IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO.: _____
L.T. No.: 2015-015825-CA-43

LAW OFFICES OF HERSSEIN AND HERSSEIN, P.A. D/B/A/ HERSSEIN LAW GROUP

AND

REUVEN T. HERSSEIN

Petitioners,

vs.

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Respondent.

PETITION FOR WRIT OF PROHIBITION

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COMES NOW, Petitioners, Law offices of Herssein And Herssein, P.A. d/b/a Herssein Law Group and Reuven Herssein, by and through undersigned counsel and Pursuant to Florida Rules of Appellate Procedure 9.100 (e) and 9.030 (b)(3), files this Petition for Writ of Prohibition disqualifying the trial court judge and for an order remanding the case to the circuit court for reassignment to another judge and in support would state:

Introduction

On June 8, 2017, for **three** (3) distinct legally sufficient reasons, the Petitioners, ("HLG" and "Reuven Herssein"), via verified motion with two separate affidavits in support, moved to disqualify the Honorable Beatrice Butchko, ("Respondent"), from the case of *Law offices of Herssein And Herssein, P.A. d/b/a Herssein Law Group v. United Services Automobile Association,* Case No. 2015-15825-CA-43. (A001-A064)[1]

The *first* compelling reason the motion was filed is because on June 6, 2017, HLG and Reuven Herssein discovered that the trial court is **Facebook 'friends'** with one of the lawyers hired by Respondent ("USAA") on this case, and this

[1] Throughout this Petition, the symbol "A" refers to the Appendix and all emphasis is added unless otherwise noted.

Facebook 'friend' lawyer regularly appears and argues before the trial court[2] on this very case, which is a violation of the Florida Judicial Canons 2B and 5A.

Moreover, the trial court did not follow binding legal precedent mandating the court disqualify itself when a Judge is Facebook 'friends' with a lawyer that appears before it on a case. A trial court judge being a Facebook 'friend' with a lawyer on the case is *per se* grounds for recusal, "as the identification of the lawyer as a "friend" on the social networking site, conveys the impression that the lawyer is in a position to influence the judge." (A008-A011)

The trial court's Facebook 'friend' is Israel "Izzy" Reyes, Esquire ("Reyes"), (A050), hired and paid by USAA on this case to represent one of USAA's executives, Catina Tomei, ("Tomei"), for a twice ordered evidentiary hearing on witness tampering[3]. Tomei – Reyes' client - is USAA's director of litigation and the individual that negotiated two (2) of the main contracts at issue in

[2] Throughout this Petition, Respondent, the Honorable Beatrice Butchko, will be referred to as the "trial court."

[3] Prior to the case being transferred over petitioners objection, the *previous* trial court judge, the Honorable Antonio Marin, twice ordered that the evidentiary hearing on witness tampering by Tomei and the prohibited client solicitation by the attorneys at Shutts and Bowen, occur, "not to leave any stone unturned" and "to get to the bottom of what happened," given the severity of the issues: witness tampering is a crime in Florida, pursuant to F.S. 914.22. Judge Butchko on USAA's fourth motion for rehearing, ruled no evidentiary hearing would occur based on USAA's due process rights being violated by judge Marin scheduling an evidentiary hearing.

this multi-million-dollar breach of contract, **fraud**, negligent misrepresentation case.

Aside from the witness tampering allegations against USAA's executive, (Tomei), and the fact that Tomei's lawyer – Reyes - *is* the trial court's Facebook 'friend', (A050), Reyes' client (Tomei) is one of USAA's key executives that HLG and Reuven Herssein[4] informed the trial court it is adding as a party to this lawsuit. At the June 2, 2017 hearing, the trial court *prejudged* HLG and Reuven Herssein's ability to possibly add Tomei as a party, and then went so far as to prejudge awarding 57.105 sanctions to USAA and Reyes' client, if and when HLG and Reuven Herssein added any of these parties. (A061; A298)

The trial court's prejudgment is the *second* compelling legally sufficient reason HLG and Reuven Herssein filed the motion to disqualify. During the June 2, 2017 hearing, the Court **prejudged awarding 57.105 sanctions** to USAA and

[4] Reuven Herssein is a counter-defendant in the underlying action, because Counter-Plaintiff, USAA, filed a counterclaim against Reuven Herssein personally on February 23, 2017 in the underlying action. The trial Court denied Reuven Herssein's Motion to Dismiss the counterclaim against him personally, despite the fact that he was not a party to the underlying action, the counterclaim was barred by the statute of limitations and it was not a compulsory counterclaim—a compulsory counterclaim cannot be filed against a non-party. See Fla. R. Civ. P. 1.170(a). At the same time as the trial court prejudged Reuven Herssein's ability to sue USAA's executives and add parties to the lawsuit, the trial court allowed USAA to amend its counterclaim against Reuven Herssein *ore tenus*, but insisted on Reuven Herssein having to file a motion for leave to amend, despite the fact that as a matter of right Reuven Herssein was allowed to do so because he had not filed his answer.

Reyes' client, regarding an unfiled and unpled sanctions motion, *prior* to HLG and Reuven Herssein even moving to amend the complaint to personally sue USAA's executives or to add them as counter-defendants to Reuven Herssein (A061; A298): It is critical to note that Reyes - the trial court's Facebook 'friend's- client, ***is* one of the USAA's executives that HLG and Reuven Herssein informed the Court it will be adding to the lawsuit.**

The Court prejudged the issues in the case with comments such as, "**I don't know what evidence you have, <u>but if anybody on the other side files a 57.105 or something on these things, it puts you in a bad position</u>**." (A061; A298). Notably, HLG and Reuven Herssein are also Counter-defendants and had not answered the counterclaim as of June 2, 2017; thus, as a matter of *right* HLG and Reuven Herssein were able to add any parties to the lawsuit and personally sue any of USAA's executives.

Nevertheless, when HLG and Reuven Herssein informed the trial court of their *intent* to add parties as a matter of right, the trial court, in addition to prejudging awarding 57.105 sanctions to USAA and Reyes' client, also *warned* HLG and Reuven Herssein *several times* that it did not have a good faith basis to add any parties with comments such as:

> "But what I'm saying to you is that **you better have a good faith basis at this juncture to do that."** (A057; A294)

And:

"**You have to be very careful with that**." (A061; A298)

And:

"So let me just say this. ***You have to be very careful*** **when you are going to be suing those people individually** because you do have to have the **evidence to support it**, and I don't know that you have the discovery to do that. You may have it, but **my impression is that you guys don't have discovery**, that's why you haven't been taking depositions.",(A056; A293),

And:

"I don't know what evidence you have, <u>but if anybody on the other side files a 57.105 or something on these things, it puts you in a bad position</u>." (A061; A298).

