IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT
STATE OF FLORIDA

Case No. 2D24-0646

OPTIMAL US LOGISTICS, INC. and KELLEY MURPHY,

Appellants,

v.

Estate of TAYLOR LAMBE-KOULOURIS by and through Personal Representative ALEXA KOULOURIS-PARKER, et al.,

Appellees.

ANSWER BRIEF

On Appeal From the Thirteenth Judicial Circuit in and for Hillsborough County, Florida

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PRELIMINARY STATEMENT

This brief is filed on behalf of Appellee, Estate of Taylor Lambe-Koulouris, by and through Personal Representative Alexa Koulouris-Parker (the "Estate"). Appellant Optimal US Logistics, Inc. is referred to herein as "Optimal." Appellant Kelley Murphy is referred to herein as "Murphy." Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A. is referred to herein as "Trenam." References to the Appellants' Appendix to Initial Brief are in the form of (App. [page number]). References to the Estate's Supplemental Appendix to Answer Brief are in the form of (Supp. App. [page number]).

INTRODUCTION

After Appellants were aware of Trenam's representation of the Estate for at least eight months and after their active participation in the litigation including written discovery, multiple depositions, motions resulting in a sanctions order against Appellants for discovery abuses, and an order setting trial, Appellants filed a motion to disqualify Trenam in the instant case. (App. 009-66, the "Disqualification Motion"). Appellants primarily argued that Trenam could not represent the Estate in a matter adverse to Optimal because Optimal was a current client of Trenam until May 2022.

(App. 009-17). At the hearing on the Disqualification Motion, Appellants pivoted and argued primarily that Optimal was a former client, but that the instant case was substantially related to Trenam's prior representation of Optimal. (App. 383-85, 430-32, 459-67).

Following the evidentiary hearing, the trial court entered an order (App. 2616-42, the "Order Denying Disqualification") that properly found that: (1) Optimal was not a current client of Trenam during the relevant time period; (2) Trenam's representation of the Estate was not substantially related to its prior representation of Optimal; and (3) even if Trenam had a conflict (which the trial court expressly found it did not), Appellants had waived their right to seek disqualification. As the trial court properly determined, "the disqualification of Trenam Law from representing the Estate in this case would work a serious injustice, and would run afoul of the principles surrounding late-filed disqualification motions that result in an unfair advantage." (App. 2639). The trial court did not abuse its discretion, and the Order Denying Disqualification should be affirmed.

STATEMENT OF THE CASE AND FACTS

In December 2021, fifteen-year-old Taylor Lambe-Koulouris ("Taylor") was tragically killed in a motor vehicle collision. (App. 1212). As alleged in the First Amended Complaint, Taylor was traveling as the rear seat passenger on a motorcycle (the "Motorcycle") being operated by Benjamin Francis. (App. 1216). Around the same time, Murphy was operating an Amazon-branded package delivery vehicle (the "Amazon Van"), making deliveries of Amazon purchases. (App. 1216). To make a delivery, Murphy parked the Amazon Van on the right shoulder of the road, just short of an intersection. (App. 1216). Murphy was employed by Optimal pursuant to a relationship between Optimal and Amazon Logistics Inc. and/or Amazon.Com, Inc. (collectively, "Amazon"), through which Amazon managed Optimal's driver-employees as "delivery associates." (App. 1213-15).

The parked Amazon Van obstructed the view of the intersection, causing another driver, Eugene Donato ("Donato"), not to see the Motorcycle approaching the intersection. (App. 1217-18). Thus, Donato pulled into the Motorcycle's travel lane and collided with the

Motorcycle. (App. 1217-18). Shortly thereafter, Taylor died from injuries sustained in the collision. (App. 1218).

The Estate engaged Trenam to investigate and ultimately pursue a wrongful death action. (App. 2617). Attorney Shirin Vesely ("Ms. Vesely") assumed principal responsibility for the case. (App. 2617).

A. Trenam's Former Representation of Optimal

Optimal and Murphy have alleged that Trenam has a conflict of interest representing the Estate in the instant case because of its former (and alleged concurrent) representation of Optimal. Trenam was retained by Optimal's predecessor, Bigger Picture, LLC, in 2016. (App. 1371). Because Bigger Picture, LLC is the predecessor in interest to Optimal, Bigger Picture, LLC is also referred to herein as Optimal.

The scope of the representation was defined by a November 15, 2016 letter, incorporating a five-page "Terms of Engagement." The November 15, 2016 letter and the Terms of Engagement are collectively referred to as the "Retention Letter." (App. 1371-78). Optimal signed the Retention Letter, affirmatively agreeing to its terms. (App. 1373).

The Retention Letter provides that Trenam was engaged to assist Optimal in connection with the formation of the entity. (App. 1371). The Terms of Engagement specifically state that Trenam's engagement was "limited to the matter identified in the letter accompanying these Terms of Engagement." (App. 1374). The Terms of Engagement further provide that:

> **Upon completion of the matter to which the representation applies**, **or** upon earlier termination of our relationship, **the attorney-client relationship will end** unless you and we have expressly agreed to a continuation with respect to other matters.

(App. 1377, emphasis added). The Retention Letter also requires "written confirmation of our having been engaged on additional projects as those matters arise." (App. 1376).

The Retention Letter also provides that **"[d]uring the course of this engagement,"** Trenam will not accept representation of an interest directly adverse to Optimal's interest, absent full disclosure and consent. (App. 1377, emphasis added). The Retention Letter does *not* say that Trenam agrees it will never accept any representation directly adverse to Optimal, and does not purport to require Trenam to disclose any adverse representations or acquire consent from Optimal after the engagement is completed.

Trenam completed the work for which it was originally retained in 2016. (App. 974). Thereafter, Optimal occasionally requested that Trenam assist with other discrete projects. Attorney D. Michael O'Leary ("Mr. O'Leary") primarily assisted with corporate and transactional matters related to corporate governance and structure. (App. 1129-31, 1133-34). Attorney Richard Hanchett ("Mr. Hanchett") provided guidance on non-litigation employment matters. (App. 1050). Of relevance to this appeal, in 2017, Mr. Hanchett assisted with the preparation of an employee handbook (the "Employee Handbook"). (Initial Brief, p. 20).

The Employee Handbook at issue contains general personnel policies for Optimal employees. (See, e.g., App. 2436-61). It is not a training manual for Optimal drivers, and it contains no policies or instructions regarding package delivery or parking of delivery vehicles during deliveries.

Preliminary drafts of the Employee Handbook contained a section titled "Company Vehicle Policy." (See, e.g., App. 1503, 1544, 1582-83). This policy did not include any instructions about how to park the vehicle during deliveries. Later, Optimal provided a PDF copy of "Vehicle Operational Guidelines" (the "Guidelines") to be

referenced in the Employee Handbook to replace the Company Vehicle Policy. (App. 2203, 2238-47). The Company Vehicle Policy was completely removed from the final version of the Employee Handbook and replaced with a statement that "[e]mployees are bound by and expected to comply with [Optimal]'s Vehicle Operational Guidelines, a copy of which will be provided." (App. 2352-53, 2507).

