ORIGINAL

SUPREME COURT OF THE STATE OF FLORIDA

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GENE D. BROWN, et al.

Petitioners,

v.

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

Respondent.

Case #75,225

1st DCA #89-2697
1st DCA #89-2698
1st DCA #89-2699

INITIAL BRIEF OF PETITIONERS

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PREFACE

In accordance with this Court's order dated January **19, 1990,** petitioners hereby submit a copy of their initial brief which was filed on September **6, 1989** in consolidated cases numbered **74,571** and **74,598.**

Said attached initial brief is submitted for this Court's consideration in its review of the First District Court of Appeal's Opinions issued in the following cases:

1. First American Bank and Trust, etc. v. St. George Island, Ltd., etc., et al., Case **#86-152** (**ST-GEORGE** I)
DCA **#89,727, SC #74,571**

2. Leisure Properties, Ltd., etc., et al. v. St. George Island, Ltd., etc., et al., Case **#84-254** (**ST-GEORGE** 11)
DCA **#89,1397, SC #74,598**

3. Doing, Inc., a Louisiana corporation v. John R. Stocks, et al., Case **#86-46** (**ST-GEORGE** 111)
DCA **#89,2697, SC #75,225**

4. Sun Bank, N.A. v. St. George Island, Ltd., etc., et al. Case **#86-142** (**ST-GEORGE** IV)
DCA **#89,2698, SC #75,225**

5. Franklin County, Florida v. John R. Stocks, etc., et al. Case **#86-200** (**ST.GEORGE** V)
DCA **#89,2699, SC 75,225**

RESPECTFULLY SUBMITTED on January **25, 1990.**

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I CERTIFY that a copy of the foregoing PREFACE, without attachments, was furnished to all parties on the respective service lists by United States mail, postage prepaid, on January 25, 1990.

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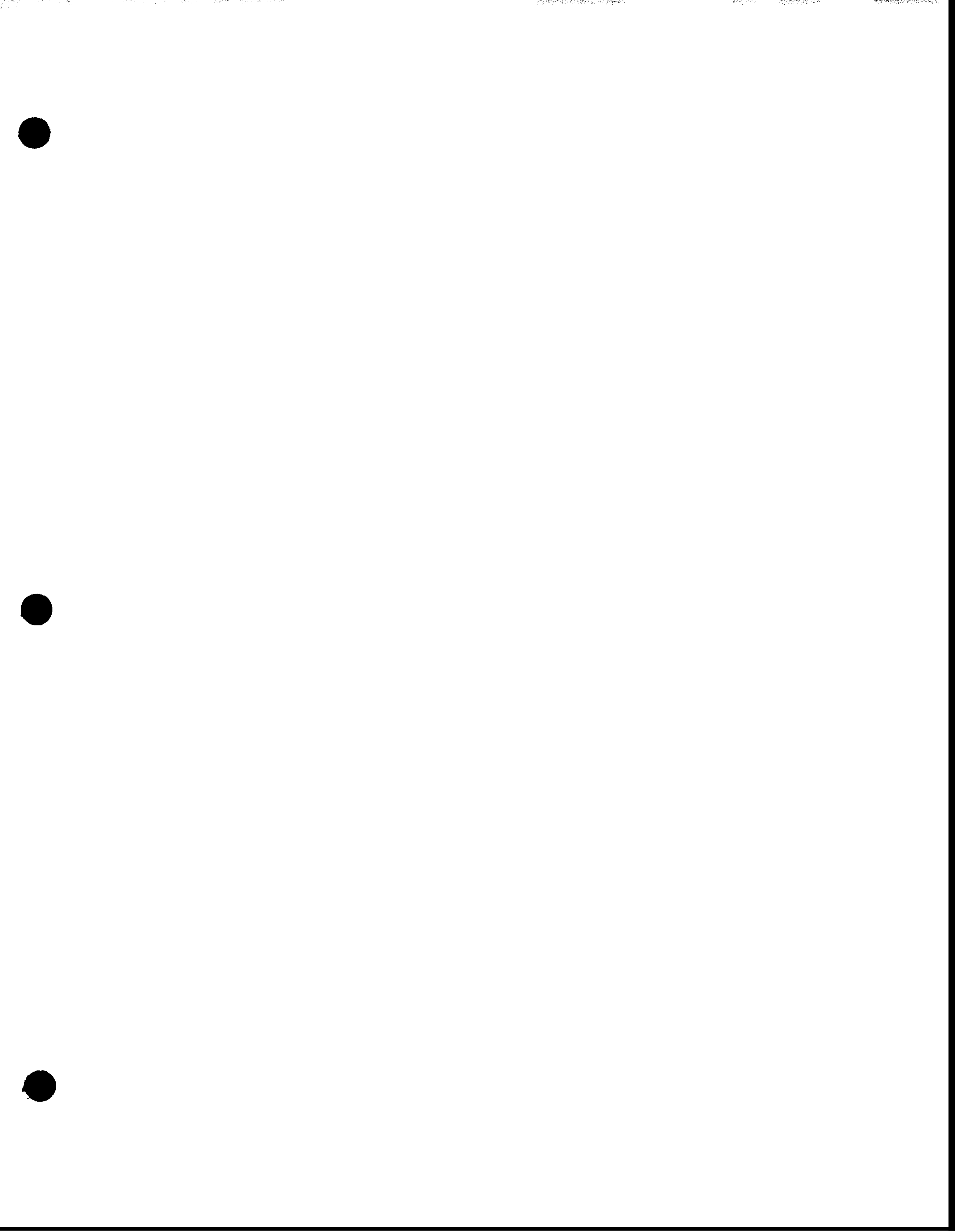

