IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC17-1848
L.T. No.: 3D17-1421

LAW OFFICES OF HERSSEIN AND HERSSEIN, P.A.,
D/B/A HERSSEIN LAW GROUP AND REUVEN T. HERSSEIN,

Petitioners,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

On July 13, 2015, Petitioner, Law Offices of Herssein & Herssein, P.A. d/b/a Herssein Law Group (hereinafter "HLG"), filed an action against Respondent, United Services Automobile Association (hereinafter "USAA"), for fraud perpetrated by USAA's executives in its business dealings and negotiations with HLG. The operative complaint alleges several counts of fraud, negligent misrepresentation, and breach of contract. The causes of action are based upon USAA's refusal to pay HLG's legal bills for earned contingency fees, pursuant to numerous unambiguous written contracts drafted and executed by USAA's executives. As alleged in the operative complaint, Catina Tomei (hereinafter "Tomei") is one of the USAA executives responsible for negotiating two of the main contracts at issue in the lawsuit. Two of the contracts, the July 2014 contract and the May 7, 2015 contract, are also the subject of the counterclaim filed by USAA against Petitioners HLG and Reuven Herssein,[1] individually (hereinafter "Herssein").

HLG contended that Tomei was involved in witness tampering. The predecessor trial judge ordered an evidentiary hearing on the witness tampering allegations. USAA agreed to schedule the evidentiary hearing. USAA hired

[1] Throughout this brief, HLG and Reuven T. Herssein are collectively referenced as "Petitioners."

former Eleventh Judicial Circuit Court Judge, Israel Reyes (hereinafter "Reyes"), the Honorable Beatrice Butchko's[2] Facebook "friend," to represent Tomei for the evidentiary hearing.

After retaining Reyes to represent Tomei, USAA sought to transfer the case to the Complex Business Litigation Division (hereinafter "CBL") of the Eleventh Judicial Circuit. HLG objected to the transfer. In December 2016, Judge Butchko, acting in her capacity as Assistant Administrative Judge, presided over the Transfer Calendar and addressed USAA's transfer motion. Reyes appeared at the Transfer Calendar, and, despite having no standing to address the propriety of USAA's motion as he represented a non-party, participated in the hearing. Relying in part on representations made by Reyes at the hearing, Judge Butchko ordered the case be transferred to CBL. Less than a month later, Judge Butchko took over the CBL division and began presiding over the very case she had previously ordered to be transferred.

Immediately after Judge Butchko was assigned the case, USAA sought reconsideration of the predecessor trial judge's order to schedule evidentiary hearings on the witness tampering allegations. Judge Butchko, citing USAA's "due process rights," over Petitioner HLG's objection, vacated the predecessor

[2] Throughout this brief, the Honorable Beatrice Butchko will be referred to as "the trial judge" or "Judge Butchko."

judge's order and ruled that no evidentiary hearing on witness tampering would occur. The trial judge did, however, allow discovery to proceed on the issue of witness tampering.

In furtherance of that discovery, Petitioners issued subpoenas for emails and correspondence between USAA's lawyers, Shutts & Bowen, LLP, and the witnesses' lawyers, in an effort to discover any bias or other possible collusion. On June 2, 2017, in ruling on USAA's objection to the subpoena on USAA's lawyers, the trial court found that Tomei (Reyes' client) and USAA had a "common legal interest," which prevented any discovery as to communications between Reyes and USAA's lawyers. (A334). [3]

On June 6, 2017, Petitioners discovered that Reyes was Facebook "friends" with the trial judge. (A013; A031; A039; A054; A062). On June 8, 2017, Petitioners filed their Verified Motion to Disqualify the Trial Judge relying upon *Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2013), *reh'g denied*, 125 So. 3d 178 (Fla. 4th DCA 2013), *review denied*, 110 So. 3d 441 (Fla. 2013), and two Judicial Ethics Advisory Committee (hereinafter "JEAC") opinions regarding judicial participation in social media. *See* Fla. JEAC Op. 2009–20 (Nov. 17, 2009); and Fla. JEAC Op. 2010-06 (March 26, 2010). (A013). Both JEAC opinions

[3] Throughout this Brief, the symbol "A" refers to the Appendix of the record on appeal and all emphasis is added unless otherwise noted.

advise that it is a violation of the Florida Code of Judicial Conduct Canon 2B for judges to be Facebook "friends" with lawyers or litigants who appear and argue before them.

Petitioners' Verified Motion for Disqualification laid out three separate and distinct legally sufficient grounds in support of the trial judge's disqualification. As the first ground for disqualification, Petitioners alleged that the trial judge's Facebook "friendship" with Reyes, a lawyer who appeared and argued on this case, mandated the trial judge's disqualification pursuant to *Domville* and the JEAC Opinions. (A013; A031; A039; A054; A062).

As the second ground for disqualification, Petitioners asserted that the trial judge prejudged Petitioners' ability to countersue USAA's executives, Jennifer Tate, Alan Bunge, Steve Duke, Brad Wallen, Gale Young, Jeannie Hopwood, and others, including Tomei, for the fraud committed by the USAA executives in the scope of their employment. The trial judge, sua sponte, implicitly threatened to grant sanctions against Petitioners pursuant to section 57.105, Florida Statutes and prejudged Petitioners' good faith basis to add Tomei and the other USAA executives as parties when no operative pleading had even been filed against Tomei or others. The trial judge stated as follows:

> So let me just say this. 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. (A045; A305).

The trial judge further said:

> 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. (A050; A310).
>
> But what I'm saying to you is that you better have a good faith basis at this juncture to do that. (A046; A069; A306).

Finally, the trial judge said:

> You have to be very careful with that. (A073; A310).

These warnings and admonitions unambiguously demonstrated that the trial judge, in addition to prejudging the propriety of awarding sanctions pursuant to section 57.105, Florida Statutes to USAA and Reyes' client based upon an unfiled and unpled motion, prejudged Petitioners "good faith basis" to add parties to the lawsuit when the matter was not yet ripe for ruling. (A046; A050; A069; A073; A306; A310). The trial judge's comments further implied that the failure to conduct depositions was Petitioners' fault, disregarding the fact that she had previously entered an order staying all depositions.[4] Finally, the trial judge, through her comments, by communicating to Reyes and counsel for USAA, that she would grant a motion for sanctions, suggested litigation strategy.

[4] The predecessor trial judge had entered two prior court orders requiring five depositions of USAA personnel.

Given the expressed prejudgment and legal advice by the trial judge on an unripe issue, Petitioners had a well-grounded fear that they would not receive a fair trial. As indicated in the Verified Motion to Disqualify, the trial judge's prejudgment of the issues concerning an unfiled and unpled sanctions motion prior to Petitioners having added any parties as a matter of right,[5] prompted USAA and its attorneys to adopt the trial judge's implicitly suggested litigation strategy. Immediately after the June 2, 2017 hearing, one of USAA's attorney's, Manuel Garcia-Linares, Esq. (hereinafter "Garcia-Linares"), approached HLG and its counsel. Garcia-Linares expressly embraced Judge Butchko's position, and threatened HLG with sanctions if HLG sued USAA's executives individually. (A036; A059). Specifically, Garcia-Linares stated, "be careful about adding USAA's executives personally, you heard what Judge Butchko said, you don't have the evidence and the Judge will issue [section] 57.105 sanctions against you." (A016; A036; A059). Thus, Garcia-Linares and USAA understood Judge Butchko's admonitions in the same manner as Petitioners interpreted them.

