IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 3D-17-1421

Circuit Court Case No. 2015-15825 CA 43 CBL

LAW OFFICES OF HERSSEIN AND HERSSEIN, P.A., d/b/a HERSSEIN LAW GROUP, a Florida corporation and REUVEN HERSSEIN,

Petitioners,

vs.

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Reciprocal Interinsurance Exchange,

Respondent,

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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I. INTRODUCTION

Respondent/Counter-Plaintiff, UNITED SERVICES AUTOMOBILE ASSOCIATION (hereinafter "**USAA**" or "**Respondent**"), through undersigned counsel and pursuant to this Court's June 29, 2017 Order, hereby responds to the Petition for Writ of Prohibition (the "**Petition**") filed by the Petitioners/Counter-Defendants, LAW OFFICES OF HERSSEIN AND HERSSEIN, P.A., d/b/a HERSSEIN LAW GROUP ("**HLG**"), and REUVEN HERSSEIN ("**Herssein**") (collectively, "**Petitioners**"). In their Petition and June 8, 2017 Motion for Judicial Disqualification (the "**Motion**") (A.001),[1] Petitioners seek to disqualify the Honorable Beatrice Butchko (the "**Trial Judge**") because (i) the attorney for one of USAA's current employees, a former (now retired) judge on the Miami-Dade County circuit court bench, is allegedly a Facebook "friend" of the Trial Judge, (ii) the Trial Judge stated that Petitioners needed a good faith basis to bring individual claims against USAA employees and others and the Trial Judge allegedly prejudged any attempt to add parties, and (iii) Petitioners perceived a remark made about Herssein (the same remark was also directed at one of USAA's counsel) as demonstrating some animus against Herssein.

[1] The designation (A.__) will be used to refer to the Appendix filed with the Petition. The designation (SA.__) will be used to refer to the Supplemental Appendix filed herewith.

Florida law is unsettled as to whether a non-party's counsel's status as a Facebook "friend" of the trial judge is, in and of itself, a basis for disqualification, but USAA submits that Petitioners' claims of prejudgment and animus are unsupported.

II. STATEMENT OF RELEVANT FACTS

This is this case's second visit to this Court. As the Court is aware, the case began on July 13, 2015 as a lawsuit between a Florida law firm and its former client after the law firm's engagement was terminated. (Pet. at 8). The law firm, HLG, alleged among other purported claims, that it was owed enhanced contingency fees under a written legal services engagement agreement. (Pet. at 8). Herssein is an attorney and vice-president of HLG, and he has been co-counsel for HLG since October 2015. (A.019-20).

In late 2015, HLG filed a motion claiming impropriety by a USAA manager, Catina Tomei ("**Tomei**"), alleging that when Herssein called retired USAA litigation manager, Debra Carlisle ("**Carlisle**"), to speak with her after having caused her to be served with a subpoena for a later-scheduled deposition, Carlisle told him that "she spoke with 'Catina Tomei' of USAA and that she could not speak to [Herssein]." ("**Motion for Evidentiary Hearing**"). (SA.1-14). HLG also accused USAA's counsel, Shutts & Bowen LLP ("**Shutts**"), of improper client solicitation of Carlisle. *Id.* Later, HLG escalated its contention to assert Tomei

committed the criminal act of witness tampering. (SA.15-19). All claims of impropriety were strongly disputed, but to avoid the distraction of the claims asserted against Shutts, USAA assisted Tomei and Carlisle in retaining separate counsel. Ramon Abadin was retained to represent Carlisle, and Israel "Izzy" Reyes, a former Circuit Court Judge for the Eleventh Judicial Circuit in and for Miami-Dade County, Florida who served on the bench from August 2003 to May 2011 ("**Ret. Judge Reyes**"), was engaged to represent Tomei. On October 10, 2016, Ret. Judge Reyes entered an appearance on behalf of Tomei. (SA.20-21). At that time, the case was pending in the Circuit Civil Division before the Honorable Antonio Marin.

