

IN THE DISTRICT COURT OF APPEAL OF FLORIDA  
THIRD DISTRICT

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**APPEAL NO. 3D2024-0450**

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TARAS S. DIAKIWSKI,  
**Appellant,**

**v.**

CRAFT CONSTRUCTION COMPANY, LLC et al.,  
**Appellees.**

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ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH  
JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA  
L.T. CASE NO. 15-28846-CA

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**APPELLANT'S REPLY BRIEF**

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Timothy S. Taylor  
Vanessa A. Van Cleaf  
TAYLOR CORWIN & VAN CLEAF, PLLC  
255 Alhambra Circle, Suite 1170  
Coral Gables, Florida 33134  
Tel.: (305) 859-4400  
Email: [ttaylor@tcv.law](mailto:ttaylor@tcv.law); [vvancleaf@tcv.law](mailto:vvancleaf@tcv.law); [vperez@tcv.law](mailto:vperez@tcv.law);  
[lvega@tcv.law](mailto:lvega@tcv.law)

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## **REPLY BRIEF**

Diakiwski incorporates his Initial Brief and submits this response and rebuttal to Appellees' Answer Brief:

**I. Appellees had no direct Rule 4-1.7/1.9 conflict-standing to disqualify Taylor because no privity existed between them.**

While attorney-disqualification orders are generally reviewed for abuse-of-discretion, *de novo* review applies here because the trial court applied the wrong legal standard, erroneously determined Appellees' standing, and misapplied the correct legal standard. Init.Br.41-42.

Because it is undisputed that Appellees never retained Taylor, the trial court could only disqualify Taylor if Appellees either established "non-client" Rule 4-1.7/1.9 "conflict" standing or satisfied the multi-pronged opposing-attorney "unfair advantage" disqualification standard. Init.Br.53-54. Reversal is necessary because Appellees did neither.

**II. Appellees lacked “non-client” Rule 4-1.7/1.9 conflict-standing to disqualify Taylor.**

**A. The trial court clearly erred in concluding Taylor “represented” CCC by creating and imputing a joint-representation of Berkley and Appellees.**

Appellate courts can reject factual findings if “the appellant can demonstrate that they are clearly erroneous.” *Universal Beverages Holdings, Inc. v. Merkin*, 902 So.2d 288, 290 (Fla. 3d DCA 2005).

Diakiwski demonstrated many findings below were clearly erroneous, including that Appellees’ longtime counsel for this case did not know Taylor. Init.Br.80. Appellees acknowledge that was error. Ans.Br.17,n.2. They also cite, as error, the trial court using “the phrase ‘joint defense agreement’ instead of ‘joint representation agreement.’” Ans.Br.56,n.4. Yet, Appellees champion the Order’s findings as “unassailable.” Ans.Br.4,63,65,68.

The trial court erred most clearly by determining Vaccarella/Munoz jointly represented CCC and Berkley against BBH until Berkley retained Taylor, and resultingly concluding Taylor “effectively represented CCC.” Init.Br.55. These unsustainable findings anchored the Order. The judge clearly wanted to disqualify Taylor but knew it could not hold he inserted himself into a CCC-

Berkley JDA because none existed on August 4—which Appellees now concede. AA.2963;Init.Br.27,32-33;Ans.Br.56,64.

Appellees dubiously suggest these arguments are unpreserved. Ans.Br.64. Berkley and Taylor vehemently opposed the imposition of unwanted attorney-client relationships (Init.Br.25-28), and Taylor argued: “[W]e know the legal standard for representation. It’s a subjective belief by the client. It has no bearing on what the lawyers thought.” AB.213. Appealing was also Diakiwski’s only option—these errors occurred when the Order was entered, and “[m]otions for rehearing directed to [nonfinal] orders are not authorized....” [Fla.R.App.P.9.130\(a\)\(5\)](#).

**1. No BBH Dispute attorney-client relationship existed between Berkley and Vaccarella/Munoz.**

An attorney-client relationship's existence hinges on the putative **client's** subjective belief. Init.Br.54. The trial court erroneously found Vaccarella/Munoz represented Berkley until August 4, based solely upon **Appellants' lawyers'** beliefs and disregarded Berkley's contrary insistence. Init.Br.54-56. While trial courts may evaluate credibility, no authority allowed the judge to force Vaccarella/Munoz's representation upon Berkley—especially when contemporaneous evidence of Berkley's BBH-default response fully corroborated Ibsen's truthful testimony that Berkley was **unrepresented** against BBH until retaining Taylor. AC.60-62.