As the third ground for disqualification, the Petitioners asserted that the trial court displayed personal animus toward Petitioner, Reuven Herssein, and denigrated him through *ad hominem* attacks. Specifically, Judge Butchko stated on the record, to Herssein, "you're crazy." (A037). Again, on June 2, 2017, Judge

[5] Petitioners had not answered the counterclaim as of June 2, 2017.

Butchko told Herssein he had a "special personality." (A037; A060; A222; A262), These comments were made in open court and in the presence of Herssein's spouse and business partner, the president of HLG, Iris Herssein, Esquire. Herssein asserted that the trial judge's public comments were humiliating to both Herssein and his wife, and publicly harmed Herssein's reputation and standing in the legal community. (A037; A060; A222; A262).

USAA filed no response to the Petitioner's Verified Motion to Disqualify. On June 9, 2017, within hours after the filing the motion, the trial court issued its order denying the motion without a hearing, finding it legally insufficient. (A077). On June 22, 2017, Petitioners filed their Petition for Writ of Prohibition to the Third District Court of Appeal. (A335). On August 23, 2017, the Third District Court of Appeal issued its opinion denying the Petition for Writ of Prohibition. (A001). In its opinion, the Third District Court of Appeal failed to address two of the three legally sufficient grounds set forth in Petitioners' Verified Motion to Disqualify and only addressed the Facebook "friendship" issue. (A002).

The Third District Court of Appeal's opinion specifically acknowledged conflict with the Fourth District Court of Appeal's *Domville* decision on this precise issue of law, yet failed to certify the conflict. (A010). On August 29, 2017, Petitioners' filed their Motion for Rehearing, Certification and Motion for Rehearing *En Banc*, which was denied on October 2, 2017. (A347). On October

17, 2017 Petitioners filed their Notice to Invoke Discretionary Jurisdiction of this Court. (A335). On October 19, 2017, the Third District Court of Appeal's mandate issued. (A350).

SUMMARY OF THE ARGUMENT

Canon 2 of Florida's Code of Judicial Conduct mandates that all judges "avoid the appearance of impropriety in all of the judge's activities" and "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *See* Canon 2 of Florida's Code of Judicial Conduct. Although judges are permitted to Facebook "friend" lawyers, and lawyers can Facebook "friend" judges, the disqualification standard must remain equal for all judges. Judges must avoid the appearance of impropriety in all the judge's activities. As the JEAC Opinions state, "Facebook 'friendship' with a lawyer that regularly appears before a judge on an active case conveys or permits others to convey the impression that they are in a special position to influence the judge."

"[T]he impartiality of the trial judge must be beyond question." *Rose v. State*, 601 So. 2d 1181, 1183 (Fla. 1992) Petitioners are not advocating that judges cannot use Facebook. Rather, Petitioners contend that judges should be held to the standard that the Code of Judicial Conduct demands, that is to avoid the appearance of impropriety in all of the judge's activities. The appearance of impropriety violates Petitioners' State and Federal Constitutional right to a fair

hearing before an impartial tribunal and is a violation of Petitioners' due process rights.

In a departure from the well settled law that "no judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned,"[6] the Third District Court of Appeal chose to import an extra-record factual discussion, ignoring the two JEAC opinions in reaching the opposite result of *Domville.* Additionally, the Third District Court of Appeal ignored the trial judge's disturbing six-month failure to disclose to the parties the Facebook "friendship" relationship with Reyes.

The practical effect of the Third District Court of Appeal's decision, in conflicting with the Fourth District Court of Appeal's *Domville* decision, is that judges in different districts now have incongruent standards of judicial conduct. Judges in the Fourth District must recuse themselves because they are bound by *Domville,* while judges everywhere else in Florida, can simply ignore the *Domville* decision and disregard both JEAC opinions on the subject. The different standards for compliance with the Code of Judicial Conduct is untenable for both judges and the public's perception of the judiciary. This is more pronounced as avoiding the appearance of impropriety is one of the cornerstones of the Code of Judicial Conduct and standards of conduct must be uniform for all judges in Florida.

[6] *State v. Steele*, 348 So. 2d 398, 401 (Fla. 3d DCA 1977)

The Third District Court of Appeal's opinion has created a new evidentiary-based burden of proof standard on a disqualification motion, thereby exposing all judges to discovery of their social media in-app communications, such as texts, e-mails, and instant messages. By holding "that the mere fact that a judge is a Facebook "friend" with a lawyer…," without more, negates a well-grounded fear that the judge cannot be impartial or that the judge is under the influence of the Facebook 'friend.'" (Opinion at 10), an aggrieved party must now substantiate the new evidentiary-based burden of proof (i.e. more) using an unworkable standard to determine the "degree of friendship," how many "friends," the judge has, and to what degree the judge "feels a particular affection and loyalty" toward his or her Facebook "friend."

If a litigant has learned that the trial judge is a Facebook "friend" with a litigant or lawyer, a litigant's right to a fair and impartial tribunal mandates the ability to obtain discovery, insuring the litigant's rights are preserved under the State and Federal Constitutions. The unintended consequence created by this new standard relating to Facebook "friends" is the exposure of the judiciary to discovery and the ancillary litigation that would logically follow.

Petitioners' Verified Motion to Disqualify should be assessed through the application of the controlling law on the date the motion was filed. In 2013, the Fourth District Court of Appeal's *Domville* decision addressed the primary

question before this Court and affirmatively established the law in Florida: a judge's Facebook "friendship" with a lawyer or litigant in an active case before them, indeed, projects the appearance of impropriety, which all judges must avoid, and is thus an ethical violation of Judicial Canon 2B, requiring disqualification. Thus, on the date Petitioners filed their motion, the trial judge was required to disqualify herself. The fact that months later, the Third District Court of Appeal disagreed with both the Fourth District Court of Appeal and two JEAC opinions on this exact issue, cannot retroactively vitiate the trial judge's appearance of impropriety, violation of the law, and ethical violation that occurred when the trial judge failed to disclose her Facebook "friendship" with Reyes and refused to disqualify herself.

The Third District Court of Appeal departed from the well-established standard of review when it failed to take the allegations of the Verified Motion to Disqualify as true and instead viewed it from the trial judge's perspective, rather than from Petitioners' perspective. The Third District Court of Appeal clearly departed from the standard set out by this Court by speculating as to the "degree of intimacy" between the judge and her Facebook "friend," looking outside the verified allegations of the motion, and by labeling different levels of Facebook "friends" and the degree of "friendship" between the trial court and her Facebook "friend," without any factual support in the motion to disqualify. Such a departure

from the standard established by this Court for deciding whether disqualification of the trial court judge is warranted cannot stand.

As a result of its fundamental misapprehension of the Facebook application and its mechanics, the Third District Court of Appeal erred by reaching far beyond the allegations of the Verified Motion to Disqualify and thus violated the basic tenets of disqualification jurisprudence. To preserve Petitioners' State and Federal Constitutional rights, this Court must review the Petitioners' Verified Motion to Disqualify the trial court judge, de novo. Petitioners' moved for disqualification based on three distinct grounds. While it is true that each ground standing on its own mandates disqualification, the combination of the three grounds gives rise to an irrefutable basis to challenge the impartiality of the judge. The Third District Court of Appeal failed to adhere to the proscribed standard by ignoring two of the three grounds, and the conjunction of all three, thereby violating Petitioners' State and Federal Constitutional due process rights.

