Considered as Brief in Case # 75,225

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs.

ST. GEORGE ISLAND, LTD.
a Florida limited partnership;
JOHN A. RUDD,
Circuit Judge, Retired
(Supreme Court Order No. 88R-174)
Second Judicial Circuit Court,
Franklin County, Florida;
FIRST AMERICAN BANK AND TRUST,
a Florida banking corporation; and
SUN BANK, N.A.,

Respondents.
_____/

CASE NO. 74,571
74,598

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REVIEW OF THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF RESPONDENT
ST. GEORGE ISLAND, LTD.

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STATEMENT OF THE CASE AND OF THE FACTS

This is a review, pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(v) and 9.120, of two decisions of the district court of appeal. Both decisions passed upon a question certified by the court of appeal to be of great public importance. [Appendix at 6, 9.] The question certified in both decisions involves the interpretation of section 38.10, Florida Statutes (1987), which provides for the disqualification of judges for prejudice. [Appendix at 6, 9.] The petitioners, Gene D. Brown; Leisure Properties, Ltd.; and Leisure Development, Inc. (collectively "Leisure"), have invoked the jurisdiction of the supreme court. The supreme court has accepted jurisdiction and has consolidated both cases for review. None of the other parties before the court of appeal, St. George Island, Ltd. ("St. George"), Retired Circuit Judge John A. Rudd ("Rudd"), First American Bank and Trust ("First American") and Sun Bank, N.A., have sought review.

The statement of the case and of the facts contained in Leisure's brief, the argument contained in Leisure's brief and the appendix which accompanies Leisure's brief, exclude much that is relevant to the supreme court's review, include much that is irrelevant, and greatly confuse and venture beyond the records of the two decisions under review. St. George, therefore, offers its own appendix and the following statement of the case and of the facts:

The Decisions Under Review

The two decisions under review are St. George Island, Ltd. v. Rudd, No. 89-727 (Fla. 1st DCA July 18, 1989) ["St. George I"], and St. George Island, Ltd. v. Rudd, No. 89-1397 (Fla. 1st DCA August 16, 1989) ["St. George II"]. [Appendix at 1-9.] The proceedings in St. George I and St. George II were instigated when St. George filed petitions from two separate civil trial court actions. By each petition, St. George sought a writ of prohibition disqualifying Judge Rudd. [Appendix at 2, 7.] In each case, the writ was issued. [Appendix at 6, 9.]

Although the court of appeal's decision in St. George I preceded the court of appeal's decision in St. George II, many of the relevant facts of the underlying trial court action in St. George II predate the relevant facts of the underlying trial court action in St. George I. The trial court action underlying St. George II is Leisure Properties, Ltd. v. St. George Island, Ltd., No. 84-254 (Fla. 2d Cir. Ct. pending) ["No. 84-254"]. [Appendix at 10-73.] The trial court action underlying St. George I is First American Bank & Trust v. St. George Island, Ltd., NO. 86-152 (Fla. 2d Cir. Ct. pending) ["No 86-152"]. [Appendix at 74-118.] Because many of the facts of No. 84-254 predate the facts of No. 86-152, it will be easier to understand the facts relevant to this review proceeding if the facts of No. 84-254 are stated first.

No. 84-254

As stated in Leisure's brief, No. 84-254 was initiated by Leisure against St. George and other parties in 1984 and a final

judgment was obtained by Leisure. [Leisure's Brief at 4.] Thereafter, on January 21, 1986, St. George and the other defendants in No. 84-254, seeking the disqualification of the then-presiding trial judge, Judge Cooksey, served a "Motion to Disqualify Judge." [Appendix at 10-13.] The motion was not verified and stated that it was "pursuant to Chapters [sic] 38.02 and 38.10, Florida Statutes." [Appendix at 10.] On January 23, 1986, St. George and the other defendants in No. 84-254 served an "Amended Motion to Disqualify Judge." [Appendix at 14-18.] The amended motion was verified and stated that it was "pursuant to Chapters [sic] 38.02 and 38.10, Florida Statutes, and Florida Rule of Civil Procedure 1.432." [Appendix at 14, 15.1

In both the motion and the amended motion in No. 84-254, the alleged grounds for disqualification were (1) the son of Judge Cooksey was an employee of one of the plaintiffs, (2) Judge Cooksey was observed having dinner with one of the plaintiffs during the pendency of the action, (3) the plaintiffs provided something of value to Judge Cooksey during the pendency of the action, and (4) two of the plaintiffs may have taken Judge Cooksey on a fishing trip during the pendency of the action. [Appendix at 10-11, 14-15.] As stated in Leisure's brief, the amended motion was denied, and a petition by St. George and the other defendants for a writ of prohibition was unsuccessful. [Leisure's Brief at 5.]

On March 21, 1986, St. George and the other defendants in No. 84-254 served a "Motion for Recusal from Further Proceedings."

The motion was not verified. [Appendix at 19-20.] The alleged grounds for disqualification were:

> 1. Defendants have filed a "Motion to Disqualify Judge" on January 21, 1986 and sought a Writ of Prohibition on February 19, 1986.
>
> 2. Because of the actions of Plaintiffs and the filing of the above-styled pleadings and the allegations therein Defendants may have prejudiced themselves in further proceedings before this Court.
>
> 3. The allegations in Defendants' Motion to Disqualify are sufficient grounds under Florida Statutes § 38.02 and § 38.10 to warrant recusal to avoid the appearance of impropriety.

[Appendix at 19.]

On March 31, 1986, Judge Cooksey entered an "Order of Recusal." [Appendix at 21-22.] In its relevant part, the order stated:

> [The] defendants filed their Motion for the undersigned to recuse himself, and also filed a separate Complaint in the Circuit Court of Franklin County, Florida, being case NO. 86-47, and styled ST. GEORGE ISLAND, LTD., et al., vs. LEISURE PROPERTY [sic], LTD., et al.
>
> It appears that this Complaint is a collateral attact [sic] on the Final Judgment this Court entered on November 7, 1985, in this case, (84-254), however, the Complaint contains allegations, (and although wholly without bases of truth and fact,) which seriously impugn the integrity of the Court. Due to these spurious allegations, the undersigned would not feel comfortable presiding further in this case.
>
> For the reasons stated, therefore, and those above, the undersigned does recuse himself from presiding further in this case . . . .

