

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CIVIL DