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' REPLY BRIEF ON THE MERITS

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INTRODUCTION

Petitioners, TABLEAU FINE ART GROUP, INC. ("Tableau") and TOD TARRANT ("Tarrant") respectfully submit this Reply Brief on the Merits. The citation format in this Reply Brief will be the same as in Petitioners' Initial Brief. Citations to Jacoboni's Answer Brief will appear as "Ans. Br. .

STATEMENT OF THE CASE AND FACTS

Petitioners for the most part do not quarrel with Jacoboni's statement of the case and facts. Petitioners do take exception to Jacoboni's statement that Tarrant admitted making "fraudulent" statements. Tarrant admitted making statements that were factually incorrect. Jacoboni characterizes those as fraudulent.

SUMMARY OF ARGUMENT

The plain wording of Fla.R.Jud.Admin. 2.160 (hereinafter "Rule") and current caselaw undermines Jacoboni's contention that in order to complain or seek disqualification based upon a trial court's delay in ruling on a motion to disqualify, the party moving for disqualification must file a second motion. Jacoboni fails to address the policy arguments supporting the *Anderson* decision.[1] That failure is a tacit

[1] Jacoboni is in good company on this point. The Third DCA also failed to address those issues.

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admission, if not an outright concession, that delay in ruling on a motion to disqualify results in exactly the evils identified in *Anderson*.

Jacoboni's position that Judge Donner's comments, viewed in context, were not sufficient to require disqualification, is without merit. The authorities Jacoboni relies upon to support this position are readily distinguishable.

Where a trial court violates the Rule's requirement for an immediate ruling, an analysis of the trial court's conduct which prompted the motion is unnecessary and inappropriate. The purpose of the Rule's requirement for immediate rulings, would be completely undermined if, the decision of whether a delay in ruling requires disqualification, turned on whether the trial court could have properly denied the motion had it ruled immediately. Such an analysis is tantamount to deleting from the Rule, the requirement for an immediate ruling.

ARGUMENT

POINT I

A. A TRIAL COURT'S FAILURE TO IMMEDIATELY RULE ON A MOTION TO DISQUALIFY REQUIRES DISQUALIFICATION.

Jacoboni's position appears to be that since the Rule does not expressly state that failing to rule upon a motion to disqualify immediately requires disqualification, an

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extended delay in ruling upon such a motion does not mandate disqualification. Petitioners and the Fifth DCA contend that it does.

Jacoboni acknowledges that, "If trial judges do not rule on motions to disqualify immediately, they are in violation of the Rule."[2] Citing the Conflict Opinion however, Jacoboni argues that the Rule does not require disqualification if its terms are violated.[3] Such an argument begs the question, "Are there any consequences for a violation of the Rule by a trial court?" Under Jacoboni's rule, no matter what the length of the trial judge's delay in ruling, months (as in this case) or years (presumably), disqualification would not be required.[4]

B. A PARTY MOVING TO DISQUALIFY A TRIAL JUDGE IS NOT REQUIRED TO FILE A SECOND MOTION TO DISQUALIFY IN ORDER TO CHALLENGE A TRIAL COURT'S DELAY IN RULING

Jacoboni candidly acknowledges that Petitioners made every effort to have their Motion to Disqualify heard by the Trial Court.[5] Jacoboni's suggestion that Petitioners

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[2] Ans.Br. 6, citing *Fuster-Escalona v. Wisotsky*, 781 So. 2d 1063, 1065 (Fla. 2000).
[3] Ans.Br. 6.
[4] Jacoboni's attempt to characterize the Trial Court's delay in ruling upon Petitioners' Motion to Disqualify as a failure to "strictly" follow the Rule is startling to say the least. If a delay of over three (3) months constitutes only a failure to "strictly" follow the Rule, it is difficult to imagine what length of delay Jacoboni feels would be required before the failure would be more than a strict failure to follow the Rule.
[5] Ans.Br. fn.6 and pg. 11.

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were required to file a **second** motion flies in the face of this Court's admonitions in *Fuster*, *supra*. Since, under *Fuster*, a party moving for disqualification is not even required to request a hearing to ensure that the trial court rules on the motion immediately, *a fortiori*, a party is not required to file a second motion to disqualify to ensure compliance. Further, Petitioners did raise the delay issue in the Trial Court by their Motion to Set Motion for Specially Set Hearing.[6]

Jacoboni posits that, if this Court approves *Anderson*, a party filing a motion to disqualify will lose the "incentive" to have the motion heard quickly because a delay in ruling will result in disqualification, effectively giving the movant "two bites at the apple." The incentive or lack of incentive on the part of the moving party is immaterial . Rather, it is clearly the trial court's obligation to rule on the motion immediately, whether the moving party has the incentive for that to occur or not.