Over two months later, by Order dated December 20, 2016 by Administrative Judge Jennifer Bailey, the case was transferred to the newly expanded Complex Business Litigation Division, effective January 3, 2017, and assigned to Judge Butchko. (SA.22-23). The Trial Judge thereafter reviewed HLG's Motion for Evidentiary Hearing and concluded that the allegations were insufficient to warrant an evidentiary hearing on the alleged witness tampering and client solicitation. (SA.24).

Petitioners contend that from some unstated date onward, Ret. Judge Reyes was listed by Judge Butchko as a "friend" on her Facebook page.

Partly based on events which took place at a June 2 Hearing and partly based on their purported discovery of the Trial Judge and Ret. Judge Reyes' status as Facebook "friends," Petitioners filed the Motion on June 8, 2017. (A.001-064). On June 9, 2017, the Trial Judge entered an Order Denying Plaintiff's Motion for Disqualification of Judge (the "**Order**"). (A.065). On June 22, 2017, Petitioners filed the Petition requesting disqualification of the Trial Judge and remand for reassignment to another judge.

Specifically, as to the June 2 Hearing, the Trial Judge made certain statements which, according to Petitioners, establish some bias or animus against Herssein and prejudgment of any attempt by HLG to add certain parties and claims. First, with regard to bias/personal animus, Petitioners suggest the Trial Judge singled out Herssein with a comment about his "special personality." In fact, in the midst of a contentious hearing, the Trial Judge noted that Herssein and co-counsel for USAA, David Kessler ("**Mr. Kessler**"), both had "a special personality":

> THE COURT: No. See, what happens is this. Personalities and people come in all shapes and sizes. **You happen to have a special personality, and so does Kessler**.

(A. 209-10 at 144:25-145:4) (emphasis supplied). And, at the June 2 Hearing, Mr. Herssein seemed to agree with that assessment:

> MR. HERSSEIN: . . . So number one, right, **everybody says I have a personality**, but he lied to you because he just said --
>
> THE COURT: **You do have a personality**.
>
> MR. HERSSEIN: He just said that --
>
> THE COURT: **Are you claiming you have no personality**?
>
> MR. HERSSEIN: **Oh, no, I have a strong personality**, Judge. But this is why I'm frustrated. They are sitting here saying that I produced something that they can't search and that's a lie. That's a fraud on the Court.[2]

(A.250 at 185:2-18) (emphasis supplied).

Second, with regard to purported prejudgment, at the June 2, 2017 hearing, following the Court's rejection of their attempts at dismissal and summary judgment of the malpractice counterclaims (A.071-072 at 6:20-7:20), Petitioners stated that because the Court had entered orders rejecting their attempts to dismiss Herssein as an individual party to at least one of the counterclaims, they were going to add as parties "everybody down the list" (A.037-038 at 10:22-11:3), and stated "[s]o I'm good. They are all coming in. If I'm personally in this now, they are." (A.039 at 12:13-14). A review of the actual colloquy establishes that the

[2] Additionally, in both the Petition and the Motion, without citing any record support, Petitioners accuse the Trial Judge of "making statements on the record, such as 'you're crazy.'" (A.006 at ¶ 21; Pet. at 7, 36).

Trial Judge did not prejudge anything. In pertinent part, the transcript shows the following:

> THE COURT: So of course, you know Florida favors the liberal amendments of pleadings. And the one issue that we always need to focus on as a Court when faced with a motion to amend is prejudice to the other side.
>
> And so at this juncture, we are still sort of at the starting gate, you know. At some point, I do have the authority to close the pleadings. So I could close the pleadings now, but that would prejudice you as well, because I think you want to add counts.
>
> MR. UDELL [HLG's Co-Counsel]: And we've got a lot more people coming in **based on you keeping my client in on one of the counts personally** -- two of the counts. But the first one, without a doubt, is problematic.
>
> **So we are going to bring in every one of the executives involved in this personally. So it's going to be a lot more people and a lot more lawyers.**
>
> THE COURT: Right.
>
> MR. UDELL: So for purposes of letting them amend, that's fine. **As long as we have the same leeway, that's fine.**
>
> THE COURT: Yes. 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.
>
> MR. UDELL: Well, they allege my client personally intermitted a tort, malpractice, which is outside the statute of limitations, and the Court disagreed, which is

fine, even though it's a compulsory counterclaim. We say it's not, but you think it is, even though he's not a party to the original case. You believe that, that's fine. We believe their people committed torts in the scope of their employment as agents of USAA, so we are --

THE COURT: Which is the only way that you could sue them individually.

