IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-943

TABLEAU FINE ART GROUP, INC. and TOD TARRANT,

Petitioners,

v.

JOSEPH J. JACOBONI, et. al.

Respondents.

ON DISCRETIONARY REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL

PETITIONERS' INITIAL BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioners certifies that the following persons and entities have or may have an interest in the outcome of this case:

Tableau Fine Art Group, Inc.

Tod Tarrant

Joseph J. Jacoboni

Honorable Amy Steele Donner

Perry M. Adair, Esq.

Becker & Poliakoff, P.A.

Gary M. Pappas, Esq.

Carlton Fields, P.A.

Honorable Alan R. Schwartz

Honorable James R. Jorgenson

Honorable Gerald B. Cope, Jr.

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TABLE OF AUTHORITIES

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INTRODUCTION

Petitioners, TABLEAU FINE ART GROUP, INC. ("Tableau") and TOD TARRANT ("Tarrant") submit this their Initial Brief on the Merits. Petitioners seek reversal of the Third District Court of Appeal's denial of Petitioners' Petition for Writ of Prohibition challenging the Trial Court's denial of Petitioners' Motion to Disqualify the Honorable Amy Steele Donner. Tableau and Tarrant are referred to collectively herein as "Petitioners". Where referred to individually, Petitioners will be referred to as either "Tableau" or "Tarrant". Respondent, the Honorable Amy Steele Donner, will be referred to as "Judge Donner".[1] Respondent, Joseph J. Jacoboni will be referred to as "Jacoboni" or "Plaintiff".

Citations to the Appendix accompanying this Petition will appear herein as "App. ". The Third District Court of Appeal will be referred to as the "Third DCA". The Third DCA's Opinion certifying conflict will be referred to as the "Conflict Opinion".[2] The case with which the Third DCA certified conflict, *Anderson v. Glass*, 727 So.2d 1147 (Fla. 5th DCA 1999), will be referred to as *Anderson*.

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[1] Pursuant to Fla.R.App.P. 9.100(e)(2), Judge Donner was not named in the caption of the Petition for Writ of Prohibition, and likewise, is not named in the caption of this proceeding. Judge Donner is a party to this proceeding.

[2] 780 So.2d 344 (Fla. 3rd DCA 2001).

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ISSUES PRESENTED

WHETHER THE THIRD DCA ERRED IN DENYING THE PETITION FOR WRIT OF PROHIBITION THEREBY AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONERS' MOTION TO DISQUALIFY WHERE:

A. The Trial Court, In Violation Of The Requirement Of Fla.R.Jud.Admin. 2.160 That Motions To Disqualify Be Ruled Upon Immediately, Delayed 92 Days From The Date The Motion Came Before the Court Before Ruling On The Motion.

B. The Denial Of The Writ Of Prohibition And The Third DCA's Rejection Of The Holding In *Anderson* Creates Precedent Which Has The Potential For Undermining Public Confidence In The Judiciary, Fosters Delay In Judicial Proceedings And Contributes To The Erosion Of The Public's Perception As To The Impartiality Of The Judiciary.

C. Petitioners' Motion To Disqualify Complied With All Requirements Set Out In Fla.R.Jud.Admin. 2.160 But Nevertheless, The Trial Court Incorrectly Determined Petitioners' Motion To Disqualify Was Legally Insufficient.

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STATEMENT OF THE CASE AND FACTS

Petitioners are the Defendants in the Trial Court. Respondent, Jacoboni, is the Plaintiff in the Trial Court. Judge Donner is the Circuit Court Judge in whose division the Trial Court proceedings are pending.

Nature of the Case

Petitioners invoke the discretionary jurisdiction of this Court to review the decision of the Third DCA denying Petitioners' Petition for Writ of Prohibition.[3] By that Petition, Petitioners challenged Judge Donner's denial of Petitioners' Motion to Disqualify.[4]

Course Of The Proceedings In The Trial Court

The proceedings in the Trial Court were instituted by Jacoboni filing a Complaint against Petitioners. Jacoboni's claims against Petitioners arise out of a transaction involving the purchase of a piece of art.[5] The Calder Mobile was being sold by its owner Maria Stone ("Stone"). Stone was represented in the transaction by her agent, art dealer Dawn Gideon ("Gideon"). The Calder Mobile was eventually

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[3] A copy of the Third DCA's Order denying the Petition for Writ of Prohibition appears at App. 14.

[4] A copy of Judge Donner's Order denying the Motion to Disqualify appears at App. 12.

[5] The art in question is a mobile sculpture by the artist Alexander Calder ("Calder Mobile").

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purchased by Jacoboni.[6] Jacoboni was represented in the transaction by his agent, art dealer Robert Lombard ("Lombard") and the gallery which Jacoboni owned and operated with Lombard, Robert Thomas Galleries ("RTG"). Tarrant is an art dealer. Tarrant owns Tableau.