SUPREME COURT OF TEE STATE OF FLORIDA

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"

INITIAL BRIEF OF PETITIONERS

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PREFACE

The First District Court's Opinions in Case P89-727, St. George Island, Ltd. v. John A. Rudd, et al. (Fla.1st DCA July 18, 1989) and in Case #89-1397, St. George Island, Ltd. v. John A. Rudd, et al., (Fla.1st DCA August 16, 1989), certified as a question of great public importance the "proper interpretation of the second portion of section 38.10, Florida Statutes." This appeal followed.

LEISURE PROPERTIES, LTD., LEISURE DEVELOPMENT, INC., and GENE D. BROWN, plaintiffs/respondents below, file this, Petitioners' Initial Brief, with this Court. ST. GEORGE ISLAND, LTD. was the defendant/petitioner below and is the respondent herein. All emphasis appearing in the text have been added by counsel, unless otherwise indicated. For ease and clarity, the following identifiers will be used in this brief:

ST. GEORGE ISLAND, LTD. v. JOHN A. RUDD, et al. Case #89-727 (Fla. 1st DCA July 18, 1989)	... ST. GEORGE I (Appendix "A")
ST. GEORGE ISLAND, LTD. v. JOHN A. RUDD, et al. Case #89-1397 (Fla. 1st DCA August 16, 1989)	... ST. GEORGE II (Appendix "B")
LEISURE PROPERTIES, LTD., LEISURE DEVELOPMENT, INC,	... LEISURE
GENE D. BROWN	... BROWN
ST. GEORGE ISLAND, LTD,	... ST. GEORGE

The Honorable JOHN A, RUDD	... Judge Rudd
FIRST AMERICAN BANK AND TRUST	... FIRST AMERICAN
JOHN R. STOCKS	... STOCKS
Appendix on Appeal	... A-___ and number of Appendix

ISSUES ON APPEAL

ISSUE 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 ?

ISSUE II

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 ?

FACTS

Although filed two years apart (ST. GEORGE II in 1984 an ST. GEORGE I in 1986), both cases involved in this appeal began as foreclosure actions (Appendix 1 and 14). Other than the fact that the subject properties happened to be located in Franklin County, the two cases were unrelated. However, both plaintiffs below, LEISURE in ST. GEORGE II and FIRST AMERICAN in ST. GEORGE I, claimed that ST. GEORGE, or its general partner STOCKS, owed debts which were evidenced by written documents.

ST. GEORGE II

Long before FIRST AMERICAN filed suit in ST. GEORGE I, LEISURE had already secured its sought-after judgment of foreclosure, as well as a money judgment of $1,216,516.11 (Appendix 2). This event began the saga which, after much posturing over a four-year period, has resulted in the case being before this Court. The events transpired as follows:

Approximately three months after the entry of final judgment in favor of LEISURE, defendants ST. GEORGE and STOCKS cited Sections 38.02 and 38.10, Florida Statutes, and moved to disqualify the presiding trial judge, Judge Kenneth R. Cooksey (Appendix 3). The motion was not verified, nor did it refer to Rule 1.432 of the Florida Rules of Civil Procedure. Shortly thereafter, on January 23, 1986, said defendants filed an amended motion to disqualify Judge Cooksey (Appendix 4). The amended motion again cited both Florida Statutes Sections 38.02 and

38.10. In addition, it cited Rule 1.432, Florida Rules of Civil Procedure, and was verified by defendant STOCXS. Both the original motion and the amended motion were partially grounded upon an allegation that Judge Cooksey's son worked for plaintiff BROWN, a factor that is specifically recognized by Section 38.02. On February 17, 1986, Judge Cooksey denied defendants' amended motion, and thereafter ST. GEORGE and STOCKS petitioned the First District Court of Appeal for a writ of prohibition. The petition for writ of prohibition was denied on March 3, 1986 (Appendix 5).