MR. UDELL: Correct.

THE COURT: **But what I'm saying to you is that you better have a good faith basis at this juncture to do that.**

MR. UDELL: I have a good faith basis. I have testimony from my client, and that's all they have, Judge, so that's all I need. **So they are all coming in. They are all going to get their own lawyers. We are going to have 50 lawyers in here.**

*** * ***

MR. UDELL: So for purposes of [USAA's counsel's] ore tenus motion [to add a negligent misrepresentation counterclaim], it's granted. He can amend, obviously. We are going to be amending.

THE COURT: Well, I would like to put some finality and a timetable on these things.

MR. UDELL: I don't think you can, Judge, because they have 15 days from yesterday to file their amended count, okay. Then I will have, I guess, 10 days plus five after that. That's 30 days.

Then I can bring in whoever I'm going to bring in after that. The pleadings are still going to be open.

THE COURT: But there is a point where I can close the pleadings.

MR. UDELL: I think I get a right to plead, but I haven't even answered the counterclaim yet, and **then I could bring in my cross-claim or counterclaim and bring in not only these corporate executives, but also Shutts & Bowen, who gave USAA advice, Wadred Hewett [sic], who gave USAA advice, each one of their lawyers who gave USAA advice. They are all coming in.**

So it's going to be a big party. But they want leave to amend, give it to them, Judge.

THE COURT: Okay. So draft up an order for me allowing you -- granting your ore tenus motion for leave to amend to file -- to add a count of negligent misrepresentation.

MR. GARCIA-LINARES: So for the 9th, Your Honor --

THE COURT: I'm looking at the notice and I'm also thinking about his – nothing is lineal here. Everything is like a tree that branches out. So I was looking at the notice for the 9th, but now I'm thinking about what Mr. Udell just said, in terms of giving him just leave to amend at will. I don't feel comfortable with doing that.

MR. UDELL: Judge, I haven't answered on behalf of Mr. Herssein yet.

THE COURT: Right. So why can't I just give them leave to amend and then address your issue?

MR. GARCIA-LINARES: You are going to be bringing as a third party complaint or I guess as a cross --

THE COURT: I would rather you file a motion.

MR. GARCIA-LINARES: Right.

MR. UDELL: I don't think I have to file a motion, Judge.

THE COURT: To do what?

MR. UDELL: You said file a cross-claim or a counterclaim.

THE COURT: That's true.

MR. UDELL: I haven't answered yet.

THE COURT: That's true.

MR. UDELL: **Once Mr. Herssein answers, Mr. Herssein can bring in whoever he wants**, via a cross-claim suing USAA --

THE COURT: That's true.

MR. UDELL: -- **via a counterclaim bringing in a third party, Shutts & Bowen, everybody down the list, every executive.**

MR. HERSSEIN: **They are all coming in. Brad Wallen. All of them are coming in personally.**

THE COURT: **You have to be very careful with that**.

MR. GARCIA-LINARES: And they want to try the case in December.

THE COURT: Well, obviously that's not going to happen. **I don't know what evidence you have, but if anybody on the other side files a 57.105 or something on these things, it puts you in a bad position**.