These warnings and comments unambiguously demonstrate the trial court (in addition to prejudging awarding 57.105 sanctions to USAA and Reyes' client on an unfiled and unpled motion) prejudged HLG and Reuven Herssein's good faith basis to add parties to the lawsuit in the first instance, by prejudging the facts and that HLG and Reuven Herssein allegedly did not have the "evidence" and or "discovery" to add parties to the lawsuit, when the matter was not even before the trial court. (A056; A057; A061; A293; A294; A298)

The ***pre-judgment*** ruling on an unpled and unfiled motion came *after* the trial court ruled that– Tomei (Reyes' client) – and Respondent USAA, have "a common legal interest" (A094; A322), and *after* counsel for HLG and Reuven Herssein informed the trial Court it is adding the Court's Facebook friend – Reyes'- client, (Tomei), one of USAA's executives personally; and that HLG and

Reuven Herssein in fact had sufficient and a good faith basis to add USAA's, executives. (A057; A294).

Given the blatant prejudgment and virtual legal advice by the trial court on an unpled and unfiled sanctions motion, Petitioners, HLG and Reuven Herssein had a well-grounded fear that they will not receive a fair trial. As indicated in the verified Motion to Disqualify, the trial court's prejudging the issues concerning an unfiled and unpled sanctions motion prior to HLG and Reuven Herssein (Counter-defendants) even adding any possible parties as a matter of right[5] provided USAA and its attorneys *exactly* what they needed and it had the desired effect. Immediately after the June 2, 2017 hearing, one of USAA's attorney's, Mr. Garcia-Linares, threatened HLG and its counsel with filing a 57.105 sanctions motion, when HLG sued USAA's executives personally, based on the specific prejudgments of Judge Butchko. (A024; A047) Mr. Garcia Linares specifically stated, "Be careful about adding USAA's executives personally, you heard what Judge Butchko said, you don't have the evidence and the Judge *will* issue 57.105 sanctions against you." (A006; A013; A024; A047)

The *third* legally sufficient and compelling reason HLG and Reuven Herssein filed the Motion for Disqualification is because the trial court has on numerous occasions displayed personal animus toward Petitioner, Reuven

[5] Counter-defendants, HLG and Reuven Herssein had not answered the counterclaim as of June 2, 2017.

Herssein, with *ad hominem* attacks, negatively referring to Mr. Herssein's temperament, making statements on the record, such as "you're crazy" and most recently, on June 2, 2017, when the Court negatively referred to Petitioner as having a "*special personality*" (A210; A250), in front of Reuven Herssein's spouse and business partner, the president of HLG, Iris Herssein, Esquire. The trial court's June 2, 2017 comment was demeaning and personally embarrassing to both Mr. Herssein, and Mrs. Herssein, and publicly hurt his reputation and standing in the legal community. (A006-A007; A025; A048)

The motion to disqualify was denied without hearing. (A065), Because the motion was legally sufficient and timely (A001-A064) the petition should be granted and the case should be reassigned to another judge.

I. Jurisdiction of the Court

This Court has jurisdiction to review a trial judge's refusal to disqualify himself. *See Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978) (if a basis for disqualification has been established "prohibition is both an appropriate and necessary remedy"); *Hill v. Feder*, 564 So. 2d 609, 609 (Fla. 3d DCA 1990) (same); *see also* Fla. R. App. P. 9.030(3) (district courts of appeal may issue writs of prohibition).

II. Statement of the Case and Facts

This is the second time this case is before this Court. In the first case, Case No. 3D16-0342, this Court denied USAA's Emergency Petitions for Writ of Mandamus and Certiorari related to the prior trial court's order on confidentiality. By way of background, on July 13, 2015, HLG filed this lawsuit against USAA and as set out in its Third Amended Complaint, ("TAC"), there are several breach of contract counts that involve USAA's refusal to honor the written contracts in place since 2010 by refusing to pay HLG's legal bills on previously triggered and earned contracted contingency fees per those contracts. Remarkably, USAA has taken the position that the written agreements are not *really* the agreements between the parties.

In addition to the breach of contract counts of the TAC, there are several fraud and negligent misrepresentation counts, based on the fraud perpetrated by USAA's executives in its business dealings and negotiations with HLG. Specifically, with regard to the fraud counts, Count IV -*Fraud* as to the New York Office; Count V - *Fraud* as to the July 2014 contract; and Count VI - *Fraud* as to the May 7, 2015 Contract, the latter two were negotiated by Tomei.

Vitally important for this Petition for Writ of Prohibition is the undisputed facts involving the parties, the witnesses, and their representation. Specifically, as alleged in the TAC, Tomei (Reyes' client) is the USAA executive responsible for

negotiating two of the main contracts at issue in this lawsuit with HLG, and it is those two contracts (July 2014 and May 7, 2015) that are also the subject of the counter-claim filed by USAA against HLG and Reuven Herssein on February 23, 2017.

The TAC specifically outlines the **fraud USAA's executives,** Jennifer Tate, Alan Bunge, Tom Strasburger, Brad Wallen, Raul De La Garza, Don Iverson, Steve Duke, **Catina Tomei**, Gale Young, Kevin Geary, and other USAA personnel perpetrated on HLG in its business dealings with HLG, a law-firm, and prior to June 30, 2015, one of USAA's (many) "vendors for legal services" in Florida.

The TAC alleges USAA fraudulently induced HLG to sign the July 2014 contract, based on the written misrepresentations and false guarantees of Catina Tomei, (USAA's director of litigation and the individual at USAA that HLG negotiated the July 2014 contract with) on June 16, 2014 that "USAA will guarantee your firm receives 50% of our incoming FL PIP cases per month." USAA breached that contract when it did not refer 50% of its incoming Florida PIP suits per month to HLG.

