IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1848

L.T. Case No. 3D17-1421

LAW OFFICES OF HERSSEIN AND HERSSEIN, P.A., d/b/a HERSSEIN LAW GROUP, a Florida corporation and REUVEN HERSSEIN,

Petitioners,

vs.

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Reciprocal Interinsurance Exchange,

Respondent,

On Review from the District Court of Appeal, Third District, State of Florida

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PREFACE

Petitioners are Law Offices of Herssein and Herssein, P.A. d/b/a Herssein Law Group and Reuven Herssein and are referred to as "HLG" and "Herssein," respectively. Respondent is United Services Automobile Association and is referred to as "USAA." References to Petitioners' Amended Initial Brief appear as IB __. Citations to Petitioners' Amended Appendix to their Brief on the Merits appear as A__. Citations to the Appendix to Respondent's Answer Brief on the Merits, filed contemporaneously herewith, appear as R.A. __.

Finally, citations to the Supplemental Appendix to USAA's Response to the Petition for Writ of Prohibition filed in the Third District Court of Appeal appear as SA. ____. Citations to the Supplemental Appendix are to the stamped page number in the bottom right corner of the page—not the page number shown on the PDF reader display.[1] Pursuant to this Court's December 11, 2017 Order, the Clerk of the Third District Court of Appeal must file the record, including the Supplemental Appendix, with this Court by February 9, 2018.

[1] The stamped page numbers do not match the PDF reader display, as is required by the current version of Florida Rule of Appellate Procedure 9.220 (regarding electronic format of appendices), because the Supplemental Appendix was filed in the Third District in July 2017—before the amendment to Rule 9.220 went into effect on October 1, 2017.

STATEMENT OF THE CASE AND FACTS

USAA offers the following additions and clarifications to Petitioners' Statement of the Case and Facts.

Proceedings Regarding Petitioners' Witness Tampering Allegations

In July 2015, HLG sued its former client, USAA, for breach of contract and fraud, among other claims. A006. In late 2015, HLG filed a motion seeking an evidentiary hearing ("Motion for Evidentiary Hearing"), asking the trial court to look into alleged improper conduct by a USAA manager, Catina Tomei ("Tomei"). Specifically, HLG alleged that when its vice president, Herssein, called retired USAA litigation manager, Debra Carlisle ("Carlisle"), to speak with her after HLG served her with a subpoena for a later-scheduled deposition, Carlisle told him that "she spoke with 'Catina Tomei' of USAA and that she could not speak to [Herssein]." SA. 1-14. HLG also accused USAA's counsel, Shutts & Bowen LLP ("Shutts"), of improper client solicitation of Carlisle when Shutts advised it was representing Carlisle individually. *Id.* HLG later escalated its contention to assert Tomei had committed the criminal act of witness tampering. SA. 15-19. The trial court granted HLG's motion and ordered an evidentiary hearing to take place. R.A. 22.

All claims of impropriety were disputed, but to avoid the distraction of the claims asserted against Shutts, USAA assisted Tomei and Carlisle in retaining

separate counsel. Ramon Abadin was retained to represent Carlisle, and Israel Reyes ("Reyes"), a former circuit court judge for the Eleventh Judicial Circuit, was engaged to represent Tomei in October 2016. SA. 20-21. At that time, the case was pending in the Circuit Civil Division before the Honorable Antonio Marin, and USAA had previously filed two motions for reconsideration of the Order Setting Evidentiary Hearing, R.A. 23-49, but Judge Marin had not heard or disposed of those motions.

Transfer to Complex Business Litigation Section

In November 2016, USAA filed its Motion to Transfer to the soon-to-be-expanded Complex Business Litigation ("CBL") section. R.A. 88-99. Contrary to Petitioners' suggestion that USAA sought to transfer the case to take advantage of Judge Butchko's alleged "friendship" with Reyes, in reality, USAA had been attempting to transfer the case to the CBL section since the case's inception. Less than a month after HLG filed the suit, USAA moved to transfer the case the CBL section. R.A. 5-12. Associate Administrative Judge Beatrice Butchko denied that motion without prejudice. R.A. 13-14. The following month, HLG and USAA filed a *Joint* Motion to Transfer the case to the CBL Section (actually submitted by HLG), noting that at the hearing on the first Motion to Transfer, Judge Butchko had indicated that "if the parties agreed, she would consider presiding over the trial in this case"—a statement made over a year before Reyes appeared in this case.

R.A. 15-18. Administrative Judge Jennifer Bailey denied the Joint Motion to Transfer. R.A. 19-20. USAA filed its third Motion to Transfer upon learning that the CBL section was being expanded from one judge to three judges effective January 2, 2017, and therefore would have increased capacity to handle additional cases. R.A. 88-99.

Two months after Reyes entered his appearance (and sixteen months after USAA had first sought to transfer the case), the case was transferred to CBL Division 40. R.A. 100-30. In the transfer order, Judge Butchko referenced the "docket history" and appended the case docket, which was twenty-nine pages long and listed 696 docket entries during the seventeen months the case had been pending.[2] *Id.* Administrative Judge Jennifer Bailey thereafter assigned the case to CBL Division 43, the division over which Judge Butchko would preside as of January 3, 2017. SA. 22-23. Notably, the transfer order states that "[t]he currently presiding division judge, Judge Antonio Marin, has requested the case be transferred to the newly-established complex business litigation division." *Id.*

Proceedings Before Judge Butchko

After the case was transferred, USAA filed its Renewed Motion for Reconsideration of the order setting the evidentiary hearing. R.A. 131-72. Judge

[2] Contrary to Petitioners' suggestion (IB at 2), the order in no way indicates that Judge Butchko relied on Reyes' representations in ruling on the Motion to Transfer.

Butchko reviewed HLG's Motion for Evidentiary Hearing and concluded HLG's allegations regarding the alleged witness tampering and client solicitation were insufficient to warrant an evidentiary hearing. SA. 24 ("No facts alleged by [HLG] give rise to the need for an evidentiary hearing on witness tampering pursuant to [sections] 904.22 and 914.21, [Florida Statutes,] official proceedings and solicitation[,] at this time."). Judge Butchko further concluded that USAA's due process rights were violated when the prior judge ordered an evidentiary hearing without first allowing USAA to file a response to HLG's Motion for Evidentiary Hearing or even allowing USAA's counsel to present argument on the issue at the hearing on that motion, which HLG had not properly noticed in the first place.[3] R.A. 258-67.

In February 2017, USAA filed counterclaims against Petitioners. R.A. 406-59. USAA asserted two counts of malpractice against Petitioners, as well as claims

[3] Judge Butchko noted that only one party, HLG, had briefed the motion at the time of the hearing and "the party that didn't brief the issue [USAA] d[id]n't get to say anything" at the hearing because USAA's counsel "was interrupted every time he started to speak," R.A. 260; *see also* R.A. 260-61 (noting that HLG did not follow prior judge's procedures regarding noticing of hearings in setting the Motion for Evidentiary Hearing for hearing). Judge Butchko also noted that the prior trial judge had ordered an evidentiary hearing where "not once were the elements of witness tampering stated to the Court or considered" by the prior judge to determine whether the conduct alleged in the motion, even if true, satisfied the elements of witness tampering under section 914.22, Florida Statutes. R.A. 263-64.

for breach of fiduciary duty and fraud, among other claims. *Id.* Petitioners moved to dismiss the counterclaims. R.A. 460-81.