Following their failed efforts to have Judge Cooksey recused, ST. GEORGE and STOCKS, on March 21, 1986, filed a third motion for recusal (Appendix 6). This third motion again cited Sections 38.02 and 38.10. However, this time ST. GEORGE and STOCKS asserted as grounds that their failed efforts to have Judge Cooksey recuse himself were such that they had "prejudiced themselves in further proceedings before the court."

While the third motion for recusal was pending, ST. GEORGE and STOCKS filed a separate lawsuit (Franklin County Circuit Case No. 86-47) seeking to have their adverse judgment set aside. The collateral attack alleged the same misconduct as had been previously asserted in support of their applications or suggestions of recusal (Appendix 7). Finally, on April 10, 1987, after much adverse publicity, Judge Cooksey entered an order of recusal (Appendix 8).

Following Judge Cooksey's recusal, ST. GEORGE II was assigned to Judge George L. Harper since he was already handling the collateral suit (Franklin County Circuit Case No. 86-47) (Appendix 7). While Judge Harper was presiding over LEISURE's efforts to collect its judgment entered by Judge Cooksey, ST. GEORGE and STOCKS filed a suggestion of recusal in 86-47 seeking to recuse Judge Harper and all other judges in the Second Judicial Circuit (Appendix 9). The motion was granted (Appendix 10). Case 86-47 was then assigned by the Florida Supreme Court to Judge Dedee S. Costello of the First Judicial Circuit. She ruled against ST. GEORGE and STOCKS (Appendix 11) and was affirmed on appeal (Appendix 12). While 86-47 was proceeding through trial and appeal, ST. GEORGE II was inactive. After 86-47 was concluded, because of the illness and unavailability of Judge Harper, ST. GEORGE II was assigned to Judge William L. Gary. At that time, BROWN and LEISURE moved to disqualify Judge Gary, and an order to that effect was entered on October 12, 1987. Thereafter, the Florida Supreme Court appointed John A. Rudd, Circuit Judge (retired), to hear and dispose of the various related cases involving the parties, including ST. GEORGE II (Appendix 13).

ST. GEORGE I

While the post-judgment legal gymnastics were ongoing in ST. GEORGE 11, FIRST AMERICAN filed its suit in ST. GEORGE I. As was previously noted, it was also a foreclosure action (Appendix 14). BROWN and LEISURE were joined as defendants because the judgment they received in ST. GEORGE II attached to the subject real property.

After ST. GEORGE I had been pending for approximately one year, following hearings on several technical motions, ST. GEORGE filed for reorganization under Chapter 11 of the Bankruptcy Code (Title 11, U.S.C.), and the case was automatically stayed pursuant to Bankruptcy Code Section 362 (Appendix 15).

Relief from that stay was not issued until August 29, 1988 (Appendix 16), and that order was subsequently amended (Appendix 17). Thereafter, the case proceeded on an amended complaint (Appendix 18) until December 7, 1988. On that date, STOCKS also filed for reorganization under Chapter 11 (Appendix 19). However, STOCKS' bankruptcy did not further delay FIRST AMERICA"s fore-closure efforts since the amended complaint sought no relief against STOCKS individually. Consequently, the case was scheduled for trial to commence on February 14, 1989 (Appendix 20).

One week before the scheduled trial, ST. GEORGE moved for a continuance asserting its attorneys' scheduling conflicts as grounds (Appendix 21). The motion was granted and the court continued the case until March 14, 1989 (Appendix 22). One week before the new trial date, ST. GEORGE filed its motion for dis-qualification of Judge Rudd (Appendix 23). This same motion, with the same supporting affidavits and depositions, was also filed in several other cases that were pending before Judge Rudd and in-volved ST. GEORGE or STOCKS or the STOCKS Family Trust. The list included Franklin County Circuit Court cases numbered 84-254, 86-46, 86-152, 86-200, 87-34, and Leon County Circuit Court Case No. 85-62.

ST. GEORGE's motion for disqualification in ST. GEORGE I was denied on March 20, 1989 (Appendix 24), and its motion for disqualification in ST. GEORGE II was denied on April 11, 1989 (Appendix 25). ST. GEORGE then petitioned the First District for writs of prohibition. When it granted the writs, the District Court, as part of its Opinions, certified questions of great public importance to this Court. Thereafter, LEISURE and BROWN filed a timely notice of appeal herein.