Gideon authorized Tarrant to present the Calder Mobile to interested parties. Tarrant made Lombard aware of the availability of the Calder Mobile. Lombard apparently procured Jacoboni's interest in the Calder Mobile and, as aforestated, Jacoboni alleges he eventually purchased the Calder Mobile. Jacoboni further alleges that: Tarrant made certain misrepresentations to Jacoboni's agent, Lombard in connection with the transaction, Jacoboni relied upon those representations and, as a result, Jacoboni paid (and Tarrant retained) $300,000.00 for the Calder Mobile in excess of the actual sale price agreed upon by Stone for the Calder Mobile.[7]

Tarrant, in his deposition, admitted making certain statements and authoring certain documents which were factually incorrect. Tarrant further testified however, that

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[6] Petitioners state that the Piece, allegedly, was "eventually" purchased by Jacoboni as it is Petitioners' position that at the time Gideon initially authorized Tarrant to begin marketing the Calder Mobile, Jacoboni was not a potential buyer. Rather, the buyer was some other person represented by Jacoboni's agent, Lombard.

[7] Jacoboni's Second Amended Complaint in this action appears at App. 5. It is undisputed that Petitioners had no direct communication with Jacoboni until after the deal with Stone had been made and the purchase proceeds had been wired.

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Jacoboni's agent was, based on discussions with Tarrant, aware of the factual inaccuracies.[8] It was and is Tarrant's position that there was no misrepresentation to Jacoboni both because Petitioners had no direct communication with Jacoboni prior to the deal for the Calder Mobile being made and also because Jacoboni's agent was aware of the factual inaccuracies, some of which Jacoboni bases his claims upon. The Motion to Disqualify has as its origin certain comments made by Judge Donner at a hearing held before her on Jacoboni's Motion for Leave to Amend Complaint to Assert Claim for Punitive Damages (hereinafter "Punitive Damage Motion") .[9]

The following timeline sets forth the occurrence of events in the Trial Court material to this Court's consideration of the issues raised by this Petition:

	Date	Event
A.	7/25/2000	Hearing held before Judge Donner on Jacoboni's Punitive Damage Motion.
B.	8/3/2000	Petitioners move to disqualify Judge

[8] Some of the alleged misrepresentations were not made to either Jacoboni or his agent Lombard but rather, were made to Stone's agent Gideon. These statements were unknown to Jacoboni or his agent prior to the sale and accordingly, could not have been relied upon by them. Tarrant submits that such statements are totally irrelevant to Jacoboni's claims. The statements are referred to herein however, because notwithstanding the fact they are not relevant to Jacoboni's claims, Judge Donner referred to them in her comments which serve as the basis for the Motion to Disqualify.

[9] The full transcript of that hearing appears at App. 2.

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		Donner.
C.	8/7/2000	Judge Donner enters Order Granting Plaintiff's Punitive Damage Motion. [10]
D.	8/18/2000	Petitioners serve Motion to Set Motion [to Disqualify] for Specially Set Hearing.[11]
E.	8/18/2000	Petitioners serve Notice of Hearing Scheduling Defendants' Motion [to Disqualify] for Specially Set hearing for August 31, 2000.[12]
F.	8/20/2000	Petitioners' Motion to Disqualify

[10] Although Petitioners contend that Judge Donner should not have ruled on the Punitive Damage Motion while the Motion to Disqualify was pending, since her decision to allow a claim for punitive damages is not the subject of this proceeding, Petitioners will not dwell further on the facts and evidence argued in connection with the Punitive Damage Motion. The facts material to that Motion, are more fully set out in Petitioners' Response In Opposition to the Punitive Damage Motion (App. 1.) and the transcript of the hearing on the Punitive Damage Motion (App. 2).

[11] A copy of this Motion appears at App. 6. The Motion recites in part that "… the Defendants attempted to set the motion [to disqualify] for hearing as soon as possible on the Court's specially set hearing calendar. The office of the undersigned attorneys for Defendants was told by Judge Donner's Judicial Assistant that the Judge was **considering the motion, would not allow it to be set for hearing** and would notify the parties as to how she intended to respond to it. Consequently, the Defendants have been unable to set the Motion for hearing." (emphasis added).

[12] A copy of this Notice appears at App. 8. This hearing did not make the Court's calendar.

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		comes before Judge Donner.[13]
G.	8/23/2000	Plaintiff serves his Response to Petitioners' Motion to Disqualify.[14]
H.	8/31/2000	Petitioners serve Notice of Hearing Scheduling Defendants' Motion to Set Motion[to Disqualify] for Specially Set Hearing for September 14, 2000.[15]
I.	9/13/2000	Petitioners serve Notice of Hearing Scheduling Petitioners' Motion to Set Motion [to Disqualify] for Specially Set hearing for September 28, 2000, (the same date that other motions pending in the action were being heard).[16]
J.	9/28/2000	Judge Donner advises the parties that she would be issuing her Order on the Motion to Disqualify.[17]

[13] A conformed copy of the Order denying the Motion to Disqualify appears at App. 12. It is undisputed that no hearing was held in this matter before Judge Donner on August 20, 2000, (which was a Sunday) but according to her Order, Judge Donner had the Motion before her on that day.

[14] Plaintiff's Response appears at App. 7.

