**IN THE DISTRICT COURT OF APPEAL**
**FOURTH DISTRICT, STATE OF FLORIDA**

CASE NO.: 4D21-2222
Lower Tribunal Case No.: CACE 20-005993 (08)

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CARL L. KENNEDY, II

*Appellant/Defendant,*

v.

POMPANO SENIOR SQUADRON FLYING CLUB, INC.,

*Appellee/Plaintiff.*

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REVIEW FROM A NON-FINAL ORDER
of the Circuit Court of the Seventeenth Judicial Circuit
In and For Broward County, Florida

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# APPELLANT'S INITIAL BRIEF

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## QUESTION PRESENTED

I. Whether the trial court abused its discretion and departed from the essential requirements of law, causing irreparable harm to Appellant that cannot be remedied by appeal from a final judgment.

## GENERAL STATEMENT

This appeal results from an order granting a motion for disqualification of Appellant's chosen counsel in a civil case. Appellant respectfully asserts that reversal is appropriate because:

1. The trial court's order departs from the essential requirements of law.

2. The error by the trial court will cause irreparable harm to Petitioner.

3. There is no adequate remedy by appeal from a final judgment.

4. The trial court failed to hold an evidentiary hearing.

5. The trial court misapplied *Philip Morris USA, Inc. v. Caro,* 207 So.3d 944 (Fla. 4th DCA 2016).

## STATEMENT OF THE CASE AND OF THE FACTS.

### A. General Facts.

This appeal is brought by Carl L. Kennedy, II ("Kennedy"), the Defendant below, arising from the granting of a motion to disqualify brought by Appellee Pompano Senior Squadron Flying Club, Inc. ("Flying Club"), the Plaintiff below, and entry of an order court entitled *Order on Plaintiff's Verified Motion to Disqualify Wendy Hausmann, Esq. as Defendant's Counsel.* (A: 10-37); (90-91).[1]

On April 7, 2020, Flying Club filed suit against Kennedy for (1) an accounting and (2) an injunction. (A: 4-9). On July 20, 2020, Flying Club filed a verified motion to disqualify Wendy Hausmann, Esquire ("Hausmann"), Kennedy's chosen attorney from representing Kennedy pursuant to Rule 4-1.9 of the Rules Regulating the Florida Bar. (A: 10-37).

In its verified motion Flying Club made the following assertions and arguments:

A. Hausmann formally represented Flying Club regarding its

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1 The parties will be referred to by a shortened version of their names or as they were below. A: ____ refers to the appendix submitted by Appellant on July 27, 2021.

by-laws as well as some other general advice. (A: 12-13).

B. Hausmann, at one point, made a loan to Flying Club. (A: 10).

C. The suit against Kennedy is seeking an accounting from him as the former treasurer of Flying Club which Flying Club contends is "substantially related" to the prior representation and the loan by Hausmann as they deal with financial dealings and interactions of Flying Club and Kennedy's duties as treasurer. (A: 10-11, 14).

On July 8, 2021, the trial court held a non-evidentiary hearing. (A: 38-89). The record indicates that the trial court was not inclined to hold an evidentiary hearing on the matter, (A: 56-57), although Hausmann did request one on behalf of Kennedy. (A: 42-43, 56, 67).

From the onset, the trial court focused on the applicable Florida Bar Rule; 4-1.9 and went so far as to read the entire rule into the record. (A: 51-52). During the hearing it was conceded that the prior representation by Hausmann of Flying Club pertained to a review of Flying Club's by-laws with proposed suggestions regarding those by-laws. One contested issue is whether that particular prior representation is substantially related to the subject matter in the

case at bar. (A: 52-53). Further for determination is whether a loan by Hausmann to Flying Club was made at a time when Hausmann "represented" Flying Club, and if so, whether the loan itself is substantially related to the subject matter of the action in which Flying Club is suing Kennedy. (A: 55-57).

After hearing legal arguments by both sides, the trial court granted the motion to disqualify Hausmann based upon Rule 4-1.9. (A: 75). The trial court then went into an analysis of this Court's case of *Philip Morris USA, Inc. v. Caro,* 207 So.3d 944 (Fla. 4th DCA 2016). (A: 75-76).

The trial court applied *Caro* as follows.