The TAC alleges USAA fraudulently induced HLG to sign the May 7, 2015 amended contract by first falsely misrepresenting the reasons for the (obvious) throttling back of the work referred to HLG from September 2014 through June 2015. Then, by expanding the three-year term (July 2014) contract, to a five (5)

year term contract with HLG. Of note, one of the **only** key terms USAA changed in the 2015 amended contract (aside from making it a five (5) year term deal) was its right to terminate the contract without any written notice to HLG. Within 55 days of signing the May 7, 2015 contract, on June 30, 2015, Tomei via a phone call, without any stated reason, fired HLG and instructed it to transfer every USAA file to another defense firm. USAA's refusal to honor the contracts it signed with HLG, pay HLG its previously triggered and owing contingency fees, and has also refused to pay HLG for the legal work necessary to transfer approximately 700 active files at USAA's request after June 30, 2015 – that is the basis of Count X of the TAC. On February 23, 2017, USAA filed a counterclaim adding Defendant Reuven Herssein personally on three counts, two of which are barred by the statute of limitations.

Reyes was originally hired by USAA to represent Tomei for a witness tampering evidentiary hearing that the previous trial court judge twice ordered to occur. When the case was transferred to the trial court complex business division (CBL), over Petitioner HLG's objection, the trial court, citing USAA's "due process rights", vacated the previous trial court's orders and ruled that no evidentiary hearing on witness tampering would occur. (A104; A112). The trial court did, however, allow discovery to be conducted on the issue. In furtherance of that discovery, HLG and Herssein attempted to subpoena emails and

correspondence between USAA's lawyers and the witnesses' lawyers in light of the witness tampering charges to discover any bias or other possible collusion.

On June 2, 2017, in ruling on USAA's objection to subpoena on USAA's lawyer (Shutts & Bowen), the trial court found that Tomei – Reyes' client- and USAA had a "common legal interest" which prevented any discovery between Tomei's lawyer and USAA's lawyer[6]. (A094; A322). On June 6, 2017, HLG and Reuven Herssein discovered that Reyes is "**Facebook Friends**" with Judge Butchko. (A027; A050) On June 8, 2017, HLG and Reuven Herssein filed their Verified Motion to Disqualify the trial court with attached affidavits in support. (A001-A064) USAA filed no response. On June 9, 2017, less than twelve (12) *hours*[7] after the filing the Motion to Disqualify, the trial Court denied the motion without a hearing, finding it legally insufficient. (A065);

Immediately after the trial court denied the motion for judicial disqualification (A065), on June 9, 2017, Petitioners, HLG and Reuven Herssein, through its trial counsel, Maury L. Udell, Esquire, requested the trial court stay the case. (A313). The trial court denied the request. (A313). Mr. Udell, then requested a twenty (20) day *temporary* stay of the case for the stated purpose to

[6] Notably, despite the crime-fraud exception (witness tampering is a crime in Florida) to any privilege the trial Court did not even mandate a privilege log be furnished.

[7] The Motion to Disqualify was filed on June 8, 2017 @ approximately 10:32 P.M. (A001). The very next morning, June 9, 2017, before 10:00 a.m. the Court issued its Order denying the Motion without a hearing. (A310)

prepare and file the Writ of Prohibition to this Court. (A314) The trial court denied HLG and Reuven Herssein's temporary 20 day stay request as well. (A314). Because both of petitioners' requests for a stay of the case were denied by the trial court (A313; A314), petitioners were forced to withdraw[8], without prejudice, it's Verified Motion to Amend the TAC to add claims for Punitive Damages – based on the Fraud perpetrated by USAA and its executives (Tomei being one of them) on HLG and Reuven Herssein, that was set for hearing on June 9, 2017. (A313)

III. Nature of the Relief Sought

Petitioners request a writ of prohibition disqualifying the trial judge and an order remanding the case to the circuit court for reassignment to another judge.

IV. Argument

A. The Standard for a Motion to Disqualify

The standard of review for the legal sufficiency of a motion to disqualify is *de novo. See R.M.C. v. D.C.,* 77 So.3d 234, 236 (Fla. 1st DCA 2012). The only issue before this Court is the question of legal sufficiency of the motion; there is

[8] To preserve the Petitioners appellate rights as to the Writ of Prohibition, given the trial court's denial of their request for a stay, HLG and Reuven Herssein were similarly forced to withdraw their Motion to Strike USAA's pleadings for a fraud on the Court and to Strike USAA's pleadings as a Sham Pleading, set for hearing June 16, 2017. (Filing # 57784588 E-Filed 06/15/2017)

no deference owed to the lower court. *Smith v. Santa Rosa Island Authority*, 729 So. 2d 944, 946 (Fla. 1st DCA 1998). "A motion is legally sufficient if it alleges facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial." *Id.* (*quoting MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332 (Fla.1990)). A mere "subjective fear" of bias will not be legally sufficient; rather, the fear must be objectively reasonable. *Fischer v. Knuck*, 497 So.2d 240, 242 (Fla.1986).

In making a determination on an initial motion for disqualification, the trial court must follow the requirements of rule 2.330(f) of the Florida Rules of Judicial Administration. This provision requires the trial court to determine only if the motion is legally sufficient; **the trial court may not consider whether the factual assertions of the motion are true**." *Messianu v. Pigna*, 180 So.3d 229 (Fla. 3rd DCA 2015); *See also Bundy v. Rudd*, 366 So.2d 440, 442 (Fla.1978). "The facts alleged in a motion seeking to disqualify a trial judge must be evaluated as true for the purposes of determining legal sufficiency." *Messianu v. Pigna*, 180 So.3d 229 (Fla. 3rd DCA 2015) *See also City of Hollywood v. Witt*, 868 So.2d 1214, 1217 (Fla. 4th DCA 2004).

The issue before this Court is the **legal sufficiency** of the motion to disqualify the trial court judge. In order to demonstrate legal sufficiency, Petitioners need only show:

> ‘a well grounded fear that he will not receive a fair [hearing] at the hands of the judge. **It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling**.’ *State ex rel. Brown v. Dewell*, 131 Fla. 566, 573, 179 So. 695, 697- 98 (1938). *See also Hayslip v. Douglas*, 400 So. 2d 553 (Fla. 4th DCA 1981). **The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially**.

State v. Livingston, 441 So. 2d 1083, 1086 (Fla. 1983)(emphasis added).

Due process guarantees the right to a neutral, detached judiciary in order “to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests.” *Careyv. Piphus*, 435 U.S. 247, 262 (1978). The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. *See Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978).