SUMMARY OF THE ARGUMENT

By finding a difference between a "suggestion of disqualification" and "application for disqualification", the District Court concluded that the second portion of Section 38.10, Florida Statutes, is not applicable to the first portion of Section 38.10, Florida Statutes. That distinction violates a cardinal rule of statutory construction in that it fails to give effect to every part of Section 38.10 as a whole. Further, it places more significance on the title of a motion than on the character of the pleading. This error, if uncorrected, invites abuse because it allows litigants to repeatedly seek the removal of judges based upon the knowledge that the truth of their supporting affidavits cannot be questioned.

Even if this Court feels compelled to disregard logic and recognize a distinction between a "suggestion" and an "application", the District Court's Opinion must still be reversed because ST. GEORGE and STOCKS filed both. Consequently, Judge Rudd was correct when he reviewed the motion and supporting affidavit and concluded that he stood fair and impartial between the parties.

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 ?

Under the interpretation advanced by the First District, a party in a civil or criminal case can continuously recuse any number of trial judges at any time he may choose. This can be done at the sole discretion of such party, without any review by the trial bench. As a consequence, the second part of Section 38.10 has been rendered ineffective despite the fact that it was obviously intended to prevent abuse of the judicial system.

The question certified to this Court is the "proper interpretation of the second portion of section 38.10, Florida Statutes." The First District concluded that a determination in accordance with the second portion of Section 38.10 only becomes necessary when a prior "suggestion of disqualification" has been made pursuant to Section 38.02. In reaching its conclusion, the court established a material distinction between a "suggestion of disqualification" as referenced in Section 38.02 versus an "application for disqualification" as referenced in Section 38.10. This semantical distinction is not logical. 1/ Further,

1/ The First District acknowledged its reasoning was not the most logical construction of the second portion of Section 30.10 (see the next to last paragraph of the Opinion in ST. GEORGE I).

it permits a party to repeatedly remove presiding judges by simply filing an affidavit which must be accepted as true.

By carefully reading the District Court's Opinion in ST. GEORGE I, it is apparent that the Court's conclusion is based entirely upon a theorized distinction between the word "suggestion" and the word "application". One need only to read and compare the subject sections to see that while the words are themselves distinct, the distinction is one without a difference.

In Section 38.02, disqualification is grounded upon a party's fear of bias due to the judge being related by cosanguinity or affinity to an opposing party, witness or attorney. Section 38.02, Fla. Stat. (1987). Under Section 38.10, grounds for disqualification similarly contemplate judicial bias. While not limited to relatives, the purpose is the same. The statute provides, "whenever a party ... fears he will not receive a fair trial ... on account of the prejudice of the judge ... ." Section 38.10, Fla. Stat. (1987).

Is it significant that one section is presented by a pleading entitled "suggestion", while the other is presented by a pleading entitled "application" ? If one asserted the grounds as noted in Section 38.02, but called the request for disqualification an "application" rather than a "suggestion", would the grounds, if true, still justify relief ? Of course.

The law of this state is very clear that courts are permitted to excuse an inappropriate designation and proceed to the merits of an issue. More regard is had for the true character of the pleading than for its title as reflected in the caption.

Hough v. Menses, 95 So.2d 410 (Fla.1957); Florida Fuel Oil, Inc. v. Springs Villas, Inc., 95 So.2d 581 (Fla.1957).

Even if a difference can be found between a "suggestion" and an "application", the language found in the second portion of Section 38.10 mandates its application to the first portion of Section 38.10. In the second portion of Section 38.10 the following language is found:

> ... when any party to any action has suggested the disqualification of a trial judge and an order has been entered admitting the disqualification of such judge and another judge has Seen 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 ..., unless such judge admits and holds that it is then a fact that he does not stand fair and impartial between the parties.

Please note that the emphasized words "alleged prejudice" are the very focus of the first portion of Section 38.10. In contrast, the grounds under Section 38.02 are limited to the judge being related to a party, attorney or witness. If the application of the second portion of Section 38.10 was intended to be limited to those occasions when the grounds of Section 38.02 had been previously asserted, is it not reasonable to expect the wording of the second portion of Section 38.10 to embrace those grounds ? Since it does not, is it not likewise reasonable to conclude that the second portion of Section 38.10 pertains to a prior "application" filed pursuant to the first portion of Section 38.10 ?

It must be pointed out that Section 38.02 contains provisions which allow the presiding judge to test the truth of a suggestion if its truth does not appear from the record. In contrast, under the First District's construction, a judge will have no basis to test the truth of multiple Section 38.10 "applications for disqualification", since the second portion of the section would not be applicable.