Berkley had to “independently[] investigate the facts and circumstances relating to the Contractor Default” and if necessary, act “at its expense.” AC.18-19,§5. If CCC performed, Berkley had “no obligation under th[e] Bond, except when applicable to participate in a conference....” AC.18,§2. Therefore, Ibsen's July 14, 2023, letter to BBH confirmed Berkley represented itself while investigating CCC's “alleged default” and evaluating its Bond options:



July 14, 2023

\* \* \*

Dear Mr. Thomas:

Berkley Surety is the surety claims representative for Berkley Insurance Company ("Berkley").

This will acknowledge receipt of your letter dated June 23, 2023 within which you gave your notice of bond claim and alleged default of the principal, Craft Construction Company, LLC under the contract for the referenced bonded project, including the Obligee's demand for the surety to perform.

Berkley has been in contact with our Principal ("Craft"), and Craft has responded disputing the alleged default. See the attached response letter, including attachments and photographs dated June 30, 2023. We are confident that Craft will perform according to the requirements of their contract, and it is our understanding that Craft continues to work on the project and nearing a Temporary Certificate of Occupancy ("TCO") status on the project.

In order to investigate and determine how we will respond under our bond to the Principal's purported default and the Obligee's demand on the surety to exercise its options under the performance bond, we will need the following information:

\* \* \*

Based on the above, Berkley requests an extension of time to investigate and will have a better idea as to the exact time required once we complete our investigation. We will be back in touch with you at that time.

In the meantime, please be advised, however, that acknowledgement of your undertaking of this investigation should not be construed as an admission of liability, estoppel, waiver or modification of any of the Surety's rights or defenses under the bond, the contract, or any other agreements or applicable law, all of which the Surety reserves to itself fully.

Please direct all further communications to Berkley Surety to the attention of the undersigned at the address set forth on our letterhead. Should you have any questions, kindly contact the undersigned.

Very truly yours,

Tracey A. Ibsen  
Surety Claim Examiner  
Enclosures

AC.60-62.

Appellees therefore misstate that “[w]hen the Owner demanded Berkley’s response, Ibsen scheduled a Team CCC-Berkley meeting for August 4, 2023 to discuss how Team CCC-Berkley should respond” (Ans.Br.15) because Berkley opened an independent dialogue with BBH weeks earlier. AC.60-62;AC.64-65;Init.Br.12. Conspicuously, Appellees do not cite Ibsen’s letter.

Further, Munoz previously informed BBH that he only represented CCC (AC.51;AB.442;Init.Br.12), and BBH replied directly to Berkley. AC.64-65. Munoz neither told Ibsen he believed he represented Berkley nor told BBH’s counsel to cease direct Berkley communications. Init.Br.27-28;AB.289,444; [Fla. Bar R. 4-4.2](#) (prohibiting communication with represented persons).

**2. The trial court could not impute an “effective” attorney-client relationship upon Taylor and CCC because there was no evidence CCC reasonably believed Taylor represented its interests.**

The trial court buoyed from erroneously imposing unwanted representation upon Berkley to incredibly concluding that when **Berkley** hired Taylor, it created a new attorney-client relationship between Taylor **and CCC**. Appellees characterize this as Taylor “functionally” representing “teammate CCC” by joining “Team CCC-Berkley.” Ans.Br.48,68. Under this reasoning, no client could ever terminate joint legal representation, not even to cure a conflict.

Appellees cite no case supporting affirmance wherein the putative Rule 4-1.7/1.9 disqualification-“client” did not attest to believing an attorney-client relationship existed because the lawyer represented the movant’s interests in a substantially related matter. Of course, Craft could not swear he believed Taylor rendered CCC legal services because Craft immediately objected to Taylor’s participation in any Berkley-CCC “team.” Init.Br.31. This was not contemplated in [Young v. Achenbauch](#), 136 So. 3d 575 (Fla. 2014) or [Pagidipati v. Vyas](#), 353 So. 3d 1204 (Fla. 2d DCA 2022) as Appellees suggest. Ans.Br.66-67. [Young](#), 136 So. 3d at 582 and [Pagidipati](#), 353

So. 3d at 1214-15 both applied the “reasonable belief” attorney-client-relationship test when deciding firms “effectively” represented disqualification movants.

**B. Rule 4-1.7/1.9 “non-client” conflict-standing decisions are otherwise inapplicable.**

Diakiwski reiterates his briefing (Init.Br.59-64) on why the trial court erroneously determined the following supported granting Appellees “non-client” standing to seek conflict-disqualification: *Young*, 136 So.3d 575, *State Farm Mut. Auto. Ins. Co. v. K.A.W.*, 575 So.2d 630 (Fla. 1991), *Visual Scene Inc. v. Pilkington Brothers, PLC.*, 508 So.2d 437,440n.3 (Fla. 3d DCA 1987), and *Pagidipati*, 353 So.3d 1204. Appellees’ chart (Ans.Br.62) and related “non-client” standing arguments do not support affirmance:

**1. *Young*’s “team approach”/“pooled information” rationale for granting “non-client” standing is inapplicable.**

The *Young*, 136 So.3d 575 “team approach”/“pooled information” reasoning derived from the movants directly sharing protected information with the attorney (Gerson) under circumstances that reasonably led them to believe he was part of their legal team. *Young* “frequently met” with “the group of attorneys”

that included her lawyer and Gerson, during which she “shared confidential information” with Gerson about which he asked her “many questions.” *Id.* at 578. Blissard likewise attended “numerous” group meetings with her attorney and Gerson at which she shared “many confidences about herself and FAMRI.” *Id.*

Here, no “group of attorneys” ever jointly met with their respective clients to share confidential information or strategies. The August 4 meeting was the first time that could have potentially occurred, but Appellees/Munoz never shared protected information or strategies with Taylor and they immediately terminated the call. Init.Br.30-31.

**2. No “assumed liability” theory supported granting Appellees “non-client” standing.**

Diakiwski detailed how the trial court misapplied *K.A.W.*, 575 So.2d 630 because Taylor is not “effectively” representing Appellees in this or any related action and Berkley is neither liable for defending Appellees against Diakiwski (or BBH) nor satisfying Diakiwski’s judgment. Init.Br.62-64.

Appellees add *Kenn Air Corp. v. Gainesville-Alachua Cnty Reg’l Airport Authority*, 593 So.2d 1219 (Fla. 5th DCA 2000) as supporting

affirmance under an “assumed liability” non-client-standing theory. Ans.Br.33,62,70. However, the *Kenn* attorney represented the movant’s **successor-in-interest** regarding a lease dispute against a City. *Id.* at 1220-21. The attorney “switched sides” and represented the City against the movant over the same leasehold-interest, which the movant had acquired. *Id.* at 1223. Under *K.A.W.*, the successor-movant could “stand in the shoes” of its predecessor to seek Rule 4-1.9 conflict-disqualification because the attorney sued the successor/movant over the same leasehold for which he represented its predecessor. *Id.* at 1222.

CCC is not Berkley’s “successor.” Suretyship does not cloak all communications in privilege. Init.Br.48. The surety-contractor business relationship did not give Appellees “non-client” standing to seek Taylor’s disqualification. No authority supports allowing Appellees to stand in disinterested Berkley’s shoes to disqualify Taylor merely because Berkley might sustain bond losses in the BBH dispute and seek reimbursement from Appellees.

**3. *Pagidipati* did not support granting Appellees “non-client” standing.**

Appellees incorrectly argue *Pagidipati*, 353 So.3d 1204 authorizes non-client disqualification-standing where the “[a]ttorney obtained an unfair informational advantage against [a] non-client” and assert Diakiwski is not challenging that case’s application. Ans.Br.62.

As Diakiwski explained (Init.Br.63), *Pagidipati* utilized *K.A.W.*’s explanation of when a non-client may stand in a client’s “shoes” to seek Rule 4-1.7 disqualification. Init.Br.63. *Pagidipati* did not create standalone “unfair advantage” non-client conflict-standing; rather, it applied *K.A.W.* and held Rule 4-1.7 granted non-clients with an interest in a defendant-entity standing to disqualify a lawyer who represented both sides of the “v.” in substantially related matters.

The non-clients (Pagidipati-Investors) were Q3I partners. *Pagidipati*, 353 So.3d at 1207. Vyas, a Q3I-investor, hired the challenged firm (McIntyre) to sue the Pagidipati-Investors and Q3I for misappropriating Q3I’s funds. *Id.* McIntyre then caused Vyas’ appointment as Q3I’s liquidating agent and sued the Pagidipati-

Investors on Q3I’s “behalf”; i.e., McIntyre represented Q3I in one action and while suing it in another. *Id.* The court determined McIntyre “must be disqualified due to simultaneous adverse representation in the litigation surrounding Q3 I.” *Id.* at 1211. Although the Pagidipati-Investors lacked individual privity with McIntyre, they had conflict-disqualification-standing because they “still ha[d] partnership interests in Q3 I.” *Id.*

*Pagidipati* is totally inapplicable. Taylor did not represent CCC in one lawsuit and sue it in another. Taylor never represented any entity of which Appellees are partners/members.