At the same time, the requirement preserves both the appearance and reality of fairness, ‘generating the feeling, so important to a popular government, that justice has been done,’ *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172, (1951)(Frankfurter, J., concurring), by ensuring that no person will be

deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

Canon 3E, Fla. Code Jud. Conduct, and Rule 2.330, Fla. R. Jud. Admin., mandate that a judge disqualify himself in a proceeding "in which the judge's impartiality might reasonably be questioned." The disqualification rules require judges to avoid even the appearance of impropriety:

> It is the established law of this State that every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any manner where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. *Crosby v. State*, 97 So.2d 181 (Fla. 1957); *State ex rel. Davis v. Parks*, 141 Fla. 516, 194 So. 613 (1939); *Dickenson v. Parks*, 104 Fla. 577, 140 So. 459 (1932); *State ex rel. Mickle v. Rowe*, 100 Fla. 1382, 131 So. 3331 (1930).
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> * * *
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> The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned. *Dickenson v. Parks*, 104 Fla. 577, 140 So. 459 (1932); *State ex rel. Aguiar v. Chappell*, 344 So.2d 925 (Fla. 3d DCA 1977).

State v. Steele, 348 So. 2d 398, 401 (Fla. 3rd DCA 1977).

The appearance of impropriety violates state and federal constitutional rights to due process. A fair hearing before an impartial tribunal is a basic requirement of due process. *See In re Murchison*, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." *State ex rel. Mickle v. Rowe*, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal, there can be no full and fair hearing.

"The trial court cannot insert its own views regarding the facts or the motivations of the parties but "must review the motion from the litigant's perspective...." *Messianu v. Pigna*, 180 So.3d 229 (Fla. 3rd DCA 2015), quoting *Jimenez v. Ratine*, 954 So.2d 706, 708 (Fla. 2d DCA 2007). "A party seeking to disqualify a judge need only show 'a well-grounded fear that he will not receive a fair trial at the hands of the judge. **It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling.**" *Zanghi v. State*, 61 So.3d 1263 (Fla. 4th DCA 2011).

"The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, *if predicated on grounds with a modicum of reason*, the judge in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned." *State v. Steele*, 348 So. 2d 398, 401 (Fla. 3d DCA 1977) (emphasis added).

Additionally, the Florida Supreme Court has stated that:

> [A] party seeking to disqualify a judge need only show 'a well-grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling.' [citations omitted] The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.

Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983); *see also MacKenzie v. Superkids Bargain Store, Inc.*, 565 So. 2d 1332, 1336 (Fla. 1990) ("The appearance of impropriety or bias is of special concern where the branch of government involved is that charged with the duty of remaining impartial, i.e., the judiciary.").

I. IN DETERMINING THE LEGAL SUFFICIENCY OF THE MOTION FOR DISQUALIFICATION, THE TRIAL COURT IGNORED BINDING PRECEDENT REQUIRING DISQUALIFICATION

Florida Code of Judicial Conduct Canon 2B requires that "A judge shall not ... convey or permit others to convey the impression that they are in a special position to influence the judge."). In *Domville v. State*, 103 So.3d 184 (Fla. 4th DCA 2013) the Fourth District Court of Appeal ruled that a trial court judge being a Facebook 'friend' with a lawyer on the case is per se grounds for recusal, "as the identification of the lawyer as a "friend" on the social networking site, conveys the impression that the lawyer is in a position to influence the judge." *Id.* at 186.

In *Domville*, the defendant alleged that the prosecutor handling the case and the trial court judge were Facebook friends and that (Facebook friend) relationship "caused Domville to believe that the Judge could not be fair and impartial." Id. The Court in *Domville*, stated as follows:

> **We find an opinion of the Judicial Ethics Advisory Committee to be instructive.** *See* Fla. JEAC Op.2009–20 (Nov. 17, 2009). There, the Committee concluded that the Florida Code of Judicial Conduct precludes a judge from both adding lawyers who appear before the judge as "friends" on a social networking site and allowing such lawyers to add the judge as their "friend." **The Committee determined that a judge's listing of a lawyer as a "friend" on the judge's social networking page—"[t]o the extent that such identification is available for any other person to view"—would violate Florida Code of Judicial Conduct Canon 2B ("A judge shall not ... convey or permit others to convey the impression that they are in a special position to influence the judge.").** *See* Fla. JEAC Op. 2009–20. The committee found that three elements are necessary in order to fall within the prohibition of Canon 2B:
>
> 1. The judge must establish the social networking page.
> 2. The site must afford the judge the right to accept or reject contacts or "friends" on the judge's page, or denominate the judge as a "friend" on another member's page.
> 3. The identity of the "friends" or contacts selected by the judge, and the judge's having denominated himself or herself as a "friend" on another's page must then be communicated to others.
>
> The committee noted that:
>
> Typically, [the] third element is fulfilled because each of a judge's "friends" may see on the judge's page who the judge's other "friends" are. Similarly, all "friends" of another user may see that the judge is also a "friend" of that user. **It is this selection and communication process, the Committee believes, that violates Canon 2B, because the judge, by so doing, conveys or permits others to convey the impression that they are in a special position to influence the judge.**

> **Further, the Committee concluded that when a judge lists a lawyer who appears before him as a "friend" on his social networking page this "reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge."** ***Id. See also*** **Fla. Code Jud. Conduct, Canon 5A.**
>
> The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a "friend" on the social networking site, conveys the impression that the lawyer is in a position to influence the judge. The Committee concludes that such identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted.
>
> Fla. JEAC Op. 2009–20.
>
> **Thus, as the Committee recognized, a judge's activity on a social networking site may undermine confidence in the judge's neutrality.** Judges must be vigilant in monitoring their public conduct so as to avoid situations that will compromise the appearance of impartiality. The Commentary to Canon 2A explains that being a judge necessarily limits a judge's personal freedom:
>
> **A judge must avoid all impropriety and the appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.**
>
> Fla. Code Jud. Conduct, Canon 2A, cmt.

Domville v. State, 103 So.3d 184, (Fla. 4th DCA 2013)

The Fourth DCA opinion in *Domville* was binding on the trial court, because *Domville* was the first and only District Court case that ruled on this precise issue and the impact of a judge's being a **Facebook friend** of a lawyer in a case. See

Pardo v. State, 596 So.2d 665, 666 (Fla.1992) (explaining that "in the absence of inter-district conflict, district court decisions bind all Florida trial courts").

