

**IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
THIRD DISTRICT**

DANIEL MIGE, as Father
and Legal Guardian of
BRYAN MIGE, a minor,

Appellant,

v.

CASE NO.: 3D2024-0150
L.T. NO.: 19-019854-CA-01

BAYSIDE MARKETPLACE, LLC,
a Foreign Limited Liability Company,
INTERSTATE CLEANING CORP.,
a Foreign Profit Corporation,

Appellees.

_____ /

ANSWER BRIEF

JOSEPHINE RAHN, ESQUIRE
Florida Bar No. 1002557
RICHARD W. ERVIN, ESQUIRE
Florida Bar No. 117027
BLEAKLY BAVOL DENMAN & GRACE P.A.
15316 N. Florida Avenue
Tampa, FL 33613
Ph: (813) 221-3759/Fax: (813) 221-3198
EMAIL: jrahn@bbdglaw.com
& rervin@bbdglaw.com

Attorneys for Appellees

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PRELIMINARY STATEMENT

DANIEL MIGE, on behalf of his son, BRYAN MIGE, a minor, appeals an order granting BAYSIDE MARKETPLACE, LLC, and INTERSTATE CLEANING CORPORATION'S motion to disqualify opposing counsel and his law firm. Appellees Bayside Marketplace and Interstate Cleaning Corporation will be referred to collectively as "Appellees." Appellant, Daniel Mige, will be referred to as "Appellant." References to Appellees' Appendix on appeal will be designated as "Apx." followed by the appropriate page number on which the information can be found. References to the Initial Brief will be designated as "IB" followed by the page number.

RESTATEMENT OF THE CASE AND FACTS

The Appellees do not agree with Appellant's statement of facts as he omits record evidence supporting the special magistrate's recommendation for disqualification and trial court's subsequent order granting the motion for disqualification. For these reasons, Appellees provide the following restatement of the case and facts.

Appellant, the plaintiff below, initiated this slip and fall case against the Appellees on July 2, 2019. (Apx. at 4). The Appellees filed motions for summary judgment on April 5 and 6, 2023. (Apx. at 14). After these hearings and the subsequent ruling of the court, defense counsel, Mrs. Rahn, sent an

email to her clients informing them of the rulings, how the rulings impact their case, and trial strategy in light of the rulings. *Id.* This email contained defense counsel's mental impressions, analysis, litigation strategy, and tactic to be use at trial and going forward. *Id.*

This email, which was intended to be attorney-client privilege, was inadvertently sent to opposing counsel, Mr. Andy Loyanz, Esq¹. as well as Mrs. Rahn's clients. *Id.* Mrs. Rahn's clients were clearly identifiable by their domain names contained in their respective email addresses. (Apx. at 69). For instance, the Croc's representative's domain name was "crocs.com"; Marketplace, LLC's domain appeared as "baysidemarketplace.com"; and Interstate Cleaning's was "safecleaning.net." *Id.* At the beginning of the message, Mrs. Rahn addresses her clients as "team". *Id.*

Rather than immediately deleting the email and notifying Mrs. Rahn that he received the privileged communication, as required under the Florida Bar Rules, Mr. Loyanz read the entire email, analyzed it, and then responded to everyone on the email with his thoughts and comments about Mrs. Rahn's strategies. (Apx. at 89). Mr. Loyanz begins his email with, "Hello, Ms. Rahn and everyone on this thread." (Apx. at 69). He immediately acknowledges

¹ Mrs. Rhan mistakenly included opposing counsel "Andy" as a recipient in this email as opposed to the client's adjuster also named "Andy".

that he knows who he's emailing, and he knows who is on the email thread. (Apx. at 69). Mr. Loyanz knew he was not supposed to be part of the email as he writes:

Thank you, Ms. Rahn and everyone on this thread. Thank you for including me on this thread. However, I get the inkling feeling I was not supposed to be part of it.

(Apx. at 70).