> There's a two-prong test for determining whether disqualification is warranted under that, and it's the Bill Morris USA v ADA Carl (ph) case, 207 So.3d 944, Florida 4 District Court of Appeals case from 2016.
>
> The first issue is whether there was an attorney/client relationship between the former client, meaning the Pompano Squadron Flying Club and counsel, Ms. Hausmann. Its existence creates an irrefutable presumption that confidences were disclosed during a relationship, et cetera.
>
> And the second inquiry is whether the matter in which the lawyer subsequently represents the interest adverse to the former client is the same

> or substantially related to the matter in which it represented the former client.
>
> Here again, that's not disputed that you have what's at issue or the accounting which includes the payments, includes the loan. It is the same.
>
> There's no need for an evidentiary hearing, and I do recognize that disqualification is an extraordinary remedy and should only be resorted to sparingly.
>
> That being said, I think the Florida Bar rules are crystal clear, and Ms. Hausmann, I think when you just look at the Bar rules you should not have taken on Mr. Kennedy as a client in this situation.
>
> The Bar rule is clear that when it's what's formerly represented a client, and the matter must not afterwards represent another person in the same or substantially related matter in which that person's interest or material adverse to the interest of the my client unless there's consent, and there's no consent here.
>
> I think the case law is crystal clear. There's no factual evidence to be developed here, and so I am granting the Motion To Disqualify.

(A: 75-77).

It is this application of the relevant law that Kennedy is seeking reversal and remand.

**B. Nature of the Case.**

This case arises from an Order of Disqualification entered by the trial court. (A:90-91).

**C. Course of the Proceedings.**

Flying Club filed suit against Kennedy for (1) an accounting and (2) an injunction. (A: 4-9). Later, Flying Club filed a verified motion to disqualify Kennedy's chosen attorney from representing Kennedy pursuant to Rule 4-1.9 of the Rules Regulating the Florida Bar. (A: 10-37). The trial court held a non-evidentiary hearing. (A: 38-89). Thereafter, an Order of Disqualification entered by the trial court. (A:90-91).

**D. Disposition in the Lower Tribunal.**

An Order of Disqualification entered by the trial court disqualifying Appellant's counsel. (A:90-91).

## SUMMARY OF THE ARGUMENT

It is clear that from the record below that the trial court abused its discretion, misapplied *Philip Morris USA, Inc. v. Caro,* 207 So.3d 944 (Fla. 4th DCA 2016) and that its findings of fact, without an evidentiary hearing, are not supported by competent substantial evidence.

Disqualification is an extremely exceptional remedy that should rarely be granted. The case at bar certainly does not warrant such an extreme remedy. The Rule relied upon by the trial court, Rule 4-1.9, is not to be broadly applied and should only be resorted to sparingly.

In any event, the case of *Waldrep v. Waldrep,* 985 So.2d 700 (Fla. 4th DCA 2008) is factually similar and on point. Applying the in-depth analysis of *Waldrep* to the record in the case at bar the conclusion is obvious. An attorney-client did exist regarding by-law review, but the case brought by Flying Club against Kennedy is NOT "substantially related" to the prior representation requiring denial of the motion to disqualify. Since the trial court was wrong applying the law to the facts, its decision must be reversed.

## ARGUMENT

### I. THE TRIAL COURT ABUSED ITS DISCRETION AND DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW, CAUSING IRREPARABLE HARM TO APPELLANT THAT CANNOT BE REMEDIED BY APPEAL FROM A FINAL JUDGMENT.

#### A. Standard of Review

The standard of review for an order on a motion to disqualify is abuse of discretion. The discretion of the trial court is limited by applicable legal principals and its express or implied findings of fact must be supported by competent substantial evidence. *Applied Digital Solutions, Inc. v. Vasa,* 941 So.2d 404, 408 (Fla. 4th DCA 2006).

#### B. The trial court abused its discretion when it departed from the essential requirements of the law, misapplying applicable law, and its findings are not supported by competent substantial evidence.

The trial court misapplied *Philip Morris USA, Inc. v. Caro,* 207 So.3d 944 (Fla. 4th DCA 2016). Before Appellant explains why that is so, some prior cases will be discussed to provide context. Then, it will be explained how the facts of this case are so different than the facts of *Caro* as to make that case completely inapplicable, particularly when there is a case from this Court directly on point.

In 2005, this Court in *Frank, Weinberg & Black, P.A. v. Effman*, 916 So.2d 971 (Fla. 4th DCA 2005) reaffirmed that "(c)ertiorari lies when there is a departure from the essential requirements of law which will materially injure the petitioner throughout the remainder of the proceedings which cannot be remedied adequately on appeal." *Id.* at 972-973. (citations omitted). This is just such the case here as Hausmann is Kennedy's chosen counsel. If he is forced to either proceed *pro se* or retain another attorney, the case will proceed and there is no appellate remedy at its conclusion.