For the foregoing reasons, this Court should interpret Canon 2 of the Code of Judicial Conduct consistent with the Fourth District Court of Appeal's well-reasoned *Domville* decision and the JEAC opinions, and require disqualification when a judge is Facebook "friends" with a lawyer that appears before that judge. This Court must reverse the Third District Court of Appeal's opinion, grant the Petition for writ of prohibition, and order the disqualification of the trial judge.

STANDARD OF REVIEW

"The question of whether a motion to disqualify is legally sufficient is a question of law, which is reviewed de novo." *Krawczuk v. Tucker*, 92 So. 3d 195 (Fla. 2012). *See also Lynch v. State*, 2 So. 3d 47, 78 (Fla. 2008).

ARGUMENT

I. JUDGES WHO ARE FACEBOOK 'FRIENDS' WITH A LAWYER OR LITIGANT WHO APPEARS AND ARGUES BEFORE THEM VIOLATE THE FLORIDA CODE OF JUDICAL CONDUCT CANON 2B.

Canon 2 of Florida's Code of Judicial Conduct states as follows:

> **A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities**
>
> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
> B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; **nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.** A judge shall not testify voluntarily as a character witness. (Emphasis added)

Id. A judge who publicly proclaims a Facebook 'friendship' with a lawyer appearing before him or her violates Canon 2B by presenting the appearance of impropriety, particularly where opposing counsel is not similarly sharing the same "special position" or status of being a Facebook "friend" of the trial judge.

Facebook friends have the ability to electronically share virtually anything from the intensely personal to the comically benign. Facebook allows "friends" to communicate, view, access, and comment on specific personal information that "non-Facebook-friends" cannot view or see. Because Petitioners' and their lawyers do not enjoy the same "special position," Reyes has, of being a Facebook "friend" of the trial judge, they are not able to freely access, view, comment, and share the same materials as Reyes. Thus, they do not enjoy a commensurate level of intimacy with the trial judge as Reyes does. It is this inclusion of Reyes and exclusion of Petitioners in Judge Butchko's inner circle and nonpublic forum that gives rise to the appearance of impropriety.

On February 3, 1976, pursuant to Art. V, sections 2(b) and 15, Fla. Const. this Court created the Committee on Standards of Conduct Governing Judges, which on September 4, 1997, was renamed as the Judicial Ethics Advisory Committee, ("JEAC"). The JEAC is composed of three district court of appeal judges, four circuit judges, two county court judges, and one practicing member of The Florida Bar. In 2009 and 2010, the JEAC issued two advisory opinions specifically stating that it was a violation of the Code of Judicial Conduct to be Facebook friends with a lawyer who appears in front of the judge, as it creates an appearance of impropriety. *See* Fla. JEAC Op. 2009–20 (Nov. 17, 2009); and Fla. JEAC Op. 2010-06 (March 26, 2010).

The Third District Court of Appeal's rejection of the JEAC's advisory opinions is evidenced by its irrelevant discussion of "friend suggestion" and the complex algorithms used by Facebook. While Facebook may suggest friends, only the user can request or accept the "friend" connection. Facebook does not provide a user with friends—only possible individuals that the person may know based on location, occupation, schools attended, age, gender, etc. Petitioners are not suggesting that judges cannot use Facebook - only that judges be held to the standard of the Code of Judicial Conduct by avoiding the appearance of impropriety in all of the judge's activity, including the selection of Facebook "friends."

In *Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2013), *reh'g denied*, 125 So. 3d 178 (Fla. 4th DCA 2013), *review denied*, 110 So. 3d 441 (Fla. 2013), the Fourth District Court of Appeal addressed the propriety of a Motion toDisqualify based on the trial judges' Facebook friendship with a lawyer in the case. The Fourth District Court of Appeal held, in finding the JEAC Opinion 2009-20 instructive:

> A judge's activity on a social networking site may undermine confidence in the judge's neutrality. Judges must be vigilant in monitoring their public conduct so as to avoid situations that will compromise the appearance of impartiality.

Id. at 186.

The State of Florida filed a Motion for Rehearing which was denied.

However, the Fourth District Court of Appeal granted the State of Florida's Motion for Certification as a matter of great public importance. This Court chose not to exercise jurisdiction and denied review. *See State v. Domville*, 110 So. 3d 441 (Fla. 2013).

As the Honorable Robert Gross of the Fourth District Court of Appeal stated in his concurrence in granting the motion for certification in *Domville:*

> Judges do not have the unfettered social freedom of teenagers. Central to the public's confidence in the courts is the belief that fair decisions are rendered by an impartial tribunal. Maintenance of the appearance of impartiality requires the avoidance of entanglements and relationships that compromise that appearance.

Domville, 125 So. 3d at 179.

The impartiality of the judiciary is of supreme importance and must be protected. In order to protect the independence of the judiciary, the right of judges to engage in political activity has been restricted. Judges and judicial employees are treated differently from other public servants because there is "something special in the judicial role." Allan Ashman et al., *Judges in an Age of Mistrust*,54 Tul. L. Rev. 382, 414 (1980). As this Court has held:

> We are not concerned with whether an ex-parte communication actually prejudices one party at the expense of the other. The most insidious result of ex-parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question.

Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992).

Moreover, the neutrality of judges is a grave concern because the judiciary must apply full equality under the law to avoid unjust results. A mere perception of impropriety can compromise the trust and security of the citizens of the State of Florida. *Aetna Life & Cas. Co. v. Thorn*,319 So. 2d 82 (Fla. 3d DCA 1975) ("A judge occupies such a particular position in the affairs of other men that not only must he be free of evil intent but he must also avoid the appearance of evil."); *Anderson v. State*, 287 So. 2d 322 (Fla. 1st DCA 1973) ("A judge must not only be impartial, but he should leave the impression of his impartiality upon all who attend court . . . The appearance of and absolute impartiality is [sic] essential. There must be no taint of any lack of objectiveness in all acts of a judge."); *See also Fuster–Escalona v. Wisotsky*,781 So. 2d 1063 (Fla. 2000)) (opining that a judge may not sit in an action where her or his neutrality is questioned or shadowed).

A fair hearing before an impartial tribunal is a basic requirement of due process. *See In re Murchison*, 349 U.S. 133 (1955). "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge." *State ex rel. Brown v. Dewell*, 131 Fla. 566, 179 So. 695 (1938). Absent a fair tribunal, there can be no full and fair hearing. "The appearance of impropriety or bias is of special concern where the branch of government involved is that charged with the duty of remaining impartial, i.e., the judiciary." *MacKenzie v. Superkids Bargain Store*,

Inc., 565 So. 2d 1332, 1336 (Fla. 1990). As the Third District Court of Appeal stated in *State v. Steele*, 348 So. 2d 398, 401 (Fla. 3d DCA 1977):

> The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, **if predicated on grounds with a modicum of reason**, the judge in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned.

State v. Steele, 348 So. 2d 398, 401 (Fla. 3d DCA 1977) (emphasis supplied). In the instant case, Reyes was hired by the opposition and regularly litigates before Judge Butchko. Thus, his special status as the Facebook "friend" of Judge Butchko created a well-grounded fear for Petitioners that impartiality had been compromised.