Jacoboni appears to presume that, in the event this Court approves *Anderson*, some counsel will file motions to disqualify which are not legally sufficient in hopes that the trial court will delay in ruling so that disqualification will be required irrespective of the merits of the motion. Petitioners refuse to attribute such lack of good faith to members of the Bar. Petitioners prefer to believe that when an attorney

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[6] App. 6.

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certifies that a motion to disqualify is made in good faith, as required by the Rule, the attorney will mean it.

C. THE LIMITED SCOPE OF REVIEW A TRIAL COURT IS PERMITTED TO MAKE IN RULING ON A MOTION TO DISQUALIFY NECESSARILY PRECLUDES EXTENDED DELIBERATION BY THE TRIAL COURT.

The limited scope of a trial court's permissible review of a motion to disqualify undermines any contention that an extended period of deliberation could be required. In every case, since it is the trial judge who engaged in the allegedly offensive conduct, there is no sound reason why the very limited determination the trial court is called upon to make in ruling upon a motion to disqualify cannot be made quickly.[7]

POINT II

A. *JACOBONI DOES NOT DENY THAT A TRIAL COURT'S DELAY IN RULING ON A MOTION TO DISQUALIFY UNDERMINES PUBLIC*

[7] Clearly, on this record, no reason appears for the Trial Court's delay in ruling. To the contrary, the record demonstrates that the Trial Court had the Motion to Disqualify before it on August 20, 2000 and had Jacoboni's Memorandum of Law in Opposition (dated August 23, 2000) presumably by mid-September, if not sooner. Further, the Trial Court indicated it was prepared to enter an Order as early as September 28, 2000. App. Tab 11, pg. 3, ln. 14 and 15.

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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.

Conspicuously absent from the Answer Brief is any argument countering the Fifth DCA's observation that:

> The [R]ule 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.[8]

Jacoboni however, citing the cases of *City of Lakeland v. Vocelle* and *Paul v. Nichols*, suggests that during an extended period of delay in ruling upon a motion to disqualify, the trial judge is entitled to a presumption of impartiality.[9] Litigants should not be required to resort to "presumptions" in order to feel secure that the trial judge's motives are proper. In any event, the *City of Lakeland* and *Paul* cases have no application to the issues presented in this proceeding.

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[8] *Anderson*.

[9] 656 So.2d 612 (Fla. 1st. DCA 1995) and 627 So. 2d. 122 (5th DCA 1993) respectively.

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In both cases, disqualification motions were denied and those denials were upheld. In both case cases, the respective appellate courts noted that there exists a presumption that a judge will remain impartial even where counsel has voiced opposition or opposed the election of a judge. Neither case involved a judge violating a rule or making inappropriate comments about a party or that party's case. The cases do not stand for the proposition that there is a presumption of impartiality where a rule is violated by a trial judge.

Jacoboni filed, as supplemental authority, *Enterprise Leasing Co. v. Jones*, 26 Fla.L.Weekly S437 (Fla. July 5, 2001). The *Enterprise* case is inapplicable to the instant case. In *Enterprise*, the defendant in a personal injury action sought disqualification because the plaintiff disclosed to the trial court, "… the demand for settlement and the highest offer made by [the Defendant]-communications that were made during mediation."[10] The disclosure was a violation of §44.102(3) Fla. Stat. (2000). The motion to disqualify sought disqualification merely because the information had been disclosed and did not set forth facts specifically showing a basis for the belief that bias or prejudice existed, as required by the Rule.

[10] Enterprise, at S437

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In upholding the denial of the disqualification motion, this Court determined that because the motion did not set forth facts showing a basis for the belief that bias or prejudice existed, the motion was properly denied. Petitioners' Motion to Disqualify does not suffer from the same defect. Presumably, Jacoboni will argue; just as this Court determined in *Enterprise,* that a violation of the mediation statute did not require a *per se* rule requiring disqualification, this Court should determine that a violation of the Rule by not immediately resolving a motion to disqualify likewise does not require a *per se* rule requiring disqualification. *Enterprise* does not support such an argument.

In *Enterprise*, this Court stated:

> We recognize the important public policy concerns favoring confidential mediation proceedings and the rule of confidentiality in settlement. This policy is neither furthered nor hindered by requiring a party moving to disqualify a judge to adhere to the pleading requirement set forth in rule 2.160, *Enterprise,* supra, at 438.

To accept Jacoboni's argument, this Court would have to hold that the public policy concerns favoring immediate rulings on motions to disqualify are not hindered by a trial court delaying for an extended period of time a ruling on a motion to disqualify. Clearly, they are.

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Jacoboni's reliance upon *D'Ambrosio v. State*, 746 So.2d 508 (Fla. 5th DCA 1999) is also misplaced. In *D'Ambrosio*, the Fifth DCA had before it a very peculiar situation. In *D'Ambrosio*, the Defendant in a criminal matter filed a motion to disqualify. When the trial court failed to rule upon the motion for two months, the movant filed a petition for writ of mandamus. Determining that Rule 2.160 required immediate rulings on motions to disqualify, the Fifth DCA entered the writ.