By distinguishing a "suggestion" from an "application", as used in Section 38.02 and 38.10, the District Court violated a cardinal rule of statutory construction. The court failed to give effect to every part of the statute as a whole. State v. Gale Distributors, Inc., 349 So.2d 150 (Fla.1977). Under the District Court's ruling in ST. GEORGE I and II, the second portion of Section 38.10 would have no application to the first portion. If that is true, then it adds nothing because the operation of Section 38.02, the only other section to which the second portion of Section 38.10 could apply, already has provisions which allow a judge to question the truth of the grounds asserted for his disqualification.

In its Opinions in ST. GEORGE I and ST. GEORGE II, the District Court has overlooked the precedents that have in dicta found no distinction between a "suggestion", "application" or "motion" for disqualification. For example, in Ball v. Yates, 29 So.2d 729 (Fla.1947), this Court referred to a "suggestion of disqualification" (Id. at 734), even though the basis of the application was one recognized by Section 38.10. Namely, prejudice and bias. Similarly, the court in Shotkin v. Rowe, 100 So.2d 429

(Fla.3rd DCA 1958), when considering an "affidavit of prejudice", concluded as follows:

> 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.

Id. at 430. The First District even overlooked its own decision in Peebles v. Smith, 291 So.2d 102 (Fla.1st DCA 1974), which contained the following dictum:

> One of the grounds for disqualification asserted by relator appears to come within the purview of Section 38.02, Florida Statutes, F.S.A., and the other ground under Section 38.10, Florida Statutes, F.S.A. In both instances the statute requires that a suggestion of disqualification must be filed together with certain supporting data in the trial court.

Id. at 102.

Consider, if you will, the abuse that will necessarily follow if the holdings of **ST. GEORGE I** and **ST. GEORGE II** are accepted by this Court, For example, every time a party has a weak position and fears an adverse ruling, he need only to fabricate an affidavit with sufficient but untrue grounds to justify a claim that "he fears he will not receive a fair trial", and be sure to style his motion an "application" rather than a "suggestion". Since, according to the First District, the truth of the affidavit supporting an "application" cannot be questioned, the tactic can be repeated without limitation.

Any doubt that such abuse can and will occur will be removed by a review of this case at the trial court level. Although STOCKS knew that Judge Cooksey's son had previously worked for one of the plaintiffs (Appendix 26, pages 4-6), he did not raise it until the final judgment from Judge Cooksey was entered. Further, when the judgment turned out to be adverse to STOCKS, he hired two private investigators who misrepresented their purpose and authority in an effort to gather information regarding a possible relationship between Judge Cooksey and LEISURE or BROWN. When nothing could be found, the investigators fabricated some documentary evidence by substituting the cover page of a work order to make it appear to be related to work done on Judge Cooksey's beach house. The document was then filed in support of STOCKS' efforts to recuse Judge Cooksey (Appendix 27, pages 8 and 9) (Appendix 28, pages 5-9).

Similarly, in support of its efforts to recuse Judge Rudd, ST. GEORGE relied upon an unsupported affidavit from the brother-in-law of Gene Lewis, STOCKS' prior attorney and the donnee of the trust which claimed the subject property. Under the District Court's interpretation of Section 38.10, it did not matter that the affidavit was untrue according to the testimony of the attorneys who were present, <u>including</u> the attorney for the Trustee, the adverse party. As the case currently stands, STOCKS and ST. GEORGE can "try out" another new judge, and if this new judge does not rule to suit them, they can simply file another affidavit without concern for its accuracy. This will once again delay the case, which has already been delayed four years by

similar allegations of alleged prejudice. While the number of recusal suggestions or applications filed in this case may be considered unusual, **LEISURE** and **BROWN** doubt that anyone would argue that a person charged with a serious crime, such as drug trafficking, would hesitate to file a series of questionable affidavits if such procedure provided a sure-fire way to avoid a day of reckoning.

To avoid abuse, to comply with the apparent legislative intent, and to give effect to all of Section 38.10, this Court must answer the certified question by construing the second portion of Section 38.10 to be applicable to a litigant's multiple efforts to disqualify a judge, regardless of what the pleading is called.

ARGUMENT II

NOTWITHSTANDING THE ULTIMATE CONSTRUCTION MADE BY TEIS 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 ?

Even if there is a distinction between an "application" and a "suggestion of disqualification", the distinction under the facts of this case did not preclude Judge Rudd from making an inquiry regarding the truth of the supporting allegations. Rather, such distinction is of no consequence here.

In its Opinion in ST. GEORGE I, the District Court held that "the different standard" set forth in the second part of Section 38.10 "applies only where the previous disqualification was made pursuant to Section 38.02, which expressly provides for a suggestion of disqualification on grounds that the judge is related to a party or attorney or a potential witness in the case." (ST. GEORGE I, page 5). That is precisely what occurred.