Mr. Loyanz did not stop there. He goes on to give specific notes to Mrs. Rahn's strategies, his opinion as to Mrs. Rahn's statements, provides his own opinion how Appellees will argue causation; and then he argues his points on causation. *Id.* Mr. Loyanz then again directly addresses Mrs. Rahn's clients in saying, "I can only hope everyone here looks at this from the right lens." *Id.* Then he uses this remark to specifically talk about his thoughts and feelings on this case, and argues his case to Mrs. Rahn's clients. *Id.*

On July 13, 2023, Appellees filed a motion to disqualify Mr. Loyanz and his law firm, Law Group of South Florida. (Apx. at 14). The motion argues that after Mr. Loyanz saw what was clearly a privileged communication, he responded to the email with his thoughts and impressions on defense counsel's strategy and even "replied all" to the email, including and addressing defense counsel's clients on said email. (Apx. at 15). The motion

further argues that Mr. Loyanz knew this email was protected by attorney-client privilege, continued reading, and responded to this email with his thoughts and notions on defense counsel's trial strategy- all while acknowledging that his email was attorney client privilege- in direct contravention to the Rules Regulating the Florida Bar, Rules of Civil Procedure, and case law on the topic. (Apx. at 15).

In the response to the motion to disqualify, Appellant candidly admits that Mr. Loyanz received "a privileged communication [that] was inadvertently sent to the Plaintiff's Counsel by the defense..." (Apx. at 19). However, Mr. Loyanz maintains that he didn't know Mrs. Rahn's clients were on the email until after she told him even though her clients were identifiable by their domain names and that he addressed everyone on the email thread. (Apx. at 20).

At the hearing on the motion for disqualification on August 15, 2023, the trial judge had concerns that Mrs. Rahn might not want him reading the contents of the email and suggested referring the matter to a special master. (Apx. at 28). Both parties agreed to retain magistrate, Israel Reyes. (Apx. at 40-41).

A hearing before the magistrate was held on November 14, 2023, the magistrate informed the parties that he had reviewed four (4) cases, which

were, in his view, potentially determinative of the issue: *Abamar Housing and Development, Inc. v. Lisa Daly Lady Décor, Inc.*, 724 So. 2d 572 (Fla. 3d DCA 1998); *Atlas Air, Inc. v. Greenberg Traurig, P.A.*, 997 So. 2d 1117 (Fla. 3d DCA 2008); *Construction Systems of America, Inc. v. Travelers Cas. & Surety Co. of Am.*, 118 So. 3d 942 (Fla. 3d DCA 2013); and *Moriber v. Dreiling*, 95 So. 3d 449 (Fla. 3d DCA 2012). (Apx. at 49). The magistrate asked the parties to review those cases and include an analysis of them in their presentation. *Id.* The hearing was rescheduled to November 16, 2023. (Apx. at 63).

At the continued hearing, Mrs. Rahn addressed the two-part test in *Moriber*: (1) whether the inadvertently disclosed information is protected, and (2) whether there is a possibility that the receiving party has obtained an unfair information advantage. (Apx. at 67-68). As to the first factor, Mrs. Rahn explained that she inadvertently emailed opposing counsel along with her clients who were clearly identifiable by their by their domain names in the recipient field. (Apx. at 67-69). The email contained sensitive mental impressions, analysis, litigation strategy, and tactics to be use at trial and going forward. *Id.* at 68.

As the second factor, Mrs. Rahn argued there was a possibility that Appellants received an unfair advantage because of the mental impressions

and strategies contained in email which Mr. Loyanz read and then provided his own comments and analysis. (Apx. at 71-73). Mrs. Rahn further argued that, pursuant to *Abamar* and *Atlas Air*, disqualification is required because of Mr. Loyanz's failure to follow the rules² in handling the inadvertent disclosure. (Apx. at 71-73).