Trenam did not create or revise the Guidelines. In fact, on May 24, 2017, Mr. Hanchett emailed Optimal memorializing his understanding that Optimal itself had revised the Guidelines, and that Optimal would have to provide him with a copy of the Guidelines if it wanted him to review or revise them. (App. 2545). Optimal did not respond to that email, and Trenam made no revisions to the Guidelines.

In any event, the Guidelines do not include any policies regarding package deliveries or how vehicles should be parked during package deliveries. Instead, the Guidelines focus on maintenance of the vehicle and the driver's financial responsibility for vehicle damage caused by the employee. (App. 2191-2201). The word "park" does not appear anywhere in the Guidelines.

Trenam's representations of Optimal were task-based, in which Trenam was engaged to perform discrete tasks. At the conclusion of each task, the matter was deemed closed and the representation ended. (App. 976-77). As a result, Trenam had to take steps to ensure that it was able to assume an engagement for each individual task as the need arose, including checking conflicts. (App. 1053). This is reflected in Mr. Hanchett's July 2017 email to an Optimal representative, which states "Re: insurance matter we have cleared conflicts. Please send me materials for our review." (App. 2547). Trenam has not performed any legal work for Optimal since September 2020. (App. 221).

B. The Estate's Retention of Trenam.

The Estate retained Trenam to represent it in connection with its wrongful death action in January 2022. (App. 929). Before Trenam accepted the engagement, it performed a "conflict check" to determine whether its representation of the estate would create any conflict under the rules of professional conduct. The conflict check did not identify any conflict with a current client. It showed that Optimal was a former client. (App. 932-33).

On January 13, 2022, Ms. Vesely sent a formal preservation letter by e-mail and certified mail to Optimal's chief operating officer, William Newell ("Mr. Newell"), demanding Optimal preserve video and other data that might have captured the accident. (App. 167-69). Mr. Newell received the letter by e-mail that day. (App. 623). The first sentence of the January 13, 2022 letter states: "Please be advised that we represent the Estate of Taylor Koulouris." (App. 167). The next day, Mr. Newell sent an email to two individuals associated with Amazon, requesting help locating the requested videos, indicating that they had been requested by "Tampa police" and "*an* attorney." (App. 243).

On January 31, 2022, Ms. Vesely sent Mr. Newell another letter, by U.S. Mail, certified mail and e-mail. (App. 176). The first sentence of this letter states:

> This law firm represents The Estate of Taylor Lambe-Koulouris in relation to the motor vehicle crash that occurred near *the negligently parked Amazon labeled vehicle* […].

(App. 176, emphasis added). The letter then requests that Optimal provide information regarding its insurance coverage. Mr. Newell testified that, at the time he received and reviewed this letter, he

understood that: (1) Trenam represented the Estate; (2) Trenam was demanding insurance coverage information from Optimal; and (3) Trenam was representing the Estate in connection with an Amazon-labeled vehicle that was alleged to have been negligently parked. (App. 689-92). Mr. Newell did not provide the requested insurance information. (App. 692). Mr. Newell also did not contact anyone at Trenam and object regarding Trenam representing the Estate. (App. 231-32).

C. Optimal's contact with Trenam in May 2022.

In May 2022, Neil Hale ("Mr. Hale") emailed Teresa Good, a paralegal at Trenam, asking if Trenam could help with a legal service involving a change of Optimal's ownership structure. (App. 033-34). Mr. Hale is not an Optimal employee, but instead an outsourced employee of a third-party company who was engaged by Optimal to act as an outside finance director of Optimal. (App. 787). Mr. Hale reminded Ms. Good that Trenam had helped Optimal with another corporate matter "a couple of years" before. (App. 033). Prior to Mr. Hale's May 24, 2022 email, Trenam had not billed Optimal for any legal services since September 2020. (App. 221, ¶ 10).

Mr. O'Leary, who had handled some past corporate matters for Optimal, responded that Trenam could assist with what Mr. Hale was asking. (App. 033, 1134-35). Thereafter, Mr. Hale exchanged a few preliminary emails with Ms. Good. (App. 031-32). On May 27, 2022, Mr. O'Leary emailed Mr. Hale and expressly declined to represent Optimal with the requested corporate matter, stating:

> Because we had not recently performed any legal work [for] Optimal Logistics, we had closed your file (as is customary at my firm).
>
> When we tried to reopen your file, we discovered a conflict has arisen after the time we closed the Optimal Logistics file **so we will be unable to provide assistance with this matter.**
>
> We apologize for any inconvenience.
>
> Please let us know if you would like a referral to another attorney.

(App. 030).

In response to Mr. O'Leary's email, Mr. Hale responded that he could not imagine what the conflict would be, although Mr. Hale also testified that he does not regularly receive notifications regarding lawsuits and has limited personal knowledge regarding Trenam's prior work for Optimal. (App. 795-99, 813). Mr. Hale accepted the

offer for a referral to another attorney, and that attorney ultimately performed the requested legal services. (App. 028-30).

D. Trenam's filing of the instant litigation and Optimal's acceptance of service.

On January 19, 2023, approximately one year after the letters from Ms. Vesely to Mr. Newell, the Estate filed a wrongful death action against, *inter alia,* Optimal and Murphy. (App. 1211-44). The Complaint clearly reflected that Trenam was counsel for the Estate. (App. 1243). The Estate alleged that Murphy negligently operated the Amazon Van. (App. 1219-20). The Estate alleged that Optimal was vicariously liable for Murphy's negligence, and that Optimal was also directly negligent in connection with its training and supervision of its employee drivers. (App. 1220-25).

In the Initial Brief, Appellants incorrectly state that the Estate "inexplicably" chose to serve the lawsuit on Optimal's outside general counsel, rather than serving the registered agent. (Initial Brief, p. 12). Indeed, the Estate attempted to serve Optimal's registered agent, Exportaction, LLC on January 11, 2023 and February 7, 2023. (Supp. App. 005). However, the address information in Optimal's

corporate filings was not accurate which prevented the process server from serving the registered agent. (Supp. App. 005).

In February 2023, Optimal's outside general counsel, attorney John Marchione of Taylor Johnson, LP, agreed to accept service on behalf of Optimal and executed an Acceptance of Service and Waiver of Service of Process (the "Acceptance of Service"). (App. 144). Optimal has never argued that the Acceptance of Service was not valid or that Mr. Marchione was not authorized to accept service on its behalf. (*See* App. 814-15). Prior to Optimal's general counsel's agreement to accept service, Optimal already knew Trenam filed a Complaint against it because Optimal sent information to its insurer QEO Insurance for purposes of defending the claim on January 19, 2023. (App. 221, ¶ 4).

Optimal clearly had notice of the complaint filed by Trenam because on March 20, 2023, attorney Kate Cooper ("Ms. Cooper") appeared as counsel of record on behalf of Murphy and Optimal, and accepted service of process and waived formal service of process on Murphy's behalf. (App. 122, Supp. App. 006-9). Optimal and Murphy, through Ms. Cooper, actively participated in the litigation. They filed answers and affirmative defenses to the complaint. (App.

123). They propounded discovery to the Estate, including interrogatories and requests for production. (App. 2562-63). They served written discovery responses. (App. 123). They produced documents in response to the Estate's request for production. (App. 123). Ms. Cooper deposed both the Personal Representative and Mr. Donato. (App. 123).

