THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 3D-_____
L.T. Case No. 2023-004472-CA-01

MOSS & ASSOCIATES, LLC,

Petitioner,

v.

3401 MIDTOWN CONDOMINIUM ASSOCIATION, INC., a Florida not-for-profit corporation; PRH MIDTOWN 3, LLC, a Florida limited liability company; ARQUITECTONICA INTERNATIONAL CORPORATION; a Florida corporation; CONSULTING ENGINEERING & SCIENCE, INC., B & J CONSULTING ENGINEERS, INC.; a Florida corporation; ARQUITECTONICA GEO CORPORATION; a Florida corporation; ASSOCIATED STEEL AND ALUMINUM, INC. a Florida corporation; BISCAYNE CONSTRUCTION COMPANY, INC., a Florida corporation; CAILIS MECHANICAL CORP., a Florida corporation; CITY ENGINEERING CONTRACTORS, INC., a Florida corporation; COASTAL MASONRY, INC., a Florida corporation; COMMERCIAL FORMING CORP SOUTH, a Florida corporation; CONCRETE HOLDINGS & SERVICES, LLC; a Florida limited liability company; DILLON POOLS, INC., a Florida corporation; EVERLAST DRYWALL CONSTRUCTION, INC., a Florida corporation; FBD CONTRACTING GROUP, INC., a Florida corporation; GM&P CONSULTING AND GLAZING CONTRACTORS, INC., a Florida corporation; JAMES J. BROOKS, INC. d/b/a ADVANCED STUCCO, a Florida corporation; MCCOURT CONSTRUCTION, INC., a Florida corporation; MODERN STONES, LLC, a Florida limited liability company; NEXT DOOR DISTRIBUTION COMPANY, an inactive Florida corporation; PASS PAINTING COMPANY, INC., a Florida corporation; PROFESSIONAL PLUMBING, CORP., a Florida corporation; REBAR UNLIMITED, INC., a Florida corporation; SIGNATURE DESIGN PAVING CORPORATION OF SOUTH FLORIDA, a Florida corporation;

SPRINKLERMATIC FIRE PROTECTION SYSTEMS, INC., a Florida corporation; THYSSENKRUPP ELEVATOR CORPORATION, A.K.A. TK ELEVATOR CORPORATION, a foreign corporation; TODD CONSTRUCTION, LLC, a Florida limited liability company; UNLIMITED ELECTRICAL CONTRACTORS CORP., a Florida corporation; and ADVANCE WATER TECHNOLOGY, CORP.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

On Review from the Circuit Court of the Eleventh Judicial Circuit
In and For Miami-Dade County, Florida

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INTRODUCTION

This Petition involves the trial court's failure to apply the correct test in determining whether Petitioner, Moss & Associates, LLC ("Moss"), established that Respondent 3401 Midtown Condominium Association, Inc.'s ("Association") engineering expert should be disqualified in this construction defects case. The Association's expert hired a non-lawyer member of Moss's in-house legal team who lead Moss's development of defenses to the expert's opinion during this lawsuit while the non-lawyer was employed by Moss, and the expert received Moss's confidential information, which the Association used to change its position in this litigation. Moss established that, under any existing standard in the case law, the Association's expert should be disqualified. The trial court therefore departed from the essential requirements of the law in denying disqualification.

BASIS FOR JURISDICTION

This Court has jurisdiction to review the non-final disqualification order and issue a writ of common-law certiorari under Florida Rules of Appellate Procedure 9.100(a) and

9.030(b)(2)(A). *Cf. Rombola v. Botchey*, 149 So. 3d 1138, 1140 (Fla. 1st DCA 2014) ("[C]ertiorari is an accepted means of protecting clients against ongoing violations of ethical rules, particularly those involving the potential disclosure or use of confidences or information related to prior representations."); *Koulisis v. Rivers*, 730 So. 2d 289, 292–93 (Fla. 4th DCA 1999) (granting writ of certiorari and quashing trial court's order denying motion to disqualify law firm due to risk that confidential information would be improperly obtained); *First Mia. Sec., Inc. v. Sylvia*, 780 So. 2d 250, 256 (Fla. 3d DCA 2001) (same).

STATEMENT OF THE CASE AND FACTS

This case involves the transfer of work-product privileged confidential information by one of Moss's former in-house litigation team members who accepted a job offer at the expert-witness engineering firm—Epic Forensics and Engineering ("Epic")—retained by the Association in this construction defect litigation.

The construction project at issue in this case is the Hyde Midtown Condominium ("Hyde" or "Project"). Moss is a large general contractor, employing approximately 6,000 people, that was responsible for overseeing construction of the Project. (App'x 13,

844). In accord with its size, Moss is named as a defendant in ten to eleven construction defect matters at any given time. (App'x 846). Moss is currently named as a defendant in five pending litigation matters other than this Project. (App'x 894). Epic is Moss's adversary in these matters, serving as the plaintiff's expert in half of Moss's chapter 558 [1] cases. (App'x 845–46). Epic has served as the Association's expert in this action since the first 558 pre-suit notice was served in 2019. (App'x 863).

Moss maintains a 558 "litigation team" within the company that specifically assists with analyzing and defending construction defect claims, including claims adverse to Epic. (App'x 844, 929–30). That team is led by Moss's general associate counsel, Christopher Barber, who was assisted by three non-attorneys: Mr. Khushroo Daruwalla, a professional engineer and the engineering team lead, and two additional individuals who reported to and assisted Mr. Daruwalla with evaluating Epic's positions on the construction defect matters. (App'x 844). Mr. Daruwalla left Moss, however, after Epic secretly recruited him to work for itself. (App'x 852–53). During the

[1] Chapter 558, Florida Statutes, prescribes construction defect litigation's pre-suit requirements.

recruitment period,and for nearly two months after Mr. Daruwalla verbally accepted Epic's job offer around February 12, 2024,Mr. Daruwalla continued working for Moss through April, advising Moss on construction defects at issue in this case—defects that Epic was providing the adverse opinion on. (App'x 968, 1318–19).

When Mr. Daruwalla finally tendered his resignation notice to Moss on March 25, after having already signed and returned Epic's offer letter, Mr. Daruwalla advised Mr. Barber that he had no definite employment plans after leaving Moss. (App'x 851, 853, 862, 963, 1318). As a result, Mr. Barber offered to have Mr. Daruwalla stay on as a consultant for Moss, and Mr. Daruwalla accepted, continuing to consult for Moss through April 12. (App'x 853–54, 874).

But word got out that Mr. Daruwalla was going to work for Epic, prompting Mr. Barber to search Mr. Daruwalla's emails. (App'x 854–56). The search yielded an offer letter sent by Epic on February 6, 2024 (erroneously dated January 6, 2024), that was signed by Mr. Daruwalla March 1. (App'x 854–56, 859, 957, 1318). Had Moss known that Mr. Daruwalla had even considered employment, much less actually already accepted a job offer from Epic, Mr. Barber would not have asked Mr. Daruwalla to continue assisting Moss as an

outside consultant and, instead, Moss would have fired him immediately. (App'x 862). Upon learning of Epic's relationship with Mr. Daruwalla, Moss filed the underlying motion to disqualify Epic, the denial of which gives rise to this Petition.[2]

a. Mr. Daruwalla's Paramount Importance to Moss.