On Motion for Rehearing, in *Domville v. State*, 125 so.3d 178 (Fla. 4th DCA 2013)[9] the Fourth DCA certified the following question as a matter of great public importance:

> Where the presiding judge in a criminal case has accepted the prosecutor assigned to the case as a Facebook "friend," would a reasonably prudent person fear that he could not get a fair and impartial trial, so that the defendant's motion for disqualification should be granted?
>
> *Id.*

In his concurrence in granting the Motion for Rehearing and certifying the question, Fourth District Court of Appeal Judge Robert Gross pointed out the problematic nature of a judge's use of social media:

> "Judges do not have the unfettered social freedom of teenagers. Central to the public's confidence in the courts is the belief that fair decisions are rendered by an impartial tribunal. Maintenance of the appearance of impartiality requires the avoidance of entanglements and relationships that compromise that appearance. Unlike face to face social interaction, an electronic blip on a social media site can become eternal in the electronic ether of the internet. Posts on a Facebook page might be of a type that a judge should not consider in a given case. The existence of a judge's Facebook page might exert pressure on lawyers or litigants to take direct or indirect

[9] The Florida Supreme Court declined to exercise jurisdiction within a month. *See* State *v. Domville*, 110 So.3d 441 (Fla. 2013).

> action to curry favor with the judge. As we recognized in the panel opinion, a person who accepts the responsibility of being a judge must also accept limitations on personal freedom."

Id. at 179.

If a judge accepted a lawyer's "friend" request, the public might perceive that the lawyer held a position of influence with the judge that others, whose "friend" requests were rejected, might not. Moreover, the Florida Ethics Advisory Committee believed that this impression would still exist even if a judge accepted all "friend" requests that were received from lawyers who appeared before the judge:

> The judge's commitment to accept as a "friend" all attorneys who ask to become a "friend" still violates Canon 2B because (1) it still creates a class of special lawyers who have requested this status and (2) these lawyers as a group, in contrast to other lawyers who do not participate in social networking sites or who choose not to ask the judge to accept them as the judge's "friend," would appear to the public to be in a special relationship with the judge.

Because of the inherent "selectivity and exclusivity" of the "process of selection," the Florida Ethics Advisory Committee found that judges should not be social media "friends" with lawyers who regularly appear before them. Other jurisdictions have come to the same conclusion. E.g. Massachusetts CJE Opinion No. 2011-6 ("The Committee is of the opinion that the Code prohibits judges from

associating in any way on social networking sites with attorneys who may appear before them.").

California has staked out a more nuanced middle-ground between the two approaches described above. The California Judges Association ruled that there is no "per se prohibition of social networking with lawyers who may appear before a judge," but cautioned that, depending on the nature of a judge's social networking interactions, the judge could nonetheless create the impression that a lawyer occupies a position of special influence with the judge, which would be inappropriate.

The association identified several factors that California judges should consider when determining whether their social networking crosses this line, including the nature of the social networking site (the more personal, the greater the likelihood that a "friend" would be in a special position to influence the judge) and the judge's practice in deciding which lawyers to accept as "friends" (the more inclusive the judge is the less likely it would be that he could create the impression that one lawyer would be in a special position as compared to the others). The association then provided one example each of what would be permissible and impermissible. These examples suggest that it would not be appropriate for a California judge to have "friends" on a more personal networking site — where a judge "updates family and friends about her/his extrajudicial activities" and

includes “such items as vacation photos, updates on the judge’s children, and the judge’s thoughts about books, movies and restaurants” — as opposed to one that is more professional — where a judge communicates with his contacts on issues relevant to the legal profession. Essentially, in California, social networking like Facebook would be problematic for judges, while professional networking like *LinkedIn* would not. Finally, the California Judges Association held that a judge should not interact with a lawyer who has a matter pending before the judge, and should actually “unfriend” any lawyer with such a matter.

In *Chace v. Loisel*, 170 So.3d 802 (Fla. 5th DCA 2014), the Fifth District Court of Appeal dealt with a case where the Judge tried to Facebook “friend” a party in the case, rather than an attorney representing a party and the court held that disqualification was required. Importantly, the Fifth District did not disagree with the *Domville* opinion, it expressed a reservation about the *Domville* court’s reasoning but distinctly agreed with the holding by stating “beyond the fact that *Domville* required the trial court to grant the motion to disqualify, the motion to disqualify was sufficient on its face to warrant disqualification.” *Id*. The reason, as stated by the *Chace* court is precisely because under the Code of Judicial Canons “a Judge must avoid the appearance of partiality. It is incumbent upon judges to place boundaries on their conduct in order to avoid situations such as the one presented in this case.”

In *Pardo v. State,* the Supreme Court has stated that "[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court." *Stanfill v. State,* 384 So.2d 141, 143 (Fla.1980). Thus, in the absence of inter-district conflict, district court decisions bind all Florida trial courts. *Weiman v. McHaffie,* 470 So.2d 682, 684 (Fla.1985). The purpose of this rule was explained by the Fourth District in *State v. Hayes:*

> The District Courts of Appeal are required to follow Supreme Court decisions. As an adjunct to this rule it is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts—District Courts of Appeal. The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision. Alternatively, if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it. Contrarily, as between District Courts of Appeal, a sister district's opinion is merely persuasive.

Id. at 666.

In light of the binding precedent of *Domville* on the trial court, the motion to disqualify was legally sufficient and the trial court's denial of the motion requires disqualification and reassignment to another judge. Under Florida law where a judge is Facebook friends with a lawyer appearing in the case, disqualification was required. In its verified motion, HLG and Reuven Herssein both attested and expressed reasonable and well-grounded legitimate fear of not

receiving an impartial trial on this matter, given the fact that the trial court is Facebook 'friends' with a lawyer on the case. (A003; A021; A044) Failing to follow binding case law in denying the Motion to Disqualify is tantamount to violating Petitioners' due process right to the cold neutrality of an impartial judge, requiring this Court to issue a writ of prohibition and require the circuit court reassign the case to another judge.