E. Sanctions Awarded Against Optimal and Murphy for Discovery Violations.

In June 2023, the Estate filed a motion to compel against Optimal, Murphy and other defendants. (Supp. App. 010-15). Following a hearing, the trial court found that Defendants' delay in providing discovery responses was willful, in bad faith, and resulted in unnecessary attorneys' fees. Accordingly, on October 2, 2023, the trial court granted the motion to compel and imposed various sanctions against Optimal, Murphy and other defendants. (Supp. App. 025-32, the "Sanctions Order").

F. Optimal Suddenly Seeks Disqualification.

On October 9, 2023, after approximately nine months of active participation in the litigation and one week after entry of the Sanctions Order, Ms. Cooper (counsel for Optimal and Murphy)

emailed a letter to Ms. Vesely (counsel for the Estate) indicating *for the first time* that it believed Trenam had a conflict of interest due to its alleged concurrent representation of Optimal. (App. 042-44). Ms. Cooper claimed that Trenam represented Optimal until at least May, 2022. (App. 042). Ms. Cooper's letter appeared to be premised on the email exchange in May 2022 between Neal Hale and D. Michael O'Leary, discussed above. (App. 043).

Ms. Vesely responded to Ms. Cooper's letter on October 12, 2023, and advised Ms. Cooper that Trenam was not representing Optimal in May 2022, and that Trenam did not have any open files related to Optimal when it began representing the Estate. (App. 047). Ms. Vesely also advised Ms. Cooper that Trenam's prior representation of Optimal was not substantially related to its representation of the Estate in this matter. (App. 048). Finally, Ms. Vesely responded that Optimal was on notice of Trenam's representation of the Estate in this matter at least since the time that it accepted service of the complaint in February 2023. (App. 050).

On October 18, 2023, five days before Murphy's scheduled deposition and less than two weeks before the scheduled depositions of other Optimal representatives, Optimal and Murphy moved for a

protective order, attempting to postpone the depositions based on Trenam's alleged conflict of interest. (App. 001-08). On October 25, 2023, Optimal and Murphy moved to disqualify Trenam as counsel for the Estate based on the same alleged conflict of interest. (App. 009-66).

The trial court allowed the parties to conduct depositions for the limited purpose of developing evidence related to the Disqualification Motion. (App. 091-92; Supp. App. 033-34). The Estate deposed Mr. Hale and Mr. Newell. (App. 606-886).

Trenam also produced Ms. Vesely, Mr. Hanchett and Mr. O'Leary for depositions. On November 9, 2023, Appellants served a notice of deposition, which scheduled the depositions for November 16, 2023 and did not request any documents. (Supp. App. 035-37). At 7:00 p.m. on November 14, 2023, **one business day** before the scheduled depositions of Trenam counsel, Optimal and Murphy served an amended Notice of Depositions Duces Tecum (the "Duces Tecum Notice"), which purported to require the Estate to produce ten categories of documents. (Supp. App. 038-42).

The Estate objected to the Duces Tecum Notice based on insufficient notice. (Supp. App. 043-47). However, to the extent that

Trenam had responsive, non-privileged documents, those documents were produced on November 20, 2023, less than one week after Appellants served the Duces Tecum Deposition Notice. The total production was 1182 pages. (App. 1371-2552). The vast majority of these documents (949 pages) were various drafts of the Employee Handbook. (App. 1393-1423, 1480-1885, 1902-1943, 1945-2049, 2058-2149, 2158-88, 2205-35, 2249-74, 2276-2332, 2335-2442, 2446-61, 2465-90, 2493-2518). Although Appellants state that Trenam "inexplicably" did not produce documents related to work done in 2020, the Duces Tecum Notice did not request documents related to work done in 2020. (Supp. App. 041-42).

G. Evidentiary Hearing on Disqualification Motion.

The trial court held an evidentiary hearing on the Disqualification Motion the following day, November 21, 2023. (App. 362-525). At the start of the evidentiary hearing, Ms. Cooper stated that 1200 documents had been produced the day before the hearing, and that she had not yet reviewed them. (App. 362-63). She did not advise the trial court that the documents were only requested five business days before the hearing. The trial court continued the hearing for an hour to allow Ms. Cooper to review the document

production. (App. 367). When the evidentiary hearing resumed, Ms. Cooper did not seek a further continuance, object, or state that she had insufficient time to review the document production. (App. 373).

Appellants presented no witnesses at the evidentiary hearing. Although Appellants state that the parties agreed to file depositions in lieu of live testimony (Initial Brief, p. 16), there was no stipulation to forego live testimony (App. 394). The Estate offered the expert testimony of Joseph Corsmeier ("Mr. Corsmeier"). (App. 400-88). Mr. Corsmeier has been a Florida attorney for 39 years. (App. 407). He worked as Senior Bar Counsel for the Florida Bar, Department of Lawyer Regulation for 8 years, and has focused his practice primarily on ethical and disciplinary matters involving Florida attorneys and the Florida Bar since 1998. (App. 402-04). Defendants did not object to Mr. Corsmeier's expert qualifications or any of his testimony. (App. 2627).

Mr. Corsmeier testified that Optimal was not a current client of Trenam at the time Trenam was retained by the Estate. (App. 425-26). He further testified that the fact that Optimal was a former Trenam client did not preclude Trenam from representing the Estate, because the representation of the Estate is not substantially related

to any matter for which it represented Optimal. (App. 433). More specifically, Mr. Corsmeier opined that: (1) Trenam was not required to advise Optimal that its file had been closed after the matter concluded (App. 415-16); (2) Trenam was not required to notify Optimal about its representation of the Estate or obtain Optimal's consent to represent the Estate (App. 472); (3) Trenam was not required to disclose the facts and details surrounding its conflict, and in fact, it would have been improper for Trenam to make such disclosures under the relevant ethical rules. (App. 416-17).

The trial court considered the deposition transcripts of Mr. Hale, Mr. Newell, Ms. Vesely, Mr. Hanchett and Mr. O'Leary. (App. 2616). The trial court also considered the declarations submitted by Mr. Hale, Mr. Newell, Ms. Vesely and the various exhibits submitted by the parties (including the 1182 pages produced by Trenam). (App. 2616, 220-33, 1286-96). In lieu of closing arguments, the trial court accepted and reviewed the parties' proposed orders on the Disqualification Motion. (App. 489, 2556-2588, 2616).

After reviewing the evidence and the proposed orders, the trial court issued an interim order asking the parties to submit supplemental briefing as to whether Trenam's work surrounding the

Guidelines was relevant to the Court's analysis of the Disqualification Motion. (App. 2593-95). Both parties submitted supplemental briefing. (App. 2596-2612).

H. The Order Denying Disqualification.

On February 14, 2024, the trial court issued a 28-page Order Denying Disqualification, which includes a detailed analysis of the allegations, evidence and relevant law. (App. 2615-42). The trial court found that: (1) Optimal was not a current client of Trenam during the relevant time period; (2) Trenam's representation of the Estate was not substantially related to its prior representation of Optimal; and (3) even if Trenam had a conflict (which the trial court expressly found it did not), Appellants had waived their right to seek disqualification. The trial court determined, "the disqualification of Trenam Law from representing the Estate in this case would work a serious injustice, and would run afoul of the principles surrounding late-filed disqualification motions that result in an unfair advantage." (App. 2639). The trial court further determined that the facts and evidence presented "militate against disqualification, in light of the serious injustice that would result." (App. 2641).