Mr. Daruwalla was one of Moss's critical employees. In fact, he was hired as Moss's fourth employee. (App'x 924). Mr. Daruwalla left Moss for a period; he, however, returned in 2020. (App'x 842, 924). After returning to Moss, Mr. Daruwalla reported to Mr. Barber and assisted him in understanding plaintiffs' allegations in construction defect litigation from the engineering perspective. (App'x 843, 926).

Mr. Daruwalla actively participated in Moss's defense of construction defect cases. Mr. Barber relied on Mr. Daruwalla's opinions and expertise when formulating Moss's litigation strategy and defense positions and in preparing for mediation settlement negotiations. (App'x 842–43, 865). Mr. Daruwalla "had unhindered access" to Moss's files. (App'x 843).

And, more than this, Mr. Daruwalla was privy to many attorney-

[2] The trial court held an evidentiary hearing on Moss's motion to disqualify Epic on August 9 and 15, 2024.

client privileged communications and worked with Mr. Barber to prepare Moss's litigation work product. (App'x 843). Indeed, Mr. Daruwalla attended monthly litigation meetings where all of Moss's 558 cases were discussed. (App'x 844–45, 927). Moss's outside counsel, the law firm of Tripp Scott, was also present at these meetings. (App'x 926–27). During these meetings, the Moss team discussed all aspects—such as defense strategies and potential settlements—of each case, including this one, and Mr. Daruwalla assisted Mr. Barber and outside counsel in preparing Moss's legal defenses. *See* (App'x 844–45, 926–27, 1083). In addition to attending these formal monthly meetings, Mr. Daruwalla discussed Moss litigation matters with Mr. Barber on a daily basis. (App'x 845).

Accordingly, Mr. Daruwalla "was privy to everything [Moss's litigation team] did, everything [Moss's litigation team] thought, every position [it] held[,] and what [Moss's] strengths and weaknesses were." (App'x 843–44). Mr. Daruwalla was more than just Mr. Barber's "right-hand guy" concerning construction defect litigation—he was the Moss litigation team's "database of knowledge." (App'x 843–44).

Mr. Daruwalla also regularly attended site inspections on

Moss's behalf. (App'x 842). Indeed, in this case, Mr. Daruwalla was responsible for analyzing alleged defects with risers, roof leaks, pool problems, a burst sprinkler pipe, balcony railings, car lifts, and a leaky pipe. (App'x 866, 1054). Additionally, Mr. Barber asked Mr. Daruwalla to assist in responding to the Association's interrogatories served on Moss in this case and in developing the matrix of Moss's responses to the Association's claimed defects. (App'x 866).

Despite his integral role in Moss's 558 litigation, however, Mr. Daruwalla was not permitted to communicate with an opposing party without Mr. Barber's permission. (App'x 866). Indeed, Mr. Barber did not authorize Mr. Daruwalla to negotiate with Epic about this case. (App'x 867).

b. Mr. Daruwalla Interviews and Accepts Employment at Epic and Maintains Frequent Contact with Epic.

Epic offered Mr. Daruwalla a job—and obtained his acceptance—while he still worked at Moss. (App'x 1318). Epic's president and chief executive officer, Mr. Rene Portieles, solicited Mr. Daruwalla's employment at Epic from time to time. (App'x 927–28). Most recently, in January 2024, Mr. Portieles again solicited Mr. Daruwalla to come work for Epic. (App'x 932). Mr. Daruwalla

interviewed with Epic on January 24, 2024, at Epic's physical location and, on February 6, 2024, Epic offered Mr. Daruwalla employment. (App'x 953, 957, 1110).

By February 12, Mr. Daruwalla orally accepted Epic's employment offer. (App'x 956). Mr. Daruwalla signed Epic's offer letter by March 1 and returned it to Epic by March 12. (App'x 957, 960). Epic and Mr. Daruwalla later agreed on an April 15, 2024 start date. (App'x 1195–99). At no point during this process did Mr. Daruwalla tell Moss about his decision to work for Epic. (App'x 953–54, 961).

Mr. Daruwalla informed Mr. Barber on March 25, 2024—weeks after he had already accepted Epic's job offer—that he was resigning from Moss. (App'x 851, 956–57, 960). And even at that time, Mr. Daruwalla told Mr. Barber that he was unsure about his future plans, and he even agreed to stay on as a consultant for Moss; Mr. Daruwalla failed to inform Mr. Barber, however, that he had already accepted a job offer at Epic—Moss's adverse engineering firm in several pending cases. (App'x 851, 853–54, 874).

c. Mr. Daruwalla Shares Moss's Confidential Information with Epic, Prompting the Association to Change its Legal Position in this Action.

Since the pre-suit 558 discussions starting in 2019 and until after Mr. Daruwalla shared Moss's confidential shop drawings with Epic, the Association had never complained that Moss was liable because the car lifts were epoxied. (App'x 873–74). Instead, Epic and the Association concluded that the car lifts installed by Moss at the Project were defective because they were not bolted down. (App'x 873, 969). On February 19, 2024, Epic's testifying expert in this case, Scott Toler, called Mr. Daruwalla to discuss this alleged defect of the car lifts. (App'x 970, 1108). During that conversation, Mr. Daruwalla volunteered that Moss had shop drawings evidencing that the lifts were designed to be epoxied, not bolted, down. (App'x 970).

Approximately one hour after that call with Mr. Toler, Mr. Daruwalla emailed to Mr. Toler the car lift shop drawings demonstrating that Moss was permitted to epoxy, rather than bolt down, the car lifts. (App'x 972–73). Although this document was available as a public record and had been produced to the Association during discovery along with thousands of other records, Epic did not retrieve it from these sources, but rather Mr. Daruwalla retrieved the shop drawings from Moss's project files and sent them

to Epic. (App'x 871, 972, 975–76, 1109, 1119). Mr. Barber "absolutely [did] not" give Mr. Daruwalla authorization to send these drawings to Epic. (App'x 868).

From a litigation standpoint, the shop drawing was critical to Moss's defense. Indeed, Mr. Barber explained that it established Moss's lack of liability on the issue and also served as a powerful tool to impeach Epic's expert for identifying the car lifts as defective even though they were properly installed, should the matter go to trial. (App'x 871–72). Although Moss had identified the strategic use of this document, Moss had not yet determined how it would use the shop drawings; Mr. Daruwalla, however, "made [that decision] for [Moss] by disclosing it" to Epic without authorization. (App'x 871–72).

Eight days later—despite there being no mention in the preceding five years that there were any issues with the lifts other than them not being bolted down—the Association changed its position and suddenly claimed the epoxy was failing. (App'x 873–74, 1274). The Association took a mere eight days from when Mr. Daruwalla provided the shop drawings to Epic to claim that the car lifts' *epoxies* were now failing, requiring emergency repair. (App'x 1274). In other words, the Association changed its tune just eight

days after Epic received the shop drawings, such that even if Moss were permitted to construct the car lifts as per the shop drawings, Moss remained liable under a new, different theory. (App'x 873).

d. Mr. Daruwalla Submits His Resignation to Moss, Completes His Epic Onboarding Paperwork, and Prepares to Run His Own Business Through Epic.