The June 2, 2017 Hearing Before Judge Butchko

On June 2, 2017, Judge Butchko heard several motions and discovery objections during a four-hour hearing. During that hearing, she sustained USAA's objections to Petitioners' discovery request seeking communications between Abadin, Reyes, and USAA's counsel, ruling that the communications were privileged under the common interest doctrine. A109-40, A338. She also denied Petitioners' motions to dismiss and for summary judgment on USAA's malpractice counterclaims against Petitioners. A087-088.

Petitioners responded to those rulings by asserting that, because the trial court had not dismissed a malpractice counterclaim against Herssein in his individual capacity, Petitioners would add numerous USAA executives as defendants. As Herssein put it, "the Court denied our motion for summary judgment on me personally being a party in this case when I wasn't a party [to the complaint]. . . . We are going to be amending our complaint to bring in a whole bunch of executives because what's good for them is good for me." A129-30. After the trial court noted that Herssein was "very emotional," A131, Petitioners' counsel, Mr. Udell, doubled down on Herssein's sentiments, stating that Herssein was "advising the Court what's going to happen based on that [summary

judgment] ruling." A131. At this point in the hearing, the trial court noted that she interpreted these statements by Udell and Herssein as threats:

> THE COURT: What is that, a threat? So I need to rule in your favor or else this is what's going to happen?
>
> MR. UDELL: Not at all, Judge.
>
> THE COURT: That's the way I'm taking it.

A131. The trial judge then noted that Petitioners could "sue anybody [they] want," and "[t]hat's not my strategy decision. I don't participate in who is going to sue. I can't rule on legal motions thinking in advance." A131-32.

Later during the hearing, Petitioners' counsel continued trying to bully the judge into ruling in their favor, with Udell telling the trial judge, "we've got a lot more people coming in based on you keeping my client [Herssein] in on one of the counts personally – two of the counts. So it's going to be a lot more people and a lot more lawyers." A308-09. This prompted the trial judge to again caution counsel that he needed evidence and a good faith basis to support claims brought against USAA's executives. A309.

Undeterred, Udell continued threatening to bring in additional defendants based on the trial court's rulings, this time citing the trial court's decision to allow USAA to amend its counterclaim, stating, "they are all coming in. They are all going to get their own lawyers. We are going to have 50 lawyers in here. . . . So it's going to be a big party. But [USAA] want[s] leave to amend, give it to them,

Judge." A310, 312. Udell then asserted that Petitioners were going to sue "everybody down the list, every executive." A314. These comments prompted the court to again caution Petitioners' counsel, stating, "You have to be very careful with that. . . . I don't know what evidence you have, but if anybody on the other side files a 57.105 or something on these things, it puts you in a bad position." *Id.* Despite this warning, Herssein advised the trial judge, "They are all coming in. If I'm personally in this now, they are." A315.

When discussing an unrelated discovery issue during this contentious hearing, Herssein and co-counsel for USAA, David Kessler ("Kessler"), were presenting argument with respect to certain issues Petitioners raised regarding USAA's privilege log. A225. When Kessler stated his position on the issue, Herssein interjected and stated to Kessler, "Excuse me. I'm talking to the Court," and proceeded to make his counter-argument, accusing USAA's counsel of intentional misconduct and of "riddl[ing] [its privilege log] with misleading entries only to bog [Petitioners] down." A225. At this point in the hearing, Judge Butchko noted that both Herssein and Kessler had "a special personality":

> THE COURT: No. See, what happens is this. Personalities and people come in all shapes and sizes. You happen to have a special personality, and so does Kessler.

A225-26. The judge's comment came shortly after Herssein had characterized USAA's position in the lawsuit as "totally nonsensical." A223; *see also* A224

(Herssein reiterating his position that USAA's argument was "nonsensical"). Shortly thereafter, Judge Butchko noted that while she understood that Herssein was taking the lawsuit "very personal[ly]," she was "just trying to get everybody to lower their blood pressure a little bit." A229.

Later in the hearing, Herssein seemed to agree with the trial judge's offhand comment regarding his personality:

> MR. HERSSEIN: . . . So number one, right, **everybody says I have a personality**, but he lied to you because he just said --
>
> THE COURT: You do have a personality.
>
> MR. HERSSEIN: He just said that --
>
> THE COURT: Are you claiming you have no personality?
>
> MR. HERSSEIN: **Oh, no, I have a strong personality**, Judge. But this is why I'm frustrated. They are sitting here saying that I produced something that they can't search and that's a lie. That's a fraud on the Court.

A266 (emphasis added).

Petitioners' Motion to Disqualify the Trial Judge

The following week, Petitioners moved to disqualify the trial judge, citing three purported bases for disqualification. A017-34. **First**, they alleged they feared they would not receive a fair trial because Reyes is listed as a "friend" on the judge's personal Facebook page. A024-27. **Second**, they alleged Judge Butchko made statements evidencing personal animus against Herssein—namely, a

statement allegedly made on an unidentified date and without record support that Herssein was "crazy", as well as the statement at the June 2 hearing that he had a "special personality." A031. **Third**, Petitioners contended Judge Butchko had prejudged their ability to add USAA executives as individual defendants by noting to Petitioners that they needed a good faith basis to support the claims and that if such was lacking and "anybody on the other side filed a 57.105 [sanctions motion] . . ., it puts you in a bad position." A027-31.

The trial court denied the disqualification motion as legally insufficient, A081, and Petitioners filed their Petition for Writ of Prohibition. The Third District Court of Appeal denied the Petition, and opted to write only on the Facebook issue, holding as follows:

> Because a "friend" on a social networking website is not necessarily a friend in the traditional sense of the word, we hold that the mere fact that a judge is a Facebook friend with a lawyer for a potential party or witness, without more, does not provide a basis for a well-grounded fear that the judge cannot be impartial or that the judge is under the influence of the Facebook "friend."

A010.

Petitioners timely invoked this Court's discretionary jurisdiction. In their Jurisdictional Brief, Petitioners argued that the Third District's decision expressly and directly conflicts with the Fourth District Court of Appeal's decision in *Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012), and that the decision

expressly and directly affects a class of constitutional or state officers, i.e., Article V judges. This Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

The Third District properly concluded that Facebook friendship, without more, is not a legally sufficient basis for disqualification. Petitioners' argument that Facebook friendship warrants disqualification erroneously assumes that actual friendship, standing alone, is a legally sufficient basis for disqualification—a proposition this Court has squarely rejected. Petitioners may have a subjective fear of not receiving a fair trial, but that is not legally sufficient; rather, the fear must be objectively reasonable. Because Facebook friendship does not necessarily signify the existence of a close relationship, the Third District correctly held that Petitioners' fear of not receiving a fair trial is objectively unreasonable.

