FLORIDA SUPREME COURT

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.

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF CASE AND FACTS

On July 13, 2015, the Law Offices of Herssein and Herssein, P.A., d/b/a Herssein Law Group (hereinafter "HLG") filed this lawsuit against United Services Automobile Association (hereinafter "USAA") for fraud perpetrated by USAA's executives in its business dealings and negotiations with HLG. The operative complaint delineates 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 USAA's executives drafted, agreed to, and signed. The contracts were in effect from 2010 to 2015. As alleged in the 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 and May 7, 2015 contracts are also the subject of the counterclaim filed by USAA against HLG and Reuven Herssein,[1] individually (hereinafter "Herssein"), on February 23, 2017 in the trial court. Tomei is represented by the trial court's Facebook "friend," former Eleventh Judicial Circuit Court judge, Israel Reyes, Esq. (hereinafter "Reyes"). (A001) Reyes was originally hired by USAA to represent Tomei in an evidentiary hearing on witness tampering that the predecessor trial court

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

ordered to occur on two separate occasions. At the request of USAA, the case was transferred to the complex business division (CBL) of the Eleventh Judicial Circuit. The newly assigned judge, citing USAA's "due process rights" over Petitioners' objection, vacated the predecessor court's orders and ruled that no evidentiary hearing on witness tampering would occur. The newly assigned trial court did, however, allow discovery to proceed 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 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 Tomei's lawyer and USAA's lawyers.

On June 6, 2017, Petitioners discovered that Reyes was Facebook "friends" with the newly assigned trial court. On June 8, 2017, Petitioners filed their Verified Motion to Disqualify the trial court relying on *State v. Domville*, 125 So.3d 178 (Fla. 4th DCA 2013), in addition to two Judicial Ethics Advisory Committee 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). Both JEAC opinions opine that it is a violation of the Florida Code of Judicial Conduct Canon 2B for a judge to be Facebook "friends" with a lawyer or litigant who appears and argues

before them. The motion for disqualification laid out three (3) distinct legally sufficient reasons for the trial court's disqualification. First, Petitioners alleged the trial court's Facebook "friendship" with Reyes, a lawyer who appeared and argued before the trial court on this case mandated the trial court's disqualification. Second, the trial court prejudged Petitioners ability to file suit against USAA's executives– **one of whom was the trial court's Facebook "friend's" client, Tomei,** to this suit. The trial blatantly offered legal advice to the trial court's Facebook "friend," even threatening to grant sanctions against Petitioners pursuant to §57.105, Fla. Stat. (2017), and *prejudging* Petitioners' good faith basis to add Tomei as a party when the matter was not ripe and had not been briefed or argued. Third, the trial court made derogatory, unprofessional comments and expressed animus toward Petitioners. USAA filed no response to the 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 to be legally insufficient.

On June 22, 2017, Petitioners filed their petition for writ of prohibition to the Third District Court of Appeal. On August 23, 2017, the Third District Court of Appeal issued its opinion denying the petition for writ of prohibition. (A001) The opinion failed to address two of the three legally sufficient reasons set forth in petitioners' motion and only addressed the Facebook "friendship" issue. The opinion specifically acknowledged conflict with the Fourth District Court of Appeal's

Domville decision on this precise issue of law. (A010) Petitioners sought rehearing and certification of conflict with *Domville.* The Third District Court of Appeal denied rehearing and certification on October 2, 2017. (A011) The opinion has created disparate standards for judges (in different districts) on when and whether they are violating the Judicial Canons, and because the opinion specifically conflicts with *Domville* and the JEAC Opinions on this precise issue, it directly and expressly affects every Article V judge (constitutional state officer) in the State of Florida.

SUMMARY OF THE ARGUMENT

There are two distinct reasons this Court has and should accept jurisdiction over this case. First, this case concerns an order of the Third District Court of Appeal rendered on October 2, 2017, that expressly and directly conflicts with the Fourth District Court of Appeal's decision in *Domville v. State,* 125 So. 3d 178 (Fla. 4th DCA 2013), which held that Facebook "friendship" of the judge and lawyer on the case projects an appearance of impropriety, and is therefore *per se* a violation of the Judicial Code of Conduct, Canons 2A and 2B, and because the Facebook "friendship" would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial, it requires disqualification. As the Third District Court of Appeal specifically acknowledges conflict with the Fourth District Court of Appeal's opinion in *Domville,* this Court has jurisdiction to review district court opinions that "expressly and directly" conflict with the decision of another district

court of appeal pursuant to Rule 9.030(a)(2)(A)(iv) and Article V, § 3(b)(3), Fla. Const.

Second, this Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(iii) because the opinion directly and expressly affects constitutional state officers, to wit, all Article V judges in Florida. The express and direct effect of the Third District Court of Appeal's opinion 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 is a violation of Canon 2B. Judges in the Fourth District **must** recuse themselves and would be violating the Judicial Canons because they are bound by *Domville*, and the JEAC is instructive, both of which specifically hold it is *per se* a violation of the Florida Code of Judicial Conduct Canon 2B to be Facebook "friends" with a lawyer that appears and argues before them on the case - as judges must avoid even the *appearance* of impropriety. While judges everywhere in Florida, ***except*** in the Fourth District, can simply ignore the *Domville* opinion which was previously binding and disregard both *JEAC* Opinions on the subject. The Third District Court of Appeal's opinion, therefore, creates completely different standards for judges in Florida, depending on which district the judge sits in, to determine when and whether they are violating the Florida Code of Judicial Conduct. This is untenable for both judges and the public perception of the judiciary. 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.