In response, Appellant admitted that the email was "a privileged communication" and that he saw "Hello, team" in the email and replied thinking it was to Mrs. Rahn's interoffice litigation team. (Apx. at 76). He sent a subsequent email to Mrs. Rahn five hours later apologizing to her. (Apx. at 73). Mr. Loyanz again apologized on the record at the hearing and admits his actions were "absolutely distasteful." He further admits the email contained litigation strategies and that, as managing partner, he "send[s] emails to [his] team like that all the time." (Apx. at 79). Mr. Loyanz argued he did not know he was communicating with Mrs. Rahn's clients and therefore

² Rule 4-4.4 of the Rules Regulating the Florida Bar provides, "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent must promptly notify the sender."

Rule 4-4.2(a) of the Rules Regulating the Florida Bar provides, "A lawyer must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer."

his conduct was not sanctionable. (Apx. at 81). He also argued the email did not provide him with a tactical advantage. *Id.*

On December 13, 2023, the magistrate filed his recommendation to grant the motion to disqualify Mr. Loyanz and his firm. (Apx. at 113). In pertinent part, the magistrate found:

Less than twenty minutes after he received the inadvertent disclosure, Mr. Loyanz responded to the email, copying all defendant clients on his response email (“response email”). In the response email, he acknowledged he was not supposed to be part of the email thread, however, he continued on to respond to defense counsel’s conclusions, opinions, impressions, theories, and strategies on the case. He commented on what defense counsel had written, argued his response points, and asked “everyone” on the email to look at this from the “right lens.”

Approximately fifteen (15) minutes after plaintiff’s counsel’s response, defense counsel replied, pointed out that the email was inadvertently sent to Mr. Loyanz, pointed out the email was protected by attorney-client privilege, it was not intended for plaintiff’s counsel to read, and that plaintiff’s counsel response email constituted unauthorized contact with defense clients. Approximately four and a half hours later, around five hours after the initial inadvertent disclosure, Mr. Loynaz again responded, this time stating he had deleted the email thread.

In response argument, Plaintiff’s counsel admitted that he knew the email was not meant for him, but advised he believed it was sent to defense counsel’s internal litigation team (i.e. fellow attorneys and paralegals within the office), but he did not know the Defendant clients were copied on the email. He admitted he received the inadvertent disclosure, read the inadvertent disclosure, and commented in his response as to the strategies in the

inadvertent disclosure. He acknowledged he replied “distastefully,” but argued he did not have malice and did not obtain a tactical advantage from the contents of the email.

(Apx. at 114-16).

Based on *Abamar*, *Atlas Air*, *Construction Systems of America*, and *Moriber*, the magistrate recommended that the trial grant defendant’s motion to disqualify opposing counsel and the firm for the following reasons:

- 1) Defense counsel’s email to Plaintiff’s counsel was an inadvertent disclosure that was protected by attorney-client and work-product privilege;
- 2) The inadvertent disclosure contained strategies, conclusions, opinions, impressions, anticipated steps, and theories that would give Plaintiff’s counsel an unfair informational advantage in this case;
- 3) Plaintiff’s counsel Andy Loynaz, Esq. read the email, analyzed it, commented on what was written, and did so in the form of an email to defense counsel and all of the defense clients;
- 4) Plaintiff’s counsel used the information contained with the inadvertently disclosure email to his informational and tactical advantage;
- 5) There is the possibility of an advantage in this case that warrants resort to the drastic remedy for the sake of the appearance of justice.

(Apx. at 118-19).

Significantly, the magistrate found that Mr. Loynaz “clearly retained some knowledge of the email, as he cited to the email from his memory at the time of the argument by the parties.” (Apx. at 119). Because of the actions of Mr. Loynaz in response to the inadvertent disclosure, and as discussed in *Atlas Air*, the magistrate concluded disqualification of Mr. Loynaz and his firm was warranted. *Id.*

On January, 4, 2024, the trial court held a case management conference to discuss the motion for disqualification in light of the magistrate's recommendations and conclusions. (Apx. at 120). Mr. Loynaz did not file exceptions to Mr. Reyes' report. The trial court asked the parties if there was anything else they would like to add. (Apx. at 122). Appellant argued that there has to be findings of prejudice and advantage and there is no showing of any advantage obtained from the email. (Apx. at 123). The Appellant also remarked that he intended to appeal the decision. (Apx. at 126).

