IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, LAKELAND, FLORIDA

MARGARITA WHIDDEN,
DON J. PEREZ, and
PEREZ & PEREZ, M.D., P.A.

Petitioners,

L.T. Case No. 08-DR-2175

v.

Case No.: 2D11-

HONORABLE CATHERINE M. CATLIN
BERNARD PEREZ, and CARMEN E. PEREZ,

Respondents.
_____/

PETITION FOR WRIT OF PROHIBITION

Petitioners, Margarita Whidden ("Whidden"), Don J. Perez ("Perez"), and Perez & Perez, M.D., P.A. ("PA") (collectively "Petitioners"), by and through their undersigned counsel, petition this Court for a Writ of Prohibition, precluding the Honorable Catherine M. Catlin ("the Judge") from presiding over Case No. 08-DR-2175, currently pending in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida ("the Case"), and as grounds would show:

BASIS FOR THIS COURT'S JURISDICTION

1. Petitioners moved to disqualify the Judge under Fla.R.Jud.Admin. 2.330. The Judge denied that motion. This Court has original jurisdiction under Fla.R.App.P. 9.030(b)(3) to enter a Writ of Prohibition.

NATURE OF THE RELIEF SOUGHT

2. Petitioners seek a Writ of Prohibition from this Court, precluding the Judge from presiding over the Case and directing that the Case be re-assigned to a randomly-assigned judge.

FACTS

3. The underlying lawsuit began in 2008 as a divorce proceeding between Respondents, Carmen E. Perez ("Wife") and Bernard R. Perez ("Husband"). The divorce case is now in its post-judgment phase, as Wife is attempting to collect on a Money Judgment against Husband in the amount of $443,386.93. In her most recent collection efforts, Wife served Writs of Garnishment on various non-parties to the divorce case, including Whidden, Perez, PA, and Magpie Islands, Inc. ("Magpie").[1] See Appendix to Petition, 1.

4. Whidden, Perez, PA, and Magpie are not indebted to Husband, have no property of Husband in their possession or control, and know of no person indebted to Husband or who may have property of Husband in their possession. See Appendix to Petition, 1 (Motion to Disqualify Judge) and 2 (Garnishees' Answer to Writs of Garnishment). As far as Whidden, Perez, PA and Magpie are concerned, these facts are not reasonably in dispute. Unfortunately, Wife disagrees

[1] Magpie is in bankruptcy, and all proceedings as to it are stayed, so it did not join in the Motion to Disqualify.

and takes the position that Whidden, Perez, PA, and Magpie owe significant sums of money to Husband. See Appendix to Petition, 3 (Writs of Garnishment) and 4 (Reply to Garnishees' Answer).

5. Given this significant factual dispute, the pendency of the Writs of Garnishment, and the large amount in controversy, it seems inevitable that the Judge will be forced to adjudicate whether and to what extent Whidden, Perez, PA and Magpie are indebted to Husband. See Appendix to Petition, 1.

6. The problem, of course, and what makes the Judge's continued role as judge so fundamentally unfair from the perspective of Petitioners, is that the Judge made a myriad of fact-findings adverse to Petitioners on this very issue, during the pendency of the divorce, at a time when none of them were parties in the Case, none of them had counsel, and none of them had the ability to subpoena witnesses or otherwise be heard. Specifically, in the Amended Final Judgment of Dissolution of Marriage, the Judge ruled PA owed Husband $85,000; Whidden owed Husband $119,000, and Husband made a $450,000 "investment" in Magpie, among other, similar findings.[2] See Appendix to Petition, 5.

7. Perhaps worse yet, the Judge made numerous statements throughout the divorce case expressing her disdain for and distrust of Whidden, Perez, PA, and

[2] These findings were made in the process of determining Husband's income and imputing income to him.

Magpie (apparently because Whidden and Perez are siblings of Husband and otherwise affiliated with him). The Judge made no attempt to hide her favoritism for Wife, as well as her ongoing and extreme disdain for Whidden and Perez, which is perhaps best reflected by her slanderous finding, in a written Order, that Husband "and his siblings [Whidden and Perez] are playing fast and loose with their finances…" See Appendix to Petition 1.

