED?
>> BECAUSE --
>> NOW HE IS ATTACKING THE VERY THING OR THINGS THAT HE WAS PERFORMING ON BEHALF OF THE CLIENT BEFORE.
>> YOU HAVE TO LOOK AT WHAT DID HE DO FOR THE CLIENT.
HE, TO DETERMINE WHETHER A DECUBITUS ULCER CASE IS ATTACKING HIS REPRESENTATION IN DECUBITUS ULCER CASE, IS ATTACKING THE WORK THAT HE DID FOR HIS FORMER CLIENT, WE HAVE TO FIRST KNOW WHAT'S INVOLVED IN A DECUBITUS ULCER CASE, WHICH MANOR CARE PRESENTED NO

EVIDENCE OF.
FOR EXAMPLE, A LAWYER IN A DECUBITUS ULCER CASE WOULD FIRST WANT TO DISCOVER WHETHER THE PATIENT OR PATIENTS INVOLVED WERE AT RISK FOR DEVELOPING ULCERS, WHETHER THE LAWYER, WHETHER THE STAFF WERE TRAINED IN RECOGNIZING SORES AND --
>> BUT DIDN'T THE PRIOR CASES INVOLVE CLAIMS RELATED TO STAFFING, INADEQUATE STAFFING, INADEQUATE TRAINING? AND IF THE LAWYER HAS BEEN INVOLVED IN DEFENDING CASES THAT INVOLVED THOSE SORTS OF CLAIMS, IT SEEMS THAT HE WOULD HAVE BEEN -

>> THE PRIOR CASES -- VOLUNTARINESS CLAIMS RELATED TO STAFFING, INADEQUATE STAFFING INADEQUATE TRAINING THE LAWYER HAS BEEN INVOLVED IN A DEGREE OF CASES DEFENDING CASES THAT VOLUNTARILY THOSE SORTS OF CLAIMS IT SEEMS HE WOULD HAVE BEEN INVOLVED IN PROVIDING SERVICES WHERE HE WOULD BE LIKELY TO GAIN SPECIFIC KNOWLEDGE THAT WOULD BE RELEVANT TO THE SIMILAR CLAIMS THAT ARE BEING -- THAT HE WOULD BE PURSUING SUBSEQUENTLY AND THAT AND YOU DON'T AND I THINK IF I UNDERSTAND YOU DON'T GET TO WHAT HE SPECIFICALLY KNEW YOU FOCUS ON THE NATURE OF THE SERVICES THE LAWYER PROVIDER, A FORMER CLIENT AND INFORMATION THAT WOULD IN ORDINARY PRACTICE BE LEARNED BY A LAWYER PROVIDING SUCH SERVICES, YOU GOT TO LOOK AT THAT.
THERE IS AN ELEMENT HERE OF -- OF LOOKING AT A KIND OF OBJECTIVELY AS OPPOSED TO SUBJECTIVELY ABOUT WHAT HE KNEW, AND THEN -- BUT IT SEEMS

LIKE TO ME YOU HAVE GOT TO
TAKE INTO ACCOUNT, THESE --
SPECIFIC SORTS OF CLAIMS THAT
HE WAS DEFENDING AND
SIMILARITY BETWEEN THE CLAIMS
WITH RESPECT TO
INADEQUATE TRAINING,
INADEQUATE STAFFING.
AND I JUST -- SEEMS TO ME
PROBLEMATIC WHERE YOU HAVE GOT
THAT KIND OF OVERLAP TO REACH
A CONCLUSION THAT THERE IS NOT
A SUBSTANTIAL RELATIONSHIP
BETWEEN THESE MATTERS.
>> YOUR HONOR, TO ANSWER YOUR
QUESTION, THE ISSUE OF
STAFFING IS SOMETHING THAT IS
EASILY DISCOVERABLE ALL THE
LAWYER ON THE OTHER SIDE HAS
TO DO IS ASK FOR THE NURSE'S
RECORD OF THE TIME OF THE
INCIDENT, YOU CAN FIGURE OUT
WHAT STAFF WAS AVAILABLE, THIS
IS NOTHING THAT IS
CONFIDENTIAL THAT WOULD LEAD
TO SUBSEQUENT REPRESENTATION
THE POLICIES AND PROCEDURES
ARE DISCOVERABLE THE TRIAL
LAWYER THAT HAD THE OUTER
VERSION OF THE POLICIES AND
PROCEDURES, I'M A LITTLE
CONFUSED.
>> I'M A LITTLE CONFUSED ABOUT
SOMETHING -- IT IS INTERESTING TO
ME DISCUSSING POLICIES AND
PROCEDURES, BUT I'M -- MAYBE
YOU CAN HELP ME OUT WITH THIS.
IN READING THE FOURTH DISTRICT
OPINION THE FOCUS DOESN'T SEEM
TO BE ON WHETHER THE ESSENCE
OF THIS CLAIM WAS ONE ABOUT
WHEN STAFFING WAS INADEQUATE,
AND THAT THEY WERE THEREOF
ATTACKING THE WORK, NOW SHE
HAS DONE A VERY GOOD JOB
SAYING THAT WAS THE FOCUS, BUT
I'M LOOKING AT THE OPINION,
AND I DON'T SEE THAT, I DON'T
SEE -- SO HELP ME IN TERMS OF
I THINK IN THIS ANALOGY IT IS
A TRUCKING COMPANY SAY
NEGLIGENCE, A CASE I THINK I'M
GOING TO ADD A CLAIM THAT THEY
ALSO WERE NEGLIGENT --