The trial judge recognized that Mr. Reyes undertook his duties thoroughly, listened to extensive argument, read operative case law, and understood the serious nature of the ruling. (Apx. at 127). The judge agreed with the magistrate that the facts warrant disqualification, and entered an order granting the motion for disqualification for the reasons stated in the magistrate's recommendations. (Apx. at 137).

This appeal followed.

SUMMARY OF THE ARGUMENT

Appellant's arguments on appeal were not properly preserved because Appellant failed to file exceptions within 10 days after service of the magistrate's report and did not present to the trial judge the issues now on

appeal. Therefore, the disqualification order should be affirmed. Nevertheless, the trial court did not abuse its discretion in granting the motion for disqualification because the magistrate's findings and recommendations were supported by competent substantial evidence. The magistrate carefully considered the evidence and the applicable case law before concluding that disqualification of Appellant's counsel and the Law Group of South Florida, LLC was warranted. The evidence establishes that Appellant's counsel, Mr. Loyanz, gained an unfair informational advantage from the contents of an email that was sent to him in error by Appellee's counsel, Mrs. Rahn. Even though Appellant's counsel candidly admits he knew the email was a privileged communication when he received it, rather than immediately deleting it, he read it, analyzed the contents, and responded directly to Mrs. Rahn and her clients with his thoughts and comments about Mrs. Rahn's litigation strategies in violation of the Florida Bar Rules. Because Mr. Loyanz, the managing partner of the firm, retained some knowledge of the email, it is possible the firm also gained an unfair advantage. Thus, disqualification of the firm was also warranted. Because the trial judge did not abuse its discretion in granting the motion for disqualification, the order should be affirmed.

ARGUMENT

I. APPELLANT'S ARGUMENTS ON APPEAL WERE NOT PROPERLY PRESERVED

Standard of Review: The trial court's order ratifying the magistrate's recommendations is reviewed for abuse of discretion. *Robinson v. Robinson*, 928 So. 2d 360, 362 (Fla. 3d DCA 2006) (*quoting Garcia v. Garcia*, 743 So. 2d 1225, 1226 (Fla. 4th DCA 1999) ("Where a general master has been appointed for fact-finding and to recommend disposition of pending issues, the trial court is bound by the general master's factual findings unless they are not supported by competent substantial evidence or are clearly erroneous.")). The decision of the trial court is presumed to be correct. See *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979).

Analysis: The process for filing exceptions to the magistrate's report is clearly outlined in rules and cases. Parties may file exceptions within 10 days after the magistrate's report is served. See Fla. R. Civ. P. 1.490(i). If no exceptions are timely filed, the challenging party waives any error in the report. *Garrison v. PHH Mortgage Corporation*, 298 So. 3d 116, 118 (Fla. 1st DCA 2020). Moreover, "The consequence of not filing exceptions [to a general magistrate's report and recommendation] is a failure to preserve the issue for appellate review." *Mio Gourmet Products, LLC v. 645 W 27 LLC*,

320 So. 3d 998 (Fla. 3d DCA 2021) (quoting *Garrison*, 298 So. 3d 116, 118). In this case, the magistrate's report was filed on December 13, 2023. Therefore, exceptions were required to be filed by December 26, 2023 (December 23 was a Saturday and the following Monday was Christmas). However, Appellant did not file any exceptions to the magistrate's report and recommendations. Under *Garrison* and *Mio Gourmet Products*, then, Appellant failed to preserve his arguments for appellate review.