Subsequently, on March 25, 2024—months into the hiring process and long after accepting Epic's offer—Mr. Daruwalla tendered his resignation letter to Mr. Barber. (App'x 966). When asked about his post-Moss plans, Mr. Daruwalla told Mr. Barber he considered starting a consulting business with a friend; he, however, did not mention that he received an Epic offer, orally accepted that offer, or returned a signed offer letter to Epic. (App'x 966). By that point, Epic had already circulated an email to its employees welcoming Mr. Daruwalla. (App'x 1030).

Four days after tendering his resignation to Moss, Mr. Daruwalla completed and returned his onboarding paperwork to Epic. (App'x 960–61). On the same day, Mr. Daruwalla asked Epic if he could "run [an insurance inspection job] through Epic," to which Epic agreed. (App'x 964). By April 9, 2024, Epic had already set up Mr. Daruwalla's Epic email address. (App'x 1049). Moreover, Mr.

Daruwalla drove to Epic's office the same day his email address was set up. (App'x 1047–48).

But despite Mr. Daruwalla's agreement to work for Epic, his completion of his onboarding paperwork, his visit to Epic's office, and his preparing to run business through Epic, Mr. Daruwalla unreasonably maintained that he "still wasn't sure [he] was going to work for" Epic. (App'x 961–64).

e. Mr. Daruwalla Maintained Constant Communication with Epic from February to April 2024.

While Epic courted Mr. Daruwalla, Epic personnel maintained frequent contact with Mr. Daruwalla. Following the January 24 interview, Mr. Daruwalla and Mr. Portieles texted one another. (App'x 1264). Thereafter, Nicole Garcia, Epic's officer manager, reached out to Mr. Daruwalla several times between early February and early April concerning his employment paperwork, Ms. Garcia's excitement that Mr. Daruwalla accepted Epic's offer, and Mr. Daruwalla's request to start running business through Epic-despite still being employed at Moss at the time. (App'x 955, 1224–27, 1230).

Moreover, one of Epic's employees, Rey Alpizar, frequently texted and called Mr. Daruwalla from early February to early April.

(App'x 1025). The two exchanged no less than twenty-eight text messages between early February to mid-March, where they discussed aspects of work and Mr. Daruwalla's transition to Epic. *See* (App'x 1232–35, 1237–38).

f. Moss Discovers Epic's Recruitment of Mr. Daruwalla and Epic Rescinds its Employment Offer.

Although Moss had received Mr. Daruwalla's resignation letter, Mr. Daruwalla never told Moss that he accepted employment with Epic. (App'x 856). Mr. Barber, instead, learned of Mr. Daruwalla's plans through a rumor he heard on April 11, 2024, and confirmed with plaintiff's counsel in another matter involving Epic on April 12. (App'x 856). The same day Moss learned that Epic recruited Mr. Daruwalla—the Friday before Mr. Daruwalla was scheduled to begin work on Monday—Epic suddenly rescinded Mr. Daruwalla's employment offer, citing conflict-of-interest concerns. (App'x 1268).

Mr. Portieles maintained that Epic simply had not completed its due diligence concerning Mr. Daruwalla *until the last weekday before Mr. Daruwalla was scheduled to begin work—which happened to be the same day Moss discovered this secret relationship between Epic and its litigation team member*. (App'x 1137, 1268, 1319). Mr.

Portieles further maintained that Epic believed that it would have been too difficult and burdensome to screen Mr. Daruwalla from Epic's matters against Moss. (App'x 1268). Notably, however, nothing had changed with respect to the pending matters between Moss and Epic from when Epic offered Mr. Daruwalla a position through when Epic rescinded Mr. Daruwalla's offer under the guise of due diligence. (App'x 1125).

Although Epic cited conflict-of-interest reasons for rescinding Mr. Daruwalla's job offer, nothing had materially changed with respect to the manifest conflict of interest. Moreover, by that point, Mr. Daruwalla had already interviewed with Epic, received an offer, accepted it, selected his office location, sent confidential information from Moss, returned onboarding paperwork, had an Epic email address created the same week he visited the office in April, and prepared to run business through Epic—all of which happened while Mr. Daruwalla was working within Moss's litigation team combating Epic. (App'x 874, 953, 956, 961, 964, 972, 1047–48, 1238, 1268, 1272).

g. Moss Moves to Disqualify Epic as Plaintiff's Expert, and the Trial Court Denies the Motion.

Realizing that Mr. Daruwalla was going to work for Epic—Moss's primary opposing expert—Moss moved to disqualify Epic as the Association's expert in this matter. (App'x 333–359). After holding a two-day evidentiary hearing on the matter, the trial court denied the motion in its order entitled Order Denying Moss's Motion to Disqualify Plaintiff's Experts from Epic Forensics and Engineering: Findings of Fact and Conclusions of Law ("Disqualification Order"). (App'x 1345–57).

In its ruling, the trial court recognized that two tests were potentially applicable under these facts, one emanating from *Sultan v. Earing-Doud*, 852 So. 2d 313 (Fla. 4th DCA 2003), and the other from *First Miami Securities, Inc. v. Sylvia*, 780 So. 2d 250 (Fla. 3d DCA 2001). The trial court held, however, that regardless of which test applied, Epic could not be disqualified because Mr. Daruwalla was never formally "associated" with Epic. (App'x 1351). Specifically, the trial court explained that because Epic rescinded its offer before Mr. Daruwalla actually began working or received payment, he was never hired by Epic. (App'x 1351).

Additionally, although the court denied relief under either test, it found *Sultan*, not *First Miami*, to be applicable. (App'x 1348–50).

And, applying *Sultan*, the trial court ruled that Moss was not entitled to disqualification for the additional reason that Moss failed to demonstrate that Mr. Daruwalla shared Moss's confidential information with Epic (App'x 1349), notwithstanding the undisputed fact that Mr. Daruwalla shared shop drawings with Epic that Moss's legal counsel had identified as significant to Moss's defense against the Association.

This Petition follows.

NATURE OF THE RELIEF SOUGHT

Moss requests that this Court grant this Petition for Writ of Certiorari and quash the Disqualification Order, with instructions to the trial court to grant Moss's motion to disqualify Epic.

ARGUMENT

"[C]ertiorari is an extraordinary remedy that is available only in limited circumstances." *Am. Prime Title Servs., LLC v. Wang*, 317 So. 3d 1183, 1185 (Fla. 3d DCA 2021) (quoting *Charles v. State*, 193 So. 3d 31, 32 (Fla. 3d DCA 2016)). "A party seeking certiorari review must demonstrate (1) that the contested order results in material injury in the proceedings that cannot be corrected on post-judgment appeal and (2) that the order departs from the essential requirements of the

law."[3] *Valencia v. PennyMac Holdings, Inc.*, 317 So. 3d 178, 180 (Fla. 3d DCA 2021) (quoting *Piquet v. Clareway Props. Ltd.*, 314 So. 3d 423, 427 (Fla. 3d DCA 2020)). Certiorari's first prong is jurisdictional. *Id.* Accordingly, if the first prong is not satisfied, certiorari jurisdiction does not lie. *See id.*

In this case, the trial court's Disqualification Order materially injured Moss—an injury that cannot be remedied on appeal—and departed from the essential requirements of the law, warranting certiorari review.