On January 21, 1986 and again on March 21, 1986, ST. GEORGE and STOCKS filed a motion requesting that the original trial judge, Judge Kenneth E. Cooksey, be disqualified because his son worked for BROWN and LEISURE and he therefore had an interest in the outcome of the case. There can be no doubt that this request was filed under Section 38.02 because St. George's attorney specified in the pleadings that it was being filed

"pursuant to Chapters 38.02 and 38.10, Florida Statutes" (Appendix 3 and 4). It is important to note that the relationship of a judge to an interested party is not a ground for disqualification under the first part of Section 38.10.

If there was any doubt that the prior request for disqualification was filed pursuant to Section 38.02, this doubt was removed at the January 24, 1986 hearing when the judge and <u>all</u> the parties, including ST. GEORGE and its attorney, elected to handle the request procedurally under Section 38.02, rather than under Section 38.10. After hearing all the arguments and reviewing STOCKS' and ST. GEORGE's allegations, Judge Cooksey ruled as follows: (Appendix 29)

THE COURT:

> From what I know at this time, Mr. Harper, it's my ruling that your motion -- your suggestion of disqualification, that the truth of it is not apparent from the record. I'm going to enter an order today allowing you 10 days within which to file any affidavits you wish to file to reflect the truth of the motion, if such exists. And at that time I will enter a ruling on your motion.
> (Appendix 29, pages 10 and 11)

Counsel responded, "Thank you, Judge. I appreciate that."

Judge Cooksey replied:

TEE COURT:

> Because my ruling is that your motion or suggestion of disqualification, the truth of it is not apparent from the record. And I don't find anything in the record to warrant me disqualifying myself.
> (Appendix 29, page 11)

The attorney for STOCKS and ST. GEORGE again responded, "I have no problem with that at all, Your Honor."

The same attorney then proceeded to take depositions and filed affidavits with the court, as he had a right to do only under Section 38.02, but not under Section 38.10 or under Rule 1.432, Florida Rules of Civil Procedure. Having proceeded under and having taken advantage of the procedures set forth in Section 38.02, ST. GEORGE should now be estopped from denying that the prior request was filed pursuant to the very statute which provided those procedural advantages.

As further support for the fact that the prior motion was brought pursuant to Section 38.02, this Court only needs to review the deposition of STOCKS (Appendix 26, page 10), the then general partner of ST. GEORGE, in support of efforts to have Judge Cooksey recused. On Page 10 of his February 5, 1986 deposition, STOCKS testified as follows:

Q. Did you have any other basis whatsoever for alleging Judge Cooksey's son had any interest in the outcome of this litigation ?

A. Well, Mr. Wadsworth, I think it's pretty apparent if Gene goes broke and he's a fellow working for him, he would probably be out of a job if Gene went broke.

B. That's what your basis was, is that right ?

A. Yes.

If STOCKS and ST. GEORGE had not been proceeding under Section 38.02, it could have and should have objected when Judge Cooksey

began handling the request under the procedures set forth in Section 38.02, rather than Section 38.10 or Rule 1.432. Instead, as noted above, the attorney for STOCKS and ST. GEORGE expressed complete agreement, and indeed satisfaction, when Judge Cooksey repeatedly referenced to their "suggestion of disqualification" and the fact that "the truth of it is not apparent from the record."

It is important to note that Judge Cooksey's repeated reference to the fact that "the truth is not apparent from the record" is taken directly from Section 38.02, which provides that, if the truth "does not appear from the record in said cause, the judge may by order entered therein require the filing in the cause of affidavits." That is exactly what Judge Cooksey did when he stated: "I'm going to enter an order today allowing you 10 days within which to file any affidavits you wish to file to reflect the truth of the motion, if such exists (Appendix 30, on page 10). This ruling was essentially correct under Section 38.02, but would have been improper under Section 38.10 or Rule 1.432, both of which require the court to accept as true the motion, and to simply rule on its legal sufficiency without further discovery or findings concerning "truth or falsity" as those terms are used in Section 38.02.

Instead of giving the trial court its normal presumption of correctness, the District Court made a factual finding that Judge Cooksey was not acting in response to a Section 38.02 "suggestion" pending before him, but rather was acting "pursuant

to a Section 38.10 motion." (Page 3, ST. GEORGE II Opinion). Such a factual determination should not be made at the appellate level.

In addition, the District Court, after espousing the virtues of following "the plain language employed by the legislature" (page 6, ST. GEORGE I Opinion), proceeded to ignore the wording of the second portion of Section 38.10 which provides:

> ... 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, ... the (new) judge so assigned and transferred is not disqualified on account of alleged prejudice .... .