The Code of Judicial Conduct and Rules of Judicial Administration place confidence in judges to disqualify themselves when necessary. Petitioners and amicus Christina Paylan turn the Code of Judicial Conduct on its head, insisting that judges cannot be trusted to disclose close relationships that warrant disqualification. They contend that discovery should be permitted into judges' and lawyers' social media and in-app communications so that litigants can begin policing judges' interactions with attorneys and parties. Petitioners and amicus Paylan envision a judicial system in which litigants must resort to vigilante justice

and enforce the Code of Judicial Conduct themselves, but this is not what the Code contemplates.

It is well-established that this Court must and does assume, absent objective evidence to the contrary, that a judge will abide by his or her oath and will perform the duties of judicial office impartially and diligently. As this Court has recognized, our judicial system cannot be operated on the "basis of the factually unsubstantiated perceptions of the cynical and distrustful.'"[4] Petitioners disregard these principles and attempt to weaponize the Code of Judicial Conduct to gain an advantage in litigation—a tactic the Code itself states is improper.

Petitioners' argument that the trial judge prejudged Petitioners' ability to add USAA executives as defendants is meritless. When read in context, it is clear that the trial judge's comment regarding a hypothetical sanctions motion was made in response to repeated threats by Petitioners' counsel to bring claims against USAA's executives in retaliation for the trial judge's refusal to dismiss USAA's counterclaims against Herssein. Further, the trial judge used qualified language to make clear that she was not prejudging any claims or motions.

Likewise, Petitioners' contention that the trial judge has personal animus against Herssein is devoid of record or legal support. The trial judge's comment

[4] *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1338 (Fla. 1990) (quoting *Breakstone v. Mackenzie*, 561 So. 2d 1164, 1178 (Fla. 3d DCA 1989) (Schwartz, C.J., dissenting)).

that Herssein has a "special personality" was a gratuitous remark expressing, at most, the trial judge's dissatisfaction with Herssein's behavior during the hearing. Trial judges have authority to take corrective action when an attorney becomes combative, disrespectful, or disruptive in the courtroom. The trial judge's comments that Herssein was being "very emotional" and was taking the case "very personal[ly]", read in context with Herssein's denigrating comments directed at USAA and its counsel throughout the hearing, confirm that Herssein was not conducting himself with decorum befitting a courtroom. Herssein's emotional, aggressive conduct at the hearing invited an appropriate response from the trial judge, and Petitioners cannot complain that the response demonstrated "personal animus."

ARGUMENT

I. THE THIRD DISTRICT CORRECTLY CONCLUDED THAT FACEBOOK FRIENDSHIP, WITHOUT MORE, IS NOT A LEGALLY SUFFICIENT BASIS FOR DISQUALIFICATION

A. Legal Standard on Disqualification

The writ of prohibition is an extraordinary remedy by which a court may prevent a lower court from acting without jurisdiction. *Mandico v. Taos Constr., Inc.*, 605 So. 2d 850, 853 (Fla. 1992). Prohibition is the appropriate method for seeking relief after the denial of a motion to disqualify a trial judge asserting bias or other reasons. *Castro v. Luce*, 650 So. 2d 1067 (Fla. 2d DCA 1995).

The standard for assessing the legal sufficiency of a motion to disqualify is whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair trial at the hands of that judge. *See Gore v. State*, 964 So. 2d 1257, 1268 (Fla. 2007); *see also* § 38.10, Fla. Stat. (2013); Fla. R. Jud. Admin. 2.330(d)(1). A judge considering a motion to disqualify is limited to "determining the legal sufficiency of the motion itself and may not pass on the truth of the facts alleged." *Rodriguez v. State*, 919 So. 2d 1252, 1274 (Fla. 2005); Fla. R. Jud. Admin. 2.330(f). "A motion to disqualify will be dismissed as legally insufficient if it fails to establish a well-grounded fear on the part of the movant that he will not receive a fair hearing." *Griffin v. State*, 866 So. 2d 1, 11 (Fla. 2003). Moreover, "mere subjective fear of bias will not be legally sufficient; rather, the fear must be objectively reasonable." *Arbelaez v. State*, 898 So. 2d 25, 41 (Fla. 2005) (quotation omitted).

Appellate courts review a trial judge's determination on a motion to disqualify de novo. *Chamberlain v. State*, 881 So. 2d 1087, 1097 (Fla. 2004), *cert. denied*, 544 U.S. 930 (2005). Whether the motion is legally sufficient is a question of law. *Barnhill v. State*, 834 So. 2d 836, 843 (Fla. 2002).

B. The Third District Properly Concluded That Facebook Friendship, Without More, Is Not a Legally Sufficient Basis for Disqualification

The Third District addressed a narrow issue: "whether a reasonably prudent person would fear that he or she could not get a fair and impartial trial because the judge is a Facebook friend with a lawyer who represents a potential witness and party to the lawsuit." A007. Answering in the negative, the Third District properly rejected Petitioners' argument that Facebook friendship creates the appearance of impropriety and violates the Code of Judicial Conduct canon barring judges from "convey[ing] or permit[ting] others to convey the impression that they are in a special position to influence the judge." IB at 13.

At the outset, it should be noted that, under well-settled Florida caselaw, **actual friendship** between a judge and an attorney who appears before him or her, **without more, is a not a legally sufficient basis for disqualification**. *MacKenzie*, 565 So. 2d at 1338 ("There are countless factors which may cause some members of the community to think that a judge would be biased in favor of a litigant or counsel for a litigant, e.g., **friendship**, member of the same church or religious congregation, neighbors, former classmates or fraternity brothers. However, such allegations have been found legally insufficient when asserted in a motion for disqualification.") (emphasis added). Notwithstanding this established precedent, Petitioners suggest Facebook "friendship" amounts to actual friendship,

and then—ignoring well-settled law—erroneously contend that any such relationship, standing alone, is a basis for disqualification. *Id.*

The Third District properly held that Facebook friendship, without more, does not convey the impression that the Facebook friend is in a special position to influence the judge. As the Third District explained, "a Facebook friendship does not necessarily signify the existence of a close relationship," A010 (quoting *Chace v. Loisel*, 170 So. 3d 802, 804 (Fla. 5th DCA 2014)), and it is therefore unreasonable for a litigant to believe he cannot obtain a fair trial before a judge who is Facebook "friends" with counsel. The court's observation that "a 'friend' on a social networking website is not necessarily a friend in the traditional sense of the word" hits the nail on the head and demonstrates why Petitioners' purported fear of not receiving a fair trial is unreasonable. A014.