Moreover, at the subsequent hearing before the trial judge, Appellant did not explain why the magistrate erred, did not argue *Moriber's* two-part test, and did not articulate which findings were not supported by competent substantial evidence. Rather, he simply reargued the arguments he made before the magistrate. This is insufficient to preserve appellate review. See *Dade County School Bd. V. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999) (a claim not raised in the trial court will not be considered on appeal); *J.T.A. Factors, Inc. v. Philcon Services, Inc.*, 820 So. 2d 367 (Fla. 3d DCA 2002) (appellant failed to preserve error when it did not raise issues on appeal before the trial court). Thus, the issues raised on appeal are waived.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE MOTION FOR DISQUALIFICATION BASED ON THE MAGISTRATE'S RECOMMENDATIONS

Standard of Review: The trial court's order ratifying the magistrate's recommendations is reviewed for abuse of discretion. *Robinson v. Robinson*, 928 So. 2d 360, 362 (Fla. 3d DCA 2006). "[T]he disqualification of counsel is left to the sound discretion of the trial court, as long as such discretion is exercised within the confines of the applicable law and the trial court's express or implied findings are supported by competent substantial evidence." *Moriber v. Dreiling*, 95 So. 3d 449, 453 (Fla. 3d DCA 2012).

Analysis: Where, as here, a special magistrate is appointed to handle an issue, the trial court is bound by the general master's factual findings when supported by competent evidence, and must uphold the master's findings unless he misconceived the legal effect of the evidence. *Wright v. Wright*, 516 So. 2d 9, 9 (Fla. 3d DCA 1987). In reviewing a magistrate's findings and conclusions, a trial court does not make independent findings of fact or reach independent conclusions as to the legal effect of the facts. *Anderson v. Anderson*, 736 So.2d 49, 50-51 (Fla. 5th DCA 1999). Rather, "The findings of fact and recommendations of a master should be approved and adopted by the trial judge unless they are clearly erroneous or the master has misconceived the legal effect of the evidence." *Reichman v.*

Reichman, 450 So.2d 1188, 1189 (Fla. 3d DCA 1984). As discussed further below, Appellant failed to demonstrate the master's factual findings and recommendations were clearly erroneous or the master misconceived the legal effect of the evidence, therefore the trial court's order approving the master's recommendations should be affirmed.

A. The Magistrate Correctly Applied This Court's Precedence in Determining Disqualification Was Warranted

The magistrate focused on four cases in guiding his decision to grant the motion for disqualification. In particular, he believed *Abamar Housing and Development, Inc. v. Lisa Daly Lady Décor, Inc.*, *Atlas Air, Inc. v. Greenberg Traurig, Construction Systems of America, Inc. v. Travelers Cas. & Surety Co. of Am.*, and *Moriber v. Dreiling* to be potentially determinative in this matter. As those cases instruct, the mere possibility that the recipient of the inadvertent disclosure gained an unfair advantage is enough to warrant disqualification. In assessing whether there was a possibility of an unfair advantage gained, the court must consider not only the contents of the disclosure, but also the recipient's actions in handling the inadvertent disclosure. Significantly, the court should consider whether the recipient followed the Florida Bar Rules in handling the materials.

For instance, in *Abamar Housing and Development, Inc. v. Lisa Daly Lady Décor, Inc.*, 724 So. 2d 572 (Fla. 3d DCA 1998) (*Abamar II*), this court

held that disqualification of counsel was warranted because of the unfair tactical advantage gained from receiving the inadvertent disclosure. In *Abamar*, during an extensive document production, petitioner's attorney inadvertently disclosed 23 documents protected by attorney-client privilege that disclosed analysis of the litigation. See *Abamar I*, 698 So. 2d 276. Petitioner's counsel requested the return of those documents, however the respondent refused arguing that the privilege had been waived by the disclosure. *Id.* The respondent then photocopied the privileged documents. *Id.* The petitioners filed a motion for disqualification which the trial court denied. On appeal, this court granted the petition for certiorari and quashed the order. *Abamar II* at 573. The court held that respondent gained an unfair tactical advantage from the receipt of the documents and focused on respondent's recalcitrance in rectifying the disclosure and photocopying the documents. *Id.* at 574.

