No. 1D17-5066

IN THE FIRST DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

JOHN E. O'DONNELL, individually and as Former Trustee of the Diane Joy Milam Dennis Revocable Trust,
Petitioner,

v.

NORTH FLORIDA LAND TRUST, INC.,
a Florida Non-Profit Corporation,
Respondent.

On Petition for a Writ of Prohibition to the Circuit Court of the Fourth Judicial Circuit in and for Duval County, State of Florida
L.T. No. 16-2016-CP-981, Hon. Peter L. Dearing

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

SMITH, GAMBRELL & RUSSELL, LLP

Alan S. Wachs
Florida Bar No.: 980160
awachs@sgrlaw.com
Jonathon D. Pressley
Florida Bar No.: 84579
jpressley@sgrlaw.com
50 N. Laura Street, Suite 2600
Jacksonville, Florida 32202
Telephone: (904) 598-6110
Facsimile: (904) 598-6210

Trial Counsel for Respondent

CREED & GOWDY, P.A.

Bryan S. Gowdy
Florida Bar No.: 176631
bgowdy@appellate-firm.com
filings@appellate-firm.com
Thomas A. Burns (*Of Counsel*)
Florida Bar No.: 12535
tburns@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Telephone: (904) 350-0075
Facsimile: (904) 503-0441

Appellate Counsel for Respondent

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BASIS FOR JURISDICTION

Respondent, North Florida Land Trust, Inc. ("NFLT"), agrees with Petitioner, John E. O'Donnell, that this Court has jurisdiction to entertain his petition for writ of prohibition. *See* Fla. Const. art. V, § 4(b)(3); Fla. R. App. P. 9.030(b)(3); *Blaxton v. State*, 85 So. 3d 1150, 1151 (Fla. 1st DCA 2012) (denying petition for writ of prohibition on denial of motion to disqualify "on the merits"). However, for the reasons explained herein, the petition should be denied on the merits.

FACTS ON WHICH RESPONDENT RELIES

Nature of the case

This original appellate proceeding arises from trust litigation. Initially, NFLT, a charitable trust with the purpose of purchasing land for a nature preserve, had sued Mr. O'Donnell in his personal capacity and as a trustee (for several other trusts of which NFLT is a beneficiary) for breach of fiduciary duty, to remove him as trustee, and for an accounting. (Supp. App. 16; Tr. 12.) After the trial court removed Mr. O'Donnell as trustee, the remaining claim against Mr. O'Donnell, in his personal capacity and as former trustee, concerned his alleged breach of fiduciary duty in, among other things, failing to distribute approximately $500,000 of a $4.5 million trust. (Supp. App. 8, 17-18; Tr. 4, 13-14.) In his petition, Mr. O'Donnell asks this Court to issue a writ of prohibition because the trial judge supposedly asked pointed questions, said sarcastic things, and made mean faces.

Course of the proceedings

During pretrial proceedings, the parties litigated several disputes concerning venue, discovery, and the pleadings. (*See* Supp. App. 5-132; Tr. 1-128.) The trial court convened a motion hearing. (*See* Supp. App. 5-132; Tr. 1-128.) At that hearing, the trial court granted NFLT's motion for protective order and denied Mr. O' Donnell's motions to transfer venue and to compel answers to deposition questions and for sanctions. (Supp. App. 52, 101-103; Tr. 48, 97-99.) The trial court also granted NFLT's motion for leave to amend the complaint and to compel interrogatory answers while Mr. O' Donnell withdrew his objection to third-party subpoenas. (Supp. App. 110, 127, 132; Tr. 106, 123, 128.)

After the hearing, Mr. O'Donnell moved to disqualify the trial judge. (App. A1-A8.) NFLT opposed. (App. A9-A18.) The motion was denied. (App. A19-A23.) This petition followed.

Disposition in the lower tribunal

A. The motion hearing.

At the motion hearing, the parties had teed up several motions for resolution. (Supp. App. 7; Tr. 3.) The primary motions concerned a motion to transfer venue, a motion for protective order, and a motion to compel answers to deposition questions and for sanctions. (Supp. App. 7; Tr. 3.) Other motions included a motion to amend the complaint, a motion to compel answers to interrogatories, and

an objection to the issuance of third-party subpoenas. (*See* Supp. App. 110, 127, 132; Tr. 106, 123, 128.)

1. The motion to transfer venue.

Mr. O'Donnell had moved to transfer venue as *forum non conveniens* from Duval County (where the plaintiff, another party, and 10 of 18 witnesses resided, plus three additional witnesses who resided across the line in St. Johns County) to Sarasota County (where Mr. O'Donnell and two witnesses resided). (Supp. App. 8-16, 40-51; Tr. 4-12, 36-47.) NFLT opposed. (Supp. App. 16-40; Tr. 12-36.) After extensive argument during which the trial court asked no questions (*see* Supp. App. 8-51; Tr. 4-47), the motion was denied:

> THE COURT: All right. I'm satisfied that venue was proper when it was asserted here to begin it. It continues to be proper. The movant has not satisfied that it is more convenient for the material fact witnesses that the case be transferred to Sarasota County and tried there.
>
> So the motion to transfer venue is denied.