II. THE TRIAL COURT'S OBVIOUS PRE-JUDGMENT OF AN UNPLED AND UNFILED MOTION FOR SANCTIONS AGAINST PETITIONERS IS GROUNDS FOR DISQUALIFICATION

Aside from the violation of Judicial Canon 2B and 5A by being Facebook friends with a lawyer who appears before the court on the case and failing to follow binding precedent, the trial court injected comments in this case which give HLG and Reuven Herssein an objectively reasonable well-grounded fear of not receiving a fair and impartial trial. Specifically, the Court has made comments evidencing her pre-judgment requiring disqualification.

Canon 3(B)(9) of the Code of Judicial Conduct requires: "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing."

Canon 3(E)(1) of the Code of Judicial Conduct provides that: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." And where a judge has prejudged or predetermined issues in a case—as the trial judge has here—impartiality is reasonably in doubt and disqualification is required. *Amato v. Winn Dixie Stores/Sedgwick James*, 810 So. 2d 979, 980-983 (Fla. 1st DCA 2002) (disqualification required where judge issued an order on the merits and thereafter vacated it upon realizing that discovery was not yet complete and all the evidence had not been heard).

Additionally, disqualification is required because the facts alleged in the motion, which must be taken as true, would "'prompt a reasonably prudent person to fear that he could not get a fair and impartial trial.'" *Molina v. Perez*, 187 So. 3d 909, 909 (Fla. 3d DCA 2016) (citation omitted).

This Court in *Great Am. Ins. Co. of N.Y. v. 2000 Island Boulevard Condo. Ass'n, Inc*., 153 So.3d 384 (Fla. 3rd DCA 2014), ruled that a trial judge that made comments concerning a sanctions motion, when the issue was not before the court, "abandoned his post as a neutral overseer of the dispute between the parties, compelling us to grant Great American Insurance Company's Petition for a Writ of Prohibition." Id.

"A trial judge crosses the line when he becomes an active participant in the adversarial process, i.e., gives "tips" to either side. The issue of sanctions was not before the court in *2000 Island,* yet the court essentially advised plaintiff that, should he request sanctions, the court would award them. The implication of the court's statement is clear—plaintiff's counsel should move for sanctions because the court will grant the motion." *Great Am. Ins. Co. of N.Y. v. 2000 Island Boulevard Condo. Ass'n, Inc*., 153 So.3d 384 (Fla. 3rd DCA 2014) See also *Chastine v. Broome*, 629 So.2d 293, 295 (Fla. 4th DCA 1993).

During the June 2, 2017 hearing, this Court's comments went so far as *to pre-judge* awarding 57.105 sanctions to USAA, if and when Counter-defendants (HLG and Reuven Herssein) moved to amend the pleadings to personally sue Reyes' client, Tomei, and other USAA executives. Comments such as:

> **" I don't know what evidence you have, <u>but if anybody on the other side files a 57.105 or something on these things, it puts you in a bad position</u>"** (A061; A298).

"Such legal advice, standing alone, is sufficient to compel disqualification. See, e.g., *Blackpool Assocs., Ltd. v. SM–106, Ltd.*, 839 So.2d 837, 838 (Fla. 4th DCA 2003) ("We grant relief in connection with the trial court's order that denied disqualification as the trial court provided Blackpool/Kevin Murphy with legal advice and suggestions."); *Shore Mariner Condo. Ass'n v. Antonious*, 722 So.2d 247, 248 (Fla. 2d DCA 1998) ("**Trial judges must studiously avoid the**

appearance of favoring one party in a lawsuit, and suggesting to counsel or a party how to proceed strategically constitutes a breach of this principle.")(emphasis added); *Leigh v. Smith*, 503 So.2d 989, 991 (Fla. 5th DCA 1987) ("Certainly an allegation that a judge assisted the opposing attorney in the trial of the case by 'signaling' is sufficient, by itself, to warrant disqualification.").

The trial court's comments concerning an unfiled and unpled sanctions motion prior to HLG or Herssein even adding any possible parties (when the pleadings have not closed) as a matter of right (Counter-defendants had not answered the counterclaim as of June 2, 2017) has given HLG and Reuven Herssein an objectively reasonable well-grounded fear of not receiving a fair and impartial trial.

The trial court's comments concerning an unfiled and unpled sanctions motion prior to Counter-defendants even adding any possible parties as a matter of right (Counter-defendants had not answered the counterclaim as of June 2, 2017) provided USAA and its attorneys exactly what they needed and it had the desired effect. USAA's attorney Mr. Garcia-Linares immediately after the hearing warned HLG and its counsel by indicating that it would be filing a 57.105 sanctions motion if and when HLG sued USAA's executives personally, based on the specific comments of the trial court.

"A trial judge crosses the line when he becomes an active participant in the adversarial process, i.e., gives "tips" to either side. *Great Am. Ins. Co. of N.Y. v. 2000 Island Boulevard Condo. Ass'n, Inc*., 153 So.3d 384 (Fla. 3rd DCA 2014) "It has long been said in the courts of this state that "every litigant is entitled to nothing less than the cold neutrality of an impartial judge." Id. The trial court's comments *pre-judging an* awarding of 57.105 sanctions against Counter-defendants and their counsel, if and when Counter-defendants personally sues USAA's executives – Reyes' client Tomei being one of them – has caused HLG and Herssein a well-grounded fear of not receiving a fair and impartial hearing and trial on this matter.

Moreover, during the June 2, 2017 hearing, the judge *pre-judged* HLG's ability to even sue Tomei and any of the USAA executives personally in the first instance. Tomei is one of the USAA executives and one of the key players in this case, and is also Judge Butchko's **Facebook friend**, Reyes' client. "While a trial judge may form mental impressions and opinions during the course of hearing evidence in a case, the judge is not permitted to pre-judge the case." *Kates v. Seidenman*, 881 So.2d 56 (Fla. 4th DCA 2004); *See also*, *Leslie v. Leslie*, 840 So.2d 1097, 1098 (Fla. 4th DCA 2003) (citing Barnett v. Barnett, 727 So.2d 311, 312 (Fla. 2d DCA 1999)).