Nevertheless, Petitioners contend the Third District failed to address "the actual issue which was the appearance of impropriety that Facebook 'friendship' creates and instead focused on the *quantity* of Facebook 'friends' the judge does or does not have, as well as the specific parsing and creation of a new definition of 'friend.'" IB at 20-21. To the contrary, the Third District specifically addressed the appearance of impropriety issue, *see, e.g.*, A009 (discussing JEAC minority opinion that "the listing of lawyers who may appear before the judge as 'friends' on a judge's social networking page **does not reasonably convey to others** the

impression that these lawyers are in a special position to influence the judge" (emphasis added)), and concluded that "[a]n assumption that all Facebook 'friends' rise to the level of a close relationship that warrants disqualification simply does not reflect the current nature of this type of electronic social networking." A013. Contrary to Petitioners' suggestion, the court's discussion regarding the quantity of Facebook friends was not the focus of the opinion, although it *was* relevant to support the court's conclusion that Facebook friendship does not necessarily signify the existence of a close relationship. Petitioners' arguments on these issues lack merit.

Petitioners also state that the Third District "misunderst[ood] the mechanism by which Facebook friends are created," IB at 19, suggesting the court erroneously believed that the Facebook "People You May Know" feature adds Facebook friends to users' friend lists without the user affirmatively accepting or requesting the Facebook friendship. IB at 19-20. To the contrary, the Third District correctly understood that Facebook merely *suggests* "People You May Know" and that the Facebook user still takes an active role in requesting or approving the Facebook friendship. *See* A012 ("Facebook then **suggests** these 'People You May Know' as **potential** 'friends.'" (emphasis added)).

Amicus Paylan contends the electorate should decide whether to vote for judges who maintain Facebook friendships with attorneys who appear before them.

Amicus Br. at 5, 12. Generally speaking, matters of judicial ethics are not regulated by the voters. In any event, Paylan's statement that "the majority of the public would be repulsed by the mere suggestion that a sitting judge would maintain Facebook Friendship with opposing counsel in an active case before the Judge, **even if it were just a casual friendship through other common friendships**," *id.* at 12 (emphasis added), is inconsistent with this Court's opinions, which make clear that even actual friendship, standing alone, is not a basis for disqualification. Paylan also contends that a "majority of other states" prohibit Facebook friendship between judges and attorneys who appear before them. *Id*. at 14. Paylan's support for this statement consists of ethics opinions from two states, one of which does **not** prohibit Facebook friendships between lawyers and judges, but instead requires judges to "be mindful of whether such on-line connections alone or in combination with other facts rise to the level of a 'close social relationship' that should be disclosed and/or require recusal." *Id.* (quoting *Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op*. JE-119).

C. The Third District Neither Considered Nor Made Findings Regarding the "Degree of Intimacy" Between the Trial Judge and Reyes and The Court Was Not Required to Review the Legal Sufficiency of Petitioners' Motion in a Vacuum.

Petitioners next accuse the Third DCA of making a "speculative finding with respect to the 'degree of intimacy' between the judge and her Facebook 'friend' [which] was completely outside the verified allegations of the Motion to

Disqualification." IB at 19. Petitioners' argument distorts the Third District's decision.

The Third District did not look beyond the allegation that the trial judge and Reyes were Facebook friends, and it certainly made no findings regarding the degree of intimacy between the two. Instead, the court merely acknowledged the notion that "the degree of intimacy among Facebook 'friends' varies greatly," A014, and the court was referring to Facebook friendship generally—not Judge Butchko's and Reyes' "friendship" in particular. A014. This goes to the issue of whether Petitioners' purported fear of not receiving a fair trial is objectively reasonable. *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986) (explaining that a mere subjective fear of bias is not a legally sufficient basis for disqualification; rather, the fear must be objectively reasonable). In other words, the Third District used the general premise that not all Facebook "friends" are intimate friends to explain why a reasonably prudent person would not fear that he or she could not receive an impartial trial under the circumstances.

According to Petitioners, the Third DCA "import[ed] an extra-record factual discussion" into its opinion by reviewing various aspects of Facebook and its features. IB at 9. Apparently, Petitioners take issue with the court's discussion of the realities of Facebook (e.g., its use of the "People You May Know" feature to suggest friends; the fact that many people have hundreds or even thousands of

Facebook friends; and the fact that many Facebook "friends" are not true friends in the traditional sense of the word), but the court's consideration of these issues was not improper.

It is not uncommon for courts to consider matters not specifically discussed within the four corners of the disqualification motion to provide context in determining whether the litigant's alleged fear of not receiving a fair trial is reasonable. *See, e.g.*, *MacKenzie*, 565 So. 2d at 1336 (considering "Florida's statutory limitation on campaign contributions and the statutorily required disclosure of the names of contributors and the amounts of their contributions" in assessing whether disqualification motion alleging that opposing party's attorney made campaign contribution to judge's husband's political campaign stated legally sufficient basis for disqualification; concluding that "Florida's Code of Judicial Conduct together with Florida's statutory limitation upon campaign contributions and the requisite public disclosure of such contributions, provide adequate safeguards against the . . . concerns regarding contributions to constitutionally mandated judicial campaigns and render the ground alleged in the motions at bar legally insufficient when presented as the sole ground for disqualification").

Petitioners suggest the Third District was required to consider the legal sufficiency of their motion in a complete vacuum, a proposition unsupported by Florida law. In short, the Third District did not err in considering widely known

facts regarding Facebook "friendship" in assessing the legal sufficiency of Petitioners' motion, and the court was not required to rely solely on Petitioners' subjective fear of not receiving a fair trial.

D. The Third District's Opinion Does Not Subject Trial Judges to Discovery

Petitioners' contention that the decision subjects trial judges to discovery of their social media and in-app communications is similarly meritless. Petitioners argue the Third District has created a "new evidentiary-based burden of proof" whereby an aggrieved litigant must prove the "degree of friendship" between the judge and the Facebook friend, how many "friends" the judge has on Facebook, and to what degree the judge "feels a particular affection and loyalty" toward his or her Facebook friend. As a result, according to Petitioners, litigants are now entitled to discover the judge's social media. IB at 25. In particular, Petitioners contend that litigants who learn their trial judge is Facebook friends with opposing counsel will be entitled to discovery of the judge's and lawyer's Facebook profiles, posts, and in-app communications to determine whether the two have a relationship that amounts to "something 'more'" than mere Facebook friendship. IB at 10, 24-26.

This argument is inconsistent with the Code of Judicial Conduct and the Rules of Judicial Administration, both of which make clear that confidence is placed in judges to disqualify themselves when appropriate, and that the burden is on the judge to rule on the legal sufficiency of a disqualification motion. Fla. R.

Jud. Admin. 2.330(f) ("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."); Code of Jud. Cond. Canon 3(E)(1) (setting forth non-exhaustive list of circumstances in which a judge must disqualify himself or herself from a case in which the judge's "impartiality might reasonably be questioned").

In other words, the Code of Judicial Conduct assumes that judges can be trusted to police themselves. Nevertheless, Petitioners ignore this concept and seek to weaponize the Code of Judicial Conduct to gain an advantage in litigation—a tactic the Code itself states is improper. *See* Fla. Code of Jud. Conduct, Preamble ("[T]he purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.").