(Supp. App. 52; Tr. 48.)

2. The motion for protective order and motion to compel answers to deposition questions and for sanctions.

NFLT also had moved for a protective order. (Supp. App. 53; Tr. 49.) Instead of responding in opposition to that motion, Mr. O'Donnell had reacted by moving to compel answers to deposition questions and for sanctions. (Supp. App. 53; Tr. 49.) The dispute in those two competing motions arose from the deposition

of NFLT's corporate representative that had taken place *after* Mr. O'Donnell had been removed as trustee. (Supp. App. 54; Tr. 50.)

At the deposition, one of Mr. O'Donnell's lawyers (Mr. Kessler) asked the witness many questions. (Supp. App. 54; Tr. 50.) The deposition began at 10:00 a.m. (Supp. App. 54; Tr. 50.) At 3:20 p.m., Mr. O'Donnell's second attorney (Mr. Fucillo) arrived in the deposition room. (Supp. App. 54-55; Tr. 50-51.) About 40 minutes later, and without having been present for almost all of the deposition, Mr. Fucillo attempted to ask questions. (Supp. App. 55; Tr. 51.) In response, NFLT objected that this violated the one-party-one-attorney rule—which was stated in *City of Miami v. Williams*, 40 So. 2d 205 (Fla. 1949), and *Perdomo v. State*, 458 So. 2d 66 (Fla. 3d DCA 1984)—and terminated the deposition. (Supp. App. 55-56; Tr. 51-52.) Mr. Kessler and Mr. Fucillo disputed that one-party-one-attorney rule and claimed they were both entitled to ask questions because they represented Mr. O'Donnell in a "dual capacity": *i.e.*, in his personal capacity and in his capacity as trustee (even though he was no longer the trustee). (Supp. App. 58; Tr. 54.) In making this argument, Mr. Kessler and Mr. Fucillo did not mention or acknowledge that Mr. O'Donnell had already been removed as trustee.

By that point, the deposition had already become chippy. (Supp. App. 59-60; Tr. 55-56.) Earlier, Mr. Kessler had attempted to show the witness a financial affidavit from the divorce case of NFLT's lead counsel. (Supp. App. 60-61; Tr. 56-

57.) This line of questioning, NFLT contended, was "designed to embarrass" the witness and NFLT's lead counsel. (Supp. App. 61; Tr. 57.) Then, when the associate attorney defending the deposition objected to a second attorney asking questions, Mr. Fucillo responded, "I think you need to go back to law school and get a little bit of a refresher." (Supp. App. 62; Tr. 58.) When the associate terminated the deposition, Mr. Fucillo threatened to seek sanctions. (Supp. App. 62; Tr. 58.)

The next morning, NFLT promptly moved for a protective order and attempted to schedule hearing time the following afternoon to have the two-lawyer issue "nipped … in the bud." (Supp. App. 57; Tr. 53.) But Mr. O'Donnell's lawyers refused because "that's not convenient for us." (Supp. App. 57; Tr. 53.)

Based on that set of facts, the Florida Supreme Court case, the Third District case, and a treatise, NFLT asked the trial court to enter a protective order, deny the motion to compel, and deny attorney's fees as a sanction. (Supp. App. 66-67; Tr. 62-63.)

In response, Mr. Fucillo argued that his intemperate comment at the deposition—*i.e.*, that the young associate "need[ed] to go back to law school and get a little bit of a refresher"—was taken "out of context." (Supp. App. 68; Tr. 64.) Instead, read in context, it was not "disrespect[ful]" but rather was an "amicabl[e]" comment intended to help the parties "resolve an issue." (Supp. App. 68; Tr. 64.)

Mr. Fucillo then repeatedly claimed there was a "conflict of interest" between his representation of Mr. O'Donnell in his personal capacity and Mr. Kessler's representation of Mr. O'Donnell in his capacity as (former) trustee. (*E.g.*, Supp. App. 68, 69, 77, 82, 83, 84, 101; Tr. 64, 65, 73, 78, 79, 80, 97.)

The trial court asked what the supposed conflict of interest could possibly have been:

> THE COURT: You've told me at least ten times that there's some conflict of interest between Mr. O'Donnell as an individual and Mr. O'Donnell as a former trustee.
>
> Explain what you believe that conflict of interest to be.

(Supp. App. 78; Tr. 74.)

Throughout the hearing, Mr. O'Donnell's counsel never answered that question except with tautological platitudes that, because he was being sued in two capacities, there was necessarily a conflict of interest. (*E.g.*, Supp. App. 68-69; Tr. 64-65) (repeatedly asserting "two capacities" mean a "conflict of interest," but never explaining why), (Supp. App. 77; Tr. 73) (bemoaning potential malpractice claim for representing one client who had a conflict of interest with himself); (Supp. App. 83; Tr. 79) ("But there's a conflict between the duties, between the individual and the trustee. There's a conflict as to whether a judgment against one or the other can be levied by the plaintiff."). Notably, those platitudes failed to

address how such a conflict could exist when Mr. O'Donnell was a *former* trustee, not an *acting* trustee. (*See, e.g.*, Supp. App. 69; Tr. 65.)