In *Kates*, the trial judge made certain comments on the record indicating how the judge intended to rule *before* the motion or issue was before the court. Although the (Respondent) judge claimed that the judge did not make the alleged comments *prior* to the presentation of evidence; rather, made her findings "after the parties' presentation." the court, nevertheless, must take the motion's sworn allegations of fact as true, and "if true, the comments create an appearance that the judge has *pre-judged* … issues that were not before the court at the hearing…"

In the instant case, the trial court, on the record, *pre-judged* HLG ability to add Reyes' client Tomei personally to this lawsuit when the matter was not even properly before the court. The trial court's comments warning counsel for HLG *several times* about filing a motion to amend to add defendants to the law suit, by personally suing USAA's executives, (Reyes's client, Tomei, being one of them), ***before*** the issue was even before the court has given HLG and Reuven Herssein a well-grounded fear of not receiving a fair and impartial hearing and trial on this matter.

> "But what I'm saying to you is that **you better have a good faith basis at this juncture to do that."** (A057; A294)
>
> *And:*
>
> "**You have to be very careful with that**." (A061; A298)
>
> *And:*

> "So let me just say this. ***You have to be very careful*** **when you are going to be suing those people individually** because you do have to have the **evidence to support it**, and I don't know that you have the discovery to do that. You may have it, but **my impression is that you guys don't have discovery**, that's why you haven't been taking depositions.",(A056; A293),
>
> *And*:
>
> **"I don't know what evidence you have, <u>but if anybody on the other side files a 57.105 or something on these things, it puts you in a bad position</u>**." (A061; A298).

Similarly, in *Irwin v. Marko*, 417 So.2d 1108, 1109 (Fla. 4th DCA 1982), the Fourth DCA ruled where a judge made certain comments on the record indicating that he intended to grant the subject motion for attorney's fees, because the comments were made prior to any hearing before the trial court on the said motion (for attorney's fees), the judge created the *appearance of having prejudged* the attorney's fee issue in advance of hearing it and, accordingly was required by law to recuse himself. *Id*., See, e.g., *State v. Steele*, 348 So.2d 398 (Fla. 3d DCA 1977). *See also Martin v. State*, 804 So.2d 360 (Fla. 4th DCA 2001); *Gonzalez v. Goldstein*, 633 So.2d 1183, 1184 (Fla. 4th DCA 1994).

Petitioner's motion was legally sufficient, per *Molina v. Perez*, 187 So.3d 909 (Fla. 3rd DCA 2016), and similar cases. *Wolfson v. Wolfson*, 159 So. 3d 394, 394 (Fla. 3d DCA 2015) (disqualification required where trial judge's comments indicated she had prejudged the case); *Wade v. Wade*, 123 So. 3d 697, 698 (Fla. 3d DCA 2013) (disqualification required where court announced its ruling before hearing all the

evidence); *Begens v. Olschewski*, 743 So. 2d 133, 133 (Fla. 4th DCA 1999) (comment suggesting that judge has already made up her mind before hearing all the evidence required disqualification); *Barnett v. Barnett*, 727 So. 2d 311, 311-12 (Fla. 2d DCA 1999) ("[w]hile it is well-settled that a judge may form mental impressions and opinions during the course of hearing evidence, he or she may not prejudge the case"); *Gonzalez v. Goldstein*, 633 So. 2d 1183, 1184 (Fla. 4th DCA 1994) ("[a] trial judge's announced intention before a scheduled hearing to make a specific ruling" required disqualification); *Irwin v. Marko*, 417 So. 2d 1108, 1109 (Fla. 4th DCA 1982) (comments suggesting that judge intended to rule a certain way prior to hearing the motion, required disqualification).

LeBruno Aluminum Co. v. Lane, 436 So. 2d 1039 (Fla. 1st DCA 1983), and *Nathanson v. Nathanson*, 693 So. 2d 1061 (Fla. 4th DCA 1997), are two additional cases where courts ordered disqualification when judges were found to have prejudged matters in advance of receiving all the evidence. In *LeBruno* (relied upon by *Amato v. Winn Dixie Stores/ Sedgwick James*, 810 So. 2d 979 (Fla. 1st DCA 2002), the trial court remarked that he had already made up his mind even though he would still allow the party to present his witnesses. 436 So. 2d at 1039-40. In *Nathanson* (also relied upon by *Amato*), the Fourth District found the motion to disqualify legally sufficient where the judge "began to rule against the wife without ever affording the wife an opportunity to respond." 693 So. 2d at 1062.

Cummings v. Montalvo, 135 So. 3d 389, 389 (Fla. 5th DCA 2014) (disqualification required based on judge's statements indicating that she had prejudged party's credibility "in an unfavorable fashion"); *DeMetro v. Barad*, 576 So. 2d 1353, 1354-55 (Fla. 3d DCA 1991) (judge's comments as to parties' believability in prior proceeding required disqualification as to future proceedings); *Deauville Realty Co. v. Tobin*, 120 So. 2d 198, 202 (Fla. 3d DCA 1960) ("statement by a trial judge that he feels a party has lied in the case . . . may operate to disqualify that judge from hearing any later or second trial of that case . .. or from participating in any subsequent trial"); *Campbell Soup Co. v. Roberts*, 676 So. 2d 435, 435-36 (Fla. 2d DCA 1995) (judge's comments during a proceeding about the credibility of a party required disqualification); *see also Brown v. St. George Island, Ltd.*, 561 So. 2d 253, 254-57 (Fla. 1990) (judge's derogatory remarks as to witness' veracity in prior hearing required disqualification as to future proceedings).

The fact that the trial court has made these comments on the record and *pre-judged* awarding 57.105 sanctions against HLG, Reuven Herssein, and its counsel, if and when HLG or Reuven Herssein personally sues USAA's executives – Reyes' client Tomei being one of them – has caused HLG and Reuven Herssein to have a well-ground fear of not receiving a fair and impartial hearing and trial on this matter requiring disqualification. (A006; A024-A025;A047) Any litigant would reasonably question the impartiality of a trial court where the court

prejudges an issue not properly before it. It is beyond a modicum of reason that any litigant should have a well-grounded fear of not receiving a fair trial where the court prejudges an unfiled sanction motion to the litigant's detriment.

III. THE TRIAL COURT HAS EXPRESSED PERSONAL ANIMUS TOWARD COUNSEL FOR HLG AND PARTY, REUVEN HERSSEIN WARRANTING DISQUALIFICATION

At the hearing on June 2, 2017, the trial court negatively referred to Mr. Herssein by commenting that he had a "*special personality*". (A210; A250) in front of Reuven Herssein's spouse and business partner, the president of Petitioner, HLG, Iris Herssein, Esquire. The comment was said in a demeaning fashion and had no bearing on the issues before the Court. "The judge's decidedly negative commentary concerning his personal opinion of the petitioner's behavior, when viewed in the context of, and at this stage of ... a proceeding, is sufficient to create in a reasonably prudent person a well-founded fear that he would not receive a fair hearing before this judge." *Molina v. Perez*, 187 So.3d 909 (Fla. 3rd DCA 2016).