Using the same "plain language of the statute" standard endorsed by the District Court, it is clear that the threshold to bring this case under the second part of Section 38.10 has been met. ST. GEORGE was a party which suggested the disqualification of a trial court judge, and an order was entered disqualifying the judge. There is no requirement in the statute that the trial judge's order of disqualification must set forth that it was based upon a "suggestion" filed under Section 38.02. The District Court's judicial addition of this requirement will allow a litigant to recuse an unwanted judge at any time until the "right one" is found, or until the sought-after delay has been accomplished.

In the case at bar, ST. GEORGE and STOCKS have successfully recused or avoided every judge in the Second Circuit. This resulted in this Court's special appointment of Judge Rudd from retirement. If the lower court's decision is allowed to stand, STOCKS and ST. GEORGE will have once again been successful at the expense of another circuit judge. It will not matter that the claimed prejudice is non-existent. The second part of Section 38.10 was written as a judicial shield against this type of abuse, and it should be given its intended effect.

Once Judge Rudd found that ST. GEORGE had previously "suggested the disqualification of a trial judge", he was then required by the second part of Section 38.10 to not call for a substitution of judges, unless he admitted that he did not stand fair and impartial between the parties. It is clear from the record that Judge Rudd made no such admission. Rather, to the contrary, he found that he did stand fair and impartial (Appendix 25). As a consequence, he was required to continue to preside over the case.

If ST. GEORGE questioned Judge Rudd's conclusion regarding impartiality, it could have assigned the ruling as "error and (it) could have been reviewed, as are other rulings of the trial court." (See the last sentence of Section 38.10, Florida Statutes). While the correctness of Judge Rudd's final ruling is not before the Court, it merits discussion.

The alleged statement attributed to Judge Rudd, and his alleged actions in tossing an affidavit back to petitioner's

attorney, served as the basis in both ST. GEORGE I and ST. GEORGE II for the ultimate holding. The problem is that tne statement allegedly made by Judge Rudd is not supported by the record. Upon review of the deposition of Nathan Bond, one of the attorneys for the adverse party, this Court will see that his deposition testimony would not lead a prudent observer to reasonably conclude that Judge Rudd had acted in a non-judicious manner. He testified 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.
> (Appendix 30, pages 7 and 8).)

This testimony by an attorney for the adverse party is remarkably similar to the testimony of BROWN, given at the hearing on the motion to disqualify Judge Rudd, held in ST. GEORGE II (Appendix 31, pages 42-48).

Both of these witnesses recalled that Judge Rudd was faced with a question of actual notice regarding the recording of a warranty deed. STOCK's affidavit stated that there was actual

notice; BROWN testified that there w s no act al notice. In order to make a ruling on the point of law before him, Judge Rudd necessarily had to accept the testimony of one party or the other. If he had accepted STOCK's testimony, title to the property would have vested in the A. Eugene Lewis Family Trust, the transferee under an unrecorded deed from STOCKS. If, however, he accepted the testimony of BROWN, the conveyance would be subject to BROWN and LEISURE's prior judgment.

When one carefully reviews the testimony of Bond and BROWN as a whole, it is clear that they are not in disagreement as to what occurred during the subject hearing before Judge Rudd. They both agreed that there was an attempt to introduce an affidavit by STOCKS on the basis that he was in California, notwithstanding the fact that he had been in the courtroom in another case minutes earlier. This fact was known to Judge Rudd but not to Attorney Bond or his client, Mr. Wallace. LEISURE objected to the admission of the affidavit and was allowed to voir dire its contents through various means, including direct testimony from BROWN. When it became apparent that there was no procedural or evidentiary basis for the submission of the affidavit, Attorney Bond requested a continuance until such time as STOCKS could be personally present. LEISURE objected to a continuance, pointing out that STOCKS could not be in California because he had been in a prior hearing with LEISURE before Judge Rudd. When all of the motions, arguments and testimony were complete, Judge Rudd made his ruling and held that as between the

direct testimony of BROWN and the proffered affidavit of STOCKS, he would believe BROWN, resulting in a finding that the property was subject to BROWN's judgment. He obviously made his statement based upon the credibility of these two witnesses. The determination was a material and indeed essential part of his ruling in open court for at least two reasons: (1) it was necessary to show why he found that the property was subject to the judgment lien, i.e., there was no actual notice; and **(2)** it was relevant to show the basis for denying Attorney Bond's request for continuance, i.e., a continuance would be a waste of judicial time and effort because, as between the two directly conflicting statements of the parties, Judge Rudd chose to believe the sworn testimony of **BROWN.** These statements and Judge Rudd's ultimate ruling reflected mental impressions and opinions necessarily formed during the course of judicial proceedings and were a necessary and proper part of those proceedings. They were certainly not intemperate or extrajudicial statements reflecting a bias toward any party. Indeed, Judge Rudd could not have made the ruling before him without forming those mental impressions and opinions with regard to the testimony and credibility of two witnesses who were offering directly conflicting testimony which could not be reconciled; and Judge Rudd was forced to accept the testimony of one witness and reject the testimony of the other witness in order to make the decision before him.