8. Whidden, Perez, PA, and Magpie strenuously and vociferously object to these findings and characterizations (made in a case in which they were not parties, had no notice, no counsel, and no opportunity to be heard). Respectfully, these assertions are simply untrue. Husband does not owe PA or Whidden any money. Husband did not invest anything in Magpie. Whidden and Perez do not "play fast and loose with their finances." See Appendix to Petition, 1.

9. The point, however, at this stage of the process, is not to question the veracity of the findings made by the Judge in the divorce case. Those findings are what they are (subject to a pending appeal in this Court by Husband). The point is to say that the Judge cannot possibly be neutral and detached in the adjudication of the pending garnishment proceedings when she has already made numerous findings adverse to Whidden, Perez, PA and Magpie on the very issues to be litigated in those garnishment proceedings (at a time when they were not parties in the case, not represented by counsel, and did not have an opportunity to subpoena

witnesses or be heard on the merits).

10. In other words, the Judge has already adjudicated the issues that will be heard *vis a vis* the Writs of Garnishment and cannot possibly be a fair and impartial Judge when she has already adjudicated these issues adverse to Whidden, Perez, PA and Magpie. To illustrate, no matter what evidence Whidden, Perez, PA and Magpie may present that they are not indebted to Husband, the Judge will know that she already ruled on that issue and will undoubtedly be disinclined to rule differently (or, essentially, overrule herself), the second time around. Undoubtedly, Wife and her counsel are trying to take advantage of this fact by bringing this dispute before the Judge in the manner they have (as opposed to some other forum, before a different judge). See Appendix to Petition, 1.

11. The Judge cannot be a neutral and detached judge when she went out of her way to make written fact-findings about Whidden and Perez ("playing fast and loose") even though they were not parties and their conduct was, candidly, irrelevant to the issue before her. Unfortunately, the Judge saw fit to slander them anyway, reflecting her clear bias against them. See Appendix to Petition, 1.

12. On February 21, 2011, Petitioners learned that the Judge would be presiding over and adjudicating the issue of their alleged indebtedness to Husband. Petitioners timely filed their Motion to Disqualify Judge based on the above-stated facts. See Appendix to Petition, 1. On March 3, 2011, the Judge entered her Order

Denying Motion to Disqualify Judge. See Appendix to Petition, 6. The instant Petition timely ensued.

ARGUMENT

13. Fla.R.Jud.Admin. 2.330 imparts several obligations on a litigant who seeks disqualification of a judge. Petitioners complied with all such requirements. First, Petitioners satisfied the timeliness requirement of Fla.R.Jud.Admin. 2.330(e) by filing the Motion on February 28, 2011, just seven days after February 21, 2011 (when they learned of the facts that gave rise to the Motion). See Appendix to Petition 1. Second, the Motion complied with Fla.R.Jud.Admin. 2.330(c), as it alleged, in writing and under oath, the reasons the Judge should be disqualified, was mailed to the Judge, and included the undersigned's certification that the Motion was made in good faith. See Appendix to Petition 1.

14. As there was plainly no basis to deny the Motion on procedural grounds, the issue before this Court is whether the Motion presented legally sufficient grounds to disqualify the Judge. In other words, the issue is whether the Motion showed Petitioners' fear that they would not receive a fair trial or hearing because of specifically described prejudice or bias of the Judge. See Fla.R.Jud.Admin. 2.330(d). In adjudicating this issue, this Court should give no deference to the lower court's ruling, but should apply a *de novo* standard of review. See Chamberlain v. State, 881 So. 2d 1087 (Fla. 2004); Frengel v.

Frengel, 880 So. 2d 763 (Fla. 2d DCA 2004).

I. THE JUDGE'S ANNOUNCED PRE-DISPOSITION TO RULE AGAINST PETITIONER REQUIRES HER DISQUALIFICATION.

15. Numerous Florida courts have prohibited a judge from presiding on a case where the judge has announced his pre-disposition to rule against a party. In Marvin v. State, for instance, the Fourth District ruled:

> A trial judge's announced intention before a scheduled hearing to make a specific ruling, regardless of any evidence or argument to the contrary, is the paradigm of judicial bias and prejudice. We could not imagine a more telling basis for a party to fear that he will not receive a fair hearing.

