

SUPREME COURT OF THE STATE OF FLORIDA

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GENE D. BROWN; LEISURE PROPERTIES,
LTD.; and LEISURE DEVELOPMENT, INC.,

Petitioners,

v.

ST. GEORGE ISLAND, LTD., a Florida
limited partnership, et al.,

Respondents.

Supreme Court
Case No. 74,571

"ST. GEORGE I"

----- /
GENE D. BROWN; LEISURE PROPERTIES,
LTD.; and LEISURE DEVELOPMENT, INC.,

Petitioners,

v.

ST. GEORGE ISLAND, LTD., a Florida
limited partnership, et al.,

Respondents.
----- / -----

Supreme Court
Case No. 74,598

"ST. GEORGE II"

REPLY BRIEF OF PETITIONERS

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ARGUMENT I

WHETHER THE SECOND PART OF SECTION 38.10, FLORIDA STATUTES, SHOULD BE CONSTRUED TO ALLOW THE UNLIMITED RECUSAL OF TRIAL JUDGES AT THE SOLE DISCRETION OF A PARTY LITIGANT ?

Obviously, there is a dispute between the parties regarding whether there is a distinction between (1) a suggestion of disqualification and (2) an application or motion for disqualification. Petitioners assert that there is no distinction between the two and cite as supporting authority Ball v. Yates, 29 So.2d 729 (Fla.1947); Peebles v. Smith, 291 So.2d 102 (Fla.1st DCA 1974); Shotkin v. Rowe, 100 So.2d 429 (Fla.3rd DCA 1958).

In its answer brief, ST. GEORGE does not address petitioners' relied upon cases, except to point out that the use of the terms "suggestion" and "application" interchangeably in those cases was done in dictum. Interestingly, it appears that the legislature has also used the terms interchangeably.

A review of Section 38.10 discloses that it contains no subsection. While the parties to this case, for clarity, have referred to "the first part of Section 38.10" or "the second part of Section 38.10," the statute itself is not divided into parts. Logic as well as rules of statutory construction would therefore dictate that the section must be read and applied in its totality. State v. Gale Distributors, Inc., 349 So.2d 150 (Fla.1977). ST. GEORGE argues for just the opposite. It suggests that the second

part of 38.10 has no application to the first part. Such a construction would render the second portion of 38.10 a nullity because it would not apply to 38.02 since that section already has its own provisions which permit a limited judicial review of a "suggestion" of disqualification.

ST. GEORGE further argues that Judge Rudd was precluded from considering the interrelationship between all of the circuit cases pending between the parties. This naive approach provides the basis for ST. GEORGE's position that Judge Cooksey's order of recusal in 86-152 was not influenced by the various motions or suggestions filed by it in 84-254 or the allegations made in 86-47. The provisions of Section 38.10 undermine this argument because they do not require the motions or applications to be filed in the subject case, rather, Section 38.10 states:

However, when any party to any action has suggested the disqualification of a trial judge
... (emphasis supplied)

Amazingly, ST. GEORGE, in an effort to avoid the impact of its original and amended suggestion or application filed pursuant to 38.02 and 38.10 in 84-254, relies upon its own ineptness. It argues that since the amended motion was not verified, it was "insufficient" and, therefore, did not count as a prior suggestion, which was sufficient to invoke the second part of 38.10.

In an equally amazing argument, ST. GEORGE asserts that Judge Cooksey's order of recusal in 84-254 was pursuant to his own

motion in accordance with Section 38.05. While Judge Cooksey denied the truth of ST. GEORGE's allegations, "which seriously impugn the integrity of the Court", petitioners doubt if even respondent would argue that its multiple pleadings were not the motivating factor behind Judge Cooksey's decision to remove himself from the case.

ST. GEORGE places much emphasis on the fact that Petitioners' recusal of Judge Gary resulted in Judge Rudd being appointed to this case. It is ST. GEORGE's theory that that fact somehow expunges its record regarding its efforts to disqualify Judge Cooksey and all other judges in the Second Judicial Circuit. To reject this argument, this Court needs only to again consider that 38.10 states that when any party to any action has suggested the disqualification of a trial judge, the next judge may consider the actual grounds for the motion.

The clear language and intent of the statute is to limit a party to one unverifiable motion to replace a judge. To construe the statute as ST. GEORGE suggests would allow unlimited judge shopping based upon grounds which could not be questioned.