[Appendix at 21.1

On April 7, 1986, the chief judge of the circuit assigned No. 84-254 to Judge Harper. [Appendix at 23.1 On February 18, 1987,

the chief judge of the circuit "because of the unavailability of" Judge Harper, assigned No. **84-254** to Judge Gary. [Appendix at **24.**] As stated in Leisure's brief, Leisure thereafter moved for the disqualification of Judge Gary. [Leisure's Brief at **6.**] On October **12, 1987,** Judge Gary disqualified himself on the motion of Leisure. [Appendix at **25.1** As stated in Leisure's brief, No. **84-254** was then assigned to Judge Rudd. [Leisure's Brief at **6.**]

No. 86-152

As stated in Leisure's brief, No. **86-152** was initiated by First American against St. George, Leisure and other parties in **1986.** [Leisure's Brief at **4.**] On April **10, 1987,** the then-presiding trial judge, Judge Cooksey, entered an "Order of Recusal." [Appendix at **74.1** In its relevant part, the order stated: "The undersigned does herewith recuse himself from presiding further in this cause, inasmuch as, he has heretofore recused himself from certain other cases wherein certain of the parties to this cause were also parties in those causes." [Appendix at **74.**] As stated in Leisure's brief, No. **86-152** was then assigned to Judge Rudd. [Leisure's Brief at **6.**]

St. George's Motions to Disqualify Judge Rudd in No. 84-254 and No. 86-152

On March **8, 1989,** St. George served a verified "Motion for Disqualification" in No. **84-254** and a substantially identical verified "Motion for Disqualification" in No. **86-152.** [Appendix at **26-69, 75-117.**] In each case, St. George sought the disqualification of Judge Rudd "pursuant to Rule **1.432,** Florida

Rules of Civil Procedure and § 38.10, Florida Statutes . . . ." [Appendix at 26, 75.] Attached to each motion was a substantially identical "Affidavit of John R. Stocks." [Appendix at 68-69, 116-17.] In his affidavits, Mr. Stocks stated:

> 1. "I, John R. Stocks, am the President of Sharon Holding Company, the general partner of St. George Island Ltd., a defendant in this action.
>
> 2. On or about November 11, 1988, the day after a hearing was held before Judge John A. Rudd in Case No. 84-254, Leisure Properties, Ltd. v. St. George Island, Ltd. et al[.], Mr. A. Eugene Lewis of Studebaker's Enterprises Inc. advised me that he was told that at the hearing, Judge Rudd made the comment that "if John Stocks were here under oath, I wouldn't believe him."
>
> 3. It was not until I read the transcript of a deposition of Jeffrey Wallace taken on February 9, 1989, in which Jeffrey Wallace testified, under oath, that Judge Rudd had actually made remarks to the effect that "if Mr. Stocks were here I wouldn't believe him anyway[,"] that I developed the belief that Judge Rudd did in fact harbor bias and prejudice against me.
>
> 4. I am an essential witness for St. George Island, Ltd. in any litigation in which St. George Island, Ltd. is a party.
>
> 5. I firmly believe that St. George Island, Ltd. cannot get a fair and impartial trial before Judge Rudd because of the bias and prejudice he feels for me."

[Appendix at 68-69, 116-17.]

Also attached to each motion was a "Deposition of Jeffrey S. Wallace." [Appendix at 32-46, 80-94.] In his deposition, Mr. Wallace testified, among other things, as follows:

> Q Mr. Wallace, were you at a hearing before Judge Rudd on November 10, 1988?
>
> A Yes, I was.
>
> Q Did that hearing concern a case which is styled 84-254, filed in Franklin County?

A Yes.

Q Why were you at that hearing, sir?

A We were there to try to establish the ownership of Lot 20 on Pebble Beach on Saint George Island.

Q In what capacity were you there?

A I am co-trustee of the A. Eugene Lewis Family Trust.

Q Was John Stocks present at that hearing?

A No, he was not.

Q During that hearing did Judge Rudd make any statements concerning the veracity or the truthfulness of John Stocks?

A At that hearing Mr. Nathan Bond, who was at that time attorney for the A. Eugene Lewis Family Trust, attempted to enter an affidavit of Mr. Stocks, and Judge Rudd rejected the submission of the affidavit stating that Mr. Stocks had been at a hearing earlier that day and he was refusing to accept it, and he tossed it back at Mr. Bond and said, if Mr. Stocks were here I wouldn't believe him anyway.

. . . .

Q Who do you remember testifying at that particular hearing?

A The people present or the people testifying? I believe Mr. Brown testified.

Q Do you remember what Mr. Brown testified to?

A Yes, he said -- Mr. Bond did most of the talking for the Trust and Mr. Brown said that, something to the effect that he didn't have knowledge of the transfer when it took place and Mr. Bond countered that and Mr. Brown said that's a lie.

Q Okay. Do you remember the issue that was before the Court in terms of what was to be decided?

A The basic issue was was it a legitimate transfer to the Trust on Lot 20.

Q Do you remember anything in terms of whether the issue being whether Mr. Brown had any knowledge of that transfer?

A Yes, that was one of the major points.

Q Okay. Do you remember Mr. Brown testifying as to that issue?

A Yes, and he said he didn't have any knowledge.

Q Okay, and what was presented on behalf of the Family Trust to contradict that?

A There was an affidavit of Mr. Stocks.

Q But that affidavit went squarely to that issue as well, did it not?

A Yes, it did.

Q Judge Rudd did, in fact, get an opportunity to review that affidavit prior to making his decision?

A Well, he looked at it and he tossed it back to Mr. Bond. That's what I recall. I don't believe he reviewed it.

Q Do you have any reason to believe that he knew what was in it?

A No, I don't.

Q Didn't Mr. Bond argue his position at the hearing?

A He tried to, but it was pretty well ignored, in my opinion.

Q In your opinion?

A Yes.

[Appendix at **35-36, 37-39, 83-84, 85-87.**]

Also attached to the motion was a "Deposition of Nathan Bond."