**4. Alleged non-Rule 4-1.7/1.9 “unethical conduct” or an “appearance of impropriety” did not support granting Appellees “non-client” standing.**

Despite Appellees’ contention (Ans.Br.62), Diakiwski did not waive his argument that the Order was erroneously based upon alleged non-conflict-related “unethical conduct.” Init.Br.81-82. Diakiwski maintains the court “erroneously injected an ‘appearance of impropriety’ standard” into its reasoning, citing *Allstate Ins. Co. v. Bowne*, 817 So.2d 994,999 (Fla. 4th DCA 2002)—which Appellees fail to mention, much less distinguish—and *Young*, 136 So.3d at 580. Init.Br.81-82. Appellees also incorrectly cite *The Florida Bar v. Scott*,

39 So.3d 309 (Fla. 2010) as supporting disqualification solely for “unethical conduct” (Ans.Br.62), as that attorney was disqualified “on the basis of a conflict of interest.” *Id. at 313*.

Appellees’ Answer Brief is otherwise riddled with half-truths and falsehoods regarding Taylor’s “conduct,” some which Diakiwski anticipatorily addressed. Init.Br.81-82. He provides the following supplemental rebuttal:

**i. Taylor did not “eavesdrop” on a “privileged” conversation between Craft/Munoz.**

Eavesdropping is “[t]he act of secretly listening to the private conversation of others without their consent; a clandestine attempt to overhear or intercept others’ private communication.” [EAVESDROPPING, \*Black’s Law Dictionary\* \(12th ed. 2024\)](#).

Appellees falsely assert Taylor “silently” listened and “eavesdropped” on Munoz and Craft. Ans.Br.3,17,51,74. Taylor’s presence was not a secret, nor was the conversation private, as Taylor was introduced and exchanged pleasantries with Munoz. Init.Br.30,37. Moreover, Munoz/Craft had no back-and-forth attorney-client conversations in Taylor’s presence. Munoz merely updated Craft on the call’s purpose and “regurgitated” what had

already been said—which all who testified agreed was not privileged. Init.Br.30-31.

**ii. Taylor did not “obstruct” disqualification-related discovery.**

Appellees falsely accuse Taylor (and Berkley) of obstructing fact-finding. Ans.Br.3,25-26,52,80. Berkley’s unwillingness to waive privilege (AC.80-81) meant Taylor ethically could not produce Berkley’s file without an order compelling same—which never occurred. Despite no *in-camera* inspection being requested or ordered, Appellees misleadingly refer to documents Berkley gave Taylor as the “Secret Berkley File,” chastise Taylor for honoring Berkley’s privilege claim, and untruthfully assert Taylor “refused” *in-camera* inspection. Ans.Br.3,61;Init.Br.16-17,69. Eventually, the trial court erred fundamentally by holding this against Diakiwski via an improper adverse-inference. Init.Br.79-82.

Further, no authority allows disqualification as a sanction for Taylor and/or Berkley not appearing for improperly noticed depositions. Appellees ignore that *Iacono v. Santa Elena Holdings, LLC*, 271 So.3d 28, 30 (Fla. 3d DCA 2018) required them to secure judicial permission before subpoenaing Taylor. AA.2067. Because

Appellees failed to do so, Taylor moved to quash and requested protection. AA.2065–73. Additionally, Berkley providently challenged Appellees’ undomesticated out-of-state subpoenas. Init.Br.23-24;AA.2582-2603.

Appellees accuse Taylor and Berkley of not setting these motions for hearing before the disqualification proceedings began. Ans.Br.24-25;AA.108. However, under an existing order (AA.1673-77), Taylor expected to receive rulings earlier that day, when “ALL PENDING MOTIONS” were scheduled for decision:

**The Final Pre-Trial Conference and the Calendar Call shall be heard on the same day/ time and the Court shall rule upon ALL PENDING MOTIONS, which is to include Jury Instructions,**

**Verdict Form, Motions in Limine, Deposition Designations, Objections to Exhibits and Frye**

**Motions. (All Motions must be filed in accordance to the deadline in this scheduling order)**

AA.1674-75.

Taylor and Berkley’s counsel appeared for the Conference. AB.244. However, numerous cases were present, and the court did not hear motions—it was Calendar Call, not a case-specific Conference like the order led Diakiwski to expect. AB.245. Later, the

trial court confoundingly implied it was unreasonable for Taylor to rely on its order as sufficient notice that all pending motions would be decided at the Conference. AB.244-45.

Appellees also misleadingly assert “Ibsen voluntarily appeared at later hearings to testify for Diakiwski.” Ans.Br.26. Diakiwski retained “counsel in New Jersey and Delaware to domesticate a Florida subpoena in both those jurisdictions and serve Berkley to get them here today [November 3, 2023].” AB.242.

Lastly, Appellees frivolously accuse Taylor of “persuading” Kahn to execute his Affidavit while irrelevantly criticizing Taylor and Kahn’s friendship. Ans.Br.20,40,47,75. There is no evidence Taylor “persuaded” Kahn (Ans.Br.20); he simply contacted Berkley—as Taylor told Murray he would—to see if Berkley would give an affidavit addressing Murray’s email demands. AC.71-72;AB.341,358-59.

**III. There is no conflict-disqualification “substantial relationship” between this dispute and the BBH Dispute.**

As briefed, even if a Rule 4-1.7/1.9 “conflict” somehow existed, Diakiwski’s claim to disgorge CCC’s earned BBH profits is not legally “substantially related” to the BBH Dispute. Init.Br.77-78. Taylor will never need to attack work performed for CCC (i.e., none) when representing Diakiwski. *Young*, 136 So.3d at 583. Appellees also clearly misunderstand Diakiwski’s BBH damage claim.

Diakiwski seeks restitutionary disgorgement because he proved Appellees breached fiduciary duties and violated FDUTPA. AA.904-06; *Forbes v. Millionaire Gallery, Inc.*, 335 So.3d 1260, 1263 (Fla. 3d DCA 2022) (“[D]isgorgement of profits is [a] remedy for breach of fiduciary duty” and “for [an] unfair competition claim under Florida law.”); *Restatement (First) of Restitution* §138 (1937) (“A fiduciary who has acquired a benefit by a breach of his duty as fiduciary is under a duty of restitution to the beneficiary.”). Diakiwski must now prove Appellees benefited from their tortious conduct by profiting from stealing clients Diakiwski brought to CCC in 2015. *Bailey v. St. Louis*, 368 So.3d 197, 202 (Fla. 2d DCA 2018) (“[T]he measure of damages for conscious wrongdoing is the appellees’ ‘net profit attributable to

the underlying wrong.” (quoting *Restatement (Third) of Restitution and Unjust Enrichment* §51(4)).

Appellees falsely contend Diakiwski’s Complaint alleged CCC struggled to manage projects before Diakiwski joined. Ans.Br.37. The cited allegations, which Diakiwski repeated in his Amended Complaint (AA.367-508), merely state CCC was a small company before Diakiwski joined and secured over \$100,000,000.00 in new business with little involvement by Craft. AA.374¶10,378¶25,379-80¶¶30-32.

Therefore, Appellees incorrectly argue the BBH Dispute is “substantially related” because Diakiwski’s proof will not implicate CCC’s management capabilities. Diakiwski’s BBH claim depends not upon **how** CCC performed, but how much profit it netted **despite** performance issues. *Bailey*, 368 So.3d at 201 (“The point of disgorgement is to deter wrongdoers by stripping them of the gains from their conduct....The trial court’s comments regarding the appellants’ business acumen are misplaced in determining a disgorgement award.”). Before Appellees moved to disqualify, duly obtained accounting/project records showed CCC’s net BBH profit

was \$1,337,893.00. AC.146. CCC's mismanagement or disputes with BBH do not impact this hard-number data. Init.Br.50-52.

As Appellees also acknowledge, the trial court limited Diakiwski's breach-of-contract 30%-ownership damages to CCC's 2015 value. Initi.Br.5-6;Ans.Br.8. Diakiwski struggles to comprehend how strategies for inchoate **2023** claims could impact CCC's **2015** value. On this point, Appellees cite only their attorneys' conclusory testimony. Ans.Br.36-37. However, even if the trial court allowed Diakiwski to seek present-day ownership damages, the unliquidated BBH Dispute's speculative impact on CCC's value—upward or downward—would likely be subject to exclusion at trial.

#### **IV. The trial court misapplied the governing “unfair advantage” standard.**

Preliminarily, Appellees incorrectly argue [Rule 4-1.6](#) independently supports disqualifying an attorney who receives his opponent’s confidential information. Ans.Br.49-50. On its face, that Rule only prohibits lawyers from revealing “information relating to **a client’s** representation.” *Id.* (emphasis added). No one has ever suggested Taylor revealed his clients’ confidential information.

Appellees also incorrectly assert Diakiwski “abandoned” his briefed arguments that the trial court erroneously commingled and/or applied the wrong legal disqualification standards and misapplied the correct standard. Arguments are only “abandoned” if not raised in the initial brief. [Ashear v. Sklarey, 247 So.3d 574, 578n.3 \(Fla. 3d DCA 2018\)](#).