This appeal followed. (*See* Notice of Appeal, filed in this appeal on March 15, 2024).

SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion in denying the Disqualification Motion. As the moving parties, Appellants had the burden to prove that disqualification was necessary. Appellants failed to satisfy this burden.

The trial court's finding that Trenam did not concurrently represent Optimal and the Estate was supported by substantial, competent evidence. The record evidence demonstrated that Trenam and Optimal agreed to a task-based representation, and that the representation ended at the completion of any requested task. Optimal failed to identify a single matter that Trenam was performing on its behalf when Trenam was engaged by the Estate in January 2022. Accordingly, the trial court did not abuse its discretion in finding that disqualification was not required by R. Regulating Fla. Bar 4-1.7.

The trial court's finding that Trenam's representation of the Estate was not substantially related to its prior representations of Optimal was also supported by substantial, competent evidence. The

Estate's claims against Murphy and Optimal arise from Murphy's negligent parking during a package delivery. There was no evidence that Optimal ever retained Trenam to revise or create policies regarding delivery driver parking during package deliveries. The Employee Handbook that Trenam prepared did not relate to or provide instructions regarding parking vehicles during package deliveries. Accordingly, the trial court did not abuse its discretion in finding that disqualification was not required by R. Regulating Fla. Bar. 4-1.9.

Finally, the trial court did not abuse its discretion in finding that Appellants waived their right to seek disqualification. Appellants did not assert an alleged conflict until eight months after Optimal accepted service of the complaint that clearly identified Trenam as the Estate's counsel. During that period, Appellants actively participated in substantial litigation, including written discovery, document production, depositions, and motion practice. Indeed, Appellants did not raise the alleged conflict until a week after the trial court sanctioned Appellants for discovery abuses. Under these circumstances, the trial court did not abuse its discretion in finding

that Appellants waived their right to seek disqualification by failing to move with reasonable promptness.

For the reasons set forth herein, the Order Denying Disqualification is supported by substantial, competent evidence and should be affirmed.

STANDARD OF REVIEW

An order denying a motion to disqualify counsel is reviewed for abuse of discretion. *Stopa v. Cannon,* 330 So. 3d 1033, 1035 (Fla. 2d DCA 2021). Under this standard, Appellants bear a difficult burden. *Id.* A ruling will be upheld unless it is "arbitrary, fanciful, or unreasonable," such that discretion is abused "only where no reasonable man would take the view adopted by the trial court." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (internal quotations omitted).

On motions to disqualify, this standard is especially difficult to meet because the 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.

Stopa, 330 So. 3d at 1035 (*quoting Applied Digital Sols., Inc. v. Vasas,* 941 So. 2d 404, 408 (Fla. 4th DCA 2006)).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE DISQUALIFICATION MOTION.

A. Legal Standard.

Florida courts uniformly hold that "[d]isqualification of a party's chosen counsel is an extraordinary remedy" that "should be resorted to sparingly." *Alexander v. Tandem Staffing Sols., Inc.*, 881 So. 2d 607, 609 (Fla. 4th DCA 2004); *Goff v. Goff*, 276 So. 3d 83, 86 (Fla. 2d DCA 2019); *Singer Island Ltd., Inc. v. Budget Const. Co., Inc.*, 714 So. 2d 651, 652 (Fla. 4th DCA 1998); *Vick v. Bailey*, 777 So. 2d 1005, 1007 (Fla. 2d DCA 2000); *Stopa* 330 So. 3d at 1035; *Applied Digital Sols., Inc.*, 941 So. 2d at 407. As this Court observed in *Stopa,*

> [u]nquestionably, "disqualification impinges on a party's right to employ a lawyer of choice. …. Since the remedy of disqualification strikes at the heart of one of the most important associational rights, it must be employed only in limited circumstances.

Id. at 1035, *quoting Coral Reef of Bicayne Devs., Inc. v. Lloyd's Underwriters at London,* 911 So. 2d 155, 157 (Fla. 3d DCA 2005).

Motions to disqualify should be "generally viewed with skepticism" because they "are often interposed for tactical purposes. *Yang Enters., Inc.,* 988 So. 2d at 1183. *See also* Comment to R. Regulating Fla. Bar. 4-1.7 (recognizing that an objection regarding conflicts of interest raised by opposing counsel "should be viewed with caution, however, for it can be misused as a technique of harassment.").

As the moving parties, Appellants had the burden to prove that disqualification was necessary. *Herschowsky v. Guardianship of Herschowsky*, 890 So. 2d 1246, 1247 (Fla. 4th DCA 2005).

B. The trial court did not abuse its discretion by finding that Trenam did not concurrently represent Optimal and the Estate

Appellants' primary argument in the Disqualification Motion was that Trenam should be disqualified pursuant to R. Regulating Fla. Bar 4-1.7 because it concurrently represented Optimal and the Estate between January 2022 and May 2022. (App. 015-17). The trial court properly found that Optimal did not meet its burden to prove a concurrent representation.

Rule 4-1.7 provides:

(a) Representing Adverse Interests.

> Except as provided in subdivision (b), a lawyer must not represent a client if: (1) the representation of 1 client will be directly adverse to another client; or (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibility to another client, a former client or a third person or by a personal interest.

Appellants argued that Trenam's representation violated this rule because Trenam represented Optimal when it was engaged by the Estate in January 2022. The trial court found that Optimal was not a current Trenam client in January 2022. As set forth in great detail in the Order Denying Disqualification, this finding was supported by substantial competent evidence, and was not an abuse of the trial court's discretion.

The evidence reflected that Trenam had not performed any legal work for Optimal after September 2020, and had no contact with Optimal in any capacity between September 2020 and May 2022, when Mr. Hale contacted Trenam regarding a potential corporate matter. (App. 221, 2630). Indeed, Mr. Hale's initial email to Ms. Good refers to corporate work for Trenam performed "a couple of years ago." (App. 033). Optimal has never identified, either below or

in this appeal, any legal services that it subjectively believed Trenam was continuing to perform on its behalf in January 2022.

Appellants argue that the trial court ignored the "absence of evidence that Trenam ever officially closed OPTIMAL'S file." This argument is belied by the record. In May 2022, Mr. O'Leary's email to Mr. Hale states that "[b]ecause we had not recently performed any legal work [for] Optimal Logistics, we had closed your file (as is customary at my firm)." (App. 030). At his deposition, Mr. O'Leary again testified that Optimal's file was closed. (App. 1175, 1176-1179-80). Ms. Vesely stated that Trenam did not have any open matters for Optimal when the Estate retained Trenam in January 2022 (App. 221, ¶ 10), and also testified that Optimal was a former client when the Estate retained Trenam. (App. 979). There was competent, substantial evidence to support the trial court's factual determination that Trenam did not concurrently represent Optimal and the Estate.