[Appendix at **49-67, 97-115.**] In his deposition, Mr. Bond testified, among other things, as follows:

I attempted to enter the affidavit and Judge Rudd in response thereto -- Mr. Dye objected, and Judge Rudd said that, in essence, and remember this was three months ago, and so I am going to give the essence, and I don't remember exact quotes, exact words or anything like that so please don't try to hold me to those, because, you know, my old age, my memory is failing; but the essence of what he said was that Mr. Brown was there and Mr. Stocks was not; that if it came down to the two of them testifying on their respective positions that, you know, he saw the affidavit, saw what Stocks would have said according to what was written in the affidavit and Mr. Brown was there and he said that in that case that he would not believe Stocks and that he would believe Brown.

. . . .

Q Do you remember, during that sequence of events, the testimony of Mr. Brown being given?

A Mr. Brown's testimony was given at the hearing, yes.

Q And was it given prior to your attempt to submit the affidavit into evidence?

A I believe it was after.

Q Okay. You have indicated that I put on my position or my argument originally.

A Right.

Q Was not his testimony given during that argument or during that presentation?

A No, as I recall it wasn't given until afterwards.

Q Okay. All right. . . .

. . . .

Q Did Judge Rudd make any statements specifically as to the veracity of John Stocks affidavit?

. . . .

THE WITNESS: I believe he said, as I answered before, that based on, you know, between Stocks and Brown, that he was going to

believe Brown and not believe Stocks' affidavit.

[Appendix at **55-56, 58, 66, 103-04, 106, 114.**]

No. 86-152: St. George I

On March **20, 1989,** Judge Rudd entered an "Order on Motion for Disqualification" in No. **86-152.** [Appendix at **118.**] In its relevant part, the order stated that St. George's motion was "not legally sufficient" and denied the motion. [Appendix at **118.**] St. George sought review of the order in No. **86-152** through a petition to the court of appeal for a writ of prohibition disqualifying Judge Rudd. [Appendix at **2.**]

In St. Georae I, the court of appeal found, contrary to Judge Rudd, that St. George's motion was legally sufficient, relying on authority "that a statement by the judge that he feels a party has lied in a case generally indicates a bias against the party." [Appendix at **3-4.**] In St. Georae I, the court of appeal also addressed an additional issue raised by Leisure:

> [Leisure] makes an additional argument in support of denial of the relief sought in the petition. [Leisure] show[s] that another circuit judge was previously disqualified in this case[4] and [Leisure] therefore contend[s] that the second portion of section **38.10,** Florida Statutes **(1987),** should control Judge Rudd's consideration of St. George's motion to disqualify him. The pertinent portion of the statute states:
>
> > [W]hen any party to any action has suggested the disqualification of a trial judge and an order has

[4] St. George and [other] defendants moved pursuant to section **38.10** to disqualify Circuit Judge Kenneth Cooksey in another case [No. **84-254**] where [Leisure was the plaintiff]. When Judge Cooksey ultimately determined to grant the motion he also disqualified himself in related cases, including this one, apparently on his own motion, see section **38.05.**

> been made admitting the disqualification of such judge and another judge has been assigned and transferred to act in lieu of the judge so held to be disqualified, the judge so assigned and transferred is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and holds that it is then a fact that he does not stand fair and impartial as between the parties. If such judge holds, rules, and adjudges that he does stand fair and impartial as between the parties and their respective interests, he shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned **as** error and may be reviewed as are other rulings of the trial court.

[Leisure] argue[s] that absent an admission by Judge Rudd that he does not stand fair and impartial between the parties, the motion for disqualification was properly denied.[5]

In response to this argument, [St. George] points to language in the statute providing that where a party "has suggested the disqualification of a trial judge" and another judge has been assigned, the different standard shall apply in reviewing the motion for disqualification. This, [St. George] argues, applies only where the previous disqualification was made pursuant to section 38.02, Florida Statutes, which expressly provides for a suggestion of disqualification on grounds that the judge is related to a party or attorney or is a potential witness in the cause. Disqualifications pursuant to sections 38.10, 38.05, and Rule 1.432, Florida Rules of Civil Procedure, by contrast, are not presented by suggestion but by motion or application, according to the express terms of those authorities. There having been no prior "suggestion" of disqualification in the circuit court proceedings, [St. George] contends the second portion of section 38.10 is not applicable to its motion to disqualify Judge Rudd.

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[5] [Leisure] show[s] that Judge Rudd has relied on the second portion of section 38.10 to deny St. George's motion to disqualify him in another case [No. 84-254] involving these parties.

> We find ourselves in agreement with the construction of the statute offered by [St. George]. While it could be argued that a more logical construction would be to apply the second portion of section 38.10 when there has been a previous disqualification on any grounds, we find no ambiguity and choose to follow the plain language employed by the legislature. Brooks v. Anastasia Mosquito Control Dist., 148 So. 2d 64 (Fla. 1st DCA 1963). Where the legislature uses exact words in different statutory provisions, the court may assume they were intended to mean the same thing. Goldstein v. Acme Concrete Corp., 103 So. 2d 202 (Fla. 1958). Moreover, the presence of a term in one portion of a statute and its absence from another argues against reading it as implied by the section from which it is omitted. Florida State Racing Comm'n **v.** Boursardez [sic], 42 So. 2d 87 (Fla. 1949).

[Appendix at 4-6.]

The court of appeal in St. Georse I, therefore, granted St. George's petition and issued the writ of prohibition disqualifying Judge Rudd. [Appendix at 6.] Additionally, the court of appeal in St. Georae I certified to the supreme court, as a question of great public importance, the proper interpretation of section 38.10, Florida Statutes (1987). [Appendix at 6.]

No. **84-254:** St. **George** II

On April 11, 1989, Judge Rudd entered an "Order on Motion for Disqualification" in No. 84-254. [Appendix at 70-73.] In its relevant part, the order stated:

> 2. That the motion for disqualification filed herein by [St. George] is not legally sufficient within the meaning of the first part of Section 38.10, Florida Statutes (1987).
>
> 3. That [St. George] has previously filed suggestions of disqualification of trial judges in this action and in Case No. 86-47 (a collateral case) and, as a consequence, its present motion is controlled by the second part of Section 38.10, Florida Statutes (1987). [Leisure has] also filed a motion for disqualification in this case.