FOLLOWED NEGLIGENT POLICIES,
JUST -- JUSTICE -- LEWIS SAID
THAT DOESN'T MAKE THAT DOESN'T
CAUSE THE INJURY, THAT IS KIND
OF THE ICING ON THE CAKE KIND OF
THING TO DO.
WE HAVE TO LOOK
BEHIND THE FOURTH DISTRICT
OPINION THE RECORD TO SAY NOW
WE ARE GOING TO DISTINGUISH
THAT THIS ISN'T AN
ORDINARY -- NEGLIGENCE CASE,
IT WAS A NURSING HOME CASE,
NURSING HOME CASES ARE A
SPECIES OF CHAPTER STATUTORY
VIOLATION THAT VOLUNTARILY
STAFFING THAT AND THEREFORE,
IS INVOLVING ATTACKING THE
WORK AGAIN, THAT MIGHT BE AN
INTERESTING ISSUE, I'M TRYING
TO SEE HOW THAT WAS HANDLED IN
THE FOURTH DISTRICT, SO IF WE
ARE GOING TO DISAPPROVE OR
APPROVE, WE ARE GOING TO
DISCUSS THE ISSUES THAT WERE
DISCUSSED BY THEM.
SO COULD YOU
HELP ME WITH THAT WAS THE MAIN
THRUST THAT THAT IS THAT THERE
YOU ARE THAT THEY WERE
ATTACKING STAFFING, AND,
THEREFORE, THAT FOR THAT
REASON IT WAS SUBSTANTIALLY
RELATED THAT WAS THE GIST OF
THE CLAIM, NOT A CLAIM ABOUT
HOW SHE ENDED UP DYING, FROM
THE PARTICULAR NEGLECT
IN THIS CASE.
>> THE CLAIM THAT WAS MADE
INTERESTING THING THE
TRIAL COURT JUDGE, WAS
UNIQUELY QUALIFIED TO DECIDE
THIS ISSUE, HAD BEEN A DEFENSE
LAWYER 20 YEARS.
>> NOW THAT YOU KNOW -- WE
DON'T GET INTO CASES, WHERE
THE TRIAL COURT IS UNIQUELY
QUALIFIED AS A MATTER OF FACT
IT SEEMS TO ME THAT NOW YOU
ARE TALKING BEING POTENTIAL ERROR
OR BIAS IF YOU ARE TALKING
ABOUT A JUDGE RELYING ON HER
EXPERIENCE AS A PRIVATE
LAWYER, IN DIVIDING AN ETHICAL

