IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
SECOND DISTRICT

CASE NO.: 2D18-663

JULIE A. WELCH

Petitioner,

v.

MICHAEL W. WELCH

Respondent.

ON PETITION FOR A WRIT OF PROHIBITION
TO THE SECOND DISTRICT COURT OF APPEAL
FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

MICHAEL W. WELCH'S RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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SUMMARY OF THE ARGUMENT

The Wife requests this Court to issue an extraordinary writ to prohibit the trial judge from exercising further responsibility over these divorce proceedings. The question for this Court is whether the record reflects that the Honorable Reinaldo Ojeda is biased in favor of the Husband such that Judge Ojeda cannot rule impartially. The answer is an easy no.

The Wife does not allege a prior working relationship between the Husband and Judge Ojeda. The Wife does not even allege Husband has any sort of relationship with Judge Ojeda. The Wife's fear is based on the fact Judge Ojeda and the Husband work in the same building. And the primary factual basis identified by the Wife to establish that her fear of impartiality is reasonable is Judge Ojeda's decision not to sanction the Husband when his attorney—who had a legitimate conflict in a neighboring courtroom—could not make a status conference.

These circumstances do not come close to meeting the legal standard necessary for this Court to grant Wife's Petition. That is why the Wife's Petition does not cite a decision from any Florida court granting a petition for writ of prohibition and disqualifying a trial judge under even remotely similar circumstances. The Petition should be denied.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE TRIAL COURT CORRECTLY DENIED THE WIFE'S MOTION FOR DISQUALIFICATION AS LEGALLY INSUFFICIENT.

Motions to disqualify are governed substantively by section 38.10, Florida Statutes, and procedurally by Florida Rule of Judicial Administration 2.330. The "legal sufficiency of the motion turns on whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." *Pilkington v. Pilkington*, 182 So. 3d 776, 778 (Fla. 5th DCA 2015) (citing *MacKenzie v. Super Kids Bargain Store, Inc*., 565 So.2d 1332, 1335 (Fla. 1990) and *Livingston v. State*, 441 So.2d 1083, 1087 (Fla. 1983)).

The Wife's Petition does not cite to a single case holding that a disqualification motion was legally sufficient under similar factual circumstances. That is not surprising. The following are examples of allegations that Florida appellate courts have held *were* sufficient to place a reasonably prudent person in fear of not receiving a fair and impartial trial:

- **Judge states on the record he believes a party has committed perjury:** Criminal defendant had a reasonable basis of fear of impartiality at sentencing when judge accused defendant of

perjury after trial on the record and prior to sentencing. *Louissant v. State*, 125 So. 3d 256, 258-59 (Fla. 4th DCA 2015).

- **Judge compares party's CEO to a Nazi war criminal:** *Philip Morris USA, Inc. v. Brown*, 96 So. 3d 468 (Fla. 1st DCA 2012).
- **Judge states belief in prior, unrelated proceeding that party's attorney is not credible:** Judge referred party's attorney to the Florida Bar in a prior case after finding: "Petitioner's attorney was 'not credible' (as a person, as opposed to testimonial credibility), had made 'false and misleading written statements,' and had a 'willful and conscious intent' to overcharge for legal services that were 'excessive and arbitrary.' The [judge] further described Petitioner's attorney's acts as 'unconscionable and abusive' and expressly stated that he believed that the attorney had conducted himself similarly in other cases, though no such case was before the [judge]." *Kline v. JRD Mgmt. Corp.*, 165 So. 3d 812, 814–15 (Fla. 1st DCA 2015); *see also Lowman v. Racetrac Petroleum, Inc.*, 220 So. 3d 1282, 1283 (Fla. 1st DCA 2017).
- **Judge expresses displeasure with case and prognosticates on the record that a party will lose:** *Miami Dade College v.*

Turnberry Investments, Inc., 979 So. 2d 1211 (Fla. 3d DCA 2008).

In this case, the trial court did not compare the Wife to a Nazi war criminal. Nor did the trial court find that the Wife or her attorney was not credible. The trial judge also did not suggest he was displeased with the case or offer his belief that the Wife ultimately would not prevail. Rather, the Wife argues bias based on allegations concerning the way Judge Ojeda exercised the ample discretion afforded to him to run his courtroom efficiently and to interpret his own case management order.