Compare Judge Rudd's statement as to the credibility of two conflicting witnesses, made as a necessary part of a final

ruling, with the following statements by judges which have been found not to show prejudice which is legally sufficient to disqualify a trial judge under the laws of Florida:

(1) "I don't see how you can't find this accident compensable." Mobile v. Trask, 463 So.2d 389 (Fla.1st DCA 1985);

(2) "This case is just another example of the waste of time of people who are guilty as heck . . . ." Wiley v. Wainwright, 793 F.2d 1190 (11th Cir.1986); and

(3) ". . ., and they will not like this decision, but I don't give a damn." City of Palatka v. Frederick, 174 So.826 (Fla.1937).

If hese comments were not sufficient grounds for disqualification, how can Judge Rudd's necessary comment and findings that he would believe BROWN over STOCKS be deemed a ground for disqualification, especially when this comment and finding represented a determination which necessarily had to be made in order for Judge Rudd to rule on the matter pending before him ?

ST. GEORGE in the District Court indicated that Judge Rudd rejected the affidavit of STOCKS prior to hearing the testimony of BROWN. However, this is not true. What Attorney Bond said was that "an attempt" to submit the affidavit was made prior to the testimony of BROWN. However, no ruling was made on that proffered affidavit until it was voir dired, including testimony from BROWN. That basic sequence was confirmed by Attorney Bond in his deposition (Appendix 30).

In summary, the testimony of witnesses Bond and BROWN are consistent and compatible. They support the proposition that Judge Rudd's statements were judicious and necessary comments made during the course of an open hearing, and that they are not the type of statements that justify disqualification.

The only remaining issue is whether the unsupported and uncorroborated statement of Jeffrey Wallace be deemed sufficient to overcome Judge Rudd's specific finding that he "stands fair and impartial between the parties." It should be noted that Mr. Wallace admitted in his deposition that he is the brother-in-law of A. Eugene Lewis and the trustee of the A. Eugene Lewis Family Trust, the recipient of the conveyance from STOCXS designed to avoid BROWN's judgment. Obviously, he had a direct interest in the outcome of the hearing and would be expected to be less t an objective.

In addition to the arguments which related to the specifics of this case, the issue before this Court has broader implications. Is this Court going to allow a party litigant in Florida to frustrate the system by repeatedly replacing a judge when he rules adversely ? Maybe the law allows this to be done once in a case, but it is incredible that a party can use this tactic indefinitely, or until such party is given a judge of his choosing.

Petitioners respectfully submit that the second half of Section 38.10, Florida Statutes, was enacted to stop this type of abuse. It is for that reason that the second part of Section 38.10 allows the Court to make findings of fact, which necessarily involve weighing the credibility of various witnesses, such as Jeffrey Wallace.

CONCLUSION

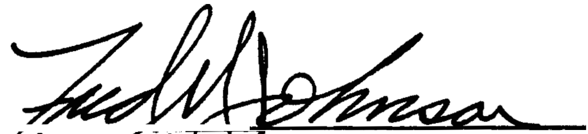
While every litigant is entitled to h ve a f ir and impartial judge, he is not entitled to have the judge of his choice. If the District Court's Opinion is permitted to stand, the system will will be opened to abuses since the truth of affidavits supporting multiple "applications" for disqualification will not be subject to question.

Judge Rudd's review, pursuant to the second portion of Section 38.10, was appropriate under the facts and should not be disturbed.

WHEREFORE, LEISURE and **BROWN** respectfully request that this Court reverse the decision of the First District Court of Appeal, deny the sought-after writ, and remand this case to the trial court for further proceedings before Judge Rudd.

RESPECTFULLY SUBMITTED on this 6th day of September, 1989.

FULLER, JOHNSON & FARRELL, P.A.



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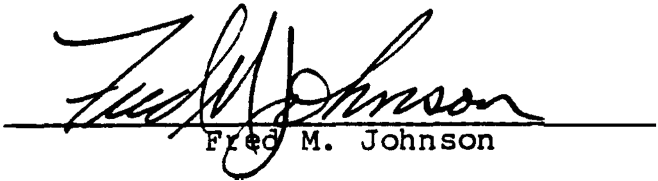
CERTIFICATE OF SERVICE

I CERTIFY that copies of the foregoing **INITIAL BRIEF** were furnished to all parties on the attached service lists, by United States Mail, postage prepaid, on **this 6th** day of September, 1989.



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