Notably, the JEAC opinions make a crucial distinction between the use of a professional social network application, such as "Linked-In" and "Twitter," and Facebook "friends" in the social-media universe. There is a fundamental difference between a professional Facebook page related to a judge (for instance, in a campaign for re-election a judge may create a Facebook page dealing solely for that specific purpose), and what this case presents, which is an intimately personal profile, private to the world, unless you are a Facebook "friend" of the judge.

The Third District Court of Appeal's opinion misapprehended the factual significance of selecting a "friend" on Facebook. The opinion erroneously noted that the factual premise underpinning the reasoning of Fla. JEAC Op. 2009-20, and

Fla. JEAC Op. 2010-05 is "evolving at an exponential rate." Opinion at 9. The only factual difference between Facebook in 2009-2010, when the JEAC addressed the propriety of Facebook "friendships" between litigants and judges, and Facebook in 2017 is the fact that the company is now publicly traded, worth over $500 billion and has over two billion registered users. Thus, only the prevalence and use of social media has exploded in the population. The mechanism for selecting a "friend" has not changed.

Nevertheless, the issue is whether the public disclosure and active acknowledgement of "friendship" on Facebook between a judge and a litigant creates a well-grounded fear in opposing party of not receiving a fair trial. The Third District Court of Appeal's misunderstanding of the mechanism by which Facebook friends are created led it to an erroneous result: It created different standards for judges to comply with the Judicial Code of Conduct and exposed all judges to discovery of their social media communications when faced with similar factual circumstances.

The Third District Court of Appeal's speculative finding with respect to the "degree of intimacy" between the judge and her Facebook "friend" was completely outside the verified allegations of the Motion to Disqualify. Moreover, by distinguishing various levels of Facebook "friends" and the degree of "friendship" between the trial court and her Facebook "friend," without deriving any factual

support from the record, the appellate court expounded upon the facts set forth in the Verified Motion to Disqualify and departed from the standards governing disqualification motions.

Becoming a "Facebook friend" is much like the execution of a contract, without consideration. There is an offer of friendship via a "click" and an acceptance via a "click." Accordingly, each "click" represents an active engagement by each user. Without the offer and acceptance of "Facebook friendship," there is no defined "Facebook friend." Facebook friends are not actively chosen by Facebook – they are chosen by the user. The Third District Court of Appeal's discussion of how Facebook mines personal data to "suggest friends" is entirely irrelevant to the issue of whether a judge violates the Code of Judicial Conduct by "being a Facebook friends" with a lawyer or litigant appearing before them, so as to avoid the appearance of impropriety in all activities of the judge. The Third District Court of Appeal's failure to comprehend this vital link of Facebook's interaction and friend creation coupled with its conflation of matters not raised or briefed and which are outside the factual allegations of the Verified Motion to Disqualify results in a violation of Petitioners' due process right to a fair and impartial trial.

The Third District Court of Appeal 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." The issue is the appearance of impropriety that the judges Facebook "friendship" with a lawyer or litigant creates. If a judge Facebook "friends" some litigants or lawyers but not others, these acts of inclusion and exclusion can reasonably be read to convey a message to any individual that some lawyers hold a special position with judge as their Facebook "friend." Parties appearing before judges might reasonably decide, for instance, to only hire attorneys who are on the judge's Facebook "friend" list, or might urge their lawyers to try to "friend" the judge to see if he or she will accept that lawyer as a "friend."

The Third District Court of Appeal's reliance on the number of Facebook friends causing a "discounting of the appearance of impropriety" fails when taken to its inverse extreme because it provides no workable principle. For example, if it had been discovered that the trial judge had only one Facebook "friend" and that single Facebook "friend" was Reyes, to the exclusion of the two Billion plus Facebook users, any person would have a reasonable well-founded fear of not receiving a fair and impartial trial. However, according to the logic of the Third District Court of Appeal, a trial judge who has one Facebook "friend", to the exclusion of two Billion plus Facebook users--that also happens to represent the opposing party or interested non-party--would not create an appearance of

impropriety.

The Third District Court of Appeal's decision is thus flawed and untenable. It is entirely reasonable for a litigant to question the neutrality of a judge that has a special connection to or relationship with opposing counsel. Under the Third District Court of Appeal's premise, because the trial judge has more than one Facebook "friend," none of whom are the opposing party or their lawyer, the appearance of impropriety is eliminated. Undoubtedly the neutrality of any judge is questioned when one litigant is a "friend" of the judge and the other is not. In such a case, an appearance of impropriety is per se apparent. As such, based on the standard set forth by this Court and followed by all courts, including the Third District Court of Appeal, the appearance of impropriety is undoubtedly implicated in this case, thus mandating disqualification of the trial judge.

A. The Third District Court of Appeal's Decision Creates Disparate Standards for Compliance with the Code of Judicial Conduct Which Must Be Uniform for All Florida Judges.

As this Court stated in *In re Amendments to the Code of Judicial Conduct Cannon 7,* 167 So. 3d 399 (Fla. 2015):

> Ultimately, it is this Court's responsibility to interpret the Code and the individual Canons when that issue comes before the Court—typically when a judge is subject to discipline for violation of the Code. *See, e.g., In re Glickstein,* 620 So. 2d 1000 (Fla. 1993) (interpreting Canon 7 in the context of a judicial disciplinary proceeding).

Id. at 403. By disagreeing with the Fourth District Court of Appeal's *Domville* decision and both JEAC Opinions, the practical effect of the Third District Court of Appeal's decision is that judges in different districts now have completely different standards on whether Facebook "friendship" with a lawyer appearing and arguing before them on a case warrants disqualification. Judges in the Fourth District must recuse themselves, because they remain bound by *Domville,* while judges everywhere in Florida may simply ignore the *Domville* decision and disregard both JEAC Opinions on the subject. This result is untenable for judges and litigants, and undermines public confidence in the judiciary, as the application and interpretation of the Code of Judicial Conduct must be uniform for all judges in the State of Florida. The disparity created by the Third District Court of Appeal's decision affects every Article V judge in the State of Florida.

To re-establish uniformity in the standards and the law, this Court should interpret Canon 2 of the Code of Judicial Conduct consistent with the well-reasoned advice of the JEAC, and the Fourth District Court of Appeal's *Domville* decision, and require disqualification when a judge is Facebook "friends" with a lawyer or litigant that appears before that judge.

B. The Third District Court of Appeal's Decision Exposes Judges to Discovery of Their Social Media and all In-App Communications by Creating an Evidentiary-Based Burden of Proof Standard.

By disagreeing with the JEAC Opinions and the Fourth District Court of

Appeal's decision in *Domville*, the Third District Court of Appeal departed from the previous standard, "whether a reasonably prudent person has a well-founded fear of not receiving a fair and impartial trial,"[7] and instead created a new evidentiary-based hurdle for moving parties seeking judicial disqualification in Florida.

A judge's failure to disqualify upon request, when he or she is Facebook "friends" with a lawyer appearing before him or her on a case, according to the JEAC, is per se a violation of Florida Code of Judicial Conduct Canon 2B. This violation exposes those judges who choose to use Facebook and then not recuse themselves upon request to discovery of their social media activity and in-app communications, such as texts, e-mails, and instant messages, and heightened public scrutiny.