As this Court has noted, "'[w]e cannot operate a judicial system, or indeed a society, on the basis of the factually unsubstantiated perceptions of the cynical and distrustful.'" *MacKenzie*, 565 So. 2d at 1338 (quoting *Breakstone v. Mackenzie*, 561 So. 2d 1164, 1178 (Fla. 3d DCA 1989) (Schwartz, C.J., dissenting)). There, this Court quoted from the dissenting opinion of the Third District's Chief Judge Schwartz, who continued:

> [B]ecause we must and do assume, in the absence of something to the contrary, that a judge will abide by his oath and not permit any such consideration [of bias in favor of a member of the judge's own race, gender,

> religion, or nationality] to influence his or her judgment, we rightly refuse to accept a suggestion of this kind as a basis for disqualification. . . . We should *not* conclude that a judge will act wrongly, particularly as a result of a lawful action, unless there is some reason to do so. Under the contrary rule . . . our system will be run by those who disbelieve in it the most.

Breakstone, 561 So. 2d at 1178–79, *decision approved in part, quashed in part sub nom. MacKenzie*, 565 So. 2d 1332.

Petitioners and amicus Paylan also both complain that Facebook can be used as a platform through which a judge and his or her "friend" may have ex parte communications. *See, e.g.*, IB at 24-25 (stating that Facebook "specifically facilitates secret communications between users"); Amicus Br. at 5 (stating that judges can use Facebook's privacy features to have ex parte communications without detection). This argument is a red herring. Petitioners' disqualification motion did not allege that the trial judge and Reyes had any ex parte communications at all, much less through Facebook. Petitioners' contention that they are entitled to discovery of the judge's social media and in-app communications based on an unfounded suspicion that an ex parte communication *could have been* sent through Facebook is akin to arguing that litigants should be allowed discovery of mail, text messages, and emails sent to the judge, merely because ex parte communications *could have been* sent through those means.

Without any well-founded reason for believing that ex parte communications actually occurred (or even an allegation that such a communication occurred), Petitioners are not entitled to any such discovery. As Chief Judge Schwartz aptly noted, if we allow such baseless assumptions that our judges will act wrongly to stand, "our system will be run by those who disbelieve in it the most." *Breakstone*, 561 So. 2d at 1179.

Petitioners rely on *Roberts v. State*, 840 So. 2d 962 (Fla. 2002), to argue that discovery of the judge's social media and in-app communications should be permitted. IB at 26. Their reliance on *Roberts* is misplaced. *Roberts* dealt with a situation where the judge was alleged to have had ex parte communications, and the appellate court held discovery was permitted into that issue. Here, by contrast, Petitioners have not alleged that the trial judge had any ex parte communications with Reyes. Thus, *Roberts* is inapposite. Petitioners have demonstrated no basis to discover the judge's social media and in-app communications, and their argument must be rejected.

E. Domville Is Factually Distinguishable and This Court's Ruling Will Apply Retroactively

Petitioners maintain the trial judge was required to disqualify herself under the Fourth District's opinion in *Domville* because it was the only case on point at the time and therefore was binding on the trial court under *Pardo v. State*, 596 So. 2d 665 (Fla. 1992). This argument fails because *Domville* is readily

distinguishable. There, the Fourth District considered "a criminal defendant's effort to disqualify a judge whom the defendant alleges is a Facebook friend **of the prosecutor assigned to his case**." 103 So. 3d at 185 (emphasis added). The court quashed the order denying disqualification "[b]ecause [the criminal defendant] has alleged facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial." *Id.* at 186.

The facts of *Domville* are different from those at issue here. Petitioners are not like the non-lawyer, criminal defendant in *Domville*, and Reyes is not a prosecutor—he does not even represent a party. Further, Petitioners are sophisticated litigators who have practiced in Miami-Dade County for many years. It is highly questionable whether any reasonably prudent person in Petitioners' situation would have a well-founded fear of not receiving a fair and impartial trial simply because the trial judge and Reyes are Facebook "friends."

As Judge Gerber explained, the holding of *Domville* is narrow and limited to its facts. *Domville v. State*, 125 So. 3d 178, 180 (Fla. 4th DCA 2013) (Gerber, J., dissenting from decision to certify question of great public importance; describing the issue involved in *Domville* as "narrow" and noting that "[t]he occurrence of those facts in [*Domville*] appears to be an isolated event"). *Domville* is distinguishable from the instant case and the trial court properly declined to rely on it.

Even if *Domville* were on point, the trial court was not bound to follow it. In *Chace v. Loisel*, 170 So. 3d 802 (Fla. 5th DCA 2014), the Fifth District signaled disagreement with *Domville* and questioned the fundamental premise on which the *Domville* holding was based. Specifically, the Fifth District, in dicta, stated:

> We have serious reservations about the court's rationale in *Domville.* The word "friend" on Facebook is a term of art. A number of words or phrases could more aptly describe the concept, including acquaintance and, sometimes, virtual stranger. Facebook friendship does not necessarily signify the existence of a close relationship. Other than the public nature of the internet, there is no difference between a Facebook "friend" and any other friendship a judge might have. *Domville*'s logic would require disqualification in cases involving an acquaintance of a judge. Particularly in smaller counties, where everyone in the legal community knows each other, this requirement is unworkable and unnecessary. Requiring disqualification in such cases does not reflect the true nature of a Facebook friendship and casts a large net in an effort to catch a minnow.

Chace, 170 So. 3d at 803-04 (footnote omitted).[5]

Given that the Third District had not yet spoken on the issue and "the applicable principle of law was sufficiently unsettled" due to the disagreement between the Fourth and Fifth Districts on the issue, the trial court was not required to follow *Domville* and did not err in denying the disqualification motion. *Cf. Allstate Fire & Cas. Ins. Co. v. Hallandale Open MRI, LLC*, 42 Fla. L. Weekly

[5] Petitioners contend the Fifth District's opinion in *Chace* "distinctly agree[d] with the holding of *Domville*." IB at 29, n.8. As the above-quoted excerpt demonstrates, Petitioners mischaracterize the Fifth District's opinion.

D2503, 2017 WL 5760355 (Fla. 3d DCA Nov. 29, 2017) (concluding that lower appellate court did not violate any clearly established principle of law where two other District Courts of Appeal had issued conflicting opinions on the issue at hand and the District in which trial court was located had not yet spoken on the issue).

Tellingly, Petitioners take the position that this Court's opinion should apply retroactively if they win, but prospectively if they lose. IB at 30-31. This position is untenable. "The general rule is that judicial decisions in the area of civil litigation have retrospective as well as prospective application[.]" *Int'l Studio Apartment Ass'n, Inc. v. Lockwood*, 421 So. 2d 1119, 1120 (Fla. 4th DCA 1982);[6] *accord Basel v. McFarland & Sons, Inc.*, 815 So. 2d 687, 695–96, 696 n.5 (Fla. 5th DCA 2002) (quoting United States Supreme Court Justice Rehnquist's statement that "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student"). As such, this Court's decision will apply retroactively, as well as prospectively.