Appellees also essentially argue Diakiwski had to preempt prospective preservation arguments by citing each instance where he raised issues below. Ans.Br.32. They offer no authority for this proposition, and all of Diakiwski’s appellate issues were preserved. Pertinently, Diakiwski tirelessly argued below (AA.1931-2008,2841-67,2895-953), as he does here, that:

- Appellees improperly commingled and misapplied the legal standards governing attorney-disqualification;
- The opposing-attorney “unfair advantage” standard governs rather than current/former client Rule 4-1.7/1.9 “conflict” principles; and
- Appellees failed to satisfy the applicable standard because they did not:
  - Prove what protected information they gave Berkley that could give Diakiwski an unfair advantage in this case; then
  - Prove this information landed in Taylor’s hands; then
  - Prove how this information gives Diakiwski a prejudicial unfair advantage in this case; and then
  - Prove no lesser means of alleviating Appellees’ alleged harm other than disqualifying Taylor exist.

Init.Br.15,22,42,65-76.

**A. Information Berkley and CCC exchanged before their JDA existed was not privileged.**

Appellees contend Diakiwski cites “no Florida case” demonstrating information CCC and Berkley exchanged before their JDA existed is not privileged. Ans.Br.64. However, *Visual Scene*, 508 So.2d 437, as applied in *U.S. v. Patel*, 509 F.Supp.3d 1334,1345 (S.D. Fla. 2020), fully supports Diakiwski. Init.Br.57-58. Appellees fail to distinguish *Patel*’s application of *Visual Scene*’s “before-the-exchange agreement” requirement and conclusion that:

It is imperative that the common interest privilege be established *prior* to the sending of materials that are intended to be privileged pursuant to that common interest privilege.

*Patel*, 509 F.Supp.3d at 1345 (judicial emphasis); see *Developers Sur. & Indem. Co. v. Harding Vill., Ltd.*, 06-21267,2007 WL 2021939,\*2 (S.D. Fla. July 11, 2007) (“[S]ince [surety] made communications with [principal] without knowing or intending that the substance of the communications were to be privileged under a [JDA], the communications were not privileged.”).

While the Order found Berkley and CCC had a “common interest” in February/March 2023 (AA.2962-63), there was no agreement between them to attach **privilege** to discussions of how

to deal with the BBH Owner until their post-August 4 oral JDA arose. Thus, no common-interest or joint-defense “privilege” protected those discussions when Berkley briefly retained Taylor.

Further, although Appellees acknowledge Diakiwski’s Berkley Subpoena did not request “privileged” documents (Ans.Br.9), they omit that it required “a privilege log...for any document withheld due to claim of privilege.” AB.1254¶8. No log exists. Appellees also omit their counsel’s May 2023 open-court concession that no privilege protected CCC-Berkley communications. Init.Br.10-11. Appellees did not contend “privilege” protected BBH communications until they seized upon Taylor’s Berkley representation to seek eve-of-trial disqualification.

**B. The trial judge’s fundamentally erroneous “adverse inference” supports reversing and directing judicial reassignment.**

As explained, the trial court erroneously took an adverse inference against Taylor to overcome Appellees’ failure to satisfy the first prong of the applicable “unfair advantage” test. Ans.Br.72,74.<sup>1</sup> Appellees claim it was not *sua sponte* because they “requested an adverse inference” (Ans.Br.75), citing their ***reply/rebuttal closing***—to which Diakiwski could not respond. AD.1191,1203-04.

Had Appellees requested an adverse inference or *in-camera* inspection during the proceedings instead of sneaking those theories into their rebuttal closing, Diakiwski could have insisted on being afforded due process. That the trial judge apparently took Appellees’ rebuttal adverse-inference bait without notifying Diakiwski counsels even more strongly in favor of reversing and ordering judicial reassignment on remand.

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<sup>1</sup> Thus, Appellees’ reliance on cases like [Adelman v. Adelman](#), 561 So.2d 671 (Fla. 3d DCA 1990) and [Frye v. Ironstone Bank](#), 69 So.3d 1046 (Fla. 2d DCA 2011) is misplaced—those movants proved the attorneys actually obtained and gained an unfair advantage from their privileged/confidential information that could not be overcome by lesser means.

Appellees contend Diakiwski should have “moved for rehearing” on the adverse-inference (Ans.Br.72), but again, such motions are not authorized for non-final-order appeals. [Fla.R.App.P.9.130\(a\)\(5\)](#). Appellees also incorrectly claim Diakiwski cannot raise this error “for the first time on appeal.” Ans.Br.74. “[T]he denial of due process constitutes fundamental error, which can be raised for the first time on appeal.” [Rodriguez v. Rodriguez, 393 So. 3d 796, 797 \(Fla. 3d DCA 2024\)](#). The adverse-inference denied Diakiwski due process and was therefore fundamentally erroneous. Init.Br.71.