[15] A copy of this Notice appears at App. 9. The Motion did not make the Court's calendar.

[16] A copy of this Notice appears at App. 10. At the hearing on September 28, 2000 the Court struck the case from the trial calendar.

[17] Judge Donner advised the parties that she would be issuing an Order on the Motion to Disqualify. The transcript of the September 28, 2000 hearing appears at App. 11.

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K. 11/20/00 Judge Donner enters her Order Denying Defendants' Motion to Disqualify.[18]

During the hearing on the Punitive Damage Motion, Judge Donner made the following statements which serve as the basis for the Motion to Disqualify:

> THE COURT: So what you would say to me in fact is that if Dawn Gideon and Robert Lombard joined in with the plaintiff, then this would be a valid motion because he's obviously lied to both of them? (App. 2, pg 17, Ln 16-19).
>
> _____
>
> I have read those letters. He deliberately misstated the truth to everyone. And if that's how the art business does work, that's how they really do business, I think there would be some legitimate dealers who would say – who would come in and say that's not true. I just can't believe everyone in the art business lies outright to everyone, because that's what your client did in these letters. (App. 2, pg 35, Ln 6-13).
>
> _____
>
> He lied. Lying is fraud. He fraudulently stated that he would only make $50,000. His commission was stated up front. That's not the case. Now whether or not he had a deal with Ms. Gideon and Mr. Lombard to split that

[18] A copy of this Order appears at App. 12.

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> $300,000.00, which I suspect might be true, that's going to be a problem some place down the line. (App. 2, pg 36, Ln 12-18).

Course of the Proceedings Before the Third DCA

The Petition for Writ of Prohibition was filed with the Third DCA on December 19, 2000 at 9:56 a.m.[19] The next day, December 20, 2000, the Third DCA denied the Petition without opinion.[20] On January 4, 2001, Petitioners filed their Motion for Certification of Conflict. On April 4, 2001, the Third DCA issued its Conflict Opinion certifying conflict with *Anderson*.

SUMMARY OF ARGUMENT

Of all the tasks required of counsel who have the privilege of practicing in the courts of this state, seeking the disqualification of a judge is one of the most difficult. When statements are made however, that give rise to a well founded fear that a party will not receive fair treatment from a trial judge, disqualification must be pursued. The judicial system functions as well as it does, not merely because of what is written in statute or rule books, but rather, because people utilizing the system, attorneys and

[19] The first page of the Petition bearing the date and time stamp of the Clerk of the Third DCA appears at App. 13.
[20] The Third DCA's Order appears at App. 14.

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litigants alike, go forward on the belief they will receive fair and impartial treatment from the trial judge. If that perception is eroded or compromised in any way, the efficacy of the system is compromised. For that reason, all of us, judges, attorneys, court staff, clerks, etc., have a duty to make sure, above all else, that the perception of the system as being impartial and fair is safeguarded.

In the interest of preserving the perception of the impartiality of trial judges, the benefit of any doubt should be given to a party who raises a concern regarding his or her ability to receive a fair trial before the presiding trial judge. Petitioners respectfully submit that it is the preservation of the public perception as to the impartiality of the judiciary that leads to limited scope of review afforded to the trial court in reviewing a motion to disqualify and requires immediate rulings by the trial court on motions to disqualify.

In this case, the Trial Court delayed 92 days from the date the Motion to Disqualify came before Her Honor before ruling on the Motion. That period of time is far in excess of what is permitted under Fla.R.Jud.Admin. 2.160 and the caselaw interpreting that Rule. As a result, the Motion to Disqualify should have been granted. The Trial Court's failure to grant the motion was error as was the Third DCA's denial of Petitioners' Petition for Writ of Prohibition challenging the Trial Court's decision.

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This Court should resolve the conflict between the Third DCA's decision in this case and the Fifth District case of *Anderson v. Glass* by disapproving the decision of the Third DCA and approving the decision in *Anderson*. The holding in *Anderson*, requiring a motion to disqualify to be granted where a trial court delays in ruling on such a motion, promotes public confidence in the impartiality of the trial judge, avoids delay in the litigation process and avoids the calling into question of the trial judge's motives. The decision of the Third DCA not only violates the requirement for immediate rulings under Fla.R.Jud.Admin. 2.160, but further, and more importantly, has the potential for undermining public confidence in the judiciary, fostering delay in judicial proceedings and contributing to the erosion of the public's perception as to the impartiality of the judiciary.

In passing upon a Motion to Disqualify, the offending comments of the trial judge must be viewed from the perception of the person to whom or about whom the comments were made. In this case, the trial judge's comments clearly indicated that Judge Donner had rejected the Petitioners' position in this case and had accepted the Respondents. The offending comments were more than sufficient to create a well founded fear in the Petitioners that they would not receive a fair trial before Judge

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Donner. As such, the Motion to Disqualify should have been granted. The trial court erred in determining that the Motion to Disqualify was legally insufficient.