I. Epic Obtained Moss's Confidential Information When It Recruited the Lead Engineer from Moss's In-House Litigation Team, Obtained His Agreement to Work at Epic, Obtained His Onboarding Paperwork, and Agreed to Allow Him to Run Business Through Epic, Such That Epic's Continued Participation Harms Moss in This Litigation.

During Epic's recruitment and onboarding process of Mr.

[3] This test has also been articulated as having three prongs, where the petitioner must demonstrate that a nonfinal order: "(1) cannot be remedied on postjudgment appeal, (2) results in material injury for the remainder of the case, and (3) departs from the essential requirements of law." *Am. Prime Title Servs., LLC v. Wang*, 317 So. 3d 1183, 1185 (Fla. 3d DCA 2021) (quoting *A.H. v. Dep't of Child. & Fams.*, 277 So. 3d 704, 707 (Fla. 3d DCA 2019)). Under the three-prong articulation, "[t]he first two prongs of the analysis are jurisdictional." *Id.* (quoting *Dade Truss Co. Inc. v. Beaty*, 271 So. 3d 59, 62 (Fla. 3d DCA 2019)).

Daruwalla, not only was there a risk that Mr. Daruwalla could transmit Moss's confidential information, but the evidence showed that Epic in fact received confidential information from Mr. Daruwalla. Accordingly, Epic must be disqualified to ensure the Association does not obtain an unfair advantage in this litigation.

"Discovery of certain kinds of information 'may reasonably cause material injury of an irreparable nature.'" *Winn-Dixie Stores, Inc. v. Lopez*, 336 So. 3d 770, 771 (Fla. 3d DCA 2021) (quoting *Allstate Ins. Co. v. Langston*, 655 So. 3d 91, 94 (Fla. 1995)). This information includes "material[s] protected by privilege" and "work product." *Langston*, 655 So. 3d at 94. Accordingly, "certiorari is an accepted means of protecting clients against ongoing violations of ethical rules, particularly those involving the potential disclosure or use of confidences or information related to prior representations." *Rombola v. Botchey*, 149 So. 3d 1138, 1140 (Fla. 1st DCA 2014).

This is because, "[a]bsent review via certiorari, the protection of clients from potential breaches of ethical rules in ongoing litigation would be unavailable." *Id.* Moreover, "[i]rreparable harm exists because there is no adequate remedy on appeal to undo the ongoing injury to a former client's interest in safeguarding confidential

information or preventing the disclosure or misuse of information obtained from the client to its disadvantage." *Id.* at 1143; *see also Koulisis v. Rivers*, 730 So. 2d 289, 292–93 (Fla. 4th DCA 1999) (granting writ of certiorari and quashing trial court's denial of motion to disqualify law firm due to risk that confidential information would be improperly obtained); *First Mia. Sec., Inc. v. Sylvia*, 780 So. 2d 250, 256 (Fla. 3d DCA 2001) (same).

Turning to the present case, Moss suffered irreparable harm. As explained in detail in Section II below, this Court articulated the appropriate test governing similar facts in *First Miami Securities, Inc. v. Sylvia*, 780 So. 2d 250 (Fla. 3d DCA 2001). Should this Court agree with Moss that *First Miami* governs and that Moss satisfied its burden, then under *First Miami*, Moss has demonstrated irreparable harm that can be remedied only by Epic's disqualification. *See id.* (granting petition for writ of certiorari when petitioner demonstrated that side-switching non-lawyer employee who worked at a law firm "was exposed to confidential information" before switching sides).

Alternatively, even if this Court determines that *Sultan* controls here, Moss satisfied that test, as discussed below. Accordingly, Epic must be disqualified as the Association's expert in this case, no

matter which test applies.

II. The Disqualification Order Departed from the Essential Requirements of Law in Its Application of Both *Sultan* and *First Miami*.

"Departure from the essential requirements of law must constitute a 'violation of a clearly established principle of law resulting in a miscarriage of justice.'" *Piquet v. Clareway Props. Ltd.*, 314 So. 423, 427 (Fla. 3d DCA 2020) (quoting *ACT Servs. v. Sch. Bd. of Mia. Dade Cnty.*, 29 So. 3d 450, 452 (Fla. 3d DCA 2010)). To constitute a "clearly established principle," however, the applicable legal standard need not be undisputed.

Indeed, as disqualification cases show, a writ of certiorari may be granted even when the applicable legal standard does not yet exist. *See First Mia. Sec., Inc.*, 780 So. 2d at 254–56 (recognizing that a prior Third District decision created "confusion" about the applicable rule in a case of first impression, adopting a novel legal standard in the district, and granting certiorari); *Koulisis*, 730 So. 2d at 292–93 (fashioning a new standard that differed from standards announced by other district courts and granting certiorari). Accordingly, the lack of Florida precedent addressing this case's precise fact pattern does not preclude Moss from demonstrating entitlement to certiorari relief.

The Disqualification Order departed from the essential requirements of law in three respects. First, *First Miami*, not *Sultan*, provides the appropriate safeguards—and, hence, the appropriate test—to protect Moss's confidential information. Second, Epic hired Mr. Daruwalla for purposes of the *First Miami* and *Sultan* side-switching tests under these facts where he accepted Epic's offer of employment, submitted his onboarding paperwork, obtained Epic's permission to begin running job proposals through Epic despite still being employed at Moss, and was issued an Epic email. And third, even if *Sultan* applies, Moss satisfied *Sultan*'s test because Mr. Daruwalla actually shared Moss's confidential work product with Epic when he sent Mr. Toler the shop drawings. These points are addressed in turn.

a. The Trial Court Departed from the Essential Requirements of Law When It Applied a Test That Afforded Moss Less Protections Than Those Articulated in *First Miami*.

Notwithstanding Mr. Daruwalla's vast knowledge of Moss's confidential information and integral role as a member of Moss's in-house litigation team, the trial court applied the Fourth District's test in *Sultan*, which is applicable to *independent* experts who switch

sides. The trial court here should have instead applied this Court's more-protective *First Miami* test that, although not directly on point, addressed situations where non-lawyer employees who work closely with lawyers become employed by the adverse side.

i. *Sultan v. Earing-Doud*, 852 So. 2d 313 (Fla. 4th DCA 2003).