Appellants also argue that there was no evidence that Trenam ever conveyed to Optimal that its file was closed. In May 2022, Mr. O'Leary advised Optimal (through Mr. Hale) that its file had been closed. (App. 030). Optimal has not cited any legal authority that

required Trenam to convey to Optimal that its file was closed before that time. In contrast, the Estate introduced unrebutted expert testimony from Mr. Corsmeier that there was no requirement for Trenam to advise Optimal that it had closed its file. (App. 415-16).

Indeed, the Retention Letter advises Optimal that the legal representation would end "upon completion of the matter to which this representation applies […]." (App. 1377). It does not contemplate that Trenam will provide Optimal with any further notice that the representation was ending. Thus, the default relationship between the parties was that the representation would end once the task for which Trenam was hired was completed, unless the parties expressly agreed to continue the representation on other matters.

As the trial court correctly noted, the May 2022 exchange between Mr. O'Leary and Mr. Hale is further evidence of the task-based nature of Trenam's work for Optimal. (App. 2631). Trenam obtained preliminary information before beginning substantive work, performed a conflict check, identified the conflict, and declined representation. (App. 2624). Similarly, in July 2017, Mr. Hanchett performed a conflict check before undertaking representation regarding an insurance matter. (App. 2547).

The task-based representation is also reflected by the fact that Optimal worked with other attorneys on other matters. Indeed, notwithstanding Mr. Hale's testimony that Trenam was Optimal's sole legal counsel until May 2022 (App. 819-20), the Taylor Johnson law firm (formerly known as Taylor & Associates) has been counsel of record for Optimal in litigation as early as March 2020. (App. 324-55). John Marchione of the Taylor Johnson law firm signed Optimal's Acceptance of Service and Waiver of Service of Process as "Outside Corporate Counsel for OPTIMAL US LOGISTICS, INC." (App. 144). Mr. Newell confirmed in his deposition that the Taylor Johnson law firm is Optimal's outside corporate counsel. (App. 803).

Appellants also argue that the Estate did not introduce any evidence that Optimal's files were formally closed after each task that it worked on. However, Ms. Vesely testified regarding this issue, as follows:

> Optimal hired Trenam on tasks sporadically. The tasks were completed. The files were closed. Another task might come along; it was completed and it was closed. There was not a continuous representation. Trenam was not their only counsel.

(App. 974). This is consistent with the terms of the Retention Letter, which provides that the representation will end upon completion of

the matter for which Trenam is retained, **unless** the parties **expressly** agree to continue the representation with respect to other matters. (App. 1377). Moreover, the question of whether Optimal's files were formally closed between every task is not relevant to determining whether Optimal was a current Trenam client in January 2022. The relevant question is whether Trenam represented Optimal in any matter in January 2022. Optimal has not identified a single legal matter for which Trenam was handling on its behalf during this period, because there were none.

Contrary to Appellants' argument, both the Estate and the trial court properly recognized that the test for determining the existence of an attorney-client relationship hinges upon a client's subjective belief concerning the relationship. (App. 2574, 2578, 2630). However, that subjective belief must be reasonable. *Bartholomew v. Bartholomew,* 611 So. 2d 85, 86 (Fla. 2d DCA 1992).

In the Initial Brief, Appellants cite *Kemp Inv. North, LLC v. Englert,* 314 So. 3d 734, 735 (Fla. 5th DCA 2021) to argue that the client's belief must only be "subjectively reasonable." (Initial Brief, p. 41, n. 10). *Kemp* does not say this, and this argument is nonsensical. *Kemp* states only that the test is based on the client's subjective

belief, which must be reasonable. *Id.* at 738, n. 3. If the client only had to subjectively believe that its own position was reasonable, the reasonableness requirement would be meaningless. Instead, the client's subjective belief must be supported by objective record evidence. *See Yang Enters., Inc.,* 988 So. 2d at 1184; *Gen. Elec. Real Estate Corp. v. S.A. Weisberg, Inc.,* 605 So. 2d 955, 956 (Fla. 4th DCA 1992). In the instant case, the trial court properly found that Appellants failed to establish that they even had a subjective belief that Trenam was Optimal's current counsel in January 2022. (App. 2632).

Appellants attempted to establish this subjective belief through affidavits from Mr. Hale and Mr. Newell. However, neither of these affidavits satisfy Appellants' burden. Mr. Hale's affidavit states that "[t]hrough May 27, 2022, I along with Optimal and its employees, understood Trenam as their corporate counsel." (App. 910). However, as the trial court properly noted:

> Hale's deposition testimony established that (1) he was not employed by Optimal when Optimal first engaged Trenam Law in 2016; (2) he had no involvement in communications between Trenam Law and Optimal US Logistics in calendar year 2017, when Hanchett and others worked on Optimal's employee manual; (3) he was not employed by Optimal in any capacity before March 2019;

> and (4) he had no interaction with any Trenam Law attorney apart from O'Leary.

(App. 2633). The trial court also noted that Mr. Hale had not been directly employed by Optimal for a number of years, and is not notified of lawsuits filed against Optimal. Thus, Mr. Hale "was not in a position to hold a 'subjective belief' as to which law firms represent Optimal, a company for whom Hale does not directly work." (App. 2633).

Mr. Newell's affidavit does not even purport to state a "subjective belief" that Trenam was Optimal's current counsel in January 2022. (App. 1292-94). As the trial court properly noted, Mr. Newell's deposition testimony "essentially established that he had no specific knowledge concerning Trenam Law's representation of Optimal beyond what he was told by others, and further, that he was not the person within Optimal positioned to have such information." (App. 2633, *citing* Newell Depo., pp. 94-95 (contained at App. 699-700)). The evidence demonstrated that Mr. Newell was not in a position to form a subjective belief regarding which attorneys or law firms Optimal employes.

Even if Optimal subjectively believed that Trenam was its current counsel, that belief would not have been reasonable. As discussed above, Optimal signed the Retention Letter, which reflected that the representation would end when Trenam completed the identified matter, or, if applicable, on completion of any later agreed-upon representation. Under the circumstances, it would not be reasonable for Optimal to believe that Trenam was its attorney in 2022, when the previous representations were explicitly task-based and Trenam had not performed any tasks since September 2020.

Contrary to Appellants' contention, *Kemp* does not support its argument. In *Kemp*, a law firm acted as closing agents for a real estate closing. *Kemp,* 314 So. 3d at 736. The seller of the property signed a written acknowledgement that she understood that the law firm was not her counsel and did not represent her in connection with the closing. *Id.* However, additional title issues arose after closing, and the law firm worked with the seller to try to resolve the title issues. *Id.*

Ultimately, the law firm filed a quiet title lawsuit on behalf of the property purchaser. *Id.* The law firm later filed an amended complaint, suing the seller for fraud. *Id.* The seller moved to

disqualify the law firm, and the trial court granted the motion. *Id.* The seller argued that she believed that the law firm represented her with respect to the title issues. *Id.* at 737. The Fifth District found that belief was reasonable because the lawyer who contacted the seller regarding the title issue "told her that he would take care of everything for her." *Id.* at 737.

Contrary to Appellants' representation, the seller did *not* claim that there was an attorney-client relationship created as to the closing (which was the matter for which she signed a document reflecting her understanding that the law firm was not her counsel). *Id.* at 737-38. Instead, the court found an attorney-client relationship with respect to the subsequent title issue, which the lawyer told her he would "take care of [...] for her." *Id.* By contrast in the instant case, Trenam never told that Optimal that it would remain its attorney unless and until the parties formally terminated the relationship. Rather, it told Optimal that the representation would end automatically when Trenam completed the identified matter, unless and until the parties mutually agreed for Trenam to handle any other legal matters.