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ARGUMENT

POINT I

THE THIRD DCA ERRED IN DENYING PETITIONERS' PETITION FOR WRIT OF PROHIBITION AND THE TRIAL COURT ERRED IN DENYING THE PETITIONERS' MOTION TO DISQUALIFY BECAUSE THE TRIAL COURT, IN VIOLATION OF THE REQUIREMENT OF FLA.R.JUD.ADMIN 2.160 THAT MOTIONS TO DISQUALIFY BE RULED UPON IMMEDIATELY, DELAYED 92 DAYS FROM THE DATE THE MOTION CAME BEFORE THE COURT BEFORE RULING ON THE MOTION.

The substantive and procedural authority for the disqualification of a Judge are Fla. Stat. ch. 38.10 and Fla.R.Jud.Admin. 2.160 respectively (hereinafter "Rule 2.160 or Rule").[21] Despite Petitioners' repeated efforts to obtain a prompt ruling on the

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[21] Fla. Stat. ch. 38.10(1993) provides in part:

> **Disqualification of Judge for prejudice; application; affidavit; etc.-** Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she 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 a manner prescribed with the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. (emphasis added).
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> ***

Rule 2.160 provides in part:

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(b) ***Parties****. Any party, including the state, may move to disqualify the trial judge assigned to the case on grounds provided by rule, by statute, or by the Code of Judicial Conduct.*

(c) ***Motion****. A motion to disqualify shall be in writing and specifically allege the facts and reasons relied on to show the grounds for disqualification and shall be sworn to by the party by signing the motion under oath or by a separate affidavit. The attorney for the party shall also separately certify that the motion and the client's statements are made in good faith.*

(d) ***Grounds****. A motion to disqualify shall show:*

(1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge; or

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(e) ***Time****. A motion to disqualify shall be made within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion and shall be* ***promptly*** *presented to the court for an* ***immediate ruling****. Any motion for disqualification made during a trial must be based on facts discovered during the trial and may be stated on the record and shall also be filed in writing in compliance with subdivision (c). Such trial motions shall be ruled on immediately.*

(f) ***Determination – Initial Motion****. The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall* ***immediately*** *enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall* ***immediately*** *be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion*. (Emphasis added).

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Motion to Disqualify, the Trial Court delayed 92 days from the date the Motion came before the Court to rule on the Motion. That such a delay violates the controlling Rule is clear from the face of the Rule. Further, case law interpreting and applying the Rule confirms that such a delay a violates the Rule. This extended delay, in and of itself, constitutes compelling grounds for reversal of the Third DCA's decision denying the Petition for Writ of Prohibition and further justifies the entry of an Order by this Court requiring that Judge Donner proceed no further in this action.

In *Cave v. State*, 660 So.2d 705 (Fla. 1995), this Court stated that §38.10 provides the substantive right to seek disqualification, while Rule 2.160 controls the procedural process. The procedural process specifically provides that the trial judge shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. *Id.* at 707-708. The Trial Court's tardy determination that Petitioners' Motion was legally insufficient will be discussed in more detail below. Suffice it to say at this point that Petitioners contend their Motion to Disqualify and supporting affidavit met the procedural and substantive requirements of the controlling statute and Rule.

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The correctness or incorrectness of the Trial Court's denial of the Motion to Disqualify and the correctness or incorrectness of the Third DCA's decision denying the Petitioners' Petition for Writ of Prohibition can be determined simply on the basis of whether the Trial Court acted "immediately" on the Motion to Disqualify as required by Rule 2.160. Petitioners contend the Trial Court did not act immediately.

This Court most recently addressed what constitutes "immediate" in the context of Rule 2.160 in *Fuster-Escalona v. Wisotsky*, 781 So.2d 1063 (Fla. 2000). Addressing what is meant by the term "immediate" this Court stated:

> This Court has strictly applied the above language because an allegation of judicial prejudice is always a serious matter. Thus, the rule provisions concerning "immediate" resolution have been accorded their plain meaning, which the Court has explained requires action that is "prompt" and is "with dispatch." (cite omitted). Our comment on the adoption of rule 2.160 emphasizes a trial judge's responsibility to act quickly on such a motion: "We find the motion [to disqualify] should be ruled on immediately following its presentation to the court". (cite omitted). When a trial court fails to act in accord with the statute and procedural rule on a motion to disqualify, an appellate court will vacate a trial court judgment that flows from that error. (cite omitted). … Here, the trial court's failure to immediately address the motion to disqualify is inconsistent with the relevant statute, rule, and caselaw. *Id.* at 1065. [22]

[22] Internal quotations and brackets in original.

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This Court went on to hold that the failure by the trial court in *Fuster* "to act immediately on the motion to disqualify violated §38.10 and rule 2.160…". *Id*. at 1066.

The Third DCA acknowledges that Rule 2.160 requires immediate rulings. In its Conflict Opinion, the Third DCA states:

> As a matter of practice, most judges enter **immediate** rulings on disqualification motions, **as contemplated by Rule 2.160(f)**. *Conflict Opinion* at Pg. 3. (emphasis added).[23]

After acknowledging the Rule contemplates immediate rulings however, the Third DCA goes on to opine that it is permissible for a trial court to take a motion to disqualify under advisement, "in order to perform legal research or consider the memoranda filed by the parties."[24] Applied to this case, what the Third DCA holds is that it was acceptable, and apparently within the parameters of "immediate"; for the Trial Court to have taken 92 days to conduct its research and then rule on the Motion.[25]

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[23] The Conflict Opinion appears at App. 15.
[24] Conflict Opinion, App. 15, pg. 3.
[25] The number of days which elapsed between August 20, 2000, the date the Trial Court's Order stated the Motion to Disqualify came before it, and the date the Trial Court ruled on the Motion.