Moreover, a failure to disqualify oneself raises serious questions of impropriety and the likelihood of investigations and complaints to the Judicial Qualification Committees ("JQC"), which, in part, is precisely what the JEAC in its role rendering advisory opinions seek to prevent. Facebook, like all social media applications, provides parties with the ability to comment or otherwise express opinions on items where their "Facebook friends" are pictured or identified. By the same token, it specifically facilitates secret communications

[7] *See Molina v. Perez*, 187 So.3d 909 (Fla. 3d DCA 2016).

between users.

By stating that, "we hold that the mere fact that a judge is a Facebook 'friend' with a lawyer…, 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,'" an aggrieved party now must substantiate the new evidentiary based burden of proof to determine the "degree of friendship," how many "friends," the judge has, and to what degree the judge "feels a particular affection and loyalty" toward his or her Facebook "friend." (Opinion at 10). Discovery of a judge's social media activity is necessary now for all litigants to substantiate this new evidentiary based burden of proof (i.e., something "more" than mere Facebook "friendship") that the Third District has created.

Based on the logic of the Third District Court of Appeal's opinion, litigants must now have evidence that the relationship between the judge and the lawyer is, in fact, more, than merely just a Facebook "friend," and that the relationship "or degree of intimacy" is deeper than the mere click of a button, as a result of an undocumented suggestion based on sophisticated algorithms within the Facebook application.

Inevitably, this will cause a moving party to seek discovery on the issue, issuing subpoenas into the judge and lawyer's Facebook and social media in-app communications, such as texts, posts, and in-app e-mails, how many Facebook

friends the judge has, all to substantiate the new evidentiary based burden of proof created by the Third District Court of Appeal. A litigant's right to a fair and impartial tribunal mandates his or her ability to obtain discovery to insure the right to a fair and impartial tribunal is preserved under the State and Federal Constitutions.

In *Roberts v. State*, 840 So. 2d 962, 969 (Fla. 2002), this Court allowed discovery of judges' conduct regarding ex-parte communications and subsequently held a criminal defendant was entitled to depose the trial judge on issues relating to ex-parte communications. Thereafter, the trial judge was precluded from presiding over the defendant's remaining claims. Undeniably a trial judge that is being asked to recuse himself or herself should not be the arbiter of whether a subpoena into his or her own social media communications is relevant to prove the new evidentiary-based standard created by the Third District Court of Appeal's opinion. Based upon this Court's holding in *Stein v. State*, 995 So. 2d 329 (Fla. 2008), where the Court acknowledged that a judge should ordinarily recuse herself if she is going to be a material witness in the case, disqualification would be mandatory.

The Third District Court of Appeal's reliance on the "minority of the JEAC Committee" is misplaced because ultimately the majority opinion governs in JQC actions against judges when judges are asserting a good faith basis as a defense to a violation. *See Petition of Comm. On Standards of Conduct Governing Judges*, 698

So. 2d 834 (Fla. 1997) (noting a judge who requests and acts according to a Committee opinion has the right to expect the JQC to consider such action as evidence of a good-faith effort to comply with the Code of Judicial Conduct.) In this instance, if the trial judge was facing JQC proceedings for failing to avoid the appearance of impropriety (for over six months) in violation of Canon 2B, she could not rely on the minority opinion of the JEAC as evidence of a good-faith effort to comply with the Code. This violation of Canon 2 of the Code of Judicial Conduct mandates that the trial judge be disqualified in this case.

C. At the Time the Petitioners' Filed their Verified Motion to Disqualify the Law Mandated Disqualification and The Judge's Refusal to Follow the Law was a Violation of The Law and the Code of Judicial Conduct.

The primary question before this Court, whether a judge's Facebook "friendship" with a lawyer or litigant that appears before them in an active case projects the appearance of impropriety and thus a judge commits an ethical violation of Judicial Canon 2B by refusing to recuse themselves, was previously addressed by the Fourth District Court of Appeals in *Domville.* In 2013, the Fourth District Court of Appeal affirmatively established the law in Florida: a judge's Facebook "friendship" with a lawyer or litigant in an active case before them, indeed, projects the appearance of impropriety, which all judges must avoid, and is thus an ethical violation of Judicial Canon 2B - mandating disqualification.

Notably, this Court declined to address this issue and overturn the law, or,

disagree with the Fourth District Court's interpretation of the Judicial Code of Conduct. The Fourth District Court of Appeal specifically certified the question as a matter of great public importance and this Court chose not to exercise its jurisdiction and denied review. *See State v. Domville*, 110 So. 3d 441 (Fla. 2013). In other words, from January 2013 through August 22, 2017, for approximately four plus years, the Fourth District Court's *Domville* ruling was the law of the land.

Accordingly, to properly analyze the question before this Court, Petitioners' Verified Motion for Disqualification, (in addition to viewing it from the Petitioners' perspective) must be assessed from a perspective of what the law was on June 8, 2017, the date the motion was filed. The appearance of impropriety and the law cannot be retroactively changed – especially when dealing with a writ of prohibition on a motion to disqualify a trial judge.

For instance, if this Court were to now decide that going forward, a judge's Facebook "friendship" with a lawyer or litigant that appears before them on a case does not project the appearance of impropriety and, therefore, that Facebook "friendship" would not be an ethical violation of the Judicial Canon 2B, that does not, nor can it ever, retroactively change the fact that there was indeed an appearance of impropriety on June 8, 2017, the date the Verified Motion to Disqualify was filed.

At the time the motion to disqualify was filed before the trial judge, the

Fourth District Court's decision in *Domville* was controlling and mandated the trial judge disqualify herself from the case, as it was the first and only district court on point that addressed this very issue and the impact of a judge being a Facebook "friend" of a lawyer who appeared in front of the judge in a case.[8]

In *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) this Court stated that "[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court." 596 So. 2d 665, 666 (Fla.1992)(citing *Stanfill v. State*, 384 So. 2d 141,143 (Fla. 1980). Thus, in the absence of inter-district conflict, district court decisions bind all Florida trial courts. *See Weiman v. McHaffie*, 470 So. 2d 682, 684 (Fla. 1985). The purpose of this rule was explained by the Fourth District in *State v. Hayes:*

> The District Courts of Appeal are required to follow Supreme Court decisions. As an adjunct to this rule it is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts—District Courts of Appeal. The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the

[8] *Also see*, *Chace v. Loisel*, 170 So.3d 802 (Fla. 5th DCA 2014), (distinctly agreeing with the holding of *Domville*, and stating "beyond the fact that *Domville* required the trial court to grant the motion to disqualify, the motion to disqualify was sufficient on its face to warrant disqualification." *Id.*, The reason, as stated by the *Chace* court, is precisely because under the Code of Judicial Canons "a Judge must avoid the appearance of partiality. It is incumbent upon judges to place boundaries on their conduct in order to avoid situations such as the one presented in this case.")

> trial court be required to follow that decision. Alternatively, if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it. Contrarily, as between District Courts of Appeal, a sister district's opinion is merely persuasive. (internal citations omitted)

State v. Hayes, 333 So. 2d 51, 52 (Fla. 4th DCA 1976)..