This Court that is the final arbiter to interpret the Code of Judicial Conduct and to decide the issue of whether a judge violated a specific Canon should exercise its discretionary jurisdiction and interpret the Canons to decide the issue presented, conclusively. For the foregoing reasons this Court should accept jurisdiction of this case.

ARGUMENT FOR JURISDICTION

I. THE OPINION EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION FROM THE FOURTH DISTRICT COURT OF APPEAL

The Third District Court of Appeal's Opinion below directly conflicts with the Fourth District Court of Appeal's decision in *Domville v. State,* 125 So. 3d 178 (Fla. 4th DCA 2013) which held that the "Facebook friendship" of the judge and prosecutor on the case would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial requiring disqualification in accordance with Canon 2A and 2B of the Judicial Code of Conduct.

The Third District Court of Appeal "respectfully acknowledged" conflict with the Fourth District Court of Appeal in *Domville* when it stated that: "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.'" By disagreeing with the JEAC opinions and *Domville*, the Third District Court of Appeal radically departed from the previous standard for disqualification by misapprehending the Facebook application itself and thus redefining the term "friend," ignoring the plan language of Canon 2B.

Although Third District Court of Appeal's opinion "acknowledges" direct conflict with the Fourth District Court on the issue, (A010), because the trial court was bound by *Domville* to disqualify itself, (aside from the other two legally sufficient reasons in the motion) the Third District Court of Appeal should have certified the conflict given the fact that their opinion directly conflicts with *Domville* and with the JEAC opinions that opine the trial judges violate Canon 2B in this instance.

In *State v. Vickery*, 961 So. 2d 309 (Fla. 2005), this Court addressed the practice of the district courts of appeal "acknowledging conflict" versus certifying conflict. While this Court instructed the district courts to use the term of art "certify" when they actually intend to in order to invoke "certified conflict jurisdiction," the Court held that under "express and direct conflict" jurisdiction, it had jurisdiction to review district court opinions that "expressly and directly" conflict with the decision of another district court of appeal or with a decision of the Florida Supreme Court. See Art. V, § 3(b)(3), Fla. Const.

The Third District Court of Appeal's ruling below has created a split among the districts wherein only this Court can resolve that conflict. In every county of Florida except those in the Fourth District, county and circuit judges are free to disregard the Judicial Canons and ignore the JEAC Opinions interpreting said canons when it comes to being Facebook "friends" with a litigant or lawyer on an active case before them. The application and interpretation of the Code of Judicial Conduct must be uniform for all judges in the State of Florida and this Court must decide the issue.

II. THE OPINION EXPRESSLY AFFECTS A CLASS OF CONSTITUTIONAL OR STATE OFFICERS

This Court also has jurisdiction pursuant to Article V, section 3(b)(3) of the Florida Constitution because the Third District Court of Appeal's opinion expressly affects constitutional officers in all 67 Florida counties—the elected and appointed members of the judiciary. As this Court has recognized, the "obvious purpose" of the jurisdictional provision at issue was to "permit this Court to review a decision which directly affects one state officer and in so doing similarly affects every other state officer in the same category." *Fla. State Bd. of Health v. Lewis*, 149 So. 2d 41, 43 (Fla. 1963). This Court has previously accepted jurisdiction in cases involving the constitutional officers *See, e.g., Cook v. City of Jacksonville*, 823 So. 2d 86 (Fla. 2002) (reviewing decision affecting county clerks); *Chief Judge of Eighth Judicial*

Circuit v. Bd. of County Comm'rs of Bradford County, 401 So. 2d 1330 (Fla. 1981) (reviewing decision affected boards of county commissioners); *City of Waldo v. Alachua County*, 249 So. 2d 419 (Fla. 1971) (same). As the application of the Code of Judicial Conduct must be uniform, this ruling affects every Article V judge, and this Court should accept jurisdiction.

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). Because this Court is the final arbiter on whether the trial judge violated the Judicial Canons, (in this instance Canon 2B) and thus requiring automatic disqualification on the case, this court should accept jurisdiction, interpret the Canons and decide the issue. Moreover, this Court should decide this issue because the Third District Court of Appeal opinion now places judges in different districts in a position, wherein everywhere in Florida, ***except in the Fourth District***, a judge need not disqualify themselves if they are Facebook "friends" with a lawyer appearing before them and arguing before them on a case.

By ignoring the JEAC opinions and disagreeing with *Domville*, the Third DCA has radically departed from the previous *standard* for moving parties seeking

a judge's disqualification, and in practice, has exposed judges who are Facebook friends with litigants or lawyers to possible discovery. 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," conceivably opens discovery of a judge's Facebook and other social media communications, such as texts, posts, and in-app e-mails, so that an aggrieved party can substantiate the new evidentiary based burden of proof (to determine the degree of friendship) the Third District Court of Appeal's opinion places on a moving party. (A010) The practical effect of the Third District Court of Appeal's opinion is that judges in different districts in Florida, now have disparate standards imposed for compliance with Judicial Canon 2B. The Third District Court of Appeal does not have the authority to decide or create new standards: as it must defer to this Court for the interpretation and application of the Judicial Canons, especially in the context of a motion to disqualify a trial court, where a party is entitled to nothing less than the cold neutrality of an impartial judge. *See State ex rel. Davis v. Parks,* 141 Fla. 516 (1939).

CONCLUSION

For the reasons stated above this Court has and should exercise discretionary jurisdiction, resolve the conflict by quashing the decision below.

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 Jurisdictional Brief was served via the Florida Court's E-Filing Portal this 19th day of October 2017 on: The Honorable Beatrice Butchko, Miami Dade County Courthouse, 73 West Flagler Street Room 303, Miami, FL 33130;

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