ARGUMENT II

THE SECOND PORTION OF SECTION 38.10 FLORIDA STATUTES (1987), CREATES SUBSTANTIVE RIGHTS IN LITIGANTS TO PROTECT THE INTEGRITY OF THE DISQUALIFICATION PROCESS, AND, AS SUCH, IS NOT AN ATTEMPT BY THE LEGISLATURE TO PROMULGATE RULES OF PROCEDURE.

Respondents' argument that Section 38.10, Florida Statutes (1987), violates the separation of powers doctrine in that it is a legislative attempt to promulgate rules of civil procedure and therefore invades the province of the judiciary, misconstrues this Court's decision in Livingston v. State, 441 So.2d 1083 (Fla. 1983). This Court in Livingston, 441 So.2d at 1087, held that a motion for disqualification of a trial judge would not be held invalid simply because it was filed pursuant to Section 38.10, rather than under Florida Rule of Criminal Procedure 3.230, as the substance of the procedural requirements of Rule 3.230 was contained in the motion.

The First District in Sikes v. Seaboard Coast Line Railroad Co., 429 So.2d 1216 (Fla.1st DCA), rev. denied, 440 So.2d 353 (Fla.1983), held that Florida Rule of Criminal Procedure 1.432 and Section 38.10, Florida Statutes, were to be read in pari materia. Id., at 628. In Caleffe v. Vitale, 488 So.2d 627 (Fla. 4th DCA 1986), the court held that Florida Rule of Criminal Procedure 1.432 was to supplant the procedural requirements of Section 38.10 in a civil case, which the court stated was consistent with the committee notes to the rule which stated that the rule was "intended to unify the procedure for disqualification."

Whereas the portion of **38.10** requiring the filing of an affidavit to accompany a motion for disqualification has been deemed procedural and, as such, constitutionally invalid, ~~see In~~ Re Amendments to Rules of Civil Procedure, 458 So.2d 245 (Fla. 1984), the second portion of **38.10**, which requires a subsequent trial judge whom a party has moved to disqualify to go beyond the affidavits to determine whether a conflict exists, creates substantive rights in litigants to protect the integrity of the disqualification process. Although Livingston stated that Section **38.10** gives to litigants a substantive right to seek disqualification of a trial judge, but the actual process of disqualification is governed by the Rules of Procedure, the second portion of Section **38.10** represents a legislative intent that forum shopping be deterred and, therefore, goes further than impacting the mere procedure of disqualification. Certain portions of **38.10** may be deemed procedural, however, this portion is not. The fact that the second portion of **38.10** has been codified in the Rules of Criminal Procedure but not in the Rules of Civil Procedure does not determine whether the second portion of **38.10** is procedural or substantive; rather, this question turns on the nature of the right created, and in this instance **38.10** defines forum shopping as an evil that will not be tolerated by the legislature. This provision goes far beyond the "process" of protecting substantive rights, it defines the nature of the substantive right. See In Re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972) ("substantive law creates, defines, adopts and regulates rights, while procedural law prescribes the method of enforcing those rights").

ARGUMENT III

NOTWITHSTANDING THE ULTIMATE CONSTRUCTION
MADE BY THIS COURT REGARDING ISSUE I, DID
THE FIRST DISTRICT INTERPRET THE FACTS OF
ST. GEORGE I AND ST. GEORGE II IN ERROR
AND THUS IMPROPERLY GRANT THE WRIT ?

ST. GEORGE's answer brief does not address this issue. Rather, ST. GEORGE ignores the lower court record as discussed by these petitioners in their initial brief as "ARGUMENT II" and raises a new issue which focuses on ST. GEORGE's claim that its motions to disqualify Judge Rudd were legally sufficient. Petitioners respond to that issue under "ARGUMENT IV" of this reply brief.

ARGUMENT IV

THE MOTIONS OR SUGGESTIONS FOR DIS-
QUALIFICATION OF JUDGE RUDD FILED BY
ST. GEORGE IN 84-254 AND 86-152 WERE
LEGALLY INSUFFICIENT.

ST. GEORGE's entire argument on this issue is grounded upon the presumption that Judge Rudd's comment was made before he had received any testimony from Gene Brown. Based upon this assumed sequence of events, ST. GEORGE argues that the alleged comment is not upon evidence involved in the proceeding and therefore extrajudicial. ST. GEORGE's premise is not supported by the record, and therefore its efforts to disqualify Judge Rudd must fail.