Metcalf v. Metcalf, 785 So. 2d 747 (Fla. 5th DCA 2001) is also inapposite. In *Metcalf,* the wife filed a petition for an injunction against domestic violence against her husband. *Id.* at 748. Before filing the petition, she consulted with a lawyer with the intent of hiring him to represent her in a divorce action against her husband, and divulged confidential information to the lawyer during that consultation. *Id.* The lawyer's partner later appeared on behalf of the husband in connection with the petition for injunction. *Id.*

The Fifth District recognized that the existence of an attorney-client relationship does not depend on whether the client ultimately retains the attorney. *Id.* at 750. It is enough that the client consults with the attorney with the intention of employing him. *Id.* Thus, because this was a substantially related matter, the law firm was properly disqualified from representing the husband. The instant case is not like *Metcalf.* Optimal never attempted to consult Trenam in relation to the subject motor vehicle collision, or anything that could be considered substantially related.

The May 2022 communications between Mr. Hale and Mr. O'Leary also do not evidence an existing attorney-client relationship. As discussed above, when Mr. Hale contacted Trenam in May 2022,

he did not suggest that there were any matters that Trenam was currently handling for Optimal. Instead, he reminded Trenam paralegal Teresa Good of a corporate matter Trenam had handled for Optimal "a couple of years ago" and asked whether Trenam could handle a new corporate matter. (App. 033).

In response, Mr. O'Leary responded that Trenam "can assist with this," indicating that this was the type of work that Trenam can handle. (App. 1162). Thereafter, Trenam obtained some preliminary information, ran a conflict check, and determined that it had a conflict, and expressly declined the representation. (App. 030-32). Mr. O'Leary offered to provide the name of another lawyer who can handle the work, and Optimal accepted that offer and ultimately retained the lawyer who Mr. O'Leary recommended. (App. 027-29). Trenam performed no substantive work and did not bill Optimal for any time spent in connection with Hale's May 2022 inquiry. (App. 2631). Under these circumstances, Optimal could not reasonably believe that Trenam was representing it in May 2022.

In a conclusory fashion Appellants argue, "it was not subjectively unreasonable for OPTIMAL to believe that Trenam was its counsel in light of its six-year relationship" and the language of

the 2016 Retainer Agreement. (Initial Brief, p. 42). First, the facts do not reflect a continuous six- year relationship. Instead, Optimal's engagements with Trenam were sporadic, task based, with each representation concluding with the completion of each task. Further, Optimal had, and still has, another law firm that it calls its "general corporate counsel," not Trenam. Moreover, the stale 2016 Retention Letter was certainly not in effect in 2022 and terminated when the related tasks were accomplished 6 years prior to this case. Trenam did not drop Optimal like a "hot potato" as suggested by Optimal because that would have required Trenam to actually be representing Optimal on some legal matter in January 2022. Optimal has not identified any such legal matter, because there were none.

In the instant case, the trial court did not abuse its discretion in finding that Optimal was not a current Trenam client when Trenam began representing the Estate. Accordingly, Rule 4-1.7 did not apply, and the trial court properly denied the Disqualification Motion.

C. The trial court did not abuse its discretion by finding that no conflict arose from Trenam's former representation of Optimal.

The Disqualification Motion was premised almost entirely on Rule 4-1.7 and Trenam's alleged "concurrent representation" of Optimal and the Estate. (App. 009-17). However, at the evidentiary hearing, Appellants' focus pivoted to Rule 4-1.9. To warrant disqualification under Rule 4-1.9, the moving party has the burden to show that: (1) an attorney-client relationship existed, thereby giving rise to an irrefutable presumption that confidences were disclosed during the relationship; and (2) the matter in which the law firm subsequently represented the interest adverse to the former client was the same or substantially related to the matter in which it represented the former client. *Global Lab Partners, LLC v. Patroni Enters., LLC,* 327 So. 3d 453, 456 (Fla. 1st DCA 2021) (*citing State Farm Mutl. Auto. Ins. Co. v. K.A.W.,* 575 So. 2d 630, 633 (Fla. 1991)); *Goff,* 276 So. 3d at 86-87.

"Matters are 'substantially related' for purposes of [Rule 4-1.9] if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client." *Goff*, 276 So. 3d at 87 (quoting *Young v. Achenbauch*, 136 So. 3d 575, 583 (Fla. 2014)). Representation of a client in a "wholly distinct problem . . . even

though the subsequent representation involves a position adverse to the prior client" is appropriate and not in violation of Rule 4-1.9. Comment to R. Regulating Fla. Bar 4-1.9; *Goff*, 276 So. 3d at 87.

The trial court found that Trenam was not subject to disqualification pursuant to Rule 4-1.9 because Trenam's prior representation of Optimal was not substantially related to the instant case. Whether the legal matters were substantially related was a question of fact to be determined by the trial court based on the evidence presented. Here, the trial court was presented with deposition testimony, documentary evidence, and the live testimony of Plaintiff's expert, Joseph A. Corsmeier. Judge Polo weighed the evidence and determined that the matters were <u>not</u> substantially related.

As the trial court properly recognized, "the decisions concerning disqualification under Rule 4-1.9 are largely fact-based and require an examination of the totality of the circumstances surrounding a situation or transaction in reaching a conclusion." (App. 2637). Because the trial court's factual determination is supported by competent substantial evidence, this Court should affirm. *See Young*, 136 So. 3d at 581 ("While the trial court's discretion [on

motions to disqualify counsel] is limited by the applicable legal principles, the appellate court will not substitute its judgment for the trial court's express or implied findings of fact which are supported by competent substantial evidence.")(quoting *Applied Digital Sols., Inc.*, 941 So. 2d at 408); *see also Stewart v. Bee-Dee Neon & Signs, Inc.*, 751 So. 2d 196, 205 (Fla. 1st DCA 2000)(holding that a trial court's findings of fact on a motion for disqualification of counsel are presumed correct and will not be disturbed unless they are unsupported by competent, substantial evidence).

In the instant case, it was undisputed that Optimal had been a Trenam client, and it was undisputed that the instant case was not the same as any matter for which Trenam previously represented Optimal. Thus, Appellants had the burden to prove that this matter is substantially related to Trenam's prior representation of Optimal. The trial court properly found that Appellants failed to meet this burden.

On appeal, Appellants argue that Trenam's prior work for Optimal is substantially related to its current representation of the Estate because Trenam was "intimately involved in drafting corporate policies and procedures." (Initial Brief, p. 46). This argument greatly

overstates Trenam's involvement with Optimal's policies and procedures. Trenam assisted with the preparation of an employee handbook. As the trial court correctly noted, "[i]n no respect is the employee handbook a training manual for drivers; rather, it contains general personnel policies unrelated to the training of drivers on package delivery." (App. 2637).

Trenam's original draft of the Employee Handbook contained a single section regarding company vehicles. (See, e.g., App. 1503, 1544, 1582-83). This section did not purport to provide any instructions regarding package delivery or parking during package deliveries. Further, as the trial court properly found, Appellants did not introduce any evidence that Optimal ever sought legal advice from Trenam regarding the training of its drivers. (App. 2637-38).