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Petitioners respectfully submit that the Third DCA's interpretation of what constitutes "immediate", does not comport with the plain meaning of the word, nor does it comport with this Court's interpretation of the word in the context of Rule 2.160. On this point, the position of the Fifth District Court of Appeal, as set out in *Anderson,* is better reasoned. On this point, the *Anderson* court stated:

> After all, there is no reason for delay in entering a ruling since motions to disqualify are decided solely on the basis of legal sufficiency. *Anderson,* at 1147.

The Conflict Opinion also suggests that Petitioners were not diligent enough in seeking a prompt ruling from the Trial Court.[26] The Third DCA's observation on this point is not justified on the facts and purports to place upon Petitioners an obligation not contemplated by the controlling statute, Rule, or caselaw interpreting the statute or Rule.

Petitioners highlight the facts undermining the observation first. Absent from the Conflict Opinion are any references to Petitioners' repeated attempts to have the Motion to Disqualify heard. As set forth in Petitioners' Motion to Set Motion [to Disqualify] for Specially Set Hearing, Petitioners immediately attempted to set the Motion to Disqualify for hearing. Petitioners' counsel was advised: that the Judge was

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[26] Conflict Opinion, App. 15, pg. 3 and 4.

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considering the Motion, would not allow it to be set for hearing and would notify the parties as to how she intended to respond to it. Thereafter, Petitioners attempted to schedule their Motion to Set Motion [to Disqualify] for Specially Set Hearing on motion calendar for August 31, 2000 and September 14, 2000.[27] Petitioners then noticed the Motion to be heard on September 28, 2000, the same date that other motions pending in the action were being heard.[28] At that hearing, Judge Donner advised the parties she would be entering an Order on the Motion to Disqualify.[29]

Petitioners next address the Third DCA's "shifting", from the Trial Court to Petitioners, the burden of of seeing to it that the Motion to Disqualify was ruled upon promptly. The Conflict Opinion suggests that when an Order on the Motion to Disqualify was not forthcoming after the September 28, 2000 hearing, Petitioners should have done more to obtain a ruling, including perhaps filing a "petition for writ of mandamus to compel a ruling by the trial judge."[30] The Third DCA's suggestion that ; a party seeking to disqualify a trial judge can, and perhaps should, seek an

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[27] App. 8 and App. 9.
[28] App. 10.
[29] App. 11.
[30] Conflict Opinion, App. 15, pg. 3 and 4.

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extraordinary Writ of Mandamus just to obtain a ruling on a motion to disqualify, misses the point of Rule 2.160's requirement that the trial court act immediately. [31]

A delay by a trial court in ruling on a motion to disqualify, such that the moving party would need to seek a Writ of Mandamus; just to obtain a ruling, is symptomatic that there is something amiss in the trial court. That said, this Court has previously spoken on whose obligation it is to see to it a motion to disqualify is ruled upon. In *Fuster*, this Court stated:

> The focus on movant's "failure" to request a hearing on the motion to disqualify is unavailing. Clearly, it would have been better practice for the movant to request a hearing date in order to ensure that the trial court would address his motion. However, neither statute, rule, nor caselaw regarding motions to disqualify require the movant request a hearing. This absence is in stark contrast to the emphasis on the immediacy with which the rule and caselaw require a judge to act when presented with such a motion. The district court, therefore, relied on a non-existent requirement to undercut the effect of a pending motion to disqualify….. *Fuster*, *supra*, at 1066.

In this case, Petitioners went far beyond the "better practice" suggested in *Fuster*.

[31] Petitioners' respectfully submit that based upon the Third DCA's position that it is acceptable for a trial judge to take a motion to disqualify under advisement for an extended period of time, it is not a foregone conclusion that a Petition for Writ of Mandamus would have been granted had one been filed.

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Finally on this issue, the Conflict Opinion's suggestion that; a trial court taking "a disqualification motion under advisement in order to perform legal research or consider the memoranda filed by the parties" might serve as an appropriate reason to delay a ruling, does not appear applicable to the facts of this case. Again, it is apparent from the Order denying the Motion that the Motion was before the Trial Court, on August 20, 2000. Jacoboni served his Memorandum of Law in Opposition to the Motion to Disqualify on August 23, 2000. Accordingly, it would appear safe to assume that by mid-September the Trial Court had before it the authorities Plaintiff thought were material to the issues.[32] Assuming *arguendo*, the Third DCA's suggestion that "research" could properly serve to justify some delay by the Trial Court, it hardly seems "immediate" for the Trial Court to have delayed over two months from the receipt of Plaintiff's Response to rule on the Motion.