804 So. 2d 360, 363 (Fla. 4th DCA 2001) (quoting Gonzalez v. Goldstein, 633 So. 2d 1183 (Fla. 4th DCA 1994)); see also Barnett v. Barnett, 727 So. 2d 311 (Fla. 2d DCA 1999) (requiring judicial disqualification where the judge's comments during trial created the impression that he had prejudged the case); Wargo v. Wargo, 669 So. 2d 1123 (Fla. 4th DCA 1996) (Writ of Prohibition issued where the judge began to rule without giving a party a chance to be heard).

16. Petitioners' argument in their Motion to Disqualify Judge is even stronger than the cases set forth above. Here, the Judge not only pre-judged the Case, she actually adjudicated the Case, adverse to Petitioners, without them having notice, counsel, or an opportunity to be heard.

17. It is eminently reasonable for Petitioners to doubt their ability to get a

fair hearing before the Judge when the Judge had already ruled against them on the very issue being litigated. To put it differently:

> *Would you think you were getting a fair hearing if you began a court proceeding knowing the judge had already ruled against you on the very issue being litigated (at a time when you were not a party, had no notice, no counsel, and no opportunity to be heard)?*

18. It is eminently reasonable for Petitioners to doubt their ability to get a fair hearing before the Judge when the Judge had repeatedly shown her extreme distrust of and disdain for Whidden and Perez, as reflected by her slanderous, written statement they "are playing fast and loose with their finances…" See Appendix to Petition 1, 6. To put it differently:

> *Would you think you were getting a fair hearing if you began a court proceeding knowing the judge had repeatedly shown her extreme disdain for you, slandered you, and said you played "fast and loose" with your finances (at a time when you were not a party, had no notice, no counsel, and no opportunity to be heard)?*

19. Respectfully, any reasonable person would question his/her ability to get a fair hearing under these circumstances.

20. Before adjudicating the instant Petition, this Court should think about how the underlying lawsuit will proceed if the relief requested herein were denied. In that event, Wife will prosecute her Writs of Garnishment, taking the position that Whidden, Perez, and PA owe Husband (and, by virtue of the outstanding money judgment, Wife) hundreds of thousands of dollars. Whidden, Perez, and

PA will deny these assertions, strenuously contending that they owe no money whatsoever to Husband. The Judge would be presiding over this six-figure dispute, knowing she has already ruled in Wife's favor on this exact issue. In fact, the parties and their lawyers will all know the Judge had previously adjudicated this issue as well. Respectfully, how on earth can anyone expect this proceeding will be fair?[3]

21. All Petitioners are asking is for a fair chance to be heard by a judge who has not already adjudicated the issues at hand adverse to them. To deny them that right would fly in the face of the purposes behind Rule 2.330. As the Marvin court said "we could not imagine a more telling basis for a party to fear that he will not receive a fair hearing." 804 So. 2d at 363.

CONCLUSION

Petitioners' Motion to Disqualify Judge was legally sufficient and should have been granted. Applying a *de novo* standard of review, this Court should issue a Petition for Writ of Prohibition and direct that the Case be re-assigned to a randomly-assigned judge.

[3] It is very apparent that Wife initiated the Writs of Garnishment in the Case (as opposed to some other forum), knowing the Judge was the presiding judge, because she wanted to take advantage of Judge's prior ruling in Wife's favor on these issues.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Mark S. Howard, Esq., 4830 W. Kennedy Blvd., Suite 300, Tampa, FL 33609, Timothy Weber, Esq., 980 Tyrone Blvd., St. Petersburg, FL 33710; and Honorable Catherine Catlin, 800 E. Twiggs St., Room 429, Tampa, FL 33602 on this 31st day of March, 2011.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant Petition complies with the font requirements of Fla.R.App.P. 9.100(l).

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Mark P. Stopa, Esquire