ISSUE LIKE THIS, HELP US WITH -- YOU ARE TALKING ABOUT APPARENTLY THE CONFIDENTIAL PORTION OF THIS IS REALLY NOT BEFORE US, IN THE CONFLICT CASE.
BUT COME BACK TO THE SUBSTANTIALLY SIMILAR ASPECT -- WHY, EXPLAIN TO ME WHY WHEN THE DISTRICT COURT SENT THIS CASE BACK TO THE TRIAL COURT ANSWERED ESSENTIALLY SHOULD HAVE AN EVIDENTIARY HEARING OR HAVE AN EVIDENTIARY HEARING TO SORT THIS OUT, WHY DIDN'T THE TRIAL JUDGE HAVE AN EVIDENTIARY HEARING?
>> SHE DID, YOUR HONOR.
IT IS VERY CLEAR IN THE TRIAL --
>> THE OPINION OF THE FOURTH DISTRICT SAYS THAT SHE DID NOT.
SO IS THE OPINION OF THE FOURTH DISTRICT IN ERROR?
>> I'M NOT SURE WHERE IT SAYS IT.
>> WELL, IT SAYS IT, IT SAYS THAT AFTER -- AS A MATTER OF FACT, IT FIRST SAYS ON THE FACE OF THE ORDER THAT THE JUDGE DIDN'T PROPERLY APPLY THE PRESUMPTION, IN OTHER WORDS, IT SEEMS TO BE SAYING, WHEN WE SENT THIS BACK, AND TOLD THE TRIAL JUDGE WHAT TO DO, THE TRIAL JUDGE GOOFED AND IN ALL RESPECTS, THAT WHEN WE READ THE ORDER, SHE DIDN'T APPLY PRESUMPTION DIDN'T HAVE THIS HEARING, BUT NEVERTHELESS WE ARE GOING TO AFFIRM YOU KNOW WHAT SHE DID.
PART OF THE -- YOU KNOW THE POLICY BEHIND THIS RULE IS ALSO THE APPEARANCE OF SOMETHING LIKE THIS, TO THE PUBLIC.
SO ONE OF THE -- WAYS THAT WE PROJECT THIS WOULD THERE BE A DIFFICULTY IF WE PROJECTED TO THAT PUBLIC A LAWYER ONE DAY IS STANDING BEFORE A JURY,

AND SAYING THE POLICIES AND
PRACTICES OF THIS NURSING HOME
ARE ATROCIOUS, AND X-NURSING
HOME THEY ARE TERRIBLE.
AND THEN THE NEXT WEEK
THE PUBLIC WOULD SEE THAT SAME
LAWYER STAND IN FRONT OF A JURY
AND SAY THE POLICIES ARE
WHATEVER OF THIS NURSING HOME
ARE IDEAL.
NOW, IN OTHER WORDS, THAT WE
HAVE TWO VERY CONFLICTING
STATEMENTS ABOUT APPROVING THE
POLICIES OR PRACTICES OF A
PARTICULAR NURSING HOME.
ISN'T -- ISN'T PART OF THE
REASON FOR THIS CONFLICT RULE
TO AVOID THAT KIND OF
APPEARANCE TO THE PUBLIC THAT
A LAWYER CAN DO THAT?
>> I HAVE TO ANSWER YOUR
QUESTION IN SECESSION,
FIRST OF ALL, WHAT HAPPENED,
WAS AFTER THE REMAND, WE WENT
BACK TO THE JUDGE, AND BOTH
SIDES DECIDED NO ADDITIONAL
DISCOVER WAS NEEDED WE
WOULD HAVE A EVIDENTIARY
HEARING, THEN BACK ABOUT A
WEEK LATER AND WE HAD AN
EVIDENTIARY HEARING AND AT
THAT TIME WHAT HAPPENED WAS
THE MANOR CARE TRIED TO
INTRODUCE VARIOUS COMPLAINTS
INTO EVIDENCE THAT THEY HADN'T
SUPPLIED TO US.
AND THE JUDGE ROLLED THROUGH
HADN'T BEEN ADEQUATE
DISCLOSURE, MANOR CARE
REMINDED THE JUDGE THESE
WERE THE SAME COMPLAINTS THAT THEY
RELIED UPON BEFORE, SO THE
JUDGE OVERRULED THEIR
OBJECTION, SHE ADMITTED SOME OF
THEM INTO EVIDENCE.
THE SECOND HEARING --
>> SO THERE WAS OR THERE
WASN'T AN EVIDENTIARY HEARING.
>> THERE WAS.
>> WELL, SO THE -- THE FOURTH
DISTRICT IS INCORRECT IN --
>> YES.
>> -- WHEN THEY SAY ON
REMAND WITHOUT TAKING