"In the context of a certiorari proceeding, 'it bears repeating that the disqualification of a party's lawyer in a civil case is an immensely unusual remedy, one that must be employed only in limited circumstances… (D)isqualification of a party's chosen counsel is an extraordinary remedy and should only be resorted to sparingly'". *Frank* at 973. (citations omitted). *See also Fleitman v. McPherson,* 691 So.2d 37, 38 (Fla. 1st DCA 1997); *Singer Island Ltd., Inc., v. Budget Construction Co., Inc.,* 174 So.2d 651, 652 (Fla. 4th DCA 1998); *Manning v. Cooper*, 981 So.2d 668, 671 (Fla. 4th DCA 2008).

The law is crystal clear that disqualification is an extremely exceptional remedy that should rarely be granted. This case at bar

is one where it should not have been granted. Flying Club did not demonstrate why such a remedy is appropriate, especially given misapplication of, and improper reliance on, *Philip Morris USA, Inc. v. Caro,* 207 So.3d 944 (Fla. 4th DCA 2016) by the trial court.

The facts of *Caro* are strikingly different from the case at bar. *Caro* delt with a lawyer who previously represented a party, Philip Morris, in tobacco litigation, spending approximately 1,300 hours of attorney billable time. Soon thereafter, that same lawyer represented Caro in her tobacco lawsuit against Philip Morris, his former client. *Caro* at 946-947. The trial court in *Caro* conducted an evidentiary hearing to determine those facts. *Id.* at 947.

In the present case, Hausmann merely reviewed and made some suggestions regarding Flying Club by-laws in 2018, and then again in January 2020 when she was requested to do further work with the by-laws. At the end of December 2019, when Flying Club was no longer her client, Hausmann made a loan to Flying Club. Flying Club sued Kennedy in early 2020 for an accounting, which was not substantially related to the legal work or the loan. (A: 52-57).

Flying Club failed to establish any specific connection, and the record is devoid of any connection, between the by-laws, and/or

the loan, and the requested accounting or injunction. In any event, the trial court did not hold the requested evidentiary hearing on the matter. (A: 56-57); (A: 42-43, 56, 67).

The case which is much more factually analogous to the case at bar is *Waldrep v. Waldrep,* 985 So.2d 700 (Fla. 4th DCA 2008). In *Waldrep*, a mother sued her son and daughter-in law under a variety of legal theories. *Id.* at 701. In that litigation the son and daughter-in law were represented by an attorney who had previously represented the mother and her deceased husband in and out of court. *Id.* A prior attorney-client relationship existed for many years. *Id.*

*Waldrep* provides an in-depth analysis of what must be shown by the moving party, in this case Flying Club, when a prior attorney-client relationship existed between the moving party and a prior legal representative.

> However, once an attorney-client relationship is shown, the party seeking disqualification must show that the current case involves the **same subject matter** or a **substantially related matter** in which the lawyer previously represented the moving party. Id. (quoting *Key Largo Rest., Inc. v. T.H. Old Town Assocs., Ltd.*, 759 So.2d 690, 693 (Fla. 5th DCA 2000)). As this court has previously

stated, "Before a client's former attorney can be disqualified from representing adverse interests, it must be shown that **the matters presently involved are substantially related to the matters in which prior counsel represented the former client.**" *Campbell v. Am. Pioneer Sav. Bank,* 565 So.2d 417, 417 (Fla. 4th DCA 1990) (emphasis added), quoted in *Health Care*, 944 So.2d at 512.

In determining which matters are "substantially related," a comment to the rule which the supreme court adopted in 2006 provides as follows:

Matters are "substantially related" for purposes of this rule 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. For example, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

*In re Amendments to the Rules Regulating the Florida Bar,* 933 So.2d 417, 445 (Fla.2006).

Plaintiff made no showing at the evidentiary hearing that Cooper's representation of her and her husband while they were running the corporation, and his representation of her on personal matters

> thereafter, was "substantially related" to, or even had anything to do with, the matters that are the subject of the instant lawsuit. There was no testimony indicating Cooper's prior representation of Plaintiff was involved in any way with Plaintiff's allegedly advancing funds toward the construction of Gary and Donna's residence, or with the lease pursuant to which Plaintiff rented her warehouse to the corporation.
>
> "Disqualification of a party's chosen counsel is an extraordinary remedy and should only be resorted to sparingly." *Singer Island, Ltd. v. Budget Constr. Co.,* 714 So.2d 651, 652 (Fla. 4th DCA 1998), quoted in *Health Care,* 944 So.2d at 511. Based on the evidence presented below, we conclude that disqualification in this case constituted a departure."

*Waldrep* at 702 (emphasis in original).