In *Atlas Air, Inc. v. Greenberg Traurig, P.A.*, 997 So. 2d 1117 (Fla. 3d DCA 2008), this court held that disqualification of the whole firm was justified because the firm fell short of satisfying the requirements in *Abamar II*, among other cases, in handling the inadvertent disclosure. *Id.* at 1118. The concurring opinion elaborated on the court's rationale and observed that the court did not have sufficient information to assess whether it was possible

that the remaining attorneys obtained an unfair informational advantage, thus the only remedy was disqualification of the entire firm. *Id.* at 1119. The concurrence recognized the possibility that such an advantage might have been obtained warrants disqualification for the sake of the appearance of justice and the public's interest in the integrity of the judicial process. *Id.*

In *Construction Systems of America, Inc. v. Travelers Cas. & Surety Co. of Am.*, 118 So. 3d 942 (Fla. 3d DCA 2013), during document production, petitioner's counsel realized two binders that had been copied by opposing counsel contained privileged documents. *Id.* at 943. Petitioner filed a motion to disqualify opposing counsel's law firm which was referred to a special magistrate. *Id.* The magistrate denied the motion, but the trial court rejected the recommendation concluding that the law firm gained an unfair informational advantage from the disclosure. *Id.* This court found that the magistrate made no findings regarding the extent of the review of the documents or the possibility that counsel's firm received an unfair informational advantage from the disclosure and remanded with instructions for the magistrate to make those findings. *Id.* at 944.

In the case of *Moriber v. Dreiling*, this Court announced a two-part test in determining whether disqualification is warranted based on an inadvertent disclosure: (1) the inadvertently disclosed information is protected, either by

privilege or confidentiality; and (2) there is a “possibility” that the receiving party has obtained an “unfair” “informational advantage” as a result of the inadvertent disclosure. *Id.* at 454.

In *Moriber*, the petitioner’s assistant inadvertently emailed respondent a confidential mediation statement. *Id.* at 451. Respondent read the mediation statement but she assumed that the petitioner had purposely sent it to her to assist in resolving the matter. *Id.* When petitioner realized the mistake, he emailed respondent that the mediation statement was confidential and sent it to her by error. *Id.* Respondent immediately destroyed the document upon receiving this email. *Id.* at 451-52. In response to petitioner’s motion for disqualification, respondent filed affidavits from other members in the firm asserting that they had not reviewed the document. *Id.* at 452. In denying the motion for disqualification, the special magistrate found there was nothing in the confidential mediation statement that would give the Defendants any possibility of an unfair advantage, rather, it simply noted the well established positions of each party. *Id.* at 452-53.

This court agreed with the magistrate’s determination that disqualification was not warranted, reasoning that although the document was confidential, there was no possibility that opposing counsel gained an unfair advantage. *Id.* at 456. The court focused on not only the content of the

inadvertent disclosure, but also “to the actions taken by the receiving lawyers” upon their receipt of the inadvertent disclosure. *Id.* Significantly, the respondent merely skimmed the document and then immediately destroyed all copies when she learned it was confidential. *Id.* at 456. She was also entirely cooperative, rather than recalcitrant, in rectifying the disclosure, and no other attorneys in the firm reviewed the information. These actions were consistent with the requirements of the rules of conduct in handling inadvertent disclosures and thereby demonstrated there was no unfair informational advantage gained.

In this case, the magistrate correctly applied this Court’s precedence in concluding disqualification was warranted. As to the first *Moriber* factor, it was undisputed that the email contained sensitive privileged information that was sent to Ms. Rahn’s clients and to opposing counsel. Appellant admits the email was “a privileged communication.” Appellant further admits that he saw “Hello, team” in the email and replied thinking it was to her interoffice litigation team. The email discusses Mrs. Rahn’s thoughts and feelings on the judge’s findings. She also provides recommendations going forward in light of the court’s ruling. This was Appellee’s litigation strategy, what they planned to do next, and anticipated arguments to be made in those next

steps, including how she plans to argue against plaintiff's arguments on causation. Accordingly, the first factor was satisfied.