II. THE THIRD DISTRICT CORRECTLY APPLIED THE LEGAL STANDARD GOVERNING MOTIONS FOR DISQUALIFICATION

Petitioners next argue the Third District misapplied the legal standard governing disqualification motions by embracing the perspective of the trial judge, rather than that of the litigant seeking disqualification. IB at 31. To the contrary,

[6] This rule is subject to an exception—inapplicable here—proscribing destruction of property or contract rights acquired in accordance with prior construction. *Id.*

the Third District correctly applied the legal standard, as evidenced by the court's statement of the issue on appeal: "[t]he issue in this case is . . . whether a **reasonably prudent person** would fear that he or she could not get a fair and impartial trial because the judge is a Facebook friend with a lawyer who represents a potential witness and party to the lawsuit." A007 (emphasis added). *Cf. Gore*, 964 So. 2d at 1268 ("The standard for assessing the legal sufficiency of a motion to disqualify is whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair trial at the hands of that judge."). The Third District assumed the facts alleged—that Reyes and the trial judge are Facebook friends—to be true, and concluded that Facebook friendship, without more, would not cause a reasonable litigant to fear he will not receive a fair trial.

Nonetheless, Petitioners insist the court misapplied the applicable legal standard and "disregard[ed] the allegations" of the disqualification motion. IB at 33. Petitioners' entire argument on this point is based on a distortion of the Third District's ruling. For example, Petitioners state the Third District "redefined the factual reality and the 'degree of intimacy' of the relationship between Judge Butchko and her Facebook 'friend' Reyes," and that the court "theorize[d] in the abstract on the degree of 'friendship'" between Judge Butchko and Reyes. *Id.* at 32, 33.

As explained above, the Third District made no statements regarding the degree of friendship between the trial judge and Reyes. Rather, the court merely observed that Facebook friendship, generally speaking, does not necessarily signify the existence of a close relationship. A010; *see also* A013 ("An assumption that all Facebook 'friends' rise to the level of a close relationship that warrants disqualification simply does not reflect the current nature of this type of electronic social networking."); *id.* ("To be sure, some of a member's Facebook 'friends' are undoubtedly friends in the classic sense of person for whom the member feels particular affection and loyalty. The point is, however, many are not."); A014 ("Because a 'friend' on a social networking website is not necessarily a friend in the traditional sense of the word, we hold that the mere fact that a judge is a Facebook 'friend' with a lawyer for a potential party or witness, without more, does not provide a basis for a well-grounded fear that the judge cannot be impartial or that the judge is under the influence of the Facebook 'friend.'").

Petitioners also complain that the Third District "determined that a party advancing a disqualification motion would need to prove a 'significantly close relationship.'" IB at 31. First of all, the "significantly close relationship" language Petitioners quote does not appear in the opinion. Second, the court did not state that the moving party has to "prove" anything or otherwise meet any evidentiary burden. Rather, the court held that an allegation that a judge is Facebook friends

with an attorney appearing before her, standing alone, is not a sufficient basis for disqualification.

Petitioners—not the Third District—misapply the legal standard governing disqualification by suggesting the trial court should have applied a subjective standard and assessed the motion in a vacuum, without reliance on real-world experience in evaluating the objective reasonableness of their purported fear of not receiving a fair trial. For instance, Petitioners argue the Third District could not "decipher and redefine the 'friend' relationship between the trial judge and Reyes, as it was confined by the allegations set forth in the disqualification motion," and "[w]ithout any evidence from the record, or, any support from the verified motion to disqualify, the Third District Court of Appeal cannot question the term 'friend' as pled." IB at 32. Under Petitioners' construct, the court should have ignored the facial deficiencies of the motion—i.e., the fact that Petitioners merely alleged that Reyes and Judge Butchko are *Facebook* friends and did *not* allege the existence of an actual, close friendship between the two.[7]

Even more, it seems Petitioners expected the trial court and the Third District to blindly accept their allegation that Facebook friendship alone constituted a well-founded reason to believe they could not obtain a fair trial before

[7] Petitioners again ignore well-settled precedent establishing hat actual friendship, standing alone, is not a legally sufficient basis for disqualification, as explained in Section I.B. above. *See MacKenzie*, 565 So. 2d at 1338.

the judge, without assessing whether that fear was reasonable, given the realities of Facebook "friendship." While Petitioners may have a subjective fear of not receiving a fair trial, a mere subjective fear of bias is not legally sufficient; rather, the fear must be objectively reasonable. *Fischer*, 497 So. 2d at 242. The Third District correctly applied this legal standard, and Petitioners' argument fails.

III. THE THIRD DISTRICT PROPERLY REJECTED PETITIONERS' OTHER TWO BASES FOR DISQUALIFICATION—PERSONAL ANIMUS AND PREJUDGMENT—AND WAS NOT REQUIRED TO ADDRESS THESE ARGUMENTS IN ITS OPINION

A. The Trial Judge Did Not Prejudge Any Issues

Petitioners argue the trial judge prejudged a hypothetical, unfiled sanctions motion by warning Petitioners that they needed a good faith basis to assert claims against USAA's executives, and that she purportedly gave legal advice to USAA's lawyers at the June 2 Hearing when she noted that, if USAA filed a sanctions motion, it would put Petitioners in a "bad position." Petitioners cherry-pick, out of context, a few comments made by the trial judge. This Court has held that, for purposes of disqualification, in evaluating statements made by a trial judge, a party cannot focus "on one word out of context," but instead must review the comments as a whole. *Gregory v. State*, 118 So. 3d 770, 779 (Fla. 2013).

When the trial judge's comments are read in context, it is clear that Judge Butchko did not prejudge any issues or provide legal advice to USAA. Instead, after Petitioners' counsel repeatedly threatened to bring in numerous additional

defendants in retaliation for the judge's decision not to dismiss or enter summary judgment for Herssein on USAA's malpractice counterclaims against him, the trial judge simply reminded Petitioners that they needed a good faith basis for such new claims. *See, e.g.*, A129-30 (Herssein stating, "[w]e are going to be amending our complaint to bring in a whole bunch of executives **because what's good for them is good for me**.") (emphasis added); A131 (Udell stating, "[Herssein's] advising the Court what's going to happen **based on that [summary judgment] ruling.**").

Judge Butchko interpreted these statements as threats that if she did not rule in Petitioners' favor, Petitioners would bring in additional defendants. A131. Nonetheless, Petitioners continued to threaten to bring in numerous defendants and create a circus-like atmosphere with "50 lawyers" crowding her courtroom. A310, 312 (Udell stating, "they are all coming in. They are all going to get their own lawyers. We are going to have 50 lawyers in here. . . . So it's going to be a big party. **But [USAA] want[s] leave to amend, give it to them, Judge.**") (emphasis added); A308-09 (Udell stating, "[W]e've got a lot more people coming in **based on you keeping my client** [Herssein] **in on one of the counts personally** – two of the counts.") (emphasis added); A314 (Herssein stating, "They are all coming in. **If I'm personally in this now, they are**.") (emphasis added).

Viewing the comments in this context, it is clear that the trial court was merely counseling caution in the face of Petitioners' repeated threats to bring in

additional defendants based on the judge's rulings on unrelated, distinct issues. Petitioners' allegations did not demonstrate an objectively reasonable basis for concluding that the trial judge prejudged any issues.