> **4.** That the undersigned judge does stand fair and impartial between the parties and their respective interests in this case.

[Appendix at **70-71.**] St. George sought review of the order in No. **84-254** through a petition to the court of appeal for a writ of prohibition disqualifying Judge Rudd. [Appendix at **7.**] Among other things, St. George in its petition questioned the constitutionality of section **38.10**, Florida Statutes **(1987)**, arguing that section **38.10** invades the province of the judiciary and, therefore, violates the separation of powers doctrine.* .

In St. Georae 11, the court of appeal noted that the facts of **No. 84-254** were identical to those of No. **86-152**, with one exception, but otherwise relied on the legal conclusions announced in St. Georae I. [Appendix at **8.**] In addressing the exception, the court of appeal in St. Georae II stated:

> As stated in [St. Georse I], St. George moved to disqualify Judge Kenneth Cooksey in this [No. **84-254**] and other cases. We found that Judge Cooksey had disqualified himself on his own motion in the underlying circuit court action [No. **86-152**] in case number **89-727** [St. Georse I], see id., slip op. at **4 n.4.** [Appendix at **4.**] However, in the circuit court action [No. **84-254**] that underlies this case [St. Georae II], Judge Cooksey disqualified himself on the motion of St. George. [Leisure] argue[s] that St. George's motion was made pursuant to sections **38.02** and **38.10**, Florida Statutes, and it therefore follows that the second portion of section **38.10** controls the proceedings in the lower

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*Because the supreme court's briefing schedule requires service of St. George's brief prior to the preparation of the record on appeal by the clerk of the court of appeal, St. George is unable to give the record page numbers at which this issue was raised. The issue was raised, however, in St. George's Petition for a Writ of Prohibition at **10-11** in St. Georae 11.

> tribunal. Judge Rudd has held that he does stand fair and impartial between the parties and [Leisure] conclude[s] that the motion to disqualify Judge Rudd was properly denied. We do not agree.
>
> St. George's motion to disqualify Judge Cooksey [in No. 84-254] did cite to both statutory sections and alleged four factual bases, that the son of the judge was an employee of one of the plaintiffs, the judge was observed having dinner with one of the plaintiffs during the pendency of the action, plaintiffs provided something of value to the judge during the pendency of the action, and two of the plaintiffs may have taken the judge on a fishing trip during the pendency of the action. Of these four grounds, only the first is arguably cognizable under section 38.02, while the other three obviously concern possible prejudice of the trial judge, grounds for disqualification under section 38.10. In his order of recusal [in No. 84-254], Judge Cooksey found that the allegations of [the] movant "seriously impugn the integrity of the Court. Due to these spurious allegations, the undersigned would not feel comfortable presiding further in this case." Although the order did not expressly rely on section 38.10, we find these remarks inconsistent with a conclusion that Judge Cooksey recused himself because of his son's alleged employment with one of the parties. Accordingly, we find that Judge Cooksey's disqualification [in No. 84-254] was pursuant to a 38.10 motion and not a section 38.02 suggestion. Therefore the second portion of section 38.10 does not control proceedings before Judge Rudd on the motion to disqualify him.

[Appendix at 8-9.]

The court of appeal in St. Georse 11, therefore, granted St. George's petition and issued the writ of prohibition disqualifying Judge Rudd. [Appendix at 9.] Additionally, the court of appeal in St. Georqe II certified to the supreme court, as a question of great public importance, the proper interpretation of the second part of section 38.10, Florida Statutes (1987). [Appendix at 9.]

SUMMARY OF ARGUMENT

The only question before the judge when a party moves to disqualify the judge pursuant to section 38.10 Florida Statutes (1987), and Florida Rule of Civil Procedure 1.432, is whether the facts alleged in the motion would prompt a reasonably prudent person to fear that the person could not get a fair and impartial trial. The judge may not pass upon the truth of the facts alleged. Section 38.10 provides a two-pronged exception where (1) there has been a previous successful suggestion of disqualification in the case by the party currently applying or moving for the disqualification of the judge and (2) the judge for whom the party is currently seeking disqualification is the judge assigned to the case to replace the judge disqualified because of the currently applying or moving party's previous suggestion.

The two-pronged exception was not applicable to St. George's motions to disqualify Judge Rudd in No. 84-254 and No. 86-152. In neither case was there a previous suggestion of disqualification by St. George. Nor, in either case, was St. George moving to disqualify a judge appointed as a result of a previous successful attempt by St. George to disqualify a judge. Further, the two-pronged exception is a rule of procedure which has not been adopted by the supreme court and is, therefore, constitutionally invalid.

Therefore, the court of appeal correctly ruled that the exception contained in section 38.10 did not apply to St. George's motions to disqualify Judge Rudd, and that both motions were legally sufficient.

ARGUMENT

I. THE COURT OF APPEAL CORRECTLY HELD THAT THE SECOND PART OF SECTION 38.10, FLORIDA STATUTES (1987), DID NOT APPLY TO EITHER OF ST. GEORGE'S TWO MOTIONS TO DISQUALIFY JUDGE RUDD

Leisure's argument ignores the plain distinction between (1) a suqqestion of disqualification, **(2)** an application or motion for disqualification, and **(3)** the disqualification of a judge on the judge's own motion or initiative. Leisure's argument **also** ignores the distinction between the facts of No. **84-254** and the facts of **No. 86-152, as** well as those facts in each case which render the second part of section **38.10,** Florida Statutes **(1987),** wholly inapplicable to the circumstances of St. George's two motions to disqualify Judge Rudd.

A suqqestion of disqualification may be filed by a party pursuant to section **38.02,** Florida Statutes **(1987),** which provides:

> **38.02** Suggestion **of** disqualification; grounds; proceedings on suggestion and effect.--In any cause of any of the courts of this state any party to said cause, or any person or corporation interested in the subject matter of such litigation, may at any time before final judgment, if the case be one at law, and at any time before final decree, if the case be one in chancery, show by a suquestion filed in the cause that [1] the judge before whom the cause is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto, or is interested in the result thereof, or [2] that said judge is related to an attorney or counselor of record in said cause by consanguinity or affinity within the third degree, or [3] that **said** judge **is** a material witness for or against one of the parties to said cause, but such an order shall not be subject to collateral attack. Such suggestions shall be filed in the cause within **30** days after the party filing the suuuestion, or his attorney, or attorneys, of record, or either of them, learned of such disqualification, otherwise the ground, or grounds, of disqualification shall be taken and considered as waived.