Relatedly, Appellees assert Diakiwski cannot request judicial reassignment on remand because Diakiwski did not ask the trial court to disqualify itself. Ans.Br.79; [Fla.R.Gen.Prac.&Jud.Admin. 2.330\(g\)](#) (trial-level judicial disqualification must be sought promptly after discovering grounds therefor). However, the Order revealing the trial judge’s offending conduct wrongly stripped Diakiwski of counsel. AA.2979. He therefore could not make this request below—in fact, the judge would not even let Taylor present Diakiwski’s [Rule 9.310\(a\)](#) appellate motion. Diakiwski had not retained new trial counsel by the time this Court (correctly) intervened on April 30, 2024 by staying further trial proceedings pending appeal. Thus, Diakiwski could only

promptly request reassignment in these proceedings, under *Ramirez v. Marzano*, 384 So.3d 273,280 (Fla. 4th DCA 2024).

**C. If Taylor received protected BBH information, the trial court should have precluded Taylor from using it instead of disqualifying him.**

*Old Tampa Bay Enterprises v. General Electric Co.*, 745 So.2d 517 (Fla. 3d DCA 1999) (*OTB*) governs to the extent the trial court accepted Appellees’ argument “that there was a **[JDA] with a single lawyer representing both interests**” (AA.2967 (trial court’s emphasis))—despite the fact that joint-representation legally cannot exist simultaneously with a JDA. Init.Br.56-57.<sup>2</sup>

Appellees incorrectly assert Diakiwski failed to preserve his *OTB* argument that if Taylor possessed JDA-protected information, the correct remedy was to exclude CCC-Berkley strategies for dealing with BBH’s owner at trial. Init.Br.45-49,56,76;Ans.Br.53. *OTB* underscores Diakiwski’s longtime positions that: (1) “unfair advantage” decisions govern instead of Rule 4-1.7/1.9 “conflict-of-

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<sup>2</sup> Appellees challenge this argument as unpreserved. Ans.Br.63-64. While Diakiwski disagrees, Appellees’ concession that no JDA existed on August 4 may render it moot—unless the Court reads the Order as accepting Appellees’ joint-representation-JDA argument, which Diakiwski challenged below. AA.1897,1944,2109,2783,2789,2795.

interest” law; (2) Appellees failed to meet their burden of proof; and (3) the trial court should have barred Taylor from using protected information (if any existed) against Appellees at trial.<sup>3</sup>

Diakiwski discovered *OTB* when challenging Appellees’ appellate motion to disqualify. However, Appellees cite no authority barring Diakiwski from citing law that supports preserved arguments. In fact, appellants/appellees may submit supplemental authorities anytime “before a decision has been rendered...that are significant to the issues raised and that have been discovered after service of the party’s last brief in the cause.” [Fla.R.App.P.9.225](#).

Appellees attempt to distinguish *OTB* because CCC’s lawyers were the only counsel involved before Berkley retained Taylor (Ans.Br.55-56), but the trial court clearly erred in finding CCC’s lawyers jointly represented Berkley and CCC. Appellees also suggest the Court should disregard *OTB* because its citing references are sparse and Rules 4-1.6/1.7/1.9 were not discussed (Ans.Br.54-55), but *OTB* has never been overruled and was correctly decided.

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<sup>3</sup>AA.1946,1949,2111,2114,2843,2857,2864,2912,2933-34,2937.

Rules 4-1.6/1.7/1.9 only apply to information gained from an **attorney-client** relationship. Conversely, *OTB* is consistent with **opposing-attorney** disqualification cases like this one. The movant must prove (1) its opponent actually received prejudicial confidential information; and (2) no lesser means exist to alleviate that harm other than disqualification. *Init.Br.66-68,76*; *Coral Reef of Key Biscayne Developers, Inc. v. Lloyd's Underwriters at London*, 911 So.2d 155, 158 (Fla. 3d DCA 2005) (“[E]ven if a lawyer violates a disciplinary rule or engages in unethical conduct to retrieve the privileged documents, the party seeking disqualification must demonstrate that the opposing counsel’s conduct caused severe prejudice that warrants disqualification....[R]espondent failed to meet its burden of showing that disqualification is necessary because the trial court lacks any lesser means to alleviate the harm.”); *Caruso v. Knight*, 124 So.3d 962,964 (Fla. 4th DCA 2013) (“Disqualification is not appropriate if lesser alternatives can alleviate the harm.”); *Allstate*, 817 So.2d at 999 (“Throwing the party’s lawyer out of the case simply should not even be considered where other remedies may mitigate any problem of unfairness that might later arise.”).

Appellees did not meet their burden; reversal is necessary.

## **CONCLUSION**

The Court should reverse the Order and direct reassignment to a new trial judge on remand.