Further, the trial judge used qualified language and specifically stated that she did not know whether Petitioners currently had the evidence or a good faith basis to assert the claims threatened by Petitioners at the hearing:

> You have to be very careful when you are going to be suing those people individually because you do have to have the evidence to support it, and I don't know that you have the discovery to do that. **You may have it,** but my impression is that you guys don't have discovery, that's why you haven't been taking depositions.

A309 (emphasis added); *see also* A314 ("**I don't know what evidence you have**, but if anybody on the other side files a 57.105 or something on these things, it puts you in a bad position.") (emphasis added). The trial judge made clear that she had not made up her mind on the issue: "Sue anybody you want. . . . That's not my strategy decision. I don't participate in who is going to sue. **I can't rule on legal motions thinking in advance**." A132 (emphasis added).

These statements are similar to those the trial judge made in *Pilkington v. Pilkington*, 182 So. 3d 776 (Fla. 5th DCA 2015), which were held to be insufficient bases for disqualification. *Id.* at 779 ("The two comments Petitioner lists as showing the judge's prejudgment or bias [i.e., 'the chronology doesn't make it look real good for [Petitioner]' and 'it doesn't look good'] contain clear

qualifiers, i.e., 'but looks can be deceiving' and 'but I can't make that—jump to that conclusion.'"). There, the Fifth District concluded that although the trial judge had made comments expressing his mental impressions, he "clarified that he would not make any decisions based upon first impressions," and, as such, disqualification was not warranted. *Id.* Similarly, here, the trial judge noted that she could not "rule on legal motions thinking in advance" and that Petitioners "may have" evidence to support their claims. A132, A309.

Petitioners take issue with the trial court's statement that "my impression is that you don't have discovery, that's why you haven't been taking depositions." IB at 4-5; *see also* A020, A021, A030, A038, A039 (Petitioners repeatedly emphasizing this statement in their disqualification motion). Once again, Petitioners take the judge's statement out of context. Petitioners suggest she was referring to their lack of discovery to support fraud claims against USAA executives. *Id.* To the contrary, in context of the entire hearing—during which both parties noted that depositions could not proceed until various document production issues were resolved—it is clear that the trial judge was referring to the parties' lack of discovery in general, not the lack of discovery related to the executives' alleged fraud specifically.

In fact, earlier in the hearing, Herssein discussed the need to delay depositions until after the court performed an in-camera inspection of documents

listed on USAA's privilege log. A107. Herssein indicated he did not have certain documents needed to prove the executives' purported fraud because Herssein believed documents had been wrongfully designated as privileged by USAA:

> Well, I agree with the Court that we are in a little bit of a procedural quagmire because **we can't take their clients' depositions until we know what [documents] we are getting** and what the Court is saying, this is what you are getting.
>
> I mean, right now, [USAA] did give us discovery, but it's irrelevant information. . . . **What I want to know is what the executives were talking about when they were gearing up [HLG's] firing and pulling the 60-day notice [of termination]. And that's what's hiding in these privilege logs somewhere**.

A107 (emphasis added).

Throughout the June 2 hearing, both parties noted the need for rulings on certain document production issues before the parties could take depositions. *See, e.g.*, A092 (USAA's counsel stating "[w]e are hopeful that by then, the Court has decided the issues related to the document production, so we can start depositions in this case"); A098 (USAA's counsel stating, "[w]e said we would give them [deposition] dates once your Honor had ruled on the issues regarding their production. There are issues with regard to production, that Your Honor will hear today, that those depositions can't go forward until we have documents from Mr. and Mrs. Herssein."); A098-99 (trial judge asking the parties' counsel, "how about the five depositions [of USAA personnel]? Can those go forward without the in-

camera [inspection]?" and Udell responding, "I think we need to have Your Honor do the in-camera inspection on the documents.").

Thus, when the judge's comment is read in context, it is clear that the trial judge was **not** opining that Petitioners had no evidence to support claims against the executives. Instead, she likely was relying on the parties' earlier representations that they needed rulings on document discovery before depositions could be taken.

Petitioners also assert that they were entitled to "add[ ] any parties as a matter of right" because "Petitioners had not answered [USAA's] counterclaim as of June 2, 2017." IB at 6, 6 n.5. Petitioners suggest the trial judge violated Florida law by prejudging their ability to add defendants where they did not need leave of court to do so. This argument is misleading. At the June 2 hearing, Petitioners were initially discussing their plan to amend HLG's **complaint** to bring fraud claims against USAA's executives. Petitioners' counsel themselves acknowledged this. *See* A129-30 ("We are going to be **amending our complaint** to bring in a whole bunch of executives . . . .") (emphasis added); A309 (Udell stating, "So for purposes of letting [USAA] **amend**, that's fine. **As long as we have the same leeway**, that's fine.") (emphasis added); A309 (Udell stating, "We are going to be **amending**.") (emphasis added). Only after the trial judge noted that she had a right to close the pleadings did Petitioners begin discussing crossclaims and

counterclaims to argue they did not need leave of court to assert claims against the executives and others. A311-12.

In any event, the fact that Petitioners had not yet answered USAA's counterclaim has no bearing on whether HLG could amend its Third Amended Complaint to add USAA's executives as defendants to the fraud claims. Given that HLG was already on its fourth iteration of its complaint, which USAA had already answered, HLG was required to seek leave to amend the complaint to add additional claims against USAA's executives for fraud. *See* Fla. R. Civ. P. 1.190(a).

B. The Trial Judge Did Not Express Personal Animus Against Herssein

Petitioners also seek disqualification because the trial judge said that Herssein had a "special personality," a comment she equally directed to one of USAA's counsel. *See* A226 ("You happen to have a special personality, and so does Kessler.").[8] Under Florida law, "[g]enerally, mere characterizations and gratuitous comments, while offensive to the litigants, do not in themselves satisfy the threshold requirement of a well-founded fear of bias or prejudice." *Wargo v. Wargo*, 669 So. 2d 1123, 1124 (Fla. 4th DCA 1996); *accord Pilkington*, 182 So. 3d at 779 ("Comments from the bench—even unflattering remarks—which reflect

[8] Although the trial judge clearly directed this comment at USAA's co-counsel Kessler as well, Petitioners misleadingly contend that "no such comments were targeted at [Herssein's] opposition or Reyes." IB at 44.

observations or mental impressions are not legally sufficient to require disqualification."); *Nassetta v. Kaplan*, 557 So. 2d 919, 921 (Fla. 4th DCA 1990) ("A judge's remarks that he is not impressed with a lawyer's, or his client's behavior are not, without more, grounds for recusal."); *Strasser v. Yalamanchi*, 783 So. 2d 1087, 1092 (Fla. 4th DCA 2001) (holding that trial judge's comments expressing "understandable frustration and concern" over a litigant's or counsel's behavior is not a basis for disqualification). Florida appellate courts have refused disqualification for far worse comments. *See, e.g.*, *Oates v. State*, 619 So. 2d 23, 25 (Fla. 4th DCA 1993) (affirming denial of motion to disqualify where trial court said defendant was "being an obstinate jerk").