> If the truth of any suggestion appear from the record in said cause, the said judge shall forthwith enter an order reciting the filing of the suggestion, the grounds of his disqualification, and declaring himself to be disqualified in said cause. If the truth of any such suggestion does not appear from the record in said cause, the judge may by order entered therein require the filing in the cause of affidavits touching the truth or falsity of such suggestion. If the judge finds that the suggestion is true, he shall forthwith enter an order reciting the ground of his disqualification and declaring himself disqualified in the cause; if he finds that the suggestion is false, he shall forthwith enter his order so reciting and declaring himself to be qualified in the cause. Any such order declaring a judge to be disqualified shall not be subject to collateral attack nor shall it be subject to review. Any such order declaring a judge qualified shall not be subject to collateral attack but shall be subject to review by the court having appellate jurisdiction of the cause in connection with which the order was entered.

Fla. Stat. § 38.02 (1987) (emphasis added).

Thus, according to section 38.02, a suggestion of disqualification is only available to a party where (1) the judge or someone related to the judge by consanguinity or affinity within the third degree is a party to or is otherwise interested in the result of the action; (2) the judge is related to an attorney or counselor of record in the action by consanguinity or affinity within the third degree; or (3) the judge is a material witness for or against one of the parties to the action. The suggestion must be filed before the final judgment or decree. The suggestion need not be verified. The judge is required to determine the truth or falsity of the suggestion from a review of the record or, if the judge so orders, affidavits.'

Somewhat different grounds and procedure for disqualification are provided to a party by section **38.10,** Florida Statutes **(1987),** and Florida Rule of Civil Procedure 1.432, as follows:

> 38.10 Disqualification **of** judge **for** prejudice; application; affidavits; etc.-- Whenever a party to any action or proceeding makes and files an affidavit stating that he fears he will not receive a fair trial in the court where the suit is pending ~~on account of the~~ prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. However, when any party to any action has suggested the disqualification of a trial judge and an order has been made admitting the disqualification of such judge and another judge has been assigned and transferred to act in lieu of the judge so held to be disqualified, the judge so assigned and transferred is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and holds that it is then a fact that he does not stand fair and impartial between the parties. If such judge holds, rules, and adjudges that he does stand fair and impartial as between the parties and their respective interests, he shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned as error and may be reviewed as are other rulings of the trial court.

Fla. Stat. § **38.10** (1987) (emphasis added).

RULE 1.432
DISQUALIFICATION OF JUDGE

> (a) Grounds. ***Any*** party may move to disqualify the judge assigned to the action on the grounds provided by statute.
>
> (b) Contents. A motion to disqualify shall allege the facts relied on to show the grounds for disqualification and shall be verified by the party.

> (c) Time. A motion to disqualify shall be made within a reasonable time after discovery of the facts constituting grounds for disqualification.
>
> (d) Determination. The judge against whom the motion is directed shall determine only the legal sufficiency of the motion. The judge shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall enter an order of disqualification and proceed no further in the action.

Fla. R. Civ. P. 1.432 (emphasis added).

Thus, unlike a suaaestion of disqualification, an application or motion for disqualification is not limited solely to those instances where the judge finds the existence of certain narrowly defined facts regarding the relationship of the judge to the action. Unlike a suaaestion of disqualification, an application or motion for disqualification is appropriate whenever a party states facts legally sufficient to support the party's fear that the party will not receive a fair trial in the court where the suit is pending. Unlike a suaaestion of disqualification, an application or motion for disqualification must be verified.

In considering an application or motion for disqualification, the judge may not pass upon the truth of the facts alleged, only their legal sufficiency. The second part of section 38.10, however, provides an exception. The exception is two-pronged: (1) there has been a previous successful suaaestion of disqualification in the case by the party currently applying or moving for the disqualification of a judge and (2) the judge for whom the party is currently seeking disqualification is the judge assianed to the case to replace the judge disqualified because of the currently

applying or moving party's previous suggestion. If both prongs of this exception exist concurrently, the current judge may not disqualify himself unless he finds that he does not stand fair and impartial between the parties.

It is presumed that in using the word "suggestion" in the second part of section **38.10,** the legislature intended "suggestion" to have the same meaning it has in section 38.02. See Goldstein v. Acme Concrete Corp., 103 So. 2d 202, 204 (Fla. 1958) (when lawmakers use the same words in different statutes dealing with the same subject matter, the court may assume that the lawmakers intended the same words to have the same meaning in each statute). Thus, **a** previously-granted application or motion for disqualification will not satisfy the first prong of the exception. Only a previously-granted suasestion of disqualification will satisfy the first prong of the exception.

Leisure relies on admitted dictum which purportedly demonstrates that courts do not distinguish motions from suggestions. Despite this dictum, the difference between a motion for disqualification and a suggestion of disqualification was recognized by the court of appeal in Shotkin v. Rowe, 100 So. 2d 429 (Fla. 3d DCA 1958), where the court stated,

> The use of the term "affidavit of prejudice" indicates an intention on the part of the appellant, who appears here in propria persona, to proceed under section **38.10,** Fla. Stat., F.S.A. The motion is not verified and is not otherwise in accord with the procedure set out in the cited section. It is therefore treated as a suggestion for disqualification of the individual judges of this Court under section 38.02, Fla. Stat., F.S.A. . . .
>
> . . . .

> As shown hereinabove, the motion or suggestion for disqualification does not meet the requirements of the statute, Section 38.10, Fla. Stat., F.S.A.

Shotkin, 100 So. 2d at 430 (emphasis added).

In addition to a party's suggestion of disqualification and a party's application or motion for disqualification, a judge may disqualify himself on his own motion or initiative as provided in section 38.05, Florida Statutes (1987), and Florida Rule of Civil Procedure 1.432(e):

> **38.05 Disqualification of judge on own motion.--** Any judge may of his own motion disqualify himself where, to his own knowledge, any of the grounds for a suggestion of disqualification, as named in s. 38.02, exist. The failure of a judge to so disqualify himself under this section shall not be assignable as error or subject to review.