The Wife also attempts to buttress her argument that the allegations in her disqualification motion were legally sufficient because the "the trial court questioned a prior ruling which was based on the Wife's disability without hearing the evidence." (Pet. at p. 12). According to the Wife's affidavit, the trial court allegedly made this comment on March 9, 2017, almost one year before she moved to recuse Judge Ojeda. (A.6-7). The timing of this plaint renders it insufficient as a matter of law to support recusal. *See* Fl. R. Jud. Admin. 2.330(e) ("A motion to disqualify shall be filed within a reasonable time not to exceed 10 days after discovery of the

facts constituting the grounds for the motion and shall be promptly presented to the court for an immediate ruling.").

Judge Ojeda did not err in ruling the disqualification motion legally insufficient, and it is an understatement to say that the Wife has shown no basis under Florida law for this Court to issue the extraordinary writ of prohibition based on the allegations contained in Wife's Motion.

II. THE TRIAL COURT DID NOT ERR BY REFERENCING FACTS RELATED TO WIFE'S MOTION FOR DISQUALIFICATION DURING A HEARING THAT TOOK PLACE AFTER HE DENIED THE MOTION AS LEGALLY INSUFFICIENT.

The trial court denied Wife's Motion for Disqualification in a January 24, 2018 written order. Almost two weeks later, on February 6, 2018, the parties attended a case management conference. At the outset of the hearing, the trial court explained "how we got here and what we're here to do today." (Feb. 6, 2018 Hearing Transcript at p. 3). In so doing, the trial court explained why, for various reasons, the prior case management conference had been continued and reconvened. And because the allegations in support of the Wife's Motion for Disqualification arose from the prior, continued case management conference, Judge Ojeda's explanation of the factual background that necessitated the reconvened

hearing naturally encompassed discussion of facts related to the Wife's recusal effort.

Once again, the Wife is unable in her Petition to cite to a single case from a Florida appellate court that suggests anything Judge Ojeda did was improper. Wife cites a bevy of cases that establish the well-settled principle that a trial court is prohibited from refuting the factual allegations supporting a motion to recuse *when the trial court denies the motion to recuse*. In this case, Judge Ojeda denied Wife's disqualification motion as legally insufficient, and two weeks later, discussed—by way of background—some of the facts germane to Wife's motion during a case management conference.

Even if Judge Ojeda's comments at the February 6 case management conference had been articulated as a basis for denying Wife's motion in the January 18 Order, Wife would still not be entitled to recusal. *See, e.g.*, *Pilkington*, 182 So. 3d at 779 ("While the judge cannot pass on the truth of the facts alleged to refute the charge of partiality, he may explain the status of the record") (citing *Shuler v. Green Mountain Ventures, Inc.*, 791 So.2d 1213, 1215 (Fla. 5th DCA 2001) (holding that fear of judicial bias giving rise to disqualification motion must be objectively reasonable))).

Judge Ojeda did not refute the accuracy of any of the facts alleged in the Wife's Motion during the February 6 hearing. He did not utter a word that would suggest he is biased in the Husband's favor. Judge Ojeda did not say anything during the reconvened case management conference that fairly calls into question his ability to adjudicate further proceedings in this case impartially. The Wife is simply using the unique procedural posture that led to Judge Ojeda's comments to suggest he ran afoul of the rule prohibiting trial courts from contesting the allegations in a recusal motion as a basis for denying the motion. That is not what happened here, and given the Wife's inability to direct this Court's attention to any authority that prohibits what actually *did* happen, her Petition should be denied.

CONCLUSION

The trial court properly denied the Wife's disqualification motion as legally insufficient. The Wife's supporting allegations, even taken as true, come nowhere near the circumstances that have led Florida courts to determine recusal should have been ordered. And nothing that happened after the trial court entered its order denying the disqualification motion establishes a basis to conclude otherwise. Consequently, this Court should deny the Wife's Petition for Writ of Prohibition.

DATED this 25th day of March, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th of March, 2018, the foregoing was filed through the eDCA system and a true and correct copy of the foregoing has been furnished via e-mail to: Jean Henne, Esquire [henneappeals@gmail.com].

/s/ Michael M. Brownlee
MICHAEL M. BROWNLEE, B.C.S.