ADDITIONAL EVIDENCE THE CIRCUIT COURT THAT IS AN ERRONEOUS STATEMENT --
>> THERE WAS EVIDENCE RECEIVED COMPLAINT THAT MANOR CARE --
>> IS IT ALSO AN ERRONEOUS STATEMENT THAT THE TRIAL JUDGE DID NOT APPLY THE CORRECT PRESUMPTION?
>> IS IT AN ERRONEOUS STATEMENT?
>> IN OTHER WORDS -- IF I READ THE OPINION CORRECTLY, IT SAYS -- THE COURT ORAL RULING DIRECTLY APPLIED TO IRREBUTTABLE PRESUMPTION AND FOCUSED ON THE ISSUE IDENTIFIED IN EARLY OPINION, HOWEVER THE ORDER SUPPLIED BY COUNSEL AND SIGNED BY THE COURT APPEARS TO CONTRADICT THE PRESUMPTION.
>> IT SAYS IT APPEARS TO CONTRADICT IT BECAUSE SHE PUT SOME FACTS IN THERE, AND THEN SAID THE PRESUMPTION EXISTS. SO YES, TO ANSWER YOUR QUESTION, I WOULDN'T ARGUE WITH THAT, THERE ARE SOME FACTS IN THE RULING BUT THEN SHE GOES ON TO SAY IN THE RULING THAT THERE IS -- THE PRESUMPTION --
>> HOW ABOUT BEHIND THIS PORTION OF THE RULE -- WITH REFERENCE TO A LAWYER ONE DAY HAVING THE NURSE DEFENDING NURSING HOME SAYING POLICIES AND PROCEDURES ARE ADEQUATE CONSISTENT WITH THE STATUTORY SCHEME ADMINISTRATIVE REGULATION, AND THEN THE NEXT WEEK SAYING THESE POLICIES AND PROCEDURES ARE TOTALLY INADEQUATE, THE SAME LAWYER.
>> THE COMMENT TO THE RULE ALLOWS A LAWYER TO TAKE POSITIONS ADVERSE TO HIS PRIOR CLIENT.
>> WHAT -- THIS IS MY PROBLEM, FIRST OF ALL, I STILL -- REREADING THE FOURTH DISTRICT AND I REALIZE THAT IT MAY BE

JUST ERRORS IN THE FOURTH
DISTRICT'S OPINION, WHAT DOES
AND MAYBE ATTACKING THE WORK
MEAN?
BECAUSE I THINK THAT THE WAY
MISS WALBOLT STATED IT SOME
JUSTICES HERE STATED IF YOU GO
AND SWITCH SIDES AND YOU ARE
THEN NOT ONLY LOOKING AT
SPECIFIC FACTS BUT AGAIN IN
THIS CASE, IF THEY IF THE
LAWYER -- AFTER -- IT DOWN
TO A NEW BALL GAME, IT
HAS BEEN GOING ON SO LONG
ASSUME THE LAWYER GETS UP THERE
AND SAYS, MANOR CARE NURSING
HOME ONLY HAS, YOU KNOW, ONE --
ONE NURSE FOR 100 RESIDENTS,
AND THAT IS DESPICABLE BUT HE
HAS -- THE DAY BEFORE SAID
THAT IS PERFECTLY WITHIN THE
GUIDELINES, IS THAT
ATTACKING THE WORK?
IS THAT WHAT WE MEAN BY THE -- OR
SHOULD IT BE WHAT WE MEAN BY
THAT?
BECAUSE THAT IS WHAT
WALBOLT IS SAYING, IT DOESN'T
MATTER THAT YOU DISCOVER,
POLICIES AND PROCEDURES, IT
DOESN'T MATTER THAT YOU DIDN'T
GET REALLY ANYTHING BEYOND
ANYONE ELSE, THAT THE PUBLIC
DOESN'T -- WE DON'T WANT TO SEE
LAWYERS SWITCHING SIDES IN THE
SAME KIND OF CASE WHAT THE
ATTACKING WORK MEANS IS THAT
WHAT IT MEANS.
>> ATTACKING THE WORK OF A
FORMER CLIENT IS WHAT TRAUTMAN,
STANSBURY ARE ABOUT.
WHEN YOU
SWITCH SIDES IN A CASE YOU
HAVE LEARNED CONFIDENTIAL
INFORMATION ABOUT A LAWNMOWER.
>> I'M ASKING YOU, AND I THINK
THIS IS IN YOUR -- IT IS A
PROBLEM, IS THAT THIS RECORD
AND THIS OPINION DOESN'T FOCUS
ON WHETHER, IN ESSENCE, INSTEAD
OF BEING A NEGLIGENCE CASE,
THIS WAS A STATUTORY CAUSE OF
ACTION, THAT IS SUBSTANTIALLY
SIMILAR, UNLIKE A GENERAL