POINT II

THE THIRD DCA ERRED IN DENYING PETITIONERS' PETITION FOR WRIT OF PROHIBITION AND IN DOING SO, REJECTING THE FIFTH DCA's DECISION IN *ANDERSON V. GLASS*, BECAUSE THE PRECEDENT CREATED BY THE THIRD DCA'S DECISION HAS THE POTENTIAL FOR UNDERMINING PUBLIC CONFIDENCE

[32] Petitioners assume that if Jacoboni had a courtesy copy of his Response delivered directly to Judge Donner so that it would have arrived in her chambers prior to mid-September , Jacoboni will make that fact known to this Court.

IN THE JUDICIARY, FOSTERS DELAY IN JUDICIAL PROCEEDINGS AND CONTRIBUTES TO THE EROSION OF THE PUBLIC'S PERCEPTION AS TO THE IMPARTIALITY OF THE JUDICIARY.

The record in this proceeding is devoid of any reason justifying the Trial Court's delay in ruling on the Motion to Disqualify. That fact alone compels a determination that *Anderson* is controlling and requires disqualification. The short shrift which the Third DCA gives to *Anderson* and particularly, that portion of the *Anderson* opinion addressing public policy reasons requiring immediate rulings on motions to disqualify is, with all due respect to the Third DCA, difficult to understand.

The Third DCA denied the Petitioners' Petition for Writ of Prohibition the day after it was filed without so much as commenting on *Anderson* (which was cited prominently in the Petition). Not until Petitioners' moved for certification of conflict did the Third DCA address the *Anderson* case. Even then, the Third DCA completely ignored the most important statement in the *Anderson* case, that being:

> **The rule recognizes that prompt rulings promote public confidence in the impartiality of the trial judge while delayed rulings not only slow the litigation process but call into question the trial judge's motives.**

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Rather than addressing those fundamental issues, the Conflict Opinion concerns itself only with the "mechanics" of Rule 2.160.

The Conflict Opinion suggests that, since Rule 2.160 "makes no provision for the automatic granting of a disqualification motion based on a delay in the trial court's ruling", no matter how long the delay, and no matter what impact that delay may have on public confidence in the impartiality of the trial judge, a delay does not mandate the granting of a disqualification motion. To adopt the reasoning of a the Third DCA on this point renders the Rule's requirement for immediate determinations meaningless. The *Anderson* court correctly observed that a delay in ruling on a disqualification motion "calls into question the trial judge's motives." Given that disastrous consequence, Petitioners submit that the *Anderson* solution, requiring that the motion be granted in the event of a delay, is the only meaningful solution.

The Conflict Opinion makes no mention of the purposes underlying Rule 2.160's requirement that motions to disqualify be ruled upon immediately. The failure of the Conflict Opinion to acknowledge the important reasons behind the Rule's requirement is reason enough for this Court to reject the Conflict Opinion and to endorse *Anderson* .

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Because Petitioners cannot say it better, they highlight the following passages which are instructive on this point:

> This Court has strictly applied the above language [requiring immediate rulings on motions to disqualify] because an allegation of judicial prejudice is **always a serious matter.** *Fuster, supra* at 1065. (emphasis added).

> It is a matter of no concern what judge presides in a particular cause, but **it is a matter of grave concern that justice be administered with dispatch, without fear or favor or the suspicion of such attributes**. The outstanding big factor in every lawsuit is the truth of the controversy. Judges, counsel, and rules of procedure are secondary factors designed by the law as instrumentalities to work out and arrive at the truth of the controversy.
>
> **The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised.** (Cite omitted).
>
> "Every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge." It is the duty of courts to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any matter where his qualifications to do so is seriously brought into question. The exercise of any other policy tends to **discredit and place the judiciary in a compromising attitude which is bad for the administration of justice.** (cite omitted). *Livingston, supra* at 1085 and 1086. (Emphasis added, internal quotations in original).

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> The basic tenant for disqualification is, "[j]ustice must satisfy the appearance of justice." (cite omitted). This tenant must be followed even if the record is lacking of any actual bias or prejudice on the judge's part, and "even though this 'stringent rule may sometimes bar trial by judges who have no actual bias and it would do their very best to weigh the scales of justice equally between contending parties.' ". (cite omitted). *Kielbania v. Jasberg*, 744 So. 2d. 1027, 1028 (Fla. 4th DCA 1997).

The position espoused in the Conflict Opinion should be given as much consideration as the Conflict Opinion gave to the purposes behind the procedural requirements of Rule 2.160. In a word, none.

A party files a motion to disqualify because that party has a fear that he or she will not receive a fair trial before the presiding judge. What proper purpose can it serve under those circumstances to condone a trial judge delaying a decision on the motion where the only decision the trial judge is allowed to make is whether the motion and supporting affidavit are legally sufficient? How can permitting an extended delay do anything but further deepen the parties' apprehension that he or she will not receive a fair trial?

Extended delay in ruling upon a motion to disqualify also delays the proceedings in the trial court. As this Court observed in *Fuster*, until a motion to disqualify is resolved, the trial court cannot proceed. Accordingly, to condone a delay in ruling upon a motion to disqualify is to condone a delay in the underlying proceeding.