Mr. Fucillo also argued that NFLT "cite[d] no authority other than the Supreme Court case law." (Supp. App. 68; Tr. 64.) Mr. Fucillo did not explain how a Florida Supreme Court decision would not constitute binding precedent. (*See* Supp. App. 68; Tr. 64.) Instead, Mr. Fucillo tried to distinguish the Florida Supreme Court's decision in *City of Miami* on the basis that it involved "three attorneys for one party," not two attorneys for one party as was the case here. (Supp. App. 86; Tr. 82.) Mr. Fucillo did not explain why the application of the one-party-one-attorney rule would have a different outcome depending on whether the party sought to be represented by two attorneys instead of three attorneys. (*See* Supp. App. 86; Tr. 82.)

Mr. Fucillo further argued: "Mr. O'Donnell is not being sued as one party. He's being sued individually and as trustee. So in effect there's two parties." (Supp. App. 86; Tr. 82.) But Mr. Fucillo did not explain how a claim or defense Mr. O'Donnell wanted to present in his personal capacity would conflict with a claim or defense Mr. O'Donnell wanted to present in his capacity as former trustee. (*See* Supp. App. 86; Tr. 82.) Nor did Mr. Fucillo identify a single case that supported his assertion that a party sued in multiple capacities is entitled to have

counsel for each of those capacities to ask questions at deposition or trial. (*See* Supp. App. 86; Tr. 82.)

The trial court asked several questions to confirm that Mr. O'Donnell's counsel never took steps to notify NFLT that both of his attorneys would be asking questions at the deposition. (Supp. App. 84-88; Tr. 80-84.) Satisfied that Mr. O'Donnell gave no such notice, the trial court granted the motion for protective order:

> THE COURT: …. The motion for protective order. Had I been present supervising the deposition, I would have said one lawyer asks questions on behalf of Mr. O'Donnell in his capacity as an individual, in his capacity as former trustee.
>
> He was not representing the trust at that point. He had been removed, so he was no longer representing the trust. He was being sued because of what he did when he was a trustee and as an individual.
>
> I would have granted that motion for—I would have sustained their objection and said, no, you don't get to ask any questions, Mr. Fucillo.
>
> So for them to have preemptively said that's the end of the deposition, I cannot disagree with that, and I think that was the appropriate thing to do.
>
> I'm granting their motion for protective order. One lawyer per party. He is a party in two different capacities because of what he was and because he is, he's still one party. So the motion for protective order is granted.

(Supp. App. 101-102; Tr. 97-98.) The trial court also denied the related motion to compel and for sanctions. (Supp. App. 102-103; Tr. 98-99.)

Nevertheless, the trial court still granted Mr. O'Donnell some relief:

> I'm going to deny the motion to compel; *however, because Mr. Fucillo was apparently unaware of this rule that only one lawyer per party gets to ask questions and may have had other valid questions to ask of Mr. McCarthy that didn't get asked because they were somehow thinking that they were going to tag-team and both of them were going to ask questions on behalf of Mr. O'Donnell, I'm going to grant some relief in that if you have any additional questions that you had intended to ask, I'm going to let you submit that for deposition by written interrogatory to Mr. McCarthy.*
>
> So that if there is somehow a duplication, and Mr. Wachs will have an opportunity to object to that duplication, that we don't give two lawyers for Mr. O'Donnell the opportunity to examine the same witness.
>
> The motion for sanctions is denied. And I just need you-all to prepare an order for me to that effect. *I'm not going to punish Mr. O'Donnell because Mr. Fucillo didn't understand that you couldn't have two lawyers asking the same witness questions.*

(Supp. App. 102-103; Tr. 98-99.) As such, so long as they were not duplicative, Mr. Fucillo would get to ask his deposition questions anyway. (*See* Supp. App. 102-103; Tr. 98-99.)

3. The motion to amend the complaint.

The litigants then proceeded to address the motion for leave to amend the complaint. (Supp. App. 104; Tr. 100.) NFLT inquired whether the motion was opposed. (Supp. App. 104; Tr. 100.) When Mr. O'Donnell's counsel kept arguing about the two-capacity issue, the trial court tried to move the hearing along by telling NFLT, "Go ahead and argue your motion for leave to amend the complaint. They're not going to agree to anything." (Supp. App. 106; Tr. 102.) Mr. Fucillo

then asked the trial court to reconsider its prior ruling regarding the two-capacity issue, which was summarily denied. (Supp. App. 107; Tr. 103.)

After NFLT presented argument in support of its motion to amend (Supp. App. 107-108; Tr. 103-104), Mr. Kessler then complained it was "not true" that "we wouldn't agree to anything." (Supp. App. 108; Tr. 104.) But then, instead of withdrawing Mr. O'Donnell's opposition to the motion for leave to amend the complaint, Mr. Kessler invited the trial court to provide him with ethical guidance whether he could continue to represent Mr. O'Donnell in his capacity as former trustee. (Supp. App. 108-109; Tr. 104-105.) The trial court declined the invitation:

> THE COURT: As we sit here today, Mr. O'Donnell has two lawyers. It doesn't matter to me which of the two of you respond to the motion to amend the complaint, but I want to hear a response from somebody on behalf of Mr. O'Donnell. I'm not giving you any direction.