The fact pattern in the case at bar is much more on point with *Waldrep* than is *Caro.* First, the position of Hausmann is analogous to that of Kenneth D. Cooper, Esquire (the attorney sought to be disqualified in *Waldrep*). Cooper had long represented the plaintiff, Betty Waldrep. *Waldrep* at 702. Thereafter, when Betty Waldrep sued her son and daughter-in law, Gary and Donna Waldrep, Cooper appeared in the case and proceeded to represent them as defendants. *Id.* In the case at bar, Hausmann did some minor by-laws review for Flying Club, the underlying plaintiff herein. This was much shorter

than the representation by Cooper of Betty Waldrep. Later, when Flying Club sued Kennedy, Hausmann proceeded to represent him, just like Cooper did of Gary and Donna Waldrep.

Second, after applying the appropriate test, this Court determined that the prior representation by Cooper of Betty Waldrep was not "'substantially related' to or even had anything to do with the matters that are the subject of the instant lawsuit." *Waldrep* at 702. In the case at bar, the prior representation of Hausmann of Flying Club regarding the by-laws is not "substantially related" to or in any manner anything to do with the present lawsuit against Kennedy for an injunction and accounting.[2]

The *Waldrep* analysis should have been applied by the trial court, and it did not do so. Applying *Waldrep* necessitates the quashing of the trial court disqualification order. Flying Club has failed to present any admissible evidence and the record is completely devoid of anything to support Flying Club's contention that Hausmann's representation of Flying Club in connection with the by-

[2] The trial court failed to explain how a loan from Hausmann to Flying Club constitutes "representation" of any kind, even making Rule 4-1.9 applicable, which it is not.

laws or the loan (even presuming an attorney-client relationship did exist at the time of the loan, which it did not) was "substantially related" to or has anything to do with its suit against Kennedy.

Flying Club also failed to present any evidence and the record is completely devoid of anything to show that Hausmann's representation had anything to do with how Kennedy acted as treasurer other than that Kennedy wrote checks to Hausmann for fees earned working on the by-laws and to pay back a loan. Further, there is no allegation in the complaint attacking the work Hausmann performed for Flying Club whatsoever. Any connection, let alone any "substantial relationship", alleged by Flying Club either between the by-laws and the accounting or between the loan and the accounting are tenuous, at best. Such a broad interpretation of the meaning of "substantial relationship" is prohibited by applicable case law. *See Health Care and Retirement Corporation of America v. Bradley,* 961 So.2d 1071, 1073-1075 (Fla. 4th DCA 2007).

> The Comment to Rule 4-1.9 indicates that the **rule is not to be broadly applied** to require disqualification:
>
> > [A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing

> another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

*Health Care* at 1073. (emphasis added).

Using the applicable law, the answers to the relevant questions are clear.

1. Was there an attorney/client relationship between Hausmann and Flying Club regarding the by-laws review? YES.

2. Is there a "substantial relationship" between the by-laws review and this suit for accounting and injunction? NO.

3. Was there an attorney/client relationship between Hausmann and Flying Club regarding the loan? NO.[3]

4. Even assuming, *arguendo,* an attorney/client relationship, existed at the time of the loan, is there a "substantial relationship" between the loan and this suit for accounting and injunction? NO.

There is not enough, in the record below, to resort to the extraordinary remedy of disqualification that should only be used

[3] Rule 4-1.9 is simply not applicable to a loan. The amount or terms of the loan are irrelevant as the rule, by its own language, does not apply. This is especially true when dealing with a former client at the time of a loan.

sparingly. Motions for disqualification should be viewed with skepticism because they impinge upon the right to employ counsel of choice and are often used for tactical purposes. *Strawcutter v. Strawcutter,* 101 So.3d 417, 418 (Fla. 5th DCA 2012); *Singer Island* at 652.

## CONCLUSION

As demonstrated above, it is clear that the trial court's order departs from the essential requirements of law. The error by the trial court will cause irreparable harm to Petitioner. There is no adequate remedy by appeal from a final judgment. This Court should quash the trial court's order of disqualification of Hausmann as Kennedy's attorney, and remand with instructions to reinstate Hausmann as attorney of record for Kennedy.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of this Petition has been e-filed via Florida e-portal to the following individual on the 4th day of August 2021;

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## CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this Brief complies with the font requirements (14-point Bookman Old Style) of Fla. R. App. P. Rules 9.210(a)(2)(B) and 9.045(e). Further, WE HEREBY CERTIFY that this Brief complies with the word count requirements (3,181 words) of Fla. R. App. P. Rules 9.210(a)(2)(B) and 9.045(e).

/s/ Ron Renzy
Ron Renzy