The only direct evidence before this Court regarding the sequence of events occurring in the subject hearing before Judge Rudd is found in the following testimony from Gene Brown (Petitioners' Appendix 31 to Initial Brief, pages 42-48):

- Q. Mr. Brown, were you present at a hearing that took place, or the hearing that took place that has been referenced in the motions for disqualifications filed in this case?
- A. Yes, I was there . . .
- Q. In particular, I am talking about the hearing wherein deposition testimony has been given and filed in 84-254 by, I believe, Mr. Wallace and Mr. Nathan Bond, that's the hearing I'm talking about.
- A. Yes, I was there. I was there all morning. We had two or three hearings.
- Q. Okay. Were there two or three hearings in 84-254? Is that the case they were in, or were they in other pending matters?

A. I think they were in 254, but there are so many cases going on -- I know that we had one hearing about 9:00 and that hearing was over, at (sic) it adjourned at about 20 minutes to 10:00. And Judge Rudd asked Mr. Stocks and his attorneys, and me and my attorneys if we couldn't go ahead, in the interest of time, and get started with the second hearing, which was this hearing. And Mr. Stocks said, "No, that will be a different set of lawyers." And he got up and left about 20 minutes or a quarter of 10:00. And then about five minutes until 10:00, or so, or 11:00, whatever the time was, about 15 minutes later, Mr. Nathan Bond came in representing the Lewis Family Trust and presented a big gold sealed affidavit of Mr. Stocks, and said they need to present that affidavit because Mr. Stocks was in California. And we objected and made some kind of -- the fact that the flight service must have improved out there, because we didn't see how he could have gotten to California because he has just walked out of the court about 10 minutes ago. And we objected to the admissibility of that affidavit.

Q. And what happened --

A. Because there was no showing Mr. Stocks couldn't have stayed around, even though they represented that he was in California right then.

Q. And what happened to that affidavit once the objection was made?

A. It was handed to the Court; it was passed to Donnie Dye, who is my attorney; it was given to me; it was passed all around the hearing room while testimony was given. And no ruling was made initially on our objection, because we wanted to -- I think the Judge turned to Donnie Dye and said, "Do you have anything, Mr. Dye?" And Mr. Dye gave me the affidavit and asked me some questions about it.

Q. Okay. So you were placed under oath at that point in time?

A. Yes.

Q. And then you gave, after -- before being placed under oath, everyone, including the Court, had reviewed the affidavit submitted by Mr. Stocks?

A. Everybody in the room. It was a short affidavit, and everybody in the room, I think, looked at it and passed it around while I gave testimony concerning the affidavit. And then it was passed back to Nathan Bond, and he reviewed it and cross examined me with regard to it. And then after my testimony, in which I testified --

Q. Let me stop you right there. What was the issue that was before the Court that was addressed by the affidavit and addressed by your testimony? ...

MR. RUDE: Your Honor, I renew my objection as to relevancy and materiality, and I move to strike the prior testimony and questions of the witness.

THE COURT: OVERRULED.

THE WITNESS: The issue, the core issue, it really came down to a swearing contest, I guess you could say, between John Stocks and me. And the issue was whether they, that is Mr. Lewis's attorneys, whether they could carry the burden by parole evidence to overturn record title. And after my testimony and after all of the testimony, and that's all there was, we presented cases that showed that that burden is not just a greater weight of the evidence, but it has to be by clear preponderance, clear and convincing evidence and more than just a toss-up. In other words, the law is, and was, as we explained to the Court that day, that if it's a simple toss-up, you go with the record title, that just a simple conflict in the evidence is not enough to overturn recorded documents.

BY MR. JOHNSON:

Q. Was your testimony in direct conflict with Mr. Stocks' affidavit?

A. Well, the only way under the law, as we understood it, that that conveyance to the Lewis Family Trust would not be valid would be that if Mr. Stocks or Mr. Lewis could show that I had actual knowledge of the transfer.

Q. Did Mr. Stocks' affidavit state that you had actual knowledge?

A. Mr. Stocks' affidavit, as I recall, stated that he told me that -- of that transfer and that, therefore, I had personal knowledge of it.

Q. And what was your sworn response to his affidavit?

A. My sworn response was that that was not true, that he had not told me of that, and I had no actual knowledge of it.

Q. Okay. Was the Court at that point in time called upon to, as the trier of fact, to make a determination, or to make a ruling?