As *Domville* bound the trial judge at the time it was filed, the Verified Motion to Disqualify was legally sufficient. Thus, the trial judge's denial of the motion was not only error, but a rejection of binding precedent and a per se violation of the Judicial Code of Conduct 2B. The fact that over two and half months later, the Third District Court of Appeal disagreed with the Fourth District Court of Appeal, and with both the JEAC opinions on this exact issue, cannot change history to retroactively vitiate the trial judge's violation of the Code of Judicial Conduct.

Similarly, while this Court is charged with interpreting the Code of Judicial Conduct, it cannot retroactively nullify a previous ethical violation implicating the appearance of impropriety, where the law earlier found that Facebook "friendship" with a lawyer or litigant was a Canon 2B violation. If this Court is to follow the Third District Court of Appeal's logic and holding, any such interpretation should apply only prospectively, not retroactively. The trial judge's refusal to disqualify herself on June 9, 2017, in addition to refusing to adhere to binding precedent was a per se violation of the Code of Judicial Conduct. Failing to follow controlling law

in denying the Motion to Disqualify is tantamount to violating Petitioners' due process right to the cold neutrality of an impartial judge. Accordingly, to safeguard Petitioners' due process rights, this Court must grant the Petition for Writ of Prohibition and disqualify the trial judge.

II. THE THIRD DISTRICT COURT OF APPEAL ERRED BY DEPARTING FROM THE STANDARD OF REVIEW FOR A MOTION FOR DISQUALIFICATION WHEN IT VIEWED THE MOTION FROM THE JUDGE'S PERSPECTIVE AND NOT FROM THE PETITIONERS' PERSPECTIVE.

The Third District Court of Appeal, in redefining a term that needs no redefinition, "friend," did not "resolve whether the alleged facts, which accepted as true, would prompt a reasonably prudent person to fear that [he or] she could not get a fair and impartial trial before that judge." *Chace v. Loisel*, 170 So.3d 802, 803 (Fla. 5th DCA 2014). Grounds asserted in a disqualification motion are legally sufficient if they create a well-founded fear in the mind of a party that he or she will not receive a fair trial. *Id.* In the instant case, the Third District Court of Appeal's redefined Facebook "friend," and determined that a party advancing a disqualification motion would need to prove a "significantly close relationship." This requirement necessarily embraces the perspective of the trial judge, not that of the litigant seeking disqualification. "It is not the appellate court's function to determine how the trial judge actually feels, but rather what feeling resides in the petitioner's mind and the basis for such feeling." *See*

Dewell,131 Fla. 566, 179 So. 695, 697-98 (1938). Thus, the redefinition of friendship is not contemplated under Florida law.

The Third District Court of Appeal's opinion categorizes various levels of Facebook "friends," without any factual support in the Verified Motion to Disqualify. Specifically, the court states:

> [S]ome member's Facebook friends are undoubtedly friends in the "classic sense" of person for whom the member feels a particular affection and loyalty. The point is, however, many are not.

Opinion at 9. The Third District Court of Appeal erred because it did not have the ability to 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. The Third District Court's discussion of "degrees of friendship" has no place in the paradigm of a motion to disqualify a trial judge. For instance, without 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.

More importantly, however, a stranger lacks the tools to assess the level of intimacy between Facebook "friends." Hence, this is precisely why judges must avoid the appearance of impropriety in promulgating "friendships" with litigants and attorneys appearing before them.

As this Court has repeatedly held, "the question of disqualification focuses

on those matters from which a litigant may reasonably question a judge's impartiality rather than the court's own perception of its ability to act fairly and impartially." *State v. Livingston*, 441 So. 2d 1083, 1086 (Fla. 1983). By ruling "Facebook "friends" "probably belongs to [a] casual friend;…or even a local celebrity like a coach," the Third District Court of Appeal redefined the factual reality and the "degree of intimacy" of the relationship between Judge Butchko and her Facebook "friend," Reyes, without any evidence or factual basis derived from the Verified Motion to Disqualify. This violated the standard of review for disqualification motions and constituted error.

It was error for the Third District Court of Appeal to disregard the allegations of the Verified Motion to Disqualify by redefining the term Facebook "friend" based on its non-record factual underpinnings of how "friends" are created within the Facebook application. It was further error for the Third District Court of Appeal to then theorize in the abstract on the degree of "friendship" between Judge Butchko and Reyes. Doing so, the appellate court viewed the Verified Motion to Disqualify from the judge's perspective or perhaps the panel's own perspective, rather than from Petitioners' perspective. This departed from the well-established standard of review for a disqualification motion. Accordingly, Petitioners' due process rights to the cold neutrality of an impartial trial judge have been violated, requiring this Court to reverse the Third District Court of Appeal.

III. THE THIRD DISTRICT COURT OF APPEAL ERRED AND DEPARTED FROM THE STANDARD OF REVIEW TO ACCEPT ALL OF THE ALLEGATIONS AS TRUE BY IGNORING TWO OF THREE REASONS SUPPORTING PETITIONERS' MOTION FOR DISQUALIFICATION.

In addition to the appearance of impropriety given the trial judge's Facebook "friendship" with Reyes and her six-month failure to disclose that "friendship," Petitioners' Verified Motion to Disqualify asserted two other distinct grounds for disqualification. It was error for the Third District Court of Appeal to ignore two of the three independent reasons, and the cumulative effect of all three grounds, asserted by Petitioners in their Verified Motion to Disqualify, because each of the three basis, standing alone, mandated the trial court's disqualification. This action constituted a departure from the standard of review. Accordingly, because "[t]he standard of review for an appellate court on a motion to disqualify is *de novo*," this Court must review the merits of Petitioner's Verified Motion to Disqualify *de novo*. *Krawczuk v. Tucker*, 92 So. 3d 195 (Fla. 2012).

A. The Trial Judge's Prejudgment of an Unpled and Unfiled Motion for Sanctions Against Petitioners is Grounds for Disqualification.

In the instant case, aside from the violation of Judicial Canon 2B and 5A of the Code of Judicial Conduct by maintaining Facebook "friendship" with Reyes, and refusing to following *Domville*, the trial judge injected comments into the case which give Petitioners a well-grounded fear of not receiving a fair and impartial

trial. Specifically, the Court made comments evidencing her prejudgment requiring disqualification.

As Petitioners asserted, first, on June 2, 2017, when HLG informed the trial judge that it intended to sue Tomei,[9] individually, for the fraud committed in the scope of her employment, the trial court, on the record, prejudged the propriety of the suit before the issue was ripe. Then the trial judge threatened to award sanctions pursuant to section 57.105, Florida Statutes in favor of her Facebook "friend's" client, with statements such as, "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." (A050; A310; A306). Judge Butchko's comments regarding her implicit advice to USAA and her Facebook "friend" Reyes to file a section 57.105 sanctions motion against Petitioners constituted a departure from the required role of a neutral arbiter and evinced prejudgment of the issues.

Canon 3(B)(9) of the Code of Judicial Conduct requires:

> A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing.

Canon 3(E)(1)(f)(ii) and (iii) of the Code of Judicial Conduct provides that:

[9] HLG further announced its intent to sue USAA executives, Jennifer Tate, Alan Bunge, Steve Duke, Brad Wallen, Gale Young, Jeannie Hopwood and others for the fraud committed in the scope of their employment at USAA.