NEGLIGENCE CASE.
MY PROBLEM IS
THAT IS NOT HOW THE FOURTH
DISTRICT DESCRIBED IT.
WHY WOULDN'T THE BETTER
THING BE SEND THIS BACK TO THE
FOURTH DISTRICT, LET THEM SORT
OUT WHAT THIS CLAIM INVOLVES,
WHETHER IN FACT IT INVOLVES
NEGLIGENCE IN THE
ADMINISTRATION OF ITS
POLICIES, VERSUS SOME GARDEN
VARIETY PRESSURE SORE CASE
THAT IS NO DIFFERENT OR IS
DIFFERENT?
>> WELL, YOUR HONOR, I THINK
WHAT YOU HAVE TO LOOK AT IS
THE EVIDENCE IN THE CASE.
AND, AGAIN, THE EVIDENCE WAS
PRODUCED AT THE FIRST HEARING,
AND THAT IS WHEN MANOR CARE
HAD THE OPPORTUNITY TO COME
FORWARD, AND SHOW HOW THE
POLICIES AND A PROCEDURES
RELATED TO THE SECOND CASE.
>> BUT YOU ARE SAYING THIS
GOES BACK TO THE ABUSIVE --
WHICH I ASKED YOU INITIALLY IS
THIS SO FACT SPECIFIC THAT
WE'RE REALLY DEALING WHETHER YOU
GO TO AN ABUSE OF DISCRETION
BY THE TRIAL COURT IN THE
SECOND ORDER?
WHETHER SHE ABUSED HER
DISCRETION BASED ON THE RECORD IN
FRONT OF HER IN NOT FINDING
THIS CASE INVOLVES ATTACKING
THE WORK?
>> YES, IT WAS FACTUALLY
SPECIFIC, THE TRIAL JUDGE AND
JUDGE GROSS, JUDGE GROSS'S
OPINION IS THIS IS A FACTUALLY
SPECIFIC CASE, GENERAL POLICIES
AND PROCEDURES, THE MANOR CARRIER
WAS ALLEGING ARE NOT ENOUGH TO
REQUIRE DISQUALIFICATION.
THAT IS EXACTLY WHAT THE RULE
SAYS, THAT IS WHAT THE THIRD
DISTRICT SAYS IN WINAGA, A
SUBSEQUENT CASE SAYS ALL CASES
AS DISCUSSING HAVE ELEMENTS IN
COMMON, ANY NURSING HOME
COMPLAINT AS YOU CAN SEE BY
THE COMPLAINTS THAT ARE IN THE

FILE, ARE GOING TO ALLEGING, VIOLATION OF STAFFING VIOLATIONS, OF MEDICATION VIOLATIONS, OF CHARTING. THOSE ARE THE POLICIES AND PROCEDURES.
BUT IS THAT SUFFICIENT?
AND IF THIS COURT WRITES AN OPINION THAT SAYS MERELY BECAUSE YOU LEARN POLICIES AND PROCEDURES AND THEN YOU GO TO ANOTHER SIDE YOU ARE DISQUALIFIED FROM EVER REPRESENTING THAT SIDE, AGAIN, YOU HAVE THE SAME QUESTION, HOW MANY YEARS, WHAT IS THE EXACT INFORMATION?
YOU HAVE TO BE FACT SPECIFIC, FOR EXAMPLE --
>> IT IS NOT A MATTER -- IN FAIRNESS, IT IS NOT A MATTER WHETHER YOU ARE DISQUALIFIED OR NOT.
IT IS A MATTER WHETHER YOU ARE DISQUALIFIED TO REPRESENT THE PERSON IN A SUBSTANTIALLY SIMILAR MATTER TO SUE THEM AND IS A SUBSTANTIALLY DIFFERENT MATTER CONCERNING ACTIVITIES THAT OCCURRED DURING THE SAME TIME THAT YOU REPRESENTED THEM.
NOW, PRESUMABLY, ALL THOSE CLAIMS ARE GOING TO BE BARRED BY THE STATUTE OF LIMITATIONS.
>> YOUR HONOR --
>> IT IS NOT FOREVER.
>> IF YOU COULD ANSWER THAT QUESTION, WRAP UP, YOU ARE WELL BEYOND YOUR TIME.
>> THANK YOU.
WE WOULD JUST REQUEST THAT YOU DISAPPROVE OF TUAZON, BECAUSE IT IS INCORRECTLY DECIDED AND IT WAS DECIDED BEFORE THE RULE WAS AMENDED AND APPROVED, THE HOLDING OF THE FOURTH DISTRICT, THANK YOU.
>> WE WILL GIVE YOU ONE MINUTE TO SUM UP YOUR ARGUMENT.
>> THANK YOU, YOUR HONOR.