Optimal subsequently decided to remove the company vehicle policy from its Employee Handbook altogether, and instead refer all employees to its own Guidelines. The Guidelines also do not provide any instructions or policies related to parking during package delivery. (App. 2238-47). Instead, they relate primarily to vehicle maintenance and the driver's financial responsibility for vehicle damage. Again, Trenam did not draft the Guidelines, and Optimal

did not ask Trenam to provide any advice regarding the Guidelines. Mr. Hanchett expressly advised Optimal that it would need to send him the revised Guidelines if it wanted him to review and provide any comment. (App. 2545). Optimal did not do so.

Appellants argue that the representations are "substantially related" because Trenam had knowledge of its Employee Handbook and the Guidelines, which were intended to be confidential. As a threshold matter, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation […]." Comment to R. Regulating Fla. Bar 4-1.9. Instead, Rule 4-1.9 prohibits lawyers from using information learned during a representation "to the disadvantage of the former client."

Appellants have not identified any information in the Employee Handbook or Guidelines that Trenam could use to Optimal's disadvantage. Indeed, Mr. Hale confirmed that the Employee Handbook was not relevant to the claims at issue in this litigation:

> Q. Do you have any knowledge as to whether or not there's anything in this handbook that would have any relevance to the automobile, motorcycle, parking violation accident that we're here about?
> * * *
> THE WITNESS: No.

(App. 862). Thus, the trial court properly found that "nothing in the multiple iterations of the employee handbook – or the [Guidelines] referenced therein – leads to a conclusion that Trenam Law gained information that could be used to Optimal's disadvantage in this case […]." (App. 2638).

Optimal also did not prove that the Employee Handbook or Guidelines were confidential. The Employee Handbook and Guidelines are provided to thousands of employees. (App. 161). Optimal produced two different versions of the Employee Handbook in discovery, and did not mark either as "confidential" as required by the parties' Confidentiality Agreement and Stipulated Protective Order. (App. 225).

Moreover, the trial court properly found that the Employee Handbook and Guidelines are obsolete. Information acquired in a prior representation may have been rendered obsolete by the passage of time. *See* Comment to R. Regulating Fla. Bar 4-1.9. Trenam's limited work related to Optimal's "policies and procedures" was performed in 2017. (App. 554-58). At that time, the relationship between Optimal and Amazon was in its preliminary stage. (App. 2637). Thus, the trial court properly found that the advice and

counsel that Mr. Hanchett provided in 2017 bore no relationship to the training of Optimal driver-employees regarding package delivery in Amazon Vans in 2021. (App. 2637).

This is particularly true because it is undisputed that the driver at issue in the instant case (Murphy) never received or signed an employee handbook until December 23, 2021, almost two weeks *after* the December 10, 2021 accident, and there is no evidence that Murphy *ever* received or reviewed the Guidelines. (App. 605). Thus, nothing that was or was not contained in the Employee Handbook or the Guidelines will be relevant to Optimal's training of or instructions to Mr. Murphy.

Further, based on discovery produced in the case, it appears that Amazon Logistics Inc. and Amazon.com, Inc. provide written parking instructions to delivery drivers, not Optimal. (App. 228, referencing documents produced by Amazon in this litigation). These are the policies that will be relevant to this litigation. (App. 228). Of course, Optimal knows this because it admitted in its discovery responses that it did not have handbooks, policies, or "procedures" in place and/or used on December 10, 2021, relating to parking Amazon Vans:

> Optimal's Responses to the 1st Request for Production:
> All protocols, policies, procedures, handbooks and/or manuals in place and/or used on December 10, 2021, relating to operation of Amazon Vans, including engaging in merchandise delivery in the Amazon Vans, and/or parking the Amazon Vans.
>
> RESPONSE:
> None in Defendant's possession.

(App. 228; Supp. App. 023).

In the Initial Brief, Appellants appear to argue that Optimal's *sole* burden was to prove that Optimal was a former Trenam client, at which point the burden would shift to Trenam to prove that the prior representation was not substantially related to the instant case. (Initial Brief, p. 45, arguing that the Estate had the "burden to prove that its prior work was not substantially related to its case against Optimal"). This is not Florida law.

Appellants' "burden shifting" argument appears to be premised entirely on cases involving the imputation of conflicts of interest under R. 4-1.10. (Initial Brief, p. 48, citing *Philip Morris USA Inc. v. Caro,* 207 So. 3d 944, 944 (Fla. 4th DCA 2016) and *Akrey v. Kindred,* 837 So. 2d 1142, 1144 (Fla. 2d DCDA 2003)). In *Caro,* the Fourth District analyzed (among other things) whether an entire law firm should be disqualified from representing a cigarette smoker in a case

against a tobacco company because a lawyer at that law firm previously represented the defendant in tobacco-related litigation while working as an associate at another firm. The Fourth District analyzed this issue pursuant to R. 4-1.10(b), which governs imputation of conflicts of interest arising from former clients of a newly associated lawyer. The Fourth District found that the burden shifting analysis arose from the commentary to Rule 4-1.10(b). *Id.* at 950.

Similarly, *Akrey* also involves an analysis of whether an entire law firm should be disqualified from representing a plaintiff in a suit against a nursing home on the grounds that one of its attorneys had formerly represented the nursing home when he was employed by a different law firm. This Court specifically noted that it was not alleged that the individual lawyer was personally representing the plaintiff. Instead, it was a case of imputed disqualification, governed by Rule 4-1.10(b).

In any event, even if this burden shifting analysis applied in the instant case, Appellants had the initial burden of establishing a prima facie case that Trenam's representation of Optimal was

substantially related to its representation of the Estate. This Court expressly recognized this burden in *Akrey*, stating:

> First, *as the moving party,* [defendant's] lawyers must establish a prima facie case for disqualification by showing that [the lawyer] acquired confidential information during his prior representation of [defendant] *in a substantially related case.*

Id. at 1144. Thus, even under the case law that Appellants cite, the burden does not shift to the non-moving party to show no actual knowledge of material, confidential information until the moving party establishes a prima facie case for disqualification. In the instant case, the trial court properly found that Appellants did not meet this burden.

Moreover, to the extent that the Estate had any burden to prove that Trenam's prior work was not substantially related to its representation of the Estate, the Estate met that burden. As discussed in detail above, the Estate introduced evidence that the Employee Handbook and Guidelines did not relate to or provide instructions regarding parking vehicles during package deliveries. It introduced evidence that Optimal had never retained Trenam to revise or create policies regarding delivery driver parking during package deliveries.

The Estate also introduced expert testimony from Mr. Corsmeier (the only witness to testify at the evidentiary hearing) that the representations were not substantially related. Mr. Corsmeier has been a Florida attorney for more than 38 years, and his practice is focused on analysis and application of the Rules Regulating the Florida Bar. (App. 403-05). In their Initial Brief, Appellants argue that the trial court should not have considered Mr. Corsmeier's testimony because he had not yet reviewed the documents produced by Trenam prior to the evidentiary hearing (and requested only five business days before the evidentiary hearing). However, Appellants have not identified any documents within the 1182 pages that reflect that the representations at issue are substantially related.