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned where…while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to:
>
> (ii) parties or classes of parties in the proceeding;
> (iii) an issue in the proceeding;

Id. Where a judge has prejudged or predetermined issues in a case, as the trial judge has here, impartiality is reasonably in doubt and disqualification is required. *Amato v. Winn Dixie Stores/Sedgwick James*, 810 So. 2d 979, 980-983 (Fla. 1st DCA 2002) (holding disqualification is required where judge issued an order on the merits and thereafter vacated it upon realizing that discovery was not yet complete and all the evidence had not been heard).

In *Great Am. Ins. Co. of N.Y. v. 2000 Island Blvd. Condo. Ass'n, Inc*., 153 So. 3d 384 (Fla. 3d DCA 2014) the Third District Court of Appeal considered whether a trial judge, who had essentially advised plaintiff that, should he request sanctions, the court would award them, should be disqualified. The appellate court noted: "The implication of the court's statement is clear--plaintiff's counsel should move for sanctions because the court will grant the motion." *2000 Island Boulevard Condo. Ass'n, Inc*., 153 So. 3d 384 at 388. *See also Chastine v. Broome*, 629 So. 2d 293, 295 (Fla. 4th DCA 1993) ("When the judge enters into the proceedings and becomes a participant, a shadow is cast upon judicial neutrality so

that disqualification is required"). Ultimately, the Third District in *2000 Island Boulevard* found that by opining on an issue not before the court, the trial judge "abandoned his post as a neutral overseer of the dispute between the parties, compelling us to grant Great American Insurance Company's Petition for a Writ of Prohibition." *Id*. at 385.

In the instant case, the trial judge's comments went so far as to prejudge the propriety of awarding sanctions to USAA, if Petitioners filed suit against Reyes's client, Tomei, and other USAA executives. This is in stark contrast to the trial judge affording USAA the ability to amend its pleading even without the filing of a written motion in contrast to the CBL Rules.

Despite announcing she did not know what evidence Petitioners had, Judge Butchko implied there was no evidence, as she stated that the filing of a sanctions motion would put Petitioners "in a bad position." This necessarily implies that such a motion would have validity. Moreover, it channeled to Tomei's counsel, Reyes, Judge Butchko's Facebook "friend," that he should file a sanctions motion forthwith.

Extending implied legal advice, standing alone, is sufficient to compel disqualification. See, e.g., *Blackpool Assocs., Ltd. v. SM–106, Ltd.*, 839 So. 2d 837, 838 (Fla. 4th DCA 2003) (granting relief in connection with the trial court's order that denied disqualification as the trial court provided a litigant with legal advice

and suggestions); *Shore Mariner Condo. Ass'n v. Antonious*, 722 So. 2d 247, 248 (Fla. 2d DCA 1998) ("Trial judges must studiously avoid the appearance of favoring one party in a lawsuit, and suggesting to counsel or a party how to proceed strategically constitutes a breach of this principle."); *Leigh v. Smith*, 503 So. 2d 989, 991 (Fla. 5th DCA 1987) ("Certainly an allegation that a judge assisted the opposing attorney in the trial of the case by 'signaling' is sufficient, by itself, to warrant disqualification.").

As expected, USAA and its attorneys interpreted Judge Butchko's comments consistent with Petitioners' interpretation. Immediately after the hearing, USAA's attorney, Garcia-Linares, warned HLG and its counsel that it would be filing a sanctions motion pursuant to section 57.105, Florida Statutes, when HLG sued USAA's executives personally, and that the trial court would grant said motion. (A016; A036; A059). The consistency in reception and interpretation of the comments by all participants evidences Judge Butchko's prejudgment of the issue.

"A trial judge crosses the line when he becomes an active participant in the adversarial process, i.e., gives 'tips' to either side." *Great Am. Ins. Co. of N.Y. v. 2000 Island Blvd. Condo. Ass'n, Inc.*, 153 So. 3d 384, 388 (Fla. 3rd DCA 2014). "It has long been said in the courts of this state that "every litigant is entitled to nothing less than the cold neutrality of an impartial judge." *Id.* While a trial judge may form mental impressions and opinions during the course of hearing evidence

in a case, the judge is not permitted to prejudge the case. *Kates v. Seidenman*, 881 So. 2d 56 (Fla. 4th DCA 2004)(holding that despite the fact the judge claimed that she did not make the alleged comments prior to the presentation of evidence, the sworn allegations of the motion to disqualification warranted disqualification.)

In *Irwin v. Marko*, 417 So. 2d 1108, 1109 (Fla. 4th DCA 1982), the Fourth District Court of Appeal granted a petition for writ of prohibition where a judge made certain comments on the record indicating that he intended to grant the subject motion for attorney's fees because the comments were made *prior* to any hearing before the trial court on the motion (for attorney's fees). The Fourth District Court of Appeal in *Marko* stated the judge created the appearance of having prejudged the attorney's fee issue in advance of hearing it and, accordingly was required by law to recuse himself. *Id; See also Martin v. State*, 804 So. 2d 360 (Fla. 4th DCA 2001); *Gonzalez v. Goldstein*, 633 So. 2d 1183, 1184 (Fla. 4th DCA 1994).

There are numerous other examples throughout the District Courts of Appeal identifying instances of prejudicial comments requiring disqualification. *See Begens v. Olschewski*, 743 So. 2d 133 (Fla. 4th DCA 1999) (comment suggesting that judge has already made up her mind before hearing all the evidence required disqualification); *Barnett v. Barnett*, 727 So. 2d 311, 311-12 (Fla. 2d DCA 1999) ("[w]hile it is well-settled that a judge may form mental impressions and opinions

during the course of hearing evidence, he or she may not prejudge the case"); *Gonzalez v. Goldstein*, 633 So. 2d 1183, 1184 (Fla. 4th DCA 1994) ("[a] trial judge's announced intention before a scheduled hearing to make a specific ruling required disqualification").

LeBruno Aluminum Co. v. Lane, 436 So. 2d 1039 (Fla. 1st DCA 1983), and *Nathanson v. Nathanson*, 693 So. 2d 1061 (Fla. 4th DCA 1997), are two additional cases where courts ordered disqualification when judges were found to have prejudged matters in advance of receiving all the evidence. In *LeBruno* (relied upon by *Amato v. Winn Dixie Stores/Sedgwick James*, 810 So. 2d 979 (Fla. 1st DCA 2002), the trial court remarked that he had already made up his mind even though he would still allow the party to present his witnesses. 436 So. 2d at 1039-40. In *Nathanson*, also relied upon by *Amato*, the Fourth District Court of Appeal found the motion to disqualify legally sufficient where the judge "began to rule against the wife without ever affording the wife an opportunity to respond." *Nathanson*, 693 So. 2d at 1062. *See also Cummings v. Montalvo*, 135 So. 3d 389, 389 (Fla. 5th DCA 2014) (disqualification required based on judge's statements indicating that she had prejudged party's credibility "in an unfavorable fashion").

In the instant case, there is no dispute that the trial judge prejudged Petitioners' ability to add Tomei and other USAA executives personally to this lawsuit when the matter was not even properly before the court. Judge Butchko's

comments prejudging the propriety of an award of sanctions against Petitioners and their counsel, and channeling legal advice, instilled in Petitioners a well-founded fear of not receiving a fair and impartial hearing and trial on this matter. Therefore, the Third District Court of Appeal erred by not granting the petition for writ of prohibition on those grounds. Therefore, this Court must reverse the Third District Court of Appeal and issue a writ of prohibition and require the clerk of courts to reassign the case to another judge.