(Supp. App. 109; Tr. 105.) When Mr. O'Donnell's response was not immediately forthcoming, the trial court allowed his counsel to discuss the issue during a brief recess. (Supp. App. 109; Tr. 105.)

When the hearing resumed, Mr. Kessler stated he would be seeking an opinion from The Florida Bar on how to proceed. (Supp. App. 109-110; Tr. 105-106.) Then, Mr. O'Donnell finally withdrew his opposition to the motion to amend, and the trial court granted leave. (Supp. App. 110; Tr. 106.)

4. The motion to compel interrogatory answers.

The parties then argued the motion to compel interrogatory answers. Nothing of significance occurred during this argument. (Supp. App. 111-127; Tr. 107-123.)

5. The objection to third-party subpoenas.

Finally, the parties discussed Mr. O'Donnell's objection to third-party subpoenas. (Supp. App. 127-132; Tr. 123-128.) Mr. Kessler complained the subpoena was "redundant" because NFLT "already ha[s] the records." (Supp. App. 129; Tr. 125.) The trial court asked Mr. Kessler to clarify his position:

> THE COURT: So what you're telling me is that because you've given him documents, he shouldn't be able to go to some third parties to get the same documents?

(Supp. App. 130; Tr. 126.)

Unable to provide a satisfactory response, Mr. Kessler acknowledged the weakness with his argument, yet still complained he was being treated unfairly:

> But, Your Honor, I understand your point and I understand where we're going with this. So I will stipulate that after you take the deposition of Mr. O'Donnell, that you can issue the subpoena based on what you wanted in the two subpoenas.
>
> Because, Your Honor, based on your comment prior in the record that we're [n]ot going to agree to anything, I feel compelled to have to agree to everything now. And—

(Supp. App. 131; Tr. 127.)

At that point, the trial court cut off Mr. Kessler to correct his misstatement and to set the record straight:

> THE COURT: My comment was simply an observation because Mr. Wachs asked on two occasions, will you agree to this, will you agree to that, and *you continued to argue something that had already been heard*. And my direction to Mr. Wachs was just to go ahead and argue his motion.
>
> I'm not expecting you or compelling you to agree to anything.

(Supp. App. 131; Tr. 127) (emphasis added).

Unsatisfied, Mr. Kessler complained that the trial court's "mannerism" and "the way that you said it" led him to "feel as though my client is being prejudiced in the event that I don't agree to everything that they want." (Supp. App. 131-132; Tr. 127-128.) With that said, Mr. Kessler withdrew his objection to the subpoena, and the hearing concluded. (Supp. App. 132; Tr. 128.)

B. The motion to disqualify.

Five days after the hearing, Mr. O'Donnell moved to disqualify the trial judge. (App. A1-A8.) The motion complained that the trial court made "disapproving facial expressions and gestures" (App. A2), took notes, smiled, and nodded his head during NFLT's arguments but not Mr. O'Donnell's arguments (App. A2), asked Mr. O'Donnell's counsel pointed questions but did not challenge NFLT's counsel (App. A3), "made a derogatory comment about" and "mischaracterized" the argument of Mr. O'Donnell's counsel (App. A3), and stated "They aren't going to agree to anything" in an "elevated" voice while making a

mean face at Mr. O'Donnell's counsel (App. A4). Notwithstanding the paucity of these grounds, the motion stated it was "brought for good and sufficient cause" and was "not offered *solely* for the purpose of delay."[1] (App. A5) (emphasis added).

C. The response to the motion to disqualify.

NFLT opposed the motion to disqualify. (App. A9-A18.) The response argued Mr. O'Donnell's allegations were "legally insufficient to create a reasonable, objective fear" that Mr. O'Donnell would not receive a fair trial. (App. A10.) Instead, the allegations merely established the trial court's "dissatisfaction with the legal positions and arguments [Mr. O'Donnell's] counsel made and not any personal bias." (App. A10.)

After sketching out the general legal standard (App. A10-A13), NFLT explained why the allegations in the motion to disqualify were legally insufficient (App. A13-A17.) In that regard, NFLT separated the allegations about the trial court's comments from the allegations about the trial court's facial expressions, note taking, and demeanor. (App. A13.) NFLT asserted the comments were legally insufficient under the authority of cases like *Pilkington v. Pilkington*, 182 So. 3d 776, 779 (Fla. 5th DCA 2015), *Bert v. Bermudez*, 95 So. 3d 274, 279-280 (Fla. 3d DCA 2012), *Oates v. State*, 619 So. 2d 23, 25-26 (Fla. 4th DCA 1993), and

[1] Contemporaneous to this response, NFLT is filing a motion to lift stay, which explains how Mr. O' Donnell's instant petition only serves to delay a hearing in the trial court on a motion seeking to compel Mr. O' Donnell to return monies he unlawfully took from a trust to pay his attorney's fees and costs.