On remand, **the trial judge disqualified himself**. That ruling was not appealed. The *D'Ambrosio* opinion is actually the Fifth DCA's "*sua sponte*" commentary on the order entered by the trial judge.[11] It appears from the order granting the motion in *D'Ambrosio,* the trial court felt that the Fifth DCA, by requiring an immediate ruling, precluded a hearing being held on the motion. The Fifth DCA responded to that concern by saying:

> Our conclusion is simple: a trial judge, confronted by a motion for disqualification, is obligated to dispose of that motion by "an immediate ruling" pursuant to Florida Rule of Judicial Administration 2.160. If the judge affords a

[11] In addition to granting the motion for disqualification, the trial judge's order stated "apparently in the Fifth Appellate District of Florida the opposing party does not have the discretion to be heard, and the trial court does not even have the discretion to hold a hearing." *D'Ambrosio* supra, at 509. The trial judge forwarded the order to the Judicial Qualifications Commission. The Fifth DCA prefaces its commentary on the order by saying "Our initial reaction to this onslaught from Seminole County is: "Good, Grief, Charlie Brown!". *D'Ambrosio, supra* at 509.

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> hearing to the parties on that motion, it must be an expedited one. *D'Ambrosio, supra,* at 510.

To the extent it has precedential value, Petitioners contend that *D'Ambrosio* supports their position. Clearly, the Fifth DCA determined that if a trial court is to hold a hearing on a motion to disqualify, the hearing must be expedited. By analogy, under *D'Ambrosio*, if a trial court is going to deliberate and/or conduct research on a motion to disqualify, that deliberation and/or research must be expedited as well.

Moody v. Moody ("Moody I") is more instructive on this point and again, supports Petitioners' position.[12] In *Moody I*, the wife in a dissolution of marriage action sought a writ of mandamus to compel the trial judge to rule on her motion to disqualify. The motion had been pending for four months. The First District Court of Appeal issued the writ. The trial judge **denied** the motion and the wife sought a writ of prohibition (*Moody II*).[13]

Although the First District did not enter the writ, the court's comments make clear the writ would have been issued had the judge not been transferred. Specifically, the First District stated:

> At oral argument, counsel for the wife conceded that should this court reverse the order of contempt, this court would

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[12] 705 So. 2d 700 (Fla. 1st DCA 1998) cited at Ans. Br. 7.
[13] 721 So. 2d 731 (Fla. 1st DCA 1998).

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> not need to issue a writ of prohibition. This is so because the presiding judge in the instant case has been administratively transferred to another county. Accordingly, we deny the wife's petition for writ of prohibition. In the event that the trial judge whose orders in this case are the subject of the instant appeal should again be reassigned, however, we are confident that he would not again assume the position of presiding judge in any case involving these two parties. **Should our confidence be misplaced, however, we direct the Chief Judge to cause such case to be assigned to one other than the original presiding judge.** *Moody II, supra* at 734. (emphasis added).

It appears that in neither *D'Ambrosio* nor *Moody I* did the parties seeking disqualification argue that the delays by the respective trial courts warranted disqualification. In *Moody II*, however, the appellate court was called upon to address a **denial** of a motion to disqualify which denial came only after an extended delay and the issuance of a writ of mandamus. Although the opinion in *Moody II* is not clear as to why the appellate court felt the way it did, the opinion is clear that the writ of prohibition would have been granted had the trial judge in that case not been reassigned. In the instant case, Judge Donner's denial of the motion to disqualify came after an extended delay. As such, *Moody II* supports Petitioners' contention that disqualification is required.

POINT III

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A. *BECAUSE JUDGE DONNER TOOK THE MOTION FOR LEAVE TO AMEND UNDER ADVISEMENT, THE OFFENDING COMMENTS DID NOT NEED TO MADE AT ALL.*

Judge Donner did not rule from the bench on the Motion for Leave to Amend. Rather, she took the Motion under advisement.[14] As such, it was not necessary for her to comment on the evidence at all.

B. THE OFFENDING COMMENTS WENT FAR BEYOND AND WERE UNRELATED TO THE THRESHOLD DETERMINATION THAT THE TRIAL COURT WAS CALLED UPON TO MAKE IN RULING UPON THE MOTION FOR LEAVE TO AMEND.

The terms of §768.72 establish the parameters of what comments would and would not be related to the determination the Trial Court was called upon to make in ruling on the Motion to Amend. The statute requires only a determination of whether a party seeking punitive damages has proffered sufficient evidence which could provide a reasonable basis for the recovery of such damages. Petitioners submit that the offending comments in this case fall well outside of those parameters.