In *Sultan*, a patient initiated medical malpractice pre-suit procedures against her doctor. 852 So. 2d at 314. The doctor hired an expert who opined that the doctor rendered adequate care. *Id.* Twenty-one months later, after the patient had approached thirty-three similar doctors, the patient hired the doctor's same expert to testify on her behalf at trial. *Id.* at 315. Although the doctor's pre-suit counsel attested that "[he] and [the expert] reviewed the medical records and discussed and formulated theories and defenses for the case," the expert attested that he did not recall reviewing the doctor's file or consulting with pre-suit counsel. *Id.*

The doctor moved to strike the expert, arguing that the patient's counsel obtained the doctor's work product by consulting with the expert. *Id.* The trial court denied the motion, and the Fourth District dismissed the petition for failure to demonstrate irreparable harm.

Id. at 314. It explained that because the expert's "opinion was based upon the information [the patient] supplied to him, and because he has no memory of his prior dealings on this case, it appear[ed] that any opinion given in court will not be tainted by confidential work product communications." *Id.* at 316. Notably, the expert's affidavit "demonstrated that he did not receive any confidential information that would give [the patient] an unfair informational advantage." *Id.* at 318.

The Fourth District further explained that "if [the expert's] . . . opinion disclose[d], either directly or indirectly, or [was] based on, any confidential communication," his retention would be improper. *Id.* at 317 (quoting *State v. Riddle*, 8 P.3d 980, 990 (Or. 2000)). Likewise, the Fourth District explained that "[i]f an expert's opinion [was] so bound up with any such communication that the expert [could not], in the view of the trial court, segregate his or her opinion from some part of the confidential communication, then the expert should not be permitted to testify." *Id.* (quoting *Riddle*, 8 P.3d at 990).

The Fourth District then held that "*[o]n this record*, because an absolute privilege does not exist to prevent [the patient] from using [the doctor]'s previously retained non-testifying expert *under the*

circumstances of this case, we conclude no irreparable harm has occurred." *Id.* (emphasis added).

ii. *Koulisis v. Rivers*, 730 So. 2d 289 (Fla. 4th DCA 1999).

In *Koulisis*, the Fourth District fashioned and applied a more protective test than *Sultan*'s test concerning side-switching experts. *See* 730 So. 2d at 292. There, a defendant retained a law firm that employed a legal secretary. *Id.* at 290–91. The secretary "had access to all confidential and privileged information in the law firm's files in the . . . case, including [the attorney's] written evaluation of damage and liability issues." *Id.* at 291. Moreover, the secretary "transcribed privileged information and coordinated depositions of all experts," spoke with the client, and "attended 'team meetings' during which all substantive aspects of the case were discussed." *Id.*

While the case was still active, the adverse party's law firm offered the secretary a job "based on the understanding that she would not work on the . . . case." *Id.* Although the secretary gave her firm notice of her departure, "she would not identify her new employer." *Id.* Upon beginning work at the new firm, the secretary was screened from the case. *Id.* Afterward, the defendant learned of the secretary's side-switching and moved to disqualify the opposing

law firm. *Id.* The trial court denied the motion. *Id.* at 290.

On certiorari review, the Fourth District disagreed. *Id.* 293. It explained that "[t]o properly analyze this case, [the secretary] must be viewed the same as if she had been an attorney at [the prior firm] assigned to handle the . . . case." *Id.* "It ma[de] no difference that [she] was a secretary and not an attorney" because "[w]here an employee of a law firm is privy to attorney-client confidences, 'a court should not look to what tasks the employee performs so much as to his or her access to the same types of privileged materials that lawyers would receive.'" *Id.* (quoting *Esquire Care, Inc. v. Maguire*, 532 So. 2d 740, 741 (Fla. 2d DCA 1988)).

This was so because if an attorney's non-lawyer support staff could switch sides and disclose confidential information, "it would have a devastating effect both on the free flow of information between client and attorney and on the cost and quality of the legal services rendered by an attorney." *Id.* (quoting *Lackow v. Walter E. Heller & Co. Se., Inc.*, 466 So. 2d 1120, 1123 (Fla. 3d DCA 1985)). Accordingly, the Fourth District held Rule 4-1.10(b) of the Rules Regulating the Florida Bar applicable to the secretary. *Id.*

Applying the rule, the court fashioned a burden-shifting test

where "disqualification turn[ed] on the factual inquiry of whether [the secretary] had actual knowledge of material, confidential information." *Id.* at 292. Under the *Koulisis* test, "once the moving party has established a prima facie case for disqualification, the burden shifts to the firm whose disqualification is sought to demonstrate that it should *not* be disqualified" because it had "no actual knowledge of any confidential information material to the case." *Id.*

The Fourth District further explained its decision not to require the movant to make an evidentiary showing demonstrating that the side-switcher actually shared confidential information with her new firm as an "acknowledg[ment of] the practical difficulty of proving what goes on behind closed doors." *Id.* at 293 (rejecting burdens in *City of Apopka v. All Corners, Inc.*, 701 So. 2d 641 (Fla. 5th DCA 1997), and *Esquire Care, Inc. v. Maguire*, 532 So. 2d 740 (Fla. 2d DCA 1988)). Instead, the Fourth District's burden-shifting test "acknowledges the difficulty of proving what someone knows and places the procedural hurdle before the law firm that could have best avoided the ethical problem by more carefully screening a hiring decision." *Id.* at 292. Indeed, the court explained the test was

intended to resolve "close cases under Rule 4–1.10(b) . . . in favor of disqualification to preserve the integrity of a fair adversary system." *Id.*

Finally, the Fourth District held that because the secretary was the primary secretary assigned to the case, "was privy to confidential information material to the case," and began working for the opposing firm, "[n]othing more was required to support disqualification." *Id.* Accordingly, the court granted the certiorari petition. *Id.*

iii. *First Miami Securities, Inc. v. Sylvia*, 780 So. 2d 250 (Fla. 3d DCA 2001).

In *First Miami*, this Court adopted *Koulisis*. *See First Mia. Sec.*, 780 So. 2d at 253. There, a legal secretary at the respondent's law firm "was exposed to confidential attorney-client information and attorney work product relating to the [respondent's] case . . . ." *Id.* at 251. Additionally, "[t]he circumstances surrounding her leaving [were] somewhat suspect" because, although she gave four days' notice, she "never returned to work." *Id.* "Moreover, at the time of her departure the secretary never indicated that she would be working for [the p]etitioner's law firm." *Id.* The respondent moved to disqualify

the petitioner's law firm due to the risk that the secretary might share his confidential information; the petitioner opposed the motion because it screened the secretary from the case. *Id.*

While analyzing the case on certiorari review, this Court acknowledged that the First, Second, and Fifth Districts adopted various tests requiring disqualification only when a side-switching employee shared or was going to share the confidential information with her new firm. *See id.* at 252–53. Additionally, those courts held screening to be either a bar to disqualification or a factor in the disqualification analysis. *Id.* But this Court rejected such tests. *See id.* at 253.

Instead, the Court adopted the *Koulisis* test and articulated that test as follows: "[O]nce the movant demonstrates that the nonlawyer employee was exposed to confidential information in the underlying case while employed at the former firm, the burden shifts to the hiring firm to demonstrate that the nonlawyer employee has no actual knowledge of confidential information material to the case." *Id.* (citing *Koulisis*, 730 So. 2d at 292). In other words, a movant need not demonstrate the information revealed to the adverse firm or party. Additionally, the Court held that screening side-switchers

could not save a firm from disqualification. *Id.* (citing *Koulisis*, 730 So. 2d at 292).