As the Third District explained in *Bert v. Bermudez*, 95 So. 3d 274 (Fla. 3d DCA 2012):

> A trial judge has the right, and, in fact the obligation to control his or her courtroom and the proceedings, including taking corrective measures, when a party, witness, observer, or, as in this case, a lawyer becomes combative, disrespectful, or disruptive. To require disqualification of a judge whenever a party, witness, or lawyer's behavior invokes an invited response by the judge, would encourage the behavior exhibited at this hearing as a means of "judge-shopping."

Id. at 280. Here, taken in context, the trial judge's comment that Herssein has a "special personality" does not establish any personal animus. The record reflects that Herssein's behavior in the courtroom could easily be characterized as

combative, and the judge's comment was merely an "invited response" to this behavior. *Id.*; *State ex rel. Fuente v. Himes,* 36 So. 2d 433, 439 (Fla. 1948) ("A lawyer cannot disagree with the court and deliberately provoke an incident rendering the court disqualified to proceed further.").

Shortly before the "special personality" comment was made, Herssein had twice referred to USAA's legal position as "nonsensical,"; when USAA's counsel attempted to respond to Petitioners' argument on another issue, Herssein interjected, "Excuse me, I'm talking to the Court," and then accused USAA of providing a privilege log containing fraudulent entries. A223-26. During the hearing, Judge Butchko noted that Herssein was being "very emotional," A131, and taking the case "very personal[ly]," so she was attempting to "get everybody to lower their blood pressure." A229. In this context, the court's comment does not display personal animus.

Petitioners accuse the trial judge of calling Herssein "crazy," but they do not identify the date on which this comment was made or provide any record citation to support this contention—and with good reason, because the comment does not appear in any of the hearing transcripts. The trial judge did not display personal animus against Herssein, and the Third District properly rejected this argument.

C. The "Six-Month Failure to Disclose" Argument Was Not Raised Below and Is Therefore Waived, and the Court's Adverse Rulings Are Not a Legally Sufficient Basis for Disqualification

Petitioners complain that the Third District "ignored" the trial judge's "disturbing six-month failure to disclose [her Facebook] 'friendship' with Reyes," as if this were one of the bases for disqualification alleged in their motion. *See* IB at 9; *see also id.* at 34. But Petitioners never raised any arguments regarding the judge's alleged "failure to disclose" her electronic "friendship" with Reyes in either the trial court or the Third District. Accordingly, the argument is waived and unpreserved for appellate review. *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.").

Petitioners also express skepticism regarding the trial court's rulings against them—namely, the CBL transfer order, the order granting USAA's motion for reconsideration of the order setting the evidentiary hearing, and the order sustaining USAA's common interest privileges—suggesting the rulings were a result of the trial judge's bias in favor of Reyes. IB at 2-3. It goes without saying that "adverse ruling[s] [are] not sufficient to establish bias or prejudice." *Correll v.*

State, 698 So. 2d 522, 525 (Fla. 1997).[9] Simply put, Petitioners have not demonstrated any basis for disqualification.

D. The Third District Did Not "Fail to Consider" Other Grounds for Disqualification or the Cumulative Effect Thereof

Next, Petitioners contend the Third District "ignore[d]" their arguments that the trial judge had prejudged certain issues in the case and displayed personal animus against Herssein, and "fail[ed] to consider" the cumulative effect of the three grounds for disqualification. IB at 34-45. Again, this argument lacks merit. The Third District was aware of Petitioners' three arguments, as it acknowledged in the opinion itself that Petitioners had raised three grounds for disqualification and noted it would only address the Facebook issue. A006. The Third District acted well within its discretion in not writing on issues it deemed meritless.

It is well-settled that there is no fundamental right to an opinion in a case decided by an appellate court. *See R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986 (Fla. 2004). An opinion's discussion of only some of the issues raised on

[9] For her part, amicus Paylan contends that Judge Butchko made adverse rulings against Petitioners and suggested litigation strategy to USAA **after** Petitioners told the judge that they had discovered her Facebook friendship with Reyes. Amicus Br. at 15. This statement is not accurate. Judge Butchko made the "special personality" comment and the comment regarding the section 57.105 motion during the June 2 hearing; Petitioners did not file the disqualification motion discussing their discovery of the judge's Facebook friendship with Reyes until June 8. A017. In any event, Paylan's argument on this point violates the principle that "amicus briefs should not argue the facts in issue." *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 683 So. 2d 522, 523 (Fla. 4th DCA 1996).

appeal is an indication that they were the only issues worthy of discussion—not that the court overlooked the other issues. *See, e.g., Bowles v. D. Mitchell Investments, Inc.*, 365 So. 2d 1028, 1029 (Fla. 3d DCA 1978) (denying rehearing motion and rejecting argument that the court "failed to consider the remaining points in the briefs"; explaining that the court "fully considered each point presented and determined that the points do not present reversible error" and that "the reference of the court in its majority opinion [to the sole issue addressed in the opinion] was an expression of the court's conclusion that the only points requiring discussion were those involving the issue [addressed]"). Here, the Third District correctly concluded that Petitioners' arguments on prejudgment, personal animus, and cumulative effect were meritless and properly exercised its discretion not to write on those issues.

Finally, the Third District correctly rejected Petitioners' "cumulative effect" argument. Petitioners essentially ask the Court to determine that the three cited bases for disqualification, taken together, gave Petitioners a well-grounded fear of not receiving a fair trial. Although Petitioners cite no cases to support their position, the cumulative effect of multiple errors has been found to require disqualification in some instances. *See, e.g., Dura-Stress, Inc. v. Law*, 634 So. 2d 769, 770 (Fla. 5th DCA 1994) (holding that recusal was warranted based on cumulative effect of separate bases for disqualification that were, standing alone,

"weak bas[e]s" for recusal). But this caselaw is inapposite because none of the three grounds alleged in Petitioners' motion provided any basis for disqualification. As such, the cumulative effect of the alleged grounds cannot be a concern here.

Petitioners' argument is analogous to a cumulative error argument. "A cumulative error claim asks an appellate court to 'evaluate claims of error cumulatively to determine if the errors collectively warrant a new trial.'" *Harrison v. Gregory*, 221 So. 3d 1273, 1278 (Fla. 5th DCA 2017) (quoting *Rogers v. State*, 957 So. 2d 538, 553 (Fla. 2007)). Since none of the three grounds for disqualification Petitioners asserted were legally sufficient, cumulative error necessarily did not occur. *Cf. London v. Dubrovin*, 165 So. 3d 30, 32 (Fla. 3d DCA 2015) ("[W]here individual claims of error fail, a related cumulative error claim must likewise fail."); *see also Dufour v. State*, 905 So. 2d 42, 65 (Fla. 2005) ("[The appellant] is not entitled to relief on his cumulative error claim because the alleged individual claims of error are all without merit, and, therefore, the contention of cumulative error is similarly without merit.").

CONCLUSION

For the reasons explained herein, the Court should affirm the Third District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that undersigned counsel has complied with the font requirement of Florida Rule of Appellate Procedure 9.210 (a)(2) because this brief is set in Times New Roman 14-point font.

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