Nassetta v. Kaplan, 557 So. 2d 919, 921 (Fla. 4th DCA 1990). (App. A14-A16.) Similarly, the allegations about the trial court's facial expressions and demeanor were insufficient under the authority of cases like *Bermudez*, *Nassetta*, and *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986). (App. A16-A17.)

D. The order denying disqualification.

The trial court denied the motion to disqualify as legally insufficient. (App. A19-A23.) Relying on numerous cases, the trial court explained its comments and demeanor reflected mental impressions and opinions formed during the proceedings but not prejudgment of the case. (App. A20.) The trial court further found its comments were made to "control the courtroom" by expediting the proceedings. (App. A21.) It also ruled its raised voice and disagreeable comment were not sufficient. (App. A21.)

NATURE OF RELIEF SOUGHT

This Court should deny the petition for writ of prohibition on the merits and with prejudice.

ARGUMENT

Introduction

In litigation, the stakes (*e.g.*, money, property, liberty) are often high. Emotions can run hot. Thus, not surprisingly, judges can sometimes get frustrated with parties or lawyers who behave unreasonably or make frivolous arguments. Judges are not emotionless robots. They might sometimes express their displeasure

to the parties or their lawyers, raise their voices, say sarcastic things, or convey their incredulity verbally or nonverbally. But such human behaviors do not mean judges are biased against one party or the other. And no reasonable person could believe otherwise.

To the contrary, the law does not impose on judges any obligation to suffer fools gladly. Rather, the case law makes clear that judges always have plenary authority to control their courtrooms and to express their skepticism and doubts. Indeed, the judiciary could not function effectively otherwise.

To the extent a judge might abuse his or her discretion or make an error of law in rendering a ruling, an aggrieved party's procedural avenue for recourse is generally to seek appropriate appellate relief (be it nonfinal appeal, original action, or final appeal). Seeking an end run around those procedures, however, Mr. O'Donnell now complains that because his feelings (or his lawyers' feelings) were hurt, he therefore is entitled to a new trial judge (whom Mr. O'Donnell would undoubtedly ask to reconsider all prior interlocutory rulings (*see* Supp. App. 368)). But that attempt to cut corners is nothing more than sour grapes played up for some tactical advantage. The petition should be denied with prejudice and on the merits.

Standards for disqualification of a trial judge

A motion to disqualify a judge is governed substantively by section 38.10, Florida Statutes, and procedurally by Florida Rule of Judicial Administration

2.330. *Parker v. State*, 3 So. 3d 974, 981 (Fla. 2009). Among other things, a motion to disqualify must demonstrate "the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge." Fla. R. Jud. Admin. 2.330(d)(1). "In ruling on a motion to disqualify, a court is limited to determining the legal sufficiency of the motion itself and may not pass on the truth of the facts alleged." *Parker*, 3 So. 3d at 982 (citing Fla. R. Jud. Admin. 2.330(f)). Because this is "a question of law," it "follows that the proper standard of review is de novo." *Barnhill v. State*, 834 So. 2d 836, 843 (Fla. 2002).

"A motion to disqualify is legally sufficient 'when the alleged facts would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial.'" *Forehand v. Walton County*, 172 So. 3d 517, 518 (Fla. 1st DCA 2015) (citing *Valdes-Fauli v. Valdes-Fauli*, 903 So. 2d 214, 216 (Fla. 3d DCA 2005)). In this regard, "a verified motion for disqualification must contain an actual factual foundation for the alleged fear of prejudice." *Id.* (citing *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986)). A subjective fear of bias is not legally sufficient to require disqualification; rather, the fear must be objectively reasonable. *Id.* at 518; *see also Parker*, 3 So. 3d at 982. Additionally, "[w]here the claim of judicial bias is based on very general and speculative assertions about the trial judge's attitudes, no relief is warranted." *Parker*, 3 So. 3d at 982.

Although a judge "cannot pass on the truth of the facts alleged to refute the charge of partiality, he may explain the status of the record." *Pilkington v. Pilkington*, 182 So. 3d 776, 779 (Fla. 5th DCA 2015). That is, a judge "may comment factually on what transpired during relevant proceedings when ruling upon a motion to disqualify." *Id.* at 780.

Merits

A. The allegations of the motion to disqualify were insufficient.

The trial court correctly ruled the allegations in the motion to disqualify were insufficient because they merely involved the judge's comments or demeanor and did not indicate he had prejudged the case or was biased. To the contrary, the judge's comments and demeanor were a normal human reaction to the baseless arguments that Mr. O'Donnell's counsel made at the hearing and continued to make after the judge had ruled.

1. Disqualification is an extraordinary remedy that cannot be based on a judge's comments or demeanor unless they indicate the judge has prejudged the case or is biased.

Disqualification of a judge is an "extraordinary remedy." *Jackson v. Leon County Elections Canvassing Bd.*, 214 So. 3d 705, 707 (Fla. 1st DCA 2016). Nevertheless, motions to disqualify trial judges regrettably "are becoming more prevalent" in "situations where the motive behind a motion to disqualify is obviously to gain a continuance or to get rid of a judge who evidences doubt or displeasure as to the efficacy of the movant's cause of action by oral comment or

by entering adverse judicial rulings." *Nassetta v. Kaplan*, 557 So. 2d 919, 921 (Fla. 4th DCA 1990); *see also supra* note 2; Respondent's Mot. to Lift Stay or Alternatively to Expedite (filed in this Court on 1/29/2018) (explaining how the instant prohibition proceeding is delaying proceedings in the trial court).