Moreover, this Court recognized the need for *Koulisis*'s movant-friendly, burden-shifting framework. It explained that the "the difficulty of proving what someone knows" justifies placing the burden on the non-movant and resolving "close cases under Rule 4–1.10(b) . . . in favor of disqualification to preserve the integrity of a fair adversary system." *Id.* (quoting *Koulisis*, 730 So. 2d at 292).

Notably, the Court, like the *Koulisis* court, acknowledged that unless non-lawyers are subject to "the same disability lawyers have when they leave legal employment with confidential information," client confidentiality would be insufficiently protected such that "it would have a devastating effect both on the free flow of information between client and attorney and on the cost and quality of the legal services rendered by . . . attorney[s]." *Id.* at 254 (quoting *Williams v. Trans World Airlines, Inc.*, 588 F. Supp. 1037, 1044 (W.D. Mo. 1984)).

Finally, the Court granted the certiorari petition. *Id.* at 256. It held that although the respondents proved "that the secretary was exposed to confidential information in the underlying case while employed at [the r]espondent's law firm thereby giving rise to the

rebuttable presumption that the secretary had actual knowledge of the confidential information," the trial court was required to consider on remand whether the petitioner rebutted that presumption by proving the secretary had no actual knowledge of material confidential information. *Id.* at 256. If the petitioner could not establish that the secretary had no actual knowledge of material information, then the law firm was required to be disqualified. *Id.*

iv. This Case

Turning to the present case, it is *First Miami*, not *Sultan*, that is most analogous, rendering it applicable here. *Sultan* concerned an *independent* expert who, ostensibly, was retained by opposing parties to provide an objective opinion. Accordingly, when an independent expert has no knowledge of a party's confidential information, his continued retention by an opposing party is not inherently problematic under *Sultan*.

But this case is materially different from *Sultan* because Mr. Daruwalla was not an independent expert who did not remember being consulted. Instead, he was Moss's *lead* forensic engineer who advised Moss's legal counsel on *all* of Moss's chapter 558 matters, including the Project at issue in this case, on a daily basis. (App'x

844–45, 865, 865, 927, 1083–84). Unlike in *Sultan* where the independent expert switched sides almost two years later, Mr. Daruwalla here was actively working on this case and other Moss cases at the same time he interviewed and accepted Epic's job offer.

Moreover, there was no evidence that Mr. Daruwalla forgot any of the confidential information he obtained while at Moss, distinguishing this case from *Sultan*. Instead, the record reveals that Mr. Daruwalla was steeped in Moss's litigation; indeed, he regularly assisted Moss's legal counsel in developing defense strategies and in preparing for mediation settlement negotiations in 558 cases. (App'x 842–43, 865). Mr. Daruwalla also attended Moss's monthly litigation meetings. (App'x 926–27). More than this, Mr. Daruwalla handled several matters *in this case* between 2020 and 2024. (App'x 866, 1051–52, 1080).

In short, it is undisputed that Mr. Daruwalla has actual knowledge of Moss's confidential information, both relating to this Project and other pending 558 matters. Thus, it was erroneous to equate Mr. Daruwalla to a contracted, independent expert in light of Mr. Daruwalla being an in-house member of the Moss litigation team that opposed Epic on a daily basis. *Sultan* simply does not provide

the governing test in this case.

Instead, it is *First Miami* that provides the governing standard in this case. That *First Miami*'s facts are not identical to those presented here is no bar to its application, because if the test enunciated in *First Miami* is appropriate under the facts of that case, a test at least as robust is applicable here.

Although *First Miami* addressed a law firm to law firm switch, this case is essentially the same. While Moss is not itself a law firm, Moss maintains an in-house legal team with several dedicated employees whose primary duties are to defend against 558 claims. (App'x 842–46). And Mr. Daruwalla, though not a legal professional, was an integral member of Moss's litigation team who reported directly to Moss's in-house counsel and worked closely with outside counsel to develop defense strategies in 558 cases. (App'x 842–45). Indeed, Mr. Daruwalla was not merely privy to confidential information, *he helped create it*. (App'x 842–43, 927). Moreover, he was privy to *all* of Moss's section 558 litigation and participated in monthly meetings where *every issue of every 558 claim* was considered and discussed. (App'x 843–45). This Project is not an exception. (App'x 865, 1083).

In light of the key role Mr. Daruwalla played in developing Moss's litigation strategies, it would make little sense to hold that because he was not technically employed at a law firm, that *First Miami* does not apply. Moreover, the fact that he was not going to a law firm is a distinction without a difference, as Epic had been the Association's expert in this case since its inception in 2019—being adverse to Moss at every step of the way. (App'x 863).

Any assumption that Epic would not share confidential information it learned with the Association is belied not only by the long-term client-expert relationship created in this case, but by the Association's altering its position only eight days after Mr. Daruwalla shared the shop drawings with Epic. (App'x 873, 1274). In other words, any information learned by Epic is likely to—at some point—make its way to the Association or its counsel. Accordingly, the fact that Epic is not a law firm is inconsequential to the disqualification analysis.

Finally, Moss seeks to protect the kind of confidential information that this Court held worthy of protection in *First Miami*: confidential attorney-client information and work product. Mr. Daruwalla, by virtue of his exposure to and participation in all of

Moss's chapter 558 litigation, had actual knowledge of significantly more confidential information than the secretary did in *First Miami*. Thus, to apply a test less robust than the test in *First Miami* would create an internal inconsistency in this Court's disqualification jurisprudence.

For these reasons, the trial court departed from the essential requirements of law when it held that *Sultan*, rather than *First Miami*, provided the applicable test in this case.

b. Epic Hired Mr. Daruwalla for Purposes of Side-Switching Analyses.

From January to April 2024, Epic interviewed Mr. Daruwalla, offered him a job, obtained his acceptance and onboarding paperwork, allowed Mr. Daruwalla to begin running proposals for testifying-expert jobs through Epic, and issued him an Epic email address. For purposes of the side-switching analyses under *First Miami* and *Sultan*, these facts establish that Epic hired Mr. Daruwalla. That Epic rescinded Mr. Daruwalla's offer one business day before he officially began *physically* working there does not negate the employment relationship formed and strengthened between January and April.

As the Fourth District explained in *Koulisis*, a burden-shifting test should be applied because of "the difficulty of proving what someone knows . . . ." *Koulisis*, 730 So. 2d at 292. This Court has repeatedly echoed that observation. *See First Mia. Sec.*, 780 So. 2d at 253 (same) (quoting *Koulisis*, 730 So. 2d at 292); *Gaton v. Health Coalition, Inc.*, 745 So. 2d 510, 511 (Fla. 3d DCA 1999) ("As the *Koulisis* court pointed out, this allocation of burden acknowledges the difficulty of proving what someone knows . . . ."); *Canta v. Philip Morris USA, Inc.*, 245 So. 3d 813, 820 (Fla. 3d DCA 2017) (same) (quoting *Gaton*, 745 So. 2d at 511). Moreover, the *Koulisis* test did not require proof that a side-switcher actually shared confidential information with the new firm because of "the practical difficulty of proving what goes on behind closed doors." *Koulisis*, 730 So. 2d at 292. Even so, the matter is worse here because the record is clear that Mr. Daruwalla shared the shop drawings—Moss's confidential information—with Epic.