The cases cited by Jacoboni as supporting his contention that the offending comments do not warrant disqualification are not factually on point and so, are not

[14] App. 2, pg. 38, ln 6-19.

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persuasive as applied to the instant action. That said, Petitioners will comment briefly on some of the cited authority.

Although he includes no argument based upon it, Jacoboni cites *Nassetta v. Kaplan,* 557 So.2d 919 (4th DCA 1990). It is unclear whether Jacoboni cites that case as authority for the proposition that a judge's remarks indicating he or she is not impressed with a party's behavior is not, without more, grounds for recusal, or alternatively, as a thinly veiled accusation that Petitioners' motives for pursuing the motion to disqualify were improper.[15] To the extent the citation to *Nassetta* is meant to indicate the latter, the suggestion is objected to by Petitioners in the strongest of terms. To the extent the case is cited for the former proposition, Petitioners respond that Judge Donner's comments went far beyond evidencing doubt as to Petitioners' position in the underlying action.

In *Thompson v. State*, the offending comments consisted of the trial judge, while considering a motion for post conviction relief, asking the state attorney (in the

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[15] In the *Nassetta,* the 4th DCA stated in part:

> We increasingly encounter situations where the motive behind the motion to disqualify is obviously to gain a continuance or get rid of a judge who evidences doubts or displeasure as to the efficacy of the movant's cause of action... . *Nassetta* at 921.

This language is quoted in Ans.Br. 12.

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presence of defense counsel) whether the motion could be denied without holding an evidentiary hearing.[16] This Court determined that the offending comments "constituted a clarification of the parties' positions in the presence of opposing counsel. *Thompson,* supra at 660. The offending comments in this case cannot reasonably be so characterized.

Petitioners disagree with Jacoboni's characterization of the *Strasser v. Yalamanchi* as "instructive."[17] The facts of *Srasser* and the context in which the offending comments therein were made, are totally dissimilar from the instant action. In *Strasser,* the trial judge was called upon to make a decision as to whether evidence of the Defendant's discovery misconduct could be admitted at trial. The bulk of the offending comments in *Strasser,* appear to be an attempt by the trial judge to elicit from the defendants some explanation as to how their conduct could be characterized as anything but willful discovery violations. The offending comments in this case cannot be so characterized.

Strasser is comparable to the case of *Mobil v. Trask* also cited by Jacoboni, and which case is also inapplicable to the instant case.[18] In *Mobil,* disqualification

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[16] 759 So.2d 650 (Fla. 2000), cited at Ans. Br. 12
[17] 783 So.2d 1087 (Fla. 4th DCA 2001) cited at Ans. Br. 13.
[18] 463 So. 2d 389 (Fla. 1st DCA 1985), cited at Ans. Br. 13.

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was sought because of a comment the Deputy Commissioner made during a workman's compensation proceeding. After some, but not all of the testimony had been taken in the matter, the Deputy commented to the employer's carrier's counsel:

> I don't see how you can't find this accident compensable. If I was sitting at my desk and a man came in here with a gun and shot me, it is an on-the-job accident.
>
> *Mobil*, supra at 390.

In refusing to reverse the denial of the motion to disqualify in *Mobil,* the First District stated:

> The alleged offensive statement seems to us to be of that variety of statement or question not infrequently posed to counsel in order to stimulate a response which would better enable the judge or deputy to adjudicate the compensability of the claim.
>
> *Mobil*, supra at 391.

Again, the offending comments complained of by Petitioners, cannot be so characterized.

C. RATHER THAN ARGUING ABOUT "TWO BITES AT THE APPLE" JACOBONI SHOULD ACKNOWLEDGE THAT HE WANTS IT "BOTH WAYS".

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According to Jacoboni, based upon: the admissions made by Tarrant, the Judge's comments on the proffered evidence and the context in which those comments were made, the Motion to Disqualify did not present a close question on disqualification. Virtually in the same breath, however, Jacoboni argues:

> But if the motion presents a complicated question about which the authority is split or tangential… two months might not be unreasonable.[19]

Jacoboni cannot have it "both ways." If the reasons for which Petitioners sought disqualification were so patently inadequate, there can be no justification for the Trial Court's delay in reaching that conclusion. Jacoboni's position is that the Motion did not present a complicated question and that Judge Donner's comments were innocuous. Accordingly, Jacoboni should not now be heard by this Court to argue that the Trial Court's delay was justified or reasonable.

CONCLUSION

Based upon the foregoing, Petitioners respectfully request that this Court accept jurisdiction and grant the relief requested in Petitioners' Initial Brief.

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[19] It is interesting to note that Jacoboni states "…**two** months might not be unreasonable." Even Jacoboni appears unwilling to argue that a delay of over 3 months is acceptable.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Reply Brief on the Merits 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 243, Miami, Florida on this day of July, 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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