MR. HERSSEIN: I would say an e-mail from Brad Wallen to USAA in April of 2015, two and a half months

> before they fired me, or three months before they fired me, and a month and a half before they sent me the May 7th contract that pulled the 60-day notice, sending out an e-mail saying, going further, do not assign any cases to the Herssein Law Group in any of their offices, okay, I think I have fraud.
>
> The Court -- we can all disagree, but I think I've got fraud in the inducement. When an executive at USAA sends out an e-mail a month and a half before they sent me this new contract, that's supposed to be for five years, saying, going further, do not assign any cases to the Herssein Law Group in any of their offices, and Alan Bunge, who signed that contract and is an executive director, was copied on that e-mail, okay, I think I have fraud.
>
> **So I'm good. They are all coming in. If I'm personally in this now, they are.** Because let's remember that a law firm sued an insurance company for monies owed based on a contract that they signed. That's the genesis of this lawsuit. Two years later, they counterclaimed and sued me personally.

(A.292-300 at 227:11-235:9) (emphasis supplied). In section IV(A)(II) of the Petition and section II of the Motion, Petitioners erroneously claim that these comments by the Trial Judge regarding the necessity of a good faith basis to name individual USAA employees as defendants qualify as legal advice to USAA and its team of lawyers and purported prejudgment of the case. (A.011-015; Pet. at 25-34).

III. ARGUMENT

A. Legal Standard

The writ of prohibition is an extraordinary remedy by which a court may prevent a lower court from acting outside of its jurisdiction. *Mandico v. Taos*

Constr., Inc., 605 So. 2d 850, 853 (Fla. 1992). Prohibition is the appropriate method for seeking relief after the denial of a motion to disqualify a trial judge because of bias or other reasons. *Castro v. Luce*, 650 So. 2d 1067 (Fla. 2d DCA 1995). Rule 2.330(d)(1) provides "[a] motion to disqualify shall show ... that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge ...." A judge considering a motion to disqualify is limited to "determining the legal sufficiency of the motion itself and may not pass on the truth of the facts alleged." *Rodriguez v. State*, 919 So. 2d 1252, 1274 (Fla. 2005); Fla. R. Jud. Admin. 2.330(f).

The standard for viewing the legal sufficiency of a motion to disqualify is whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair trial at the hands of that judge. *See Gore v. State*, 964 So. 2d 1257 (Fla. 2007). *See also* § 38.10, Fla. Stat. (2013); Fla. R. Jud. Admin. 2.330(d)(1). "A motion to disqualify will be dismissed as legally insufficient if it fails to establish a well-grounded fear on the part of the movant that he will not receive a fair hearing." *Griffin v. State*, 866 So. 2d 1, 11 (Fla. 2003). Moreover, "mere subjective fear of bias will not be legally sufficient, rather, the fear must be objectively reasonable." *Arbelaez v. State*, 898 So. 2d 25, 41 (Fla. 2005) (quoting *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986)).

This Court's standard of review of a trial judge's determination on a motion to disqualify is de novo. *Chamberlain v. State*, 881 So. 2d 1087, 1097 (Fla. 2004), cert. denied, 544 U.S. 930 (2005). Whether the motion is legally sufficient is a question of law. *Barnhill v. State*, 834 So. 2d 836, 843 (Fla. 2002).

C. <u>The Sufficiency of the Motion</u>

The term "legal sufficiency" encompasses more than mere technical compliance with the rule and the statute. The standard for viewing the legal sufficiency of a motion to disqualify is whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair trial at the hands of that judge. *See* Fla. R. Jud. Admin. 2.330(d)(1). Further, this fear of judicial bias must be objectively reasonable. *See State v. Shaw*, 643 So. 2d 1163, 1164 (Fla. 4th DCA 1994).

The subjective fear of a party seeking the disqualification of a judge is not sufficient. *See Kowalski v. Boyles*, 557 So. 2d 885 (Fla. 5th DCA 1990). Rather, the facts and reasons given for the disqualification of a judge must tend to show "the judge's undue bias, prejudice, or sympathy." *Jackson v. State*, 599 So. 2d 103, 107 (Fla. 1992); *see also Rivera v. State*, 717 So. 2d 477, 480-81 (Fla. 1998). Where the allegation of judicial bias is based on general and speculative assertions about the

trial judge's attitudes, disqualification is inappropriate. *McCrae v. State*, 510 So. 2d 874, 880 (Fla. 1987).