This recognition of the lofty burden of establishing what happens behind closed doors is in accord with Florida jurisprudence more generally. Although no case has passed on the precise fact pattern before this Court, Florida's district courts have explained

time and again that courts must pragmatically protect clients' confidential information rather than adhere to rigid rules that permit abuse. *See, e.g.*, *Koulisis*, 730 So. 2d at 291 ("Where an employee of a law firm is privy to attorney-client confidences, 'a court should not look to what tasks the employee performs so much as to his or her access to the same types of privileged materials that lawyers would receive.'" (quoting *Maguire*, 532 So. 2d at 741); *Rombola*, 149 So. 3d at 1143 (rejecting argument that attorney's side-switching harm was speculative because "this is a real case, with real clients, not a moot court competition"); *First Mia. Sec.*, 780 So. 2d at 254 ("The only *practical way* to assure that [parties do not exploit confidentiality loopholes] and to preserve public trust in the scrupulous administration of justice is to subject these 'agents' of lawyers to the same disability lawyers have when they leave legal employment with confidential information." (quoting *Williams*, 588 F. Supp. at 1044)).

Turning to this case, the trial court here departed from the essential requirements of law when it held that Mr. Daruwalla was not sufficiently associated with Epic to be considered a side-switcher. Instead of viewing secretive attempts to obtain an adversary's confidential information for what they are—surreptitious attempts to

covertly gain an unfair advantage—the court applied a rigid test to determine whether Mr. Daruwalla was sufficiently associated with Epic to require its disqualification.

The court found that Mr. Daruwalla was never sufficiently associated with Epic because Epic never "hired" him. (App'x 1351). And Epic never hired him, the court explained, because Mr. Daruwalla never officially began work, did not receive a paycheck, and his offer of employment was rescinded the last business day before he was scheduled to begin work. (App'x 1351, 1268). The trial court did not address that Mr. Daruwalla and Epic had already agreed to start running proposals for testifying-expert work through Epic while Mr. Daruwalla was still employed at Moss.

Although Moss disagrees with the trial court's factual finding that Epic did not "hire" Mr. Daruwalla in a *colloquial* sense, Moss does not challenge this finding in this Court. Instead, Moss challenges the trial court's *legal conclusion* that Epic did not "hire" Mr. Daruwalla for purposes of side-switching analyses under both *Sultan* and *First Miami*. While this Court has not enunciated a specific test concerning when a side-switching non-independent expert is considered legally "hired" for purposes of the disqualification

analysis, Florida's appellate courts have routinely impressed upon the trial courts the need to take account of the realities concerning the improper collection and disclosure of confidential information. This Court should not now stray from that principle.

Viewing this case from that perspective, it is clear that Epic fostered an inappropriate employment relationship with Mr. Daruwalla and wrongfully obtained Moss's shop drawings, constituting confidential information. Epic serves as the plaintiff-side expert in half of Moss's 558 matters. (App'x 846, 1097). Mr. Daruwalla, as explained above, played an integral role in Moss's 558 litigation, crafting Moss's defense positions and strategically settling claims. (App'x 842–45). Without telling Moss, Epic then engaged in a four-month campaign to recruit Mr. Daruwalla to work as a testifying forensic engineer for itself—Moss's primary opponent expert in 558 cases. (App'x 845, 932, 953, 956–57, 960–61, 964, 1195–99, 1272).

The following timeline demonstrates the extent of Mr. Daruwalla's association with Epic while still employed at Moss:

- January 24, 2024: Epic interviewed Mr. Daruwalla
- February 6: Epic extended Mr. Daruwalla an employment offer

- February 12: Epic received Mr. Daruwalla's oral acceptance no later than this date
- February 19: Mr. Daruwalla shared the shop drawings—Moss's confidential information—with Epic's testifying expert in this case, Mr. Toler
- March 12: Mr. Daruwalla returned a signed offer letter to Epic no later than this date
- March 13: Epic circulated an email to its employees welcoming Mr. Daruwalla
- March 25: Mr. Daruwalla tendered his resignation letter to Moss, without informing Moss of his acceptance of Epic's offer
- March 29: Mr. Daruwalla filled out and returned his onboarding paperwork to Epic, and Epic agreed to begin running one of Mr. Daruwalla's pending jobs through Epic
- April 9: Epic issued Mr. Daruwalla an Epic email address
- April 12 (the final business day before Mr. Daruwalla was scheduled to begin work at Epic): Epic rescinded its offer.

(App'x 853, 856, 953, 956, 960–61, 964, 966, 972–73, 1232–35, 1237–39, 1268, 1272, 1317–19). During this time, Mr. Daruwalla

and Epic were in regular communication with Epic personnel, and Mr. Daruwalla was reporting to work at Moss to defend against Epic's opinions. Under these facts, Mr. Daruwalla was hired by Epic for purposes of a side-switching analysis in the context of protecting client confidences.

It is true, as far as Moss knows, that Mr. Daruwalla never sat behind an Epic desk or received an Epic paycheck. But Epic's months-long, secret effort to acquire Mr. Daruwalla—Moss's lead expert on the 558 cases that Epic helps prosecute—cannot be understood as creating anything less than an inappropriate employee-employer relationship that compromised Moss's confidential information. When Epic offered Mr. Daruwalla a job doing precisely the kind of work he was doing for Moss—and Mr. Daruwalla accepted that job offer, returned his onboarding paperwork, and Epic issued him an email address and permitted him to run upcoming business through itself—Epic hired Mr. Daruwalla for purposes of *First Miami* and *Sultan* side-switching analyses. Mr. Daruwalla's continued communications with Epic personnel only underscore this conclusion.

Accordingly, this Court should hold that, regardless of Mr.

Daruwalla's *official* status as an Epic employee, Epic hired Mr. Daruwalla for purposes of side-switching analyses when it interviewed him, offered him a job, obtained his acceptance and onboarding paperwork, agreed to permit Mr. Daruwalla to run upcoming business through Epic, and issued him an Epic email address.

c. Even if This Court Determines that *Sultan* Provides the Appropriate Test, Moss Satisfied that Test Because Mr. Daruwalla Shared Moss's Confidential Work Product with Epic When He Sent Mr. Toler the Shop Drawings.

Although Moss maintains that *Sultan* does not provide the appropriate test here, Moss nevertheless satisfied *Sultan* and is still entitled to certiorari relief under that test. As demonstrated above, Mr. Daruwalla switched sides for purposes of the disqualification analysis. Additionally, *Sultan* requires a showing that the side-switching expert's opinion is based on or revealed confidential information of the former client to the latter client. *See* 852 So. 2d at 317. The trial court here departed from the essential requirements of law when it ruled that Mr. Daruwalla did not share Moss's confidential information with Epic.