Recognizing the mischief that motions to disqualify can cause, courts have held "[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." *Nassetta*, 557 So. 2d at 921. "Comments from the bench—even unflattering remarks—which reflect observations or mental impressions are not legally sufficient to require disqualification." *Pilkington v. Pilkington*, 182 So. 3d 776, 779 (Fla. 5th DCA 2015). Indeed, even a remark that a litigant "was being an obstinate jerk" is insufficient to create a legitimate fear of the litigant not receiving a fair trial. *Oates v. State*, 619 So. 2d 23, 26 (Fla. 4th DCA 1993). Rather, "[d]isqualification based upon comments by a judge is required only when they indicate the judge has prejudged the case or is biased." *Pilkington*, 182 So. 3d at 779.

Given that general framework, courts have held that remarks made to a party or the party's attorney by a judge in the course of the judge's efforts to control the courtroom, even if stern or short-tempered, are not legally sufficient to require disqualification. *E.g.*, *Braddy v. State*, 111 So. 3d 810, 834 (Fla. 2012). For instance, in *Bert v. Bermudez*, a trial judge's repeated attempts to make an attorney

stop arguing, including telling the attorney that "[i]f I tell you again to shut up, I'm going to hold you in contempt," were insufficient to warrant disqualification. *Bert*, 95 So. 3d at 279–80. Rather, a 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, or observer, or, as in this case, a lawyer becomes combative, disrespectful, or disruptive." *Id.* at 280. "To require disqualification of a judge whenever a party, witness, or lawyer's behavior invokes a response by the judge would encourage the behavior exhibited at this hearing as a means of 'judge-shopping.'" *Id.*

The result is the same if the motion is based on a judge's tone of voice or facial expressions. In *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986), the petitioner moved to disqualify a trial judge because, among other things, the judged refused to admit certain testimony, refused to look at the petitioner or her attorney, kept his eyes averted from all persons in the courtroom who appeared on the petitioner's behalf, and looked visibly uncomfortable and uninterested in the petitioner's testimony or that of petitioner's witnesses. *Id.* at 241. On appeal, the Florida Supreme Court approved of the district court's denial of the petition for writ of prohibition: "[w]e find the petitioner's subjective fears, as alleged, are not reasonably sufficient to justify a 'well-founded fear' of prejudice." *Id.* "To the

contrary, the allegations are frivolous and appear designed to frustrate the process by which petitioner suffered an adverse ruling." *Id.*

2. The allegations did not indicate the judge had prejudged the case or was biased.

The petition does not cite a single case supporting Mr. O'Donnell's argument that a judge is required to disqualify himself if he said something unpleasant or made a mean face. Instead, the bulk of the petition is spent on attempts to distinguish the cases on which NFLT and the trial court relied, such as *Pilkington*, *Oates*, *Braddy*, *Nassetta*, *Bermudez*, and *Fischer*.[2] (*See* Pet. 11-22.) In all these cases, the appellate courts found the trial judges were not required to disqualify themselves for conduct that was similar to, or more objectionable, than the judicial conduct alleged here. Accordingly, Mr. O' Donnell's distinctions can be easily dispatched.

Mr. O'Donnell argues *Pilkington*[3] is distinguishable because that case involved mere comments and rulings whereas this case involved "facial expressions, mannerisms, verbal statements, coaching of NFLT's counsel,

[2] *Pilkington v. Pilkington*, 182 So. 3d 776 (Fla. 5th DCA 2015); *Oates v. State*, 619 So. 2d 23 (Fla. 4th DCA 1993); *Braddy v. State*, 111 So. 3d 810 (Fla. 2012); *Nassetta v. Kaplan*, 557 So. 2d 919 (Fla. 4th DCA 1990); *Bert v. Bermudez*, 95 So. 3d 274 (Fla. 3d DCA 2012); *Fischer v. Knuck*, 497 So. 2d 240 (Fla. 1986).

[3] In *Pilkington*, the Fifth District denied a petition for writ of prohibition because it concluded a judge's comments at a hearing that criticized the petitioner's litigation tactics and motives and the judge's prior rulings against that petitioner were not legally sufficient bases on which to seek disqualification. 182 So. 3d at 779.

mischaracterization of facts, and derogatory comments." (Pet. 12-13.) This purported distinction is meaningless. Under *Pilkington*, a judge's comments, mannerisms, and expressions do not support disqualification unless they demonstrate bias. 182 So. 3d at 779. And it is clear the trial judge was not biased when he ruled against Mr. O'Donnell on the dual-capacity issue. In fact, the trial judge made sure that Mr. O'Donnell would not be punished for his counsel's ignorance of the one-party-one-attorney rule by granting his second counsel permission to ask non-duplicative, written deposition questions. (Supp. App. 102-103; Tr. 98-99.)