A. Well, toward the end of the hearing, Nathan Bond started making comments and suggestions -- I don't know if he actually made a formal motion, but making comments to the effect that he might need to get a continuance because Mr. Stocks wasn't there, and he did not know he really wasn't in California, and he might want to get a continuance. In other words, just buy some more time, and get him in there. And so it sort of became an issue as to whether we should continue the hearing, and we objected to that. And my recollection of what Judge Rudd said was that he did not feel that the Lewis Family Trust had carried their burden, because we had just finished reading the cases to him that said it had to be clear and convincing, and a greater weight, that just a toss-up in evidence wasn't sufficient. He said they had not carried the burden, and I think my interpretation of what he said about whether Mr. Stocks was there or not, I don't remember him saying ever that he would not believe Mr. Stocks. I do remember him saying something to the effect that he accepted my testimony, and that the Lewis Family Trust had not carried their burden, that the affidavit wasn't sufficient. And I think he went on to say that even if Mr. Stocks were there in person, and if he testified in person as to what was said in that affidavit, that that still would no (sic) be sufficient. I interpreted that to be a response to the suggestion for a continuance, that there really wouldn't be any reason to continue it, because we were both there, and we both said the opposite things that he would not necessarily have to believe one over the other, but that a simple conflict with my testimony would not be clear and convincing, sufficient under the case law, to carry the burden. He did not say he wouldn't believe Mr. Stocks. He said he accepted my testimony and believed me. And I think that was interpreted to mean that he couldn't believe both of us. The context of that, I don't see -- I mean, he had to make that ruling in order to make a decision. And the most important thing about this whole scenario is that that statement and that ruling was not made until the conclusion of the entire hearing as a necessary part of the ruling. It was not a situation -- I mean, there are some people that try to characterize, and Nathan Bond doesn't say that, if you notice, but I think Mr. Wallace, who is Gene Lewis' brother-in-law, in their accepting this deed, that we think was backdated, he did say that it was, or implied in his affidavit that it was objected to, and that Judge Rudd immediately rejected it, something to the effect that it was unbelievable. And that's about the way it happened. He did not make a comment like that until after -- he never made that comment, but what he said at the end was made after all the testimony as a necessary part of the ruling. And he certainly didn't look at the affidavit and toss it back, and say, "Well, I wouldn't believe that.["] He made it at the very conclusion

of the hearing as part of the ruling in response to that motion for continuance. And Mr. Dye was there if you want --

MR. JOHNSON: Nothing further.

In comparing the testimony of Jeffre Wallace with the above quote, this Court will see that Mr. Wallace does not address the sequence of events as they occurred at the hearing. Further, ST. GEORGE's statement on page 32 of its answer brief that "Mr. Bond clarified in his deposition that Judge Rudd's comment in No. 84-254 on Mr. Stocks' veracity occurred prior to hearing Mr. Brown's testimony in contradiction of Mr. Stocks' affidavit," is an overstatement. By reading pages 10 through 14 of Mr. Bond's deposition (Appendix to Brief of Respondent, pages 00106-00110), this Court will see that his recollection of the sequence of events is not clear. Further, Mr. Bond conceded that the subject affidavit was proffered, and that information about the conflicting factual positions was before the court at the conclusion of the hearing.

According to a fair reading of the record before this Court, the alleged statement made by Judge Rudd, even if made, constituted his remarks upon evidence involved in or upon the result of the subject judicial proceeding and is, therefore, not legally sufficient to require his disqualification. City of Palatka v. Frederick, 174 So.826 (Fla.1937); Wiley v. Wainwright, 793 F.2d 1190 (11th Cir.1986); Mobile v. Trask, 463 So.2d 389 (Fla.1st DCA 1985).

CONCLUSION

If the District Court's construction of Section 38.10 is allowed to stand, it will permit litigants to replace judges without restraint. A party's initial motion for disqualification, if legally sufficient, clearly cannot be questioned. Second and subsequent motions by that same party directed toward the replacement judge who has been assigned to act in lieu of the prior judge, will similarly not be subject to question. Under the District Court's Opinion, those subsequent motions will have to be accepted as valid, regardless of the availability of other evidence to the contrary. The second part of Section 38.10 was enacted to protect the integrity of the disqualification process and to preclude potential abuse. It must not be rendered a nullity.

CERTIFICATE OF SERVICE

I **CERTIFY** that copies of the foregoing REPLY BRIEF OF PETITIONERS were furnished to all parties on the attached service lists, by United States Mail, postage prepaid, on this 23rd day of October, 1989.



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