I THINK THE QUESTIONS REALLY
HAVE FRAMED THE ISSUES THAT I
WOULD URGE THIS COURT TO
ADDRESS.
>> LET ME ASK ONE QUESTION.
WE HAVE HEARD THE PHRASE
"SUBSTANTIALLY SIMILAR."
WHAT IS THE TEST?
IS IT SUBSTANTIALLY SIMILAR OR IS IT
SUBSTANTIALLY RELATED?
IT IS SUBSTANTIALLY RELATED.
>> SO SIMILAR CASES ARE NOT
NECESSARILY RELATED, ARE THEY?
BECAUSE SOMETHING MAY BE
SIMILAR DOES NOT MAKE IT
SUBSTANTIALLY ASSERTED?
>> THAT IS CORRECT.
THE IDENTICAL CLAIMS ASSERTED IN
ONE SET OF LAWSUITS, AND THEN ARE
ASSERTED IN THE LAWYER'S
ON THE OTHER SIDE OF THOSE
COMPACT CLAIMS, THAT
LAWYER HAS SWITCHED SIDES, AND
THAT IS NOT PROPER UNDER THE
COMMENT THAT --
>> WHERE WOULD CLAIMS AGAINST
INSURANCE COMPANIES FALL?
UNINSURED MOTORIST CLAIMS
AGAINST AN INSURANCE COMPANY
THAT YOU HAVE DEFENDED FOR
YEARS, HOW THEY
HANDLE THEM, PROCESS THEM,
ANYTHING ABOUT THOSE WOULD --
WOULD THAT SAME -- LEARN THEIR
POLICIES YOU LEARN THEIR
PROCEDURES, AND HOW THEY WANT
TO DEFEND AGAINST THOSE, WOULD
THEN IF SOMEONE HAS A
DIFFERENT CLAIM BUT STILL
UNINSURED MOTORIST CLAIM,
WOULD THEY -- IF THEY ARE
CHALLENGING THE POLICY
PROCEDURES THEY WOULD THEN
BE EXCLUDED AS WELL?
>> IT DOES HAVE TO BE -- UNDER
THE FIRST PART OF THE RULE IT
DOES HAVE TO BE SUBSTANTIALLY
RELATED, YOU WOULD HAVE TO SHOW
THAT --
>> POLICIES AND PROCEDURES ARE
INVOLVED AND YOU WOULD BE
EXCLUDED FROM THOSE CASES AS
WELL; CORRECT?
>> NOT UNLESS THE CASES WERE

SUBSTANTIALLY RELATED.
>> THAT IS WHAT I'M SAYING.
POLICIES AND PROCEDURES, JUST
LIKE YOU DO IN THIS CASE THEN
WOULD YOU BE --
>> YOU WOULD BE, AND I WOULD
JUST, IF I MAY SUM UP, I URGE
THIS COURT TO REAFFIRM THE
IMPORTANT POLICIES THAT IT DID
AFFIRM IN THE KAW CASE.
IT IS IMPORTANT FOR CLIENTS TO HAVE
THE RIGHT TO CHOOSE THEIR OWN
LAWYERS, BUT THERE IS A FAR
MORE PARAMOUNT IMPORTANCE, THAT
CLIENTS BE ASSURED THAT WHEN
THEY TALK WITH THEIR LAWYERS
THAT THOSE CONFIDENCES ARE NOT
TURNING UP ON THE OTHER SIDE,
IN THE SAME -- OF CLAIMS, THAT
THERE BE AS THIS COURT SAID IN
KAW, AN APPEARANCE OF A FAIR
JUDICIARY, OF A FAIR TRIAL,
WHERE ONE LAWYER DOES NOT
APPEAR TO HAVE INFORMATIONAL
ADVANTAGE.
THANK YOU.
>> THANK YOU VERY MUCH.
THE COURT WILL BE IN RECESS UNTIL
TOMORROW MORNING.