1. Facebook "Friendship" Does Not Warrant Disqualification Under the Circumstances Presented in this Case

Petitioners assert that they learned through Facebook that the Trial Judge and Ret. Judge Reyes are listed as "friends," and they claim that alone warrants disqualification. In making this argument, Petitioners rely heavily on *Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2013)—a case which relies primarily on a nonbinding[3] ethics opinion.

In *Domville*, the Fourth District considered "a criminal defendant's effort to disqualify a judge whom the defendant alleges is a Facebook friend **of the prosecutor assigned to his case**." *Id*. at 185 (emphasis added). The court held that "[b]ecause [the criminal defendant] has alleged facts that would create in a

[3] *See The Fla. Bar v. Hines*, 39 So. 3d 1196, 1201 (Fla. 2010) ("ethics opinions of The Florida Bar are not binding on this Court"); *see also Stewart v. Bee-Dee Neon & Signs, Inc.*, 751 So. 2d 196 (Fla. 1st DCA 2000):

> While not binding upon the courts, these ethics opinions set out standards that we find balance the public's interest in the integrity of the judicial process, the parties' interest in the integrity of the particular proceeding, the client's right to chosen counsel and the financial burden on the client of replacing disqualified counsel, the nonlawyer employee's interest in open employment opportunities, the lawyers' interests in providing efficient and effective legal representation, and the court's concern that tactical abuse may underlie the motion for disqualification.

Id. at 204.

reasonably prudent person a well-founded fear of not receiving a fair and impartial trial, we quash the order denying disqualification of the trial judge." *Id.* at 186. In other words, Facebook "friendship" does not serve as an absolute basis for disqualification of a judge. Rather, a court must still look to whether the fear of not receiving a fair and impartial trial is well-founded in a reasonably prudent person. *Id.*

Petitioners are not like the non-lawyer, criminal defendant in *Domville* and Ret. Judge Reyes is not a prosecutor—he does not even represent a party. Further, Petitioners are sophisticated litigators with offices in Miami who have practiced in Miami-Dade County for many years. It is highly questionable whether any reasonably prudent person in Petitioners' situation would have a well-founded fear of not receiving a fair and impartial trial simply because the Trial Judge and Ret. Judge Reyes are Facebook "friends."

Moreover, any notion that the *Domville* decision sets any absolute standard of disqualification has been called into doubt by the Fifth District in *Chace v. Loisel*, 170 So. 3d 802 (Fla. 5th DCA 2014), wherein the court observed:

> We have serious reservations about the court's rationale in *Domville.* The word "friend" on Facebook is a term of art. A number of words or phrases could more aptly describe the concept, including acquaintance and, sometimes, virtual stranger. A Facebook friendship does not necessarily signify the existence of a close relationship. Other than the public nature of the internet, there is no difference between a Facebook "friend" and any other friendship a judge might have.

> *Domville*'s logic would require disqualification in cases involving an acquaintance of a judge. Particularly in smaller counties, where everyone in the legal community knows each other, this requirement is unworkable and unnecessary. Requiring disqualification in such cases does not reflect the true nature of a Facebook friendship and casts a large net in an effort to catch a minnow.

Id. at 803–04. The facts in *Chace* are distinguishable here too. In *Chace*, the trial court judge, during the pendency of the case and prior to entry of final judgment, sent a Facebook "friend request" to a non-lawyer party in the case—who feared that not accepting the request would result in an unfair trial. Like the court in *Domville*, the Fifth District used the reasonably-prudent-person test and found that "[b]ecause Petitioner has alleged facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial, we quash the order denying the motion to disqualify." *Chace*, 170 So. 3d at 804. Here, the Court should find that no reasonably prudent Miami lawyer has a well-founded fear of not receiving a fair and impartial trial simply because two judges who sat on the bench in Miami-Dade County are "friends" on Facebook. Therefore, the Court should deny the Petition.