As the moving parties, Appellants had the burden to prove that Trenam's representation is the same or substantially related to a matter in which Trenam previously represented Optimal. The trial court considered all the evidence presented and made a factual determination that Optimal did not meet its burden. The trial court's finding is supported by competent, substantial evidence, and is not an abuse of discretion. The Estate respectfully requests that the Court affirm the Order Denying Disqualification.

D. The trial court did not abuse its discretion by finding that Optimal waived its objections to Trenam's representation of the Estate.

Even if Appellants had proven that Trenam's representation of the Estate presented a conflict (which they did not), the trial court properly held that Appellants waived their right to seek disqualification. A motion to disqualify should be made with reasonable promptness after the party discovers the facts which lead to the motion. *Transmark U.S.A. v. State, Dept. of Ins.,* 631 So. 2d 1112, 1116 (Fla. 1st DCA 1994). "A party can waive his right to seek disqualification of the opposing party's counsel by failing to promptly move for disqualification upon learning of the facts leading to the alleged conflict." *Zayas-Bazan v. Marcelin,* 40 So. 3d 870, 872-73 (Fla. 3d DCA 2010). In the instant case, the trial court properly found that Appellants' actions were not "reasonably prompt."

In its Initial Brief, Appellants argue that the *earliest* it could have known of a conflict was in February 2023, when it was served with the Estate's complaint. However, February 2023 is the *latest* Optimal should have known of the conflict. Trenam first advised Optimal that it represented the Estate on January 13, 2022, when Ms. Vesely sent certified mail correspondence to Mr. Newell,

Optimal's chief operating officer, demanding preservation of relevant video recordings.

On January 31, 2022, Ms. Vesely sent a second certified mailing to Mr. Newell demanding liability insurance disclosure. This letter again stated that Trenam represented the Estate, and notified Optimal that the Estate believed the Amazon Van was "negligently parked." Mr. Newell testified that when he received this letter, he understood that Trenam was representing the Estate in connection with an Amazon labeled vehicle that Trenam alleged to have been negligently parked. (App. 689-92). Thus, as of this date, it was clear to Optimal that Trenam was representing the Estate in a matter that was adverse to Optimal.

However, as the trial court noted, service of the complaint "left no more room for argument. The fact that Trenam Law was representing a client whose interests were adverse to Optimal's was inescapable at that point." (App. 2640). Despite Optimal's claim that it "subjectively believed" that Trenam was its counsel through May 2022, it accepted service of the complaint and participated in eight months of very active litigation before raising this alleged conflict. The trial court properly held that Appellants did not act with

reasonable promptness and waived any objection to Trenam's representation of the Estate.

Appellants continue to argue that Optimal's acceptance of service (through its outside corporate counsel, John Marchione at the Taylor Johnson law firm) somehow prevented it from learning about Trenam's representation in this matter. Appellants also imply that Trenam sought an acceptance of service from Mr. Marchione to somehow conceal its representation of the Estate, which would have been discovered if Trenam had served its registered agent, Exportaction, LLC. This argument is pure conjecture, belied by record evidence, and frankly ludicrous.

In reality, Trenam first attempted to serve Optimal through its registered agent before Mr. Marchione accepted service. (Supp. App. 005). Further, there is no record evidence to support its claim that service on its registered agent would have somehow alerted Optimal to the alleged conflict earlier. In any event, Optimal was undoubtedly on notice of the Estate's claim in February 2023 at the *latest* and only pulled the disqualification card after the trial court's sanctions order against it, the order setting the trial, and just before it would have to appear for depositions.

Appellants also argue that their defense counsel, Kate Cooper, did not know about Trenam's prior representation of Optimal. As the trial court correctly found, Ms. Cooper's knowledge is irrelevant. A motion to disqualify must be promptly served after *the party* discovers the facts giving rise to the motion. "The party in this case is Optimal, not its counsel." (App. 2640).

Appellants rely on *Global Lab Partners* to argue that a motion for disqualification filed 8 months after discovery of a conflict was filed with "reasonable promptness." (Initial Brief, p. 53). However, the facts of *Global Lab Partners* are very different from the facts of the instant case. In *Global Lab Partners,* the First District reviewed an order granting a motion to disqualify. 327 So. 3d at 456. The appellant argued that the trial court should not have granted the motion because it was filed eight months after counsel appeared in the case. *Id.* at 457. However, although the case had been pending for more than eight months, it was still at a preliminary stage. The First District noted, "Appellees filed their motion to disqualify between pleadings and discovery, a natural demarcation in the proceedings, and the motion was not preceded by a great deal of work by either side's counsel." *Id.*

In the instant case, the parties engaged in extensive litigation before the Disqualification Motion, including propounding written discovery, responding to written discovery, producing documents and conducting key depositions. As the trial court properly found:

> [T]he parties have engaged in substantial litigation of the matter, including a significant amount of discovery. A trial date has been set and the matter involves multiple other defendants. Optimal was aware of Trenam Law's representation of the Plaintiff for over eight months, at the very least, yet did not express any concerns until October 2023 – just days after Defendants were sanctioned for discovery violations, shortly before key depositions were to take place, and after litigating the matter for months.

(App. 2641).

Global Lab Partners also does not hold that eight months is presumptively "reasonably prompt." To the contrary, the First District states:

> We recognize that disqualification of opposing party's counsel is an extreme maneuver that cuts to the very heart of the litigation at hand. *See Gutierrez v. Rubio,* 126 So. 3d 320, 321 (Fla. 3d DCA 2013). It should be met with a degree of skepticism even if filed in a more timely manner than the motion here. We do not endorse an eight-month delay in filing a motion to disqualify or assert that an eight-month delay in and of itself is "reasonably prompt." However, given the particular facts of this case *and the standard of review on appeal,* the trial court's order is AFFIRMED.

Id. at 457-58.

This holding emphasizes the most important difference between *Global Lab Partners* and the instant case. In *Global Lab Partners,* the First District was considering whether the trial court abused its discretion by *granting* a motion to disqualify counsel. In the instant case, this Court is considering whether the trial court abused its discretion in *denying* a motion to disqualify counsel. As the First District recognized, in analyzing whether a trial court abused its discretion, "the appellate court will not substitute its judgment for the trial court's express or implied findings of fact which are supported by competent, substantial evidence." *Id.* at 456. Thus, a ruling should be upheld unless "no reasonable man would take the view adopted by the trial court." *Id.* (*quoting Canakaris,* 382 So. 2d at 1203).

Under the facts of this case, Appellants cannot show that no reasonable person would find that Appellants failed to move reasonably promptly in filing its Disqualification Motion. Because the trial court's decision is supported by substantial competent evidence and the trial judge did not abuse her discretion, the Order Denying Disqualification should be affirmed.

CONCLUSION

For the reasons set forth herein, the Estate respectfully requests this Court affirm the Order Denying Disqualification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of May, 2024, a true and correct copy of **ANSWER BRIEF** has been electronically filed with the Clerk of Court by using the Florida Courts E-Filing Portal System, which will send a notice of electronic filing and copy to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the type style and size used in this brief is Bookman Old Style 14-point and that this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2), because it contains 11,258 words.

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