As to the second *Moriber* factor, the magistrate correctly determined that Appellant obtained an unfair informational advantage as a result of the disclosure. The competent substantial evidence establishes that Mr. Loynaz failed to comply with the Florida Bar Rules by not immediately deleting the email. To make matters worse, he engaged in improper correspondence with Mrs. Rahn's clients. Although he acknowledges that he was not supposed to be on the email thread, he read the entire email, analyzed it, commented on what was written, and did so in the form of an email to defense counsel and all of the defense clients. Clearly, Appellant did not follow the Florida Bar Rules in handling the email. Moreover, unlike the petitioner in *Moriber*, the Appellant here retained some knowledge of the email, as he cited to the email from his memory at the hearing before the magistrate. Thus, disqualification was proper under *Moriber's* two-factor test.

The cases cited by Appellant are inapplicable to the facts of the case. For instance, in *Allstate Ins. Co. v. Bowne*, 817 So. 2d 994 (Fla. 4th DCA 2022) the attorney was accused of having communications with an opposing parties' manager in violation of Disciplinary Rule (DR) 4-4.2. barring a lawyer from having communications with managerial level employees of an

opposing entity represented by counsel. The Fourth District affirmed the denial of the motion to disqualify because the witness was not in a management position at the time of the interview and, unlike here, there was no evidence that confidential information was conveyed.

Appellant also cites to *Applied Digital Solutions, Inc. v. Vasa*, 941 So. 2d 404 (Fla. 4th DCA 2006). The evidence in that case showed that the disclosure was not harmful and there was no proof of an unfair tactical advantage. Here, the facts are much different as the email contained sensitive litigation strategies, analysis, and recommendations which opposing counsel reviewed, analyzed, and retained.

Coral Reef of Key Biscayne Devs., Inc. v. Lloyd's Underwriters at London, 911 So. 2d 155, 157 (Fla. 3d DCA 2005) is also distinguishable because in that case there was an order allowing for the production of certain privileged documents, but the order was later reversed on appeal. This court held that "a higher standard must apply for disqualifying counsel when the privileged documents are received pursuant to a court order that is subsequently vacated. Contrary to the "inadvertent disclosure" cases, the mere possibility of an unfair tactical advantage cannot give rise to the drastic remedy of disqualification in cases where the disclosure results from a court order."

Steinberg v. Marlin, 201 So. 3d 129 (Fla. 3d DCA 2015) and *Goff v. Goff*, 276 So. 3d 83 (Fla. 2d DCA 2019) are inapposite because they are not “inadvertent disclosure” cases, rather they are conflict of interest cases governed by different Bar rules.

B. The Magistrate’s Recommendations and Conclusions Were Supported by Competent Substantial Evidence

The magistrate’s report contained detailed findings supported by the evidence and arguments of the parties. In applying this court prior precedence to the facts, the magistrate correctly held that Mr. Loyanz and his law firm should be disqualified. The trial court reviewed those findings and conclusions and determined they were supported by competent evidence. As mentioned above, it is not the trial court’s function to make independent findings of fact or reach independent conclusions, rather the court’s role is to determine whether master’s findings and conclusions are supported by competent substantial evidence and the law. It is clear from the transcript of the hearings that the magistrate’s findings were supported by competent substantial evidence and correctly applied the law to the facts in his decision.

Appellant argues that counsel’s limited exposure to the email and prompt actions to delete it show no possibility of an unfair advantage. However, the record tells a different story. The record establishes that the

inadvertent disclosure occurs at 12:16. Mr. Loyanz's response email was at 12:35. Mrs. Rahn's response stating the email was an attorney-client privilege email was at 12:49. Rather than immediately deleting the email when he received it, Mr. Loyanz responds 5 hours later at 5:14 stating he had deleted the email thread. Appellant's argument that he had limited exposure to the privileged material is incomprehensible. He admitted he received the inadvertent disclosure, read it, and commented in his response as to the strategies in the email. He acknowledged he was not supposed to be part of the email thread, however, he continued on to respond to defense counsel's conclusions, opinions, impressions, theories, and strategies on the case. He was also able to cite to it from his memory at the hearing. These facts demonstrate that Mr. Loyanz gained an unfair informational and tactical advantage.