2. <u>The Trial Judge Did Not Prejudge or Give Legal Advice to USAA</u>

Next, Petitioners argue that the Trial Judge prejudged the case because she purportedly gave "tips" or "legal advice" to USAA's team of lawyers at the June 2 Hearing with regard to section 57.105, Florida Statutes. To make this argument, they cherry-pick, out of context, a few comments made by the Trial Judge.

However, the Supreme Court of Florida has held that, for purposes of disqualification, in evaluating statements made by a trial judge, a party cannot focus "on one word out of context," but instead must review the comments as a whole. *Gregory v. State*, 118 So. 3d 770, 779 (Fla. 2013).

When the Trial Judge's comments are read in context, the record shows that she specifically stated that she did not know whether Petitioners currently had the evidence or a good faith basis to assert the claims which were threatened by Petitioners at the June 2 Hearing. Here, no facts exist which demonstrate an objectively reasonable basis for concluding that the Trial Judge has prejudged any issues, is personally biased or will in the future fail to be impartial.

In fact, contrary to Petitioners' assertion of prejudgment or legal advice, when Petitioners discussed their plan to bring in additional defendants at the June 2 hearing, the Trial Judge stated: "Sue anybody you want. . . . That's not my strategy decision. I don't participate in who is going to sue. **I can't rule on legal motions thinking in advance**. . . . I can't possibly think like that. That's not my role." (A.115-16 at 50:21-51:14) (emphasis added).

3. The Comments Made By the Trial Judge Do Not Warrant Disqualification Under Florida Law

Finally, Petitioners seek disqualification because the Trial Judge said that Mr. Herssein had a "special personality," a comment she equally directed to one of

USAA's counsel. (A.210 at 145:2-4). Under Florida law, "[g]enerally, mere characterizations and gratuitous comments, while offensive to the litigants, do not in themselves satisfy the threshold requirement of a well-founded fear of bias or prejudice." *Wargo v. Wargo*, 669 So. 2d 1123, 1124 (Fla. 4th DCA 1996); *see also Pilkington* v. *Pilkington*, 182 So. 3d 776, 779 (Fla. 5th DCA 2015) ("Comments from the bench—even unflattering remarks—which reflect observations or mental impressions are not legally sufficient to require disqualification. Disqualification based upon comments by a judge is required only when they indicate the judge has prejudged the case or is biased.") (citations omitted); *Nassetta v. Kaplan*, 557 So. 2d 919, 921 (Fla. 4th DCA 1990) ("A judge's remarks that he is not impressed with a lawyer's, or his client's behavior are not, without more, grounds for recusal"). Moreover, Florida appellate courts have refused disqualification for far worse comments. *See, e.g.*, *Oates v. State*, 619 So. 2d 23, 25 (Fla. 4th DCA 1993) (affirming denial of motion to disqualify where trial court said defendant was "being an obstinate jerk").

In *Ragsdale v. State*, 720 So. 2d 203 (Fla. 1998), the Supreme Court of Florida held that it was unnecessary for a trial judge to recuse himself after he stated, in denying a motion to vacate judgment and sentence, that certain claims were "bogus" and "a sham," and "nothing but abject whining." *Id.* at 207. The Court found that where comments were read in context, it was clear they were

simply statements that those particular claims were not only without merit but frivolous as well. As this Court explained in *Bert v. Bermudez*, 95 So. 3d 274 (Fla. 3d DCA 2012):

> A trial judge has the right, and, in fact the obligation to control his or her courtroom and the proceedings, including taking corrective measures, when a party, witness, observer, or, as in this case, a lawyer becomes combative, disrespectful, or disruptive. To require disqualification of a judge whenever a party, witness, or lawyer's behavior invokes an invited response by the judge, would encourage the behavior exhibited at this hearing as a means of "judge-shopping."

Id. at 280. Here, when read in context, the Trial Judge's comments do not establish any prejudgment, bias, or animus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via electronic mail this **6th** day of July, 2017, upon:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that undersigned counsel has complied with the font requirement of Rule 9.210 (a)(2), Fla. R. App. P.

/s/ Patrick G. Brugger
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