In reviewing a petition based upon comments made by the trial court, "the standard is the reasonable effect on the ***party*** seeking disqualification, *not* the subjective intent of the judge. *Molina*, *Id.* (Quoting *Vivas v. Hartford Fire Ins. Co.*, 789 So.2d 1252, 1253 (Fla. 4th DCA 2001). As the June 8, 2017 Motion to

Disqualify and affidavits[10] attached in support attest, the Court's June 2, 2017 "special personality" comments (A210; A250) were demeaning and personally embarrassing to both Mr. Herssein, and Mrs. Herssein, and publicly hurt his reputation and standing in the legal community and have given HLG and Reuven Herssein a well-founded fear of not receiving a fair and impartial trial. (A019, A024, A025; A042, A048)

It is *not* a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." *State ex rel. Brown v. Dewell,* 131 Fla. 566, 573, 179 So. 695, 697–98 (1938). *See also Hayslip v. Douglas*, 400 So.2d 553 (Fla. 4th DCA 1981). Even where the trial court's negative comments are meant as a joke rather than a reflection on the court's belief as to the merits of the petitioner's case, the trial court's have been disqualified because the standard is the reasonable effect on the party seeking disqualification, not the subjective intent of the judge. *State ex rel. Brown v. Dewell,* 131 Fla. 566, 573, 179 So. 695, 697-98 (1938), quoted in *Hayslip*, 400 So.2d at 556. Jokes by the trial judge are a risky venture in any event, and the closer the joke to the subject matter of the litigation, the greater the risk that the attempted humor will, in one way or another, be inappropriate. *Brofman v. Florida Hearing Care Center, Inc.*, 703 So.2d 1191 (Fla. 4th DCA1997)

[10] Reuven Herssein's affidavit A019, A024, A025; Iris Herssein's affidavit, A042, A048

It is not the appellate court's function to determine how the trial judge actually feels, but rather what feeling resides in the petitioner's mind and the basis for such feeling. *State ex rel. Brown v. Dewell,* 131 Fla. 566, 179 So. 695, 697-98 (1938); *Wargo v. Wargo,* 669 So.2d 1123 (Fla. 4th DCA 1996). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the court's own perception of its ability to act fairly and impartially.

Because the trial court has on numerous occasions displayed personal animus toward Petitioner, Reuven Herssein, with *ad hominem* attacks, negatively referring to Mr. Herssein's temperament, making statements on the record, such as "you're crazy" and most recently, on June 2, 2017, when the Court negatively referred to Petitioner as having a "*special personality*" (A210; A250), the judge's decidedly negative commentary concerning [her] personal opinion of the petitioner's behavior, when viewed in the context of, and at this stage of the proceeding, have given HLG and Herssein a well-founded fear of not receiving a fair and impartial trial. The trial court should be disqualified and the matter transferred to another judge. *Molina, Id. See* also *Miami Dade College v. Turnberry Inv., Inc.*, 979 So.2d 1211 (Fla. 3d DCA 2008); *Valdes–Fauli v. Valdes–Fauli*, 903 So.2d 214, 216 (Fla. 3d DCA 2005); *Kopel v. Kopel*, 832 So.2d 108

(Fla. 3d DCA 2002); *Royal Caribbean Cruises, Ltd. v. Doe*, 767 So.2d 626 (Fla. 3d DCA 2000); *Tindle v. Tindle*, 761 So.2d 424 (Fla. 5th DCA 2000).

Context matters when viewing the trial court's comments in the mind of Petitioners. The trial court's decidedly negative commentary concerning her personal opinion of, Petitioner, Reuven Herssein's behavior and personality, when viewed in the context of the fact that the trial court judge is **Facebook 'friends'** with a lawyer (Reyes) hired by Respondent, USAA, who regularly appears before her and argues on behalf of USAA on this very case, and where the trial court judge on June 2, 2017 referred to her the Facebook 'friend' lawyer as "Judge Reyes" (A100, A124), combined with the fact that that the trial court *prejudged* awarding 57.105 sanctions against HLG, Reuven Herssein, and its counsel, if and when HLG or Reuven Herssein personally sues USAA's executives – **Reyes – the trial court's Facebook Friend's client, Tomei, being one of them** – has caused HLG and Reuven Herssein to have a well-ground fear of not receiving a fair and impartial hearing and trial on this matter requiring disqualification.

Finally, HLG and Reuven Herssein's motion was timely because it was filed within 2 days, after they discovered the trial court was Facebook 'friends' with a lawyer on the case; within 6 days of the court prejudging awarding 57.105 sanctions on an unpled and unfiled sanctions motion; and within 6 days of the trial court's "*special personality*" comment. *See* Fla. R. Jud. Admin. 2.330(e) (motion

to disqualify must be filed within a reasonable time not to exceed 10 days); *Amato*, 810 So. 2d at 981-82 (motion to disqualify timely when filed within 10 days of party learning that judge had vacated premature order on the merits after judge realized party had not finished presenting all the evidence on the issues).

CONCLUSION

In determining the legal sufficiency of a motion for disqualification, the test is "whether 'the facts alleged (which must be taken as true) would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial. Based on this well-known standard, Petitioner has set forth three (3) separate and distinct legally sufficient grounds for disqualification, all of which on their own would require disqualification. Taken in context of the case and viewed together in the mind of the Petitioners, the combination of all three (3) reasons clearly would prompt a reasonably prudent person to fear that he could not get a fair trial. For those compelling reasons, this Court must issue the writ of prohibition and enter an order remanding the case to the circuit court for reassignment to another judge.

WHEREFORE, Petitioner respectfully requests this Court GRANT this Petition and issue writ of prohibition disqualifying the trial court judge and an order remanding the case to the circuit court for reassignment to another judge and provide any other relief this Court deems just and proper.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-mail this 22nd day of June 2017 on:

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CERTIFICATE OF COMPLIANCE - TYPE SIZE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), this Brief has been prepared using Times New Roman 14 point font.

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