C. Mige Counsel Knew the Email Was a Privileged Communication But Did Not Immediately Delete It

Appellant asserts that his counsel did not know that Appellees' clients were listed in the email. Even assuming, *arguendo*, he didn't know Appellee's clients were part of the email, that doesn't change the result because he admits he thought the email was sent to Mrs. Rahn's interoffice litigation team. So, at a minimum he knew the communication was privileged work product.

Even so, Mrs. Rahn's clients were clearly identifiable by their domain names contained in their respective email addresses. These email addresses clearly showed that Mrs. Rahn was communicating with her clients. Mr. Loyanz's email response directly addresses the fact that he knew he shouldn't have been copied, and addresses, "Everyone on this thread." It is simply not believable that he addressed everyone on the thread without knowing who was on the thread and then addressed them several more times on the email.

D. Disqualification of the Firm Was Warranted

Appellant argues this Court's ruling in *Atlas Air* requires a trial court to disqualify the firm if the receiving party reviews some of the inadvertently disclosed documents and copies them. He maintains, however, *Atlas Air's* facts are distinguishable because Appellant's counsel did not make copies of the email nor disclose the content of the email with other attorneys or staff inside his firm, and thus disqualification of the firm was improper.

In *Atlas Air*, the majority held that disqualification of the firm was warranted because the firm took an unfair informational advantage of its adversary. *Id.* at 1118. Specifically, one of the firm's partners reviewed and copied privileged documents that were inadvertently sent to her by mistake. *Id.* at 1119. At least one other attorney in the firm reviewed at least one of

the documents. *Id.* The concurrence observed that although it was unknown the extent of the tactical advantage the firm gained, the mere *possibility* that the firm gained a tactical advantage was enough to justify disqualification of the entire firm for the sake of appearance of justice. *Id.* Consistent with *Moriber* and *Abamar*, this ruling recognizes that an attorney's failure to comply with the rules in handling an inadvertent disclosure demonstrates the possibility that an unfair informational advantage was gained by both the attorney and the firm.

Atlas Air's holding is applicable in this case because Mr. Loyanz, the four-member firm's managing partner, took an unfair informational advantage from Appellees by reviewing the privileged email communication, analyzing it, and taking notes through his response email which included his own analysis and opinions on Mrs. Rahn's strategies. Significantly, Mr. Loyanz retained some knowledge of the email through memory, which is akin to photocopying it. This is important because, as the magistrate recognized, Mr. Loyanz cannot delete what he saw and learned. He will retain that knowledge regardless of whether the actual email is deleted. This is troubling because he could disseminate that information to other members in the firm at any time.

Additionally, even if the magistrate were to believe his unverified statements that he did not disseminate the information to any other person, despite no other attorney filed an affidavit verifying his statements, the extent of the tactical advantage the firm received is great because the head of the firm, who makes up 1/4th of the firm's attorneys, retained the privileged information. These facts not only establish a possibility the firm gained an unfair informational advantage, but also demonstrate an actual unfair informational and tactical advantage has accrued. Accordingly, the magistrate's recommendation was supported by competent substantial evidence.

CONCLUSION

For the above stated reasons, Appellees, Bayside Marketplace, LLC, and Interstate Cleaning Corporation, respectfully submit that the Court should affirm the order granting the motion for disqualification.

Respectfully submitted,

/s/ Richard W. Ervin

Bleakley Bovol Denman & Grace

Richard W. Ervin, Esquire

Florida Bar Number 117027

Josephine Rahn, Esquire

Florida Bar Number 1002557

15316 N. Florida Avenue

Tampa, FL 33613

(813) 221-3759 [Telephone]

(813) 221-3198 [Facsimile]

rervin@bbdglaw.com
jrahn@bbdglaw.com
bbdgpremises@bbdglaw.com
eservice@bbdglaw.com
Attorney for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to: Andy Loynaz, Esq. *aloynaz@lawgroupsf.com*; *sruiz@lawgroupsf.com*; *pleadings@lawgroupsf.com*; (Attorney for Appellant) on this 31st day of July 2024.

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Arial 14-point font, in compliance with Fla. R. App. P. 9.045(b).

/s/ Richard W. Ervin, Esq.
Counsel