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In summary, there is no benefit to be gained by this Court resolving the conflict presented by endorsing the position of the Third DCA. A decision requiring anything less than immediate rulings on motions to disqualify opens the door to the evils so eloquently expressed by the *Anderson* court. Endorsing the position expressed in *Anderson* however, furthers the purposes behind the immediate ruling requirement of Rule 2.160; to wit, promoting public confidence in the impartiality of the trial judge, avoiding delays in the litigation process and avoiding calling into question the trial judge's motives.

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POINT III

THE THIRD DCA ERRED IN DENYING PETITIONERS' PETITION FOR WRIT OF PROHIBITION AND THE TRIAL COURT ERRED IN DENYING PETITIONERS' MOTION TO DISQUALIFY AS THE MOTION COMPLIED WITH ALL REQUIREMENTS SET OUT IN FLA.R.JUD.ADMIN. 2.160, BUT NEVERTHELESS, THE TRIAL COURT INCORRECTLY DETERMINED PETITIONERS' MOTION TO DISQUALIFY WAS LEGALLY INSUFFICIENT.

Although given the amount of time the Motion was pending, one might have expected a more in-depth analysis, in denying the Motion to Disqualify, the Trial Court simply stated:

> The facts alleged in Defendants' Motion to Disqualify, assuming them to be true and taken in the best light to the moving party are legally insufficient[33].

Under the circumstances of this case, if, as the face of the Order suggests, the Trial Court limited its review of the Motion to determining its legal sufficiency, it is difficult to comprehend how the Trial Court reached the conclusion it did (or why it took so long to do so).

In this action, Jacoboni alleges that Tarrant made certain misrepresentations to Jacoboni's agent, Lombard, in connection with the purchase and sale of the Calder

[33] App. 12.

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Mobile. Tarrant, in his deposition, admitted making certain statements and authoring certain documents which were factually incorrect. Critically however, Tarrant also testified that Jacoboni's agent was, based upon discussions with Tarrant, aware of the factual inaccuracies and as a result, Lombard was not misled. The Trial Court's comments upon which Petitioners' Motion to Disqualify is based were so egregious, they warrant repeating here:

> THE COURT: So what you would say to me in fact is that if Dawn Gideon and Robert Lombard joined in with the plaintiff, then this would be a valid motion because he's obviously lied to both of them? (App. 2, pg 17, Ln 16-19)
>
> ---
>
> I have read those letters. He deliberately misstated the truth to everyone. And if that's how the art business does work, that's how they really do business, I think there would be some legitimate dealers who would say – who would come in and say that's not true. I just can't believe everyone in the art business lies outright to everyone, because that's what your client did in these letters. (App. 2, pg 35, Ln 6-13)
>
> ---
>
> He lied. Lying is fraud. He fraudulently stated that he would only make $50,000. His commission was stated up front. That's not the case. Now whether or not he had a deal with Ms. Gideon and Mr. Lombard to split that $300,000.00, which I suspect might be true, that's going to be a problem some place down the line. [App. 2, pg 36, Ln 12-18].

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These comments make clear that Judge Donner accepted Plaintiff's version of the case and rejected Petitioners' position. Judge Donner's comment, "lying is fraud" necessarily carries with it the conclusion by Judge Donner that Jacoboni's agent was not aware of any factual inaccuracies in Tarrant's statements and letters. If he were, there could be no fraud committed based upon those "misrepresentations". Should the jury in this action make the determination that Jacoboni's agent was not aware of any factual inaccuracies such that Tarrant's statements were fraudulent, so be it. Judge Donner's pre-judgment on that issue, however, is improper and warrants disqualification.

A trial court, in considering a motion to disqualify, can only determine the legal sufficiency of the motion. *Smith v. Santa Rosa Island Authority*, 729 So. 2d 944 (Fla. 1st DCA 1998). In determining legal sufficiency, the facts alleged as a basis for the motion must be taken as true. The standard to be applied is whether a reasonable person faced with those facts would develop a well grounded fear that he or she would not receive a fair hearing in front of the judge. *Barnett v. Barnett*, 727 So. 2d 311 (Fla. 2nd DCA 1999). This Court has spoken to the legal sufficiency issue as follows:

> The facts alleged in the motion need only show that "the party making it has a well grounded fear that he will not receive a fair trial at the hands of the judge." (cite omitted). "If the attested facts supporting the suggestion are reasonably sufficient to create such a fear, it is not for the trial judge to say that it is not there." (cite omitted). Further, "it is a question of what feeling resides in the affiant's mind and the basis for such feeling." *Livingston v. State*, 441 So. 2d 1083, 1087 (Fla. 1983).

The First District Court of Appeal echoed this Court's admonition in *Smith*, when it stated:

> It is not a question of how the judge feels; it is a question of what feeling resides in the movant's mind and the basis of such feeling. *Smith, supra*, at 947.