"[A]n attorney's mental impressions, conclusions, opinions, or

theories concerning the client's case are opinion work-product and are absolutely privileged." *Ford Motor Co. v. Hall-Edwards*, 997 So. 2d 1148, 1152–53 (Fla. 3d DCA 2008) (quoting *5500 N. Corp. v. Willis*, 729 So. 2d 508, 512 (Fla. 5th DCA 1999)). "The privilege extends to an attorney's selection of the facts and information that the attorney considers important to the case." *Ford Motor Co.*, 997 So. 2d at 1153.

For example, even a document created in the ordinary course of business can be considered work product where "the selection process itself represents defense counsel's mental impressions and legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation." *Smith v. Fla. Power & Light Co.*, 632 So. 2d 696, 698 (Fla. 3d DCA 1994) (quoting *Sporck v. Peil*, 759 F.2d 312, 315 (3d Cir. 1985)). This is especially true in "cases that involve reams of documents and extensive document discovery." *See id.* (quoting *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986)).

Where documents sought "comprise a grouping that is the end result of counsel's selection process," the "identification of the group would reveal counsel's mental impressions" and is considered privileged information. *Id.* at 698–99; *see also Hickman v. Taylor*, 329

U.S. 495, 511 (1947) ("Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."); *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 112 (Fla. 1970) (noting that an attorney's personal view of "how and when to present evidence" and his or her "evaluation of its relative importance" constitute work product).

Work product is confidential information in the conflicts context, and its improper handing will result in disqualification. *See ATC Logistics Corp. v. Jackson*, 168 So. 3d 292, 295 (Fla. 1st DCA 2015) (holding that side-switching attorney who assisted, analyzed legal issues with, and drafted a motion for summary judgment for a lead attorney "[c]learly . . . was privy to the work product of [the lead attorney]," which constituted confidential information); *Gaton*, 745 So. 2d at 511 (holding that a side-switcher was privy to confidential information when his firm "provided [attorney] with 'extensive background on all aspects of the case,' 'mental impressions on the entire matter,' 'strategies and how they impacted the future of the case,' and 'overall thoughts regarding liability, damages, and

discovery of the case as a whole'").

Additionally, the fact that a document is of public record does not strip it of the confidential nature of the probative value of such document. Indeed, the First District expressly rejected this argument in *ATC Logistics Corp. v. Jackson*, 168 So. 3d 292 (Fla. 1st DCA 2015). There, the appellant argued that although its attorney may have obtained work product while representing the opposing party, all such information was included in documents filed with the court and thus became "public knowledge" and accessible by "any competent lawyer." *Id.* at 295–96.

The First District rejected this contention, explaining that "[w]hile any lawyer may [have] be[en] able to attempt to determine the relative strengths and weaknesses [of the case by obtaining those documents], [the attorney] and [her co-counsel] *actually discussed* the strengths and weaknesses of [the] case." *Id.* at 296. And it was those discussions *about the case*—not the documents themselves—that constituted confidential information. The court explained:

> [O]ftentimes it is what is *not* in the record that is critical in making strategic decisions. Information shared in confidential after-hours trial preparation sessions—that unveil litigation strategies and test their strengths and weaknesses—is oftentimes far more potentially harmful if

> disclosed to adversaries (or used against a former client) than what is in the record.

Id. at 296 (quoting *Rombola*, 149 So. 3d at 1144); *see also Philip Morris USA Inc. v. Caro*, 207 So. 3d 944, 948–51 (Fla. 4th DCA 2016) (holding that despite public availability of the documents on which side-switching counsel worked at his previous law firm, he retained confidential information that required disqualification).

Here, Mr. Daruwalla not only had access to Moss's confidential information, but he gratuitously handed that information over to Epic without being authorized to do so by Mr. Barber or Moss's outside counsel. (App'x 866–67, 972). Specifically, Mr. Daruwalla had access to Moss's shop drawings that its counsel had identified as valuable both as an impeachment tool as to the completeness of Epic's review of the construction documents and evidence demonstrating its lack of liability on the car lift matter. (App'x 871–72). Under well-established precedent, counsel's selection of that shop drawing as significant to Moss's defense rendered it confidential work product as it related to the Association's assertion that the car lifts were defective. *See Hickman*, 329 U.S. at 511; *Surf Drugs, Inc.*, 236 So. 2d at 112; *Smith*, 632 So. 2d at 698–99.

The fact that the shop drawing was part of the construction documents and a public record is of no moment. (App'x 871, 1109); *see ATC Logistics, Corp.*, 168 So. 3d at 296; *Caro*, 207 So. 3d at 948–51. To the contrary, precisely because there was a publicly available document tending to show that Moss built the car lifts as they were designed demonstrated that Epic failed to review the necessary public records or construction documents before opining that Moss was liable. This is why the document had strategic utility. The fact that Epic and opposing counsel had access to that document—along with thousands of others—but failed to appreciate that it would show Epic was rendering opinions without a complete review of the constructions documents has extraordinary impeachment value. (App'x 871–72). Epic did not identify or receive the document from public records; it got it from Mr. Daruwalla who was in a unique position to know what documents Moss could use to show that Epic's opinions were incomplete and inaccurate. (App'x 972).

Mr. Daruwalla—after orally accepting a position at Epic—picked that document out of Moss's internal Project files and delivered it to Epic's expert, Mr. Toler. (App'x 972). Accordingly, Mr. Daruwalla improperly shared Moss's confidential information with Epic,

establishing that Epic had actual knowledge of Moss's confidential information. Just eight days later, the Association's counsel emailed Moss and the other defendants notifying them that the car lifts contained an issue with the epoxy, no longer mentioning any issue with the bolts being missing. (App'x 873). The record therefore demonstrates that the Association used the confidential information that Mr. Daruwalla disclosed to Epic.

Although Epic had already served Moss with its expert report in this case, a worse result occurred here than in *Sultan*. First, Epic's attention was drawn to documents that Moss could have used to impeach Epic, enabling Epic to better prepare if it decided to litigate the matter. Second, instead of Epic changing its position and retracting its assertion that the car lifts were defective as Mr. Daruwalla hoped, the Association changed its theory of liability concerning the car lifts *eight days* after Mr. Daruwalla's transmission of the confidential information to Epic. (App'x 873–74, 1274). Thus, Moss suffered more damage than that required by *Sultan*.

In conclusion, Epic should be disqualified.

CONCLUSION

For the reasons discussed above, Moss respectfully requests

that the Court grant this Petition for Writ of Certiorari, quash the trial court's Disqualification Order, and instruct the trial court to disqualify Epic as the Association's expert in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was filed with the Third District Court of Appeal by using the Florida Courts e-Filing Portal, which will be furnished by E-service this 1st day of October 2024 to all counsel on the attached Service List.

/s/ Seth J. Donahoe

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CERTIFICATE OF COMPLIANCE

I certify that this Petition for Writ of Certiorari complies with the requirements of Florida Rules of Appellate Procedure 9.045(b) and (e) and 9.100(g) because it uses Bookman Old Style 14-point font and because the word count from Microsoft Word is 9,117 words.

/s/ Seth J. Donahoe, Esq.