Fla. Stat. § 38.05 (1987). "**(e) Judge's Initiative.** Nothing in [Florida Rule of Civil Procedure 1.4321 limits a judge's authority to enter an order of disqualification on the judge's own initiative." Fla. R. Civ. P. 1.432(e).

St. George's motions to disqualify Judge Rudd in No. 84-254 and in No. 86-152 were pursuant to section 38.10 and rule 1.432. In each case, therefore, absent facts that would invoke the two-pronged exception contained in the second part of section 38.10, Judge Rudd was not authorized to pass upon the truth of the facts alleged. See Bundy v. Rudd, 366 So. 2d 440, 442 (Fla. 1978) (a judge's looking beyond the legal sufficiency of a motion for disqualification exceeds the proper scope of the judge's inquiry and establishes grounds for the judge's disqualification.) Judge

Rudd was only permitted to determine the legal sufficiency of the facts alleged in support of St. George's fear that it would not receive a fair trial before Judge Rudd. The two-pronged exception contained in the second part of section **38.10** plainly was not applicable in either No. **84-254** or **No. 86-152.** Indeed, neither prong was satisfied in either case.

No. 84-254

On January 21, **1986,** after the entry of final judgment for the plaintiffs in No. **84-254,** St. George, **a** defendant, served a "Motion to Disqualify Judge," seeking the disqualification of Judge Cooksey. The motion purported to rely upon sections **38.02** and **38.10,** but was not verified. Two days later, on January **23, 1986,** St. George served an "Amended Motion to Disqualify Judge" in No. **84-254,** again seeking the disqualification of Judge Cooksey. The amended motion purported to rely upon section **38.02,** section **38.10** and rule **1.432,** and was verified.

The motion and the amended motion in No. **84-254** both alleged the following grounds for disqualification: (1) the son of Judge Cooksey was an employee of one of the plaintiffs, **(2)** Judge Cooksey was observed having dinner with one of the plaintiffs during the pendency of the action, **(3)** the plaintiffs provided something of value to Judge Cooksey during the pendency of the action, and **(4)** two of the plaintiffs may have taken Judge Cooksey on a fishing trip during the pendency of the action.

Although the amended motion in No. **84-254** purported to rely on section **38.02** and section **38.10,** as well as rule **1.432,** it was

in the form of an application or motion for disqualification pursuant to section **38.10** and rule **1.432,** in that it was verified. Also, only the first alleged ground would have supported a suggestion of disqualification, but each of the four grounds was a proper basis for an application or motion for disqualification. Finally, the amended motion in No. **84-254** was filed after the entry of the final judgment and, therefore, could not have been pursuant to section **38.02,** which is only available prior to the entry of final judgment. Regardless of the procedure relied upon, however, as Leisure has acknowledged in its brief, the amended motion in No **84-254** was denied. The amended motion to disqualify Judge Cooksey in No. **84-254** is, therefore, irrelevant to the applicability of the second part of section **38.10** to St. George's motion to disqualify Judge Rudd in No. **84-254.**

After the denial of its amended motion in No. **84-254,** St. George, on March **21, 1986,** served a "Motion for Recusal from Further Proceedings" in No. **84-254,** again seeking the disqualification of Judge Cooksey. In this motion, St. George alleged that its previous actions in seeking Judge Cooksey's disqualification in No. **84-254** may have prejudiced St. George in further proceedings before Judge Cookseyin No. **84-254.** St. George further alleged that the grounds alleged in its previous motion in No. **84-254** were sufficient under section **38.02** and section **38.10** to warrant Judge Cooksey's disqualification to avoid the appearance of impropriety. The motion was not verified.

Thereafter, on March 31, 1986, Judge Cooksey disqualified himself from presiding further in No. 84-254. In its relevant part, the order stated,

> [The] defendants filed their Motion for the undersigned to recuse himself, and also filed a separate Complaint in the Circuit Court of Franklin County, Florida, being case NO. 86-47, and styled ST. GEORGE ISLAND, LTD., et al., vs. LEISURE PROPERTY [sic], LTD., et al.
>
> It appears that this Complaint is a collateral attact [sic] on the Final Judgment this Court entered on November 7, 1985, in this case, (84-254), however, the Complaint contains allegations, (and although wholly without bases of truth and fact,) which seriously impugn the integrity of the Court. Due to these spurious allegations, the undersigned would not feel comfortable presiding further in this case.
>
> For the reasons stated, therefore, and those above, the undersigned does recuse himself from presiding further in this case . . . .

As can be seen from his order disqualifying himself in No. 84-254, Judge Cooksey relied upon certain allegations contained n a complaint in another action: "[T]he complaint contains allegations, (and although wholly without bases of truth and fact,) which seriously impugn the integrity of the Court. Due to these spurious allegations, the undersigned would not feel comfortable presiding further in this case. For the reasons stated, therefore, and those above, the undersigned does recuse himself . . ." (emphasis added). It is, therefore, apparent from the language of Judge Cooksey's order in No. 84-254, that Judge Cooksey's disqualification in No. 84-254 was not a result of St. George's March 21, 1986, "Motion for Recusal from Further Proceedings" in No. 84-254, which, because not verified, was legally insufficient. See

Hayslip v. Douglas, 400 So. 2d 553, 555-56 (Fla. 4th DCA 1981) (to be legally sufficient, a motion for disqualification must, among other things, be verified).

Rather, by the express language of his order, Judge Cooksey disqualified himself in No. 84-254 because of a complaint filed in another action. The complaint contained allegations which, according to Judge Cooksey, made him feel uncomfortable about presiding further in No. 84-254. Therefore, Judge Cooksey's disqualification in No. 84-254 was on his own initiative.

Even if it were accepted that Judge Cooksey's disqualification in No. 84-254 resulted from St. George's March 21, 1986, "Motion for Recusal from Further Proceedings" in No. 84-254, the stated ground for that motion was Judge Cooksey's prejudice against St. George. Prejudice is a ground which supports disqualification pursuant to an application or motion for disqualification under section 38.10 and rule 1.432. It is not, however, a ground which would support a suggestion of disqualification under section 38.02.