B. The Trial Judge Expressed Personal Animus Toward Counsel for Petitioner Herssein Warranting Disqualification.

At the hearing on June 2, 2017, the trial judge negatively referred to Herssein by commenting that he had a "special personality" in the presence of Herssein's spouse and business partner, the president of Petitioner, HLG, Iris Herssein, Esquire. (A037; A060; A222; A262). This followed a prior comment that Herssein was "crazy" that no bearing on the issues for resolution before the Court. This characterization denigrated Herssein.

In reviewing a petition based upon comments made by the trial judge, "the standard is the reasonable effect on the party seeking disqualification, not the subjective intent of the judge." *Molina v. Perez*, 187 So. 3d 909 (Fla. 3d DCA 2016) ("The judge's decidedly negative commentary concerning his personal opinion of the petitioner's behavior, when viewed in the context of, and at this stage of ... a proceeding, is sufficient to create in a reasonably prudent person a

well-founded fear that he would not receive a fair hearing before this judge.")(quoting *Vivas v. Hartford Fire Ins. Co.*, 789 So. 2d 1252, 1253 (Fla. 4th DCA 2001)). It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." *Hayslip v. Douglas*,400 So. 2d 553, 556 (Fla. 4th DCA 1981). Even where trial courts' negative comments are meant as humor rather than a reflection on the court's belief as to the merits of the petitioner's case, trial courts have been disqualified because the standard is the reasonable effect on the party seeking disqualification, not the subjective intent of the judge. *Id*. at 663. Jokes by the trial judge are a risky venture in any event, and the closer the joke to the subject matter of the litigation, the greater the risk that the attempted humor will, in one way or another, be inappropriate. *Brofman v. Florida Hearing Care Center, Inc.*, 703 So. 2d 1191 (Fla. 4th DCA1997).

It is well within reason that any litigant should have a well-grounded fear of not receiving a fair trial when the trial judge displayed personal animus and expressed negative commentary concerning [her] personal opinion of the petitioner's behavior. Therefore, the Third District Court of Appeal erred by not granting the petition for writ of prohibition requiring the removal of the trial judge from the case on those grounds.

C. The Third District Court of Appeal Failed to Recognize the Cumulative Effect of all Three Grounds for Disqualification

Although each of the three asserted grounds for disqualification, standing alone, mandates disqualification of the trial judge, the cumulative effect of the three grounds clearly establish that the trial judge departed from her role as a neutral arbiter. Rather than accepting the allegations as true, and considering the three individual assertions in addition to the cumulative effect of those grounds, the Third District Court of Appeal focused on a single ground: whether a judge who is Facebook "friends" with a lawyer who appears and argues before him or her violates Canon 2 of Florida's ethical Code of Judicial Conduct. Moreover, the Third District Court of Appeal chose to ignore Judge Butchko's refusal to follow binding precedent at the time the Verified Motion to Disqualify was filed.

By failing to consider the other two valid legal reasons for disqualification and the cumulative effect of all grounds asserted, the Third District Court of Appeal failed to follow the proper standard of review on a disqualification motion. "[T]he facts alleged in a motion seeking to disqualify a trial judge must be evaluated as true for the purposes of determining legal sufficiency." *Messianu v. Pigna*, 180 So. 3d 229, 230 (Fla. 3d DCA 2015). *See also Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978). Distinctly highlighting the fact that the Third District Court of Appeal departed from standard of review of taking all the allegations of the motion as true, is the following language:

> [W]e hold that the mere fact that a judge is a Facebook "friend" with a lawyer…, 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,"

Opinion at 10.

In the instant case, in addition to Judge Butchko's Facebook "friendship" with Reyes and her failure to disclose that "friendship," Petitioners' Verified Motion to Disqualify had "more." Petitioners had asserted two separate grounds for disqualification.

Judge Butchko's prejudgment of the evidence and the issues, as well her comments with implicit advice to USAA and her Facebook "friend" Reyes to file a section 57.105 sanctions motion against Petitioners was a departure from the trial judges required role of being a neutral arbiter.

Furthermore, Judge Butchko's derogatory commentary concerning Petitioner Herssein calling him "crazy" and characterizing him as having a "special personality," in a public courtroom warrant disqualification. No such comments were targeted at his opposition or Reyes. Judge Butchko's failure to observe basic courtroom decorum and treat a litigant and attorney with professionalism and respect demonstrates that the trial court harbors animus against Herssein.

In its opinion, the Third District Court of Appeal failed to consider the cumulative effect of Judge Butchko's public humiliation and denigration of Herssein, her prejudgment as to the validity of a future lawsuit, and her failure to

disclose her Facebook "friendship" and tacit impartment of legal advice to Reyes from the view of the Petitioners. Given those three grounds for disqualification and their cumulative effect, a reasonable person would have a well-founded fear of not receiving a fair and impartial trial.

The Third District Court of Appeal's failure to consider the cumulative effect of the three grounds for disqualification resulted in a departure from the standard of review and a violation of Petitioners' constitutional rights. Therefore, this Court must reverse the Third District Court of Appeal and grant the petition for writ of prohibition removing Judge Butchko from the case.

CONCLUSION

Avoiding the appearance of impropriety is of paramount importance in affording all litigants a right to a fair and impartial trial. Each litigant is entitled to nothing less than the cold neutrality of an impartial tribunal. By allowing judges to publicly indicate their Facebook "friendship" with a party or lawyer, to the exclusion of the opposing party, the neutrality of the trial judge is undoubtedly questioned. Judge Butcko's failure to disclose her Facebook "friendship", violation of binding law at the time the Motion was filed, coupled with her specific prejudgment of unpled sanctions against Petitioners in addition to her channeling litigation strategy to her Facebook "friend" Reyes required her removal. Moreover, her personal animus against Herssein necessitated disqualification. Finally, the cumulative effect of her demonstrated bias on the record instills in Petitioners a well-founded fear of not receiving a fair trial.

The Third District Court of Appeal, by ignoring the standard by which motions to disqualify are reviewed and inserting its view of the non-record facts in violation of its own prior holdings, has created disparate standards for judges (in different districts) exposing the judiciary to discovery of social media relationships. Accordingly, Petitioners request this Court reverse the Third District Court of Appeal and grant the Petition for Writ of Prohibition and any other relief it deems just and proper.

CERTIFICATE OF FONT COMPLIANCE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), this Brief has been prepared using Microsoft Word, Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits was served via the Florida Court's E-Filing Portal this this **2nd day of January** 2018 on: The Honorable Beatrice Butchko, Miami Dade County Courthouse, 73 West Flagler Street Room 303, Miami, FL 33130; bbutchko@jud11.flcourts.org; Frank Zacherl, Esq., fzacherl@shutts.com; gservice@shutts.com; Patrick G. Brugger, Esq. pbrugger@shutts.com; Stephen B. Gillman, Esq., sgillman@shutts.com; Suzanne Y. Labrit, B.C.S. (slabrit@shutts.com), of Shutts & Bowen, LLP 201 South Biscayne Boulevard, Suite 4100 Miami, FL 33131; Manuel Garcia-Linares, Esquire mlinares@richmangreer.com; Richman Greer, P.A. 396 Alhambra Circle, North Tower- 14th Floor, Miami FL 33134.

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