Mr. O'Donnell contends *Oates*[4] and *Braddy*[5] are distinguishable because he and his counsel had not "engaged in any conduct that was disrespectful to the court, or that required control of the courtroom." (Pet. 15.) Even if that were true, it

[4] In *Oates*, a final judgment appeal, the Fourth District affirmed a trial judge denial of a motion to disqualify based on an allegation that he had told a reporter that a criminal defendant was "being an obstinate jerk." 619 So. 2d at 25–26. In part, *Oakes* based that ruling on its observation that the criminal defendant's behavior at trial was literally the dictionary definition of being a "jerk." *Id.* at 26 (quoting dictionary definition). As such, "[t]he amorphous meaning of the term 'jerk,' and the defendant's behavior which prompted the remark, considered together, lead us to conclude that the court properly denied the motion to disqualify." *Id.*

[5] In *Braddy*, the Florida Supreme Court ruled a trial judge who, with "exasperated" and "sharply spoken" comments, "cut off" a "disruptive" criminal defendant and "refused to let him belabor the point" when he "continued to press the issue" after the trial court had ruled on it did not require disqualification. 111 So. 3d at 834. Similarly, *Braddy* also ruled disqualification was unnecessary when the trial judge had "angrily" made "stern" comments and threatened to revoke his constitutional right to proceed *pro se*, because those statements were "made in the course of the judge's efforts to control the courtroom." *Id.*

misses the point. Here, the trial court was justifiably annoyed that Mr. O'Donnell's counsel kept arguing the dual-capacity issue after it had ruled, so it sought to expedite the hearing. And it is important not to lose sight of just how silly counsel's argument was. It contradicted decisions of the Florida Supreme Court and the Third District. *City of Miami v. Williams*, 40 So. 2d 205, 207 (Fla. 1949) ("'Only one counsel on each side shall conduct the examination of witnesses except by permission of the court.'" (citation omitted)); *Perdomo v. State*, 458 So. 2d 66, 67 (Fla. 3d DCA 1984) (there was "no error" where "defendant had two defense counsel" and trial court "refused to permit a witness to be examined on recross by a second attorney" (citations omitted); *see also* M.D. Fla. Local R. 5.03(b)(9) ("Only one attorney for each party shall examine, or cross examine each witness."). It was factually baseless because Mr. O'Donnell was a *former* trustee, not an *acting* trustee. And it was impossible to understand because, despite numerous opportunities to do so, Mr. O'Donnell's counsel never explained what possible conflict of interest Mr. O'Donnell could have had with himself.

Mr. O'Donnell argues *Nassetta*[6] was distinguishable because it was dicta and that petitioner sought disqualification "based on a single comment." (Pet. 16-18.) Mr. O'Donnell is mistaken on both counts. Everything said in *Nassetta* was necessary to its outcome, so it is not dicta. And the petitioner in *Nassetta* challenged many statements; it was the appellate court that summarily rejected them: "there were other allegations of prejudicial remarks, but in other reported cases, all of those have been clearly held to be insufficient and we do not address them." *Nassetta*, 557 So. 2d at 920.

In *Bermudez*,[7] the judge was not required to disqualify himself even though he vindictively reversed a prior ruling, yelled at a lawyer, told him to shut up, told him he was getting on his nerves, and told him to let another lawyer handle the rest

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[6] In *Nassetta*, the Fourth District denied a petition for writ of prohibition because a judge's statement that he "did not care whether the defendant got out of jail or not" was not legally sufficient, particularly because the bond set was not excessive. 557 So. 2d at 920. Moreover, the judge's subsequent comment where he did not deny the comment, but instead claimed he was quoted out of context, was "minimal" and "harmless." *Id.* at 921. "We recognize the difficulty in expecting a judge to sit as silent as a sphinx on the Nile in the face of personal attacks on his impartiality and his integrity. A certain amount of visceral reaction is unavoidable." *Id.*

[7] In *Bermudez*, the Third District denied a petition for writ of prohibition when a trial court told an attorney who kept interrupting his opposing counsel, "If I tell you again to shut up, I'm going to hold you in contempt. I'm trying to hear from him. Now be quiet." 95 So. 3d at 279. Instead, it held 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." *Id.* at 280. In further noted that 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.*

of the hearing. 95 So. 3d at 279–80. Mr. O'Donnell distinguishes *Bermudez* by noting this case involves a judge's "facial expressions, … gestures and mannerisms" and mean comments in an "elevated tone" of voice. (Pet. 18-19.) To state that distinction is to refute it: there is no appreciable difference between yelling and speaking in an elevated tone of voice. If anything, the mean comments and facial expressions in this case are far less objectionable than the judge's conduct in *Bermudez*, in which he yelled at the attorney and threatened contempt, and disqualification was not required. 95 So. 3d at 279–80.

Finally, Mr. O'Donnell argues that *Fischer*[8] was distinguishable because that case involved a judge who did not look at one side, whereas this case involved a judge who did (by making mean faces). Again, to state that purported distinction is to refute it: there is no appreciable difference between not looking and making mean faces. Either way, no reasonable person could believe it meant the judge was biased.