It is true that St. George's March 21, 1986, "Motion for Recusal from Further Proceedings" in No. 84-254 also referred to the four grounds previously alleged in St. George's January 23, 1986, "Amended Motion to Disqualify Judge" in No. 84-254. As has been pointed out, however, only one of those grounds, the employment of Judge Cooksey's son by one of the plaintiffs, would have been cognizable under section 38.02, although any of the four grounds would have been cognizable under section 38.10. Further, Judge Cooksey's order disqualifying himself in No. 84-254 made no

finding, as would have been required under section **38.02,** that his son was indeed an employee of one of the plaintiffs. Finally, St. George's March **21, 1986,** "Motion for Recusal from Further Proceedings" in No. **84-254** was filed after the entry of Final Judgment in No. **84-254.** Therefore, the procedure for filing a suggestion of disqualification was not available.

Regardless of whether Judge Cooksey's disqualification in No. **84-254** was, as is apparently the case, on his **own** initiative, or was the result of St. George's March **21, 1986,** "Motion for Disqualification from Further Proceedings" in No. **84-254,** it was not pursuant to a suggestion of disqualification. Therefore, at the time St. George moved for the disqualification of Judge Rudd in No. **84-254,** the first prong of the exception contained in the second part of section **38.10** was not satisfied. Judge Cooksey's disqualification in No. **84-254** was not pursuant to a suggestion of disqualification.

Nor was the second prong of the exception satisfied. Because of the disqualification of Judge Cooksey, No. **84-254** was assigned to Judge Harper. Thereafter, because of Judge Harper's unavailability, No. **84-254** was assigned to Judge Gary. Judge Gary was disqualified in No. **84-254** on October **12, 1987,** on the motion of Leisure. Because of Judge Gary's disqualification, No. **84-254** was then assigned to Judge Rudd.

The second prong of the exception contained in the second part of section 38.10 is only satisfied where the currently applying or moving party is seeking the disqualification of the judge assigned

to the case to replace the judge disqualified because of the currently applying or moving party's previous suggestion. St. George had absolutely nothing to do with the assignment of No. **84-254** to Judge Rudd. No. **84-254** was assigned to Judge Rudd because Leisure sought and obtained the disqualification of Judge Gary.

Therefore, even if the distinction between a suggestion of disqualification and an application or motion for disqualification is ignored, it is indisputable that the second prong of the exception has not been satisfied. Even if one were to assume that Judge Cooksey disqualified himself as a result of a previous motion of St. George, in seeking the disqualification of Judge Rudd in No. **84-254,** St. George **was** not seeking the disqualification of the judge appointedto replace Judge Cooksey. In seeking to disqualify Judge Rudd in No. **84-254,** St. George was seeking the disqualification of the judge appointed to replace Judge Gary, a judge disqualified as the result of a previous motion of Leisure. Therefore, the exception contained in the second part of section **38.10** is wholly inapplicable to the disqualification of Judge Rudd in No. **84-254.**

No. 86-152

On April 10, **1987,** Judge Cooksey disqualified himself from presiding further in No. **86-152.** In its relevant part, the order stated: "The undersigned does herewith recuse himself from presiding further in this cause, inasmuch as, he has heretofore recused himself from certain other cases wherein certain of the parties to this cause were also parties in those causes."

There was no suggestion of disqualification or application or motion for disqualification before Judge Cooksey in No. **86-152.** That fact, and the language of the order, make it indisputable that Judge Cooksey disqualified himself in No. **86-152** on his **own** initiative. Therefore, the exception contained in the second part of section 38.10 is wholly inapplicable to the subsequent disqualification of Judge Rudd in No. **86-152.**

II. BECAUSE SECTION 38.10, FLORIDA STATUTES (1987), TO THE EXTENT IT PURPORTS TO PROMULGATE RULES OF PROCEDURE, VIOLATES THE SEPARATION OF POWERS DOCTRINE *AND* IS INVALID, THE SECOND PART OF SECTION 38.10 DID NOT APPLY TO EITHER OF ST. GEORGE'S TWO MOTIONS TO DISQUALIFY JUDGE RUDD

Section 38.10, Florida Statutes (1987), gives to litigants the substantive right to seek the disqualification of a trial judge. Livingston v. State. 441 So. 2d 1083, 1087 (Fla. 1983). However, as pointed out in Livingston, the actual process of the disqualification of a judge is procedural. See Id. In Livinaston, therefore, the supreme court held that Florida Rule of Criminal Procedure 3.230, rather than section 38.10, controls the disqualification process in criminal litigation. See Livinaston, 441 So. 2d at 1087.

By analogy, Florida Rule of Civil Procedure 1.432 controls the disqualification process in civil litigation. See Caleffe v. Vitale, 488 So. 2d 627, 628 (Fla. 4th DCA 1986). The supreme court has recognized that the procedural requirements of section 38.10 are unconstitutionally invalid unless adopted as a rule by the supreme court. See In re Amendments to Rules of Civil Procedure, 458 So. 2d 245, 247 (Fla. 1984). Insofar as section 38.10 purports to promulgate rules of civil procedure, therefore, it invades the province of the judiciary to adopt rules of practice and procedure, as definedby article V, section 2(a), Florida Constitution (1972), and violates the separation of powers doctrine. See Graham v. Murrell, 462 So. 2d 34, 35 (Fla. 1st DCA 1984).

The supreme court has determined that the second part of section **38.10** is procedural, not substantive, in nature. This is demonstrated by the supreme court's adoption of the second part of section **38.10** as a rule of criminal procedure. **See** Fla. R. Crim. P. 3.230(e). The supreme court has not, however, chosen to adopt the second part of section **38.10** as a rule of civil procedure. **See** Fla. R. Civ. **P. 1.432.**

Leisure makes much of its purported fear that the absence of the second part of section **38.10** in civil matters may lead to abuse of the disqualification process. The supreme court has not as yet determined that fear to be well-founded: regardless of whether such a rule should be promulgated, one does not at present exist for civil litigation. The second part of section **38.10** is, therefore, inapplicable to St. George's two motions to disqualify Judge Rudd.