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Clearly, the offending comments of a trial judge must be viewed from the perspective of the person to whom or about whom those comments were made. It matters not what motive the trial judge had in his or her mind when the comments were made. All that matters is whether a reasonable person, faced with the trial judge's statements, would develop a well grounded fear that he or she would not receive a fair hearing in front of the judge.

Certainly Judge Donner's comments could reasonably be construed, and frankly, appear to leave no doubt, that she had flatly rejected any possibility that Jacoboni's agent was aware of any factual inaccuracies. It can hardly be said that Petitioners would be acting unreasonably to interpret Judge Donner's comments in that fashion. As this Court has stated, if an allegation of prejudice is "predicated on a modicum of reason, the judge against whom it is raised, should be prompt to recuse himself." *Livingston, supra* at 1086.

A statement by a trial judge that he or she feels a party has lied is generally regarded as indicating a bias against such party. *Deauville Realty Co. v. Tobin*, 120 So.2d 198 (Fla. 3rd DCA 1960). In this action, Judge Donner went further than just stating Tarrant lied. Judge Donner went on to say that the lying constituted fraud.

Plaintiff submitted a written Response to the Motion to Disqualify.[34] In his Response, Jacoboni stated in part:

> Moreover, viewing the comments in the context in which they were made, a hearing to determine whether Jacoboni had

[34] Rule 2.160 does not appear to invite or contemplate a written Response. Petitioners concede however, the Rule does not prohibit one either.

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> demonstrated sufficient grounds to include a claim for punitive damages, they are obviously innocuous and completely proper.[35]

There is no dispute that Judge Donner's comments were made in the context Jacoboni describes. That context was a hearing where Judge Donner was being called upon to determine if the Plaintiff had made "a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for the recovery of [punitive] damages".[36] Judge Donner's comments at the hearing could indeed have been "innocuous" had her ruling been stated in terms of:

> Mr. Jacoboni has presented sufficient evidence from which the jury could determine that Mr. Jacoboni's agent was not aware of the factual inaccuracies and so there was an intent to deceive on the part of Tarrant. The jury however, could also determine that Jacoboni, via his agent, was aware of the factual inaccuracies, and so there was no intent to deceive or right to rely. Since at this point, the Court is only called upon to determine if sufficient evidence has been presented which would provide a reasonable basis for the recovery of punitive damages if the jury accepts the evidence, the Court will permit the amendment to allow a claim for punitive damages.

The foregoing however, is not how Judge Donner's comments were framed. Certainly, that is not the way Judge Donner's comments appear from the perspective

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[35] Plaintiff's Response to Defendants' Motion to Disqualify, App.7, page 9.
[36] Fla. Stat. ch. 768.72(1), 1999.

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of the Petitioners, which is the perspective from which the comments must be evaluated in passing on their Motion to Disqualify.

Respondents may argue that it is too much to expect from a trial judge such balanced and antiseptic commentary. To the contrary, litigants have every right to expect it. Trial judges have an obligation to measure their statements no less carefully. As the Fourth District Court of Appeal observed in commenting on the constraints placed on the trial court's choice of language:

> He [or she] who chooses to sit on the bench must forego the pleasures of oral condemnations therefrom which are unrelated to the furtherance of the cause at hand. *Oates v. State*, 619 So. 2d. 23, 25 (Fla. 4th DCA 1993).

In the posture this case was in at the time Judge Donner made the offending comments, in order to "further the cause", Judge Donner was only required to make the finding required by Fla. Stat. ch. 768.72. In fact, since Judge Donner took the Punitive Damage Motion under advisement for later determination, it was not necessary that she comment on the proffered evidence at all in order to further the cause.[37] Instead, and in the words of the *Oates* court, Judge Donner chose not to "forego the pleasures of oral condemnations" but rather, chose to make

[37] *See* App. 2, Pg. 38, Ln 6-19. Significantly, Judge Donner took only 12 days to rule upon the Punitive Damage Motion.

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comments which would cause any reasonable person and which did cause Petitioners to develop a well grounded fear that they would not receive a fair hearing in front of Judge Donner. Disqualification is mandated under such circumstances.

CONCLUSION

Based upon the foregoing, Petitioners respectfully request that this Court accept jurisdiction and enter its Order granting the following relief:

A. Quashing the decision of the Third DCA and disapproving the Conflict Opinion.

B. Remanding the case with directions that Petitioners' Petition for Writ of Prohibition be granted, that Judge Donner be disqualified as the trial judge and that a successor judge be assigned to the trial court proceedings.

C. Expressly approving the decision in *Anderson.*

D. Granting whatever other and further relief this Court deems appropriate under the circumstances.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Initial Brief on the Merits and Appendix thereto was sent via U.S. Mail to: **Gary M. Pappas, Esq.,** Carlton Fields, Ward, Emmanuel, Smith & Cutler, P.A., P.O. Box 019101, Miami, FL 33131-9101 and **Honorable Amy Steele Donner,** Dade County Courthouse, 73 West Flagler Street, Room 800, Miami, Florida on this day of June, 2001.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

Undersigned counsel for the Petitioners hereby certifies that this Brief complies with the font requirements of Fla.R.App.Pro. 9.210(a). This Brief is printed in Times New Roman 14-point font.

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