Respectfully Submitted,

TAYLOR CORWIN & VAN CLEAF, PLLC  
*Attorneys for Appellant*  
255 Alhambra Circle, Suite 1170  
Coral Gables, Florida 33134  
Telephone: (305) 859-4400

By: *s/Timothy S. Taylor*  
TIMOTHY S. TAYLOR  
Florida Bar No. 545015  
VANESSA A. VAN CLEAF  
Florida Bar No. 093131  
Email: [ttaylor@tcv.law](mailto:ttaylor@tcv.law)  
[vvanceaf@tcv.law](mailto:vvanceaf@tcv.law)  
[vperez@tcv.law](mailto:vperez@tcv.law)  
[lvega@tcv.law](mailto:lvega@tcv.law)

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing has been served via automatic e-service through the Florida E-Portal filing system to all parties who have selected inclusion of service and all Parties on the Service List below on this 30th day of December, 2024.

Respectfully Submitted,

TAYLOR CORWIN & VAN CLEAF, PLLC  
*Attorneys for Appellant*  
255 Alhambra Circle, Suite 1170  
Coral Gables, Florida 33134  
Telephone: (305) 859-4400

By: *s/Timothy S. Taylor*  
TIMOTHY S. TAYLOR  
Florida Bar No. 545015  
VANESSA A. VAN CLEAF  
Florida Bar No. 093131  
Email: [ttaylor@tcv.law](mailto:ttaylor@tcv.law)  
[vvanceaf@tcv.law](mailto:vvanceaf@tcv.law)  
[vperez@tcv.law](mailto:vperez@tcv.law)  
[lvega@tcv.law](mailto:lvega@tcv.law)

**SERVICE LIST**

<p>Thomas S. Ward Luis E. Suarez Heise Suarez Melville, P.A. 2990 Ponce de Leon Blvd. Suite 300 Coral Gables, FL 33134 <b>Counsel for</b> <b>Defendants/Appellees, Craft</b> <b>Construction Company, LLC</b> <b>and Barry Craft,</b> <a href="mailto:tward@hsmpa.com">tward@hsmpa.com</a> <a href="mailto:lsuarez@hsmpa.com">lsuarez@hsmpa.com</a> <a href="mailto:filings@hsmpa.com">filings@hsmpa.com</a></p>	<p>Vincent F. Vaccarella John Moore Zachary Auspitz Vincent F. Vaccarella, P.A. 401 SE 12 Street, Suite 300 Ft. Lauderdale, FL 33316 <b>Counsel for</b> <b>Defendants/Appellees, Craft</b> <b>Construction Company, LLC</b> <b>and Barry Craft</b> <a href="mailto:vincent@v-law.net">vincent@v-law.net</a> <a href="mailto:jmoore@v-law.net">jmoore@v-law.net</a> <a href="mailto:zauspitz@v-law.net">zauspitz@v-law.net</a></p>
<p>Gabrielle C. Craft Alan J. Kluger Kluger, Kaplan, Silverman, Katzel &amp; Levine, P.L., 201 S. Biscayne Boulevard 27th Floor Miami, Florida 33131 <b>Counsel for</b> <b>Defendants/Appellees, Craft</b> <b>Construction Company, LLC</b> <b>and Barry Craft,</b> at <a href="mailto:gcraft@klugerkaplan.com">gcraft@klugerkaplan.com</a> <a href="mailto:gpardo@klugerkaplan.com">gpardo@klugerkaplan.com</a> <a href="mailto:akluger@klugerkaplan.com">akluger@klugerkaplan.com</a></p>	<p>Francis D. Murray Stumphauzer Kolaya Nadler &amp; Sloman PLLC 2 S. Biscayne Blvd. Suite 1600 Miami, FL 33131 Tel: 305 614-1408 <b>Counsel for</b> <b>Defendants/Appellees, Craft</b> <b>Construction Company, LLC</b> <b>and Barry Craft</b> <a href="mailto:fmurray@sknlaw.com">fmurray@sknlaw.com</a></p>

**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the font and word limit requirements of the Florida Rules of Appellate Procedure.

Respectfully Submitted,

TAYLOR CORWIN & VAN CLEAF, PLLC  
*Attorneys for Appellant*  
255 Alhambra Circle, Suite 1170  
Coral Gables, Florida 33134  
Telephone: (305) 859-4400

By: s/Timothy S. Taylor  
TIMOTHY S. TAYLOR  
Florida Bar No. 545015  
VANESSA A. VAN CLEAF  
Florida Bar No. 093131  
Email: [ttaylor@tcv.law](mailto:ttaylor@tcv.law)  
[vvanceaf@tcv.law](mailto:vvanceaf@tcv.law)  
[vperez@tcv.law](mailto:vperez@tcv.law)  
[lvega@tcv.law](mailto:lvega@tcv.law)