III. THE COURT OF APPEAL CORRECTLY HELD THAT ST. GEORGE'S TWO MOTIONS TO DISQUALIFY JUDGE RUDD WERE LEGALLY SUFFICIENT

In St. George's March 8, 1989, "Motion for Disqualification" in No. 84-254 and St. George's substantially identical March 8, 1989, "Motion for Disqualification" in No. 86-152, St. George sought the disqualification of Judge Rudd, pursuantto Florida Rule of Civil Procedure 1.432 and section 38.10, Florida Statutes (1987). A party seeking to disqualify a judge need only show a well-grounded fear that the party 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. Livinaston v. State, 441 So. 2d 1083, 1086 (Fla. 1983). The question before Judge Rudd, and the court of appeal, in each case was whether the facts alleged in the motions (which must be taken as true) would prompt a reasonably prudent person to fear that the person could not get a fair and impartial trial. See Hayslip V. Douglas, 400 So. 2d 553, 556 (Fla. 4th DCA 1981). Judge Rudd's determination, therefore, was limited to the four corners of the motions.

Attached to each motion was the affidavit of John R. Stocks. In his affidavit, Mr. Stocks stated that he was the president of the corporation which is the general partner of St. George, and that he was an essential witness for St. George. Mr. Stocks further stated in his affidavit that he had been advised that, at a hearing in No. 84-254 at which Mr. Stocks was not present, Judge Rudd has commented that "if John Stocks were here under oath, I

wouldn't believe him." Mr. Stocks further stated in his affidavit that he subsequently read the transcript of a February 9, 1989, deposition of Jeffrey Wallace, in which Mr. Wallace corroborated that Judge Rudd had made the remark regarding Judge Rudd's disbelief in Mr. Stocks's veracity.

Also attached to each motion was the transcript of Mr. Wallace's deposition. In his deposition, Mr. Wallace stated:

> At that hearing [in No. 84-254] Mr. Nathan Bond, who was at that time attorney for the A. Eugene Lewis Family Trust, attempted to enter an affidavit of Mr. Stocks, and Judge Rudd rejected the submission of the affidavit stating that Mr. Stocks had been at a hearing earlier that day and he was refusing to accept it, and he tossed it back at Mr. Bond and said, if Mr. Stocks were here I wouldn't believe him anyway.

In his deposition, Mr. Wallace also stated that Gene Brown testified at the hearing, and that Mr. Brown's testimony was in contradiction to Mr. Stocks's affidavit.

Also attached to the motion was the transcript of a deposition of Mr. Bond. In his deposition, Mr. Bond did not contradict the testimony of Mr. Wallace. Further, Mr. Bond clarified in his deposition that Judge Rudd's comment in No. 84-254 on Mr. Stocks's veracity occurred prior to hearing Mr. Brown's testimony in contradiction of Mr. Stocks's affidavit.

Given the remark of Judge Rudd in No. 84-254, revealing his prejudice and bias toward St. George's essential witness, this case falls squarelywithin the intended application of section 38.10 and rule 1.432. As explained in Hayslip, "Section 38.10 was crafted to insure confidence in the integrity of our system of justice,"

id. at 556. Once its principal, Mr. Stocks, had read the February 9, 1989, deposition in which it was revealed that Judge Rudd had, in No. 84-254, tossed Mr. Stocks's affidavit at an attorney and stated that Judge Rudd would not believe Mr. Stocks even if he appeared in person, St. George had a reasonable and prudent fear that it would not receive a fair and impartial trial before Judge Rudd in either No. 84-254 or No. 86-152. Cf. Hayslip, 400 So. 2d at 556-57 (prejudicial remarks directed at counsel rather than client sufficient to warrant disqualification).

Leisure argues, however, that the action and remark of Judge Rudd were merely an expression of the judge's mental impression or opinion duringthe presentation of evidence. The action and remark of Judge Rudd in No. 84-254, however, occurred prior to having received any live testimony from Mr. Stocks or any opposing testimony from Mr. Brown.

The cases relied upon by Leisure regarding expressions of mental impressions or opinions are distinguishable from the present situation. In each of the cases relied upon by Leisure in which disqualification was found to be unnecessary, (1) the remarks were made by the trial judge during a judicial proceeding, (2) the remarks were upon evidence involved in or upon the result of the judicial proceeding, and (3) a party to the judicial proceeding sought to have the trial judge disqualified in that proceeding. Thus, each of these cases falls within the general rule that "bias or prejudice sufficient to disqualify a judge must stem from

extrajudicial sources," Wilev v. Wainwriaht, 793 F.2d 1190, 1193 (11th Cir. 1986).

The present case is distinguishable. To begin with, the action and remark of Judge Rudd in No. 84-254 was clearly extrajudicial to No. 86-152. Even when made duringthe proceeding, as was the case with No. 84-254, however, a judge's remarks are sufficient to disqualify him when the remarks "demonstrate such pervasive bias or prejudice that it constitutes bias against a party." Wiley, 793 F.2d at 1193; see Deauville Realty Co. v. Tobin, 120 So. 2d 198, 202 (Fla. 3d DCA 1960) (statement by a judge that he feels a party has lied generally indicates bias against the party), cert. denied mem., 127 So. 2d 678 (Fla. 1961). Furthermore, the remark was not upon evidence in a judicial proceeding. The remark was that the trial judge would not believe the live testimony of a witness, reaardless of the content of that testimony, and the remark was made after rejecting the witness's affidavit and prior to having heard any live testimony by the witness or any opposing testimony.

As stated by the court of appeal in Hayslip, quoting the supreme court,

> Ultimately, questions of judicial disqualification, must be viewed in the context of those principles which were eloquently set forth by Justice Terrell in State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613, 615 (1939):
>
> > [E]very litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise

> of any other policy tends to discredit the judiciary and shadow the administration of justice.
>
> It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such-that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

Hayslip, 400 So. 2d at 557 (emphasis added).

The court of appeal correctly ruled, therefore, that each of the two motions to disqualify Judge Rudd was legally sufficient.

CONCLUSION

For the foregoing reasons, the decisions of the court of appeal should be approved.

Respectfully submitted,

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