[8] In *Fischer*, the Florida Supreme Court held the Third District properly denied a petition for writ of prohibition. 497 So. 2d at 241–43. Indeed, it held the allegations of the motion to disqualify, which concerned a trial judge's "descriptions of the judge's facial expressions and 'non-verbal behavior' during the trial" were substantively "frivolous and appear designed to frustrate the process by which petitioner suffered an adverse ruling." *Id.* at 241–42.

B. In denying the motion to disqualify, the trial court did not go beyond its four corners.

Relying on *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1339 (Fla. 1990), Mr. O'Donnell argues the trial court went outside the four corners of the motion to disqualify in explaining his comments were meant to control the courtroom. (Pet. 16, 22-26.) Again, Mr. O'Donnell is mistaken.

Although a judge "cannot pass on the truth of the facts alleged to refute the charge of partiality, he may explain the status of the record." *Pilkington*, 182 So. 3d at 779; *see also Rolle ex rel. Dabrio v. Birken*, 984 So. 2d 534, 535–36 (Fla. 3d DCA 2008). ("The trial judge's pro se response filed in this Court is not grounds for disqualification. The trial judge does not attempt to dispute the basis of the charges of disqualification, try to explain his actions or pass on the truth as stated, any of which could be grounds for disqualification. All the trial court judge attempts to do in the pro se response is explain the record and what had transpired in this action." (citations omitted)); *Kowalski v. Boyles*, 557 So. 2d 885, 887 (Fla. 5th DCA 1990) (denying petition for writ of prohibition because trial judge "was not attempting to refute the charges of partiality; he was merely stating the status of the record"). That is, a judge "may comment factually on what transpired during relevant proceedings when ruling upon a motion to disqualify." *Pilkington*, 182 So. 3d at 780. Here, the trial court did precisely what *Pilkington*, *Rolle*, and

Kowalski permit: instead of passing on the truth of the facts alleged to refute the charge of partiality, he merely explained the status of the record.

CONCLUSION

Mr. O'Donnell's complaints about the trial court's comments and facial expressions are misplaced. The trial court did precisely what trial courts are supposed to do: it controlled and expedited the proceeding while giving the parties and their lawyers immediate feedback. The judge's comments and facial expressions did not betray bias. Rather, they showed bewilderment at the bizarre, nonsensical arguments by Mr. O'Donnell's counsel.

This Court cannot grant the petition because it would open the floodgates to permit parties to judge shop. Additionally, granting the petition would make it more difficult for trial judges to control their courtrooms because they would always know, in the back of their minds, that even one subjectively "mean" facial expressions or comment could lead to their disqualification. That would paralyze the judiciary, and it is why the petition should be denied.

The Court should deny the petition for writ of prohibition with prejudice and on the merits.

Respectfully submitted,

CREED & GOWDY, P.A.

/s/*Bryan S. Gowdy*
Bryan S. Gowdy

Florida Bar No.: 176631
bgowdy@appellate-firm.com
filings@appellate-firm.com

/s/*Thomas A. Burns*
Thomas A. Burns (*Of Counsel*)
Florida Bar No.: 12535
tburns@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Telephone: (904) 350-0075
Facsimile: (904) 503-0441
Appellate Counsel for Respondent

-and-

SMITH, GAMBRELL & RUSSELL, LLP

Alan S. Wachs
Florida Bar No.: 980160
awachs@sgrlaw.com
Jonathon D. Pressley
Florida Bar No.: 84579
jpressley@sgrlaw.com
50 N. Laura Street, Suite 2600
Jacksonville, Florida 32202
Telephone: (904) 598-6110
Facsimile: (904) 598-6210
Trial Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court on January 29, 2018, and that a true and correct copy of the foregoing has been furnished via email to:

Edward. J Fucillo, Esq.
ejf@fucillolaw.com
FUCILLO LAW FIRM, P.L.
PO Box 2012
Dunedin, Florida 34697
Telephone: (727) 945-2862
Attorney for Petitioner John E. O'Donnell, as Former Trustee of the Diane Joy Milam Dennis Revocable Trust

Alan Wachs, Esq.
awachs@sgrlaw.com
Jonathon Pressley, Esq.
jpressley@sgrlaw.com
SMITH GAMBRELL & RUSSELL, LLP
50 N. Laura Street, Suite 2600,
Jacksonville, Florida 32202
Telephone: (904) 598-6110
Co-Counsel for North Florida Land Trust

John P. Cole, Esq.
jcole@gunster.com
Jason P. Van Lenten, Esq.
jvanlenten@gunster.com
GUNSTER YOAKLEY & STEWART, P.A.
225 Water Street, Suite 1750
Jacksonville, Florida 32202
Telephone: (904) 354-1980
Co-Counsel for North Florida Land Trust

Bryan S. Kessler, Esq.
bryan@bergandkessler.com
BERG AND KESSLER
1872 Tamiami Trail, Suite C
Venice, Florida 34293
Telephone: (941) 493-0871
Attorney for the Former Trustee of the Diane Joy Milam Dennis Revocable Trust

/s/*Bryan S. Gowdy*
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/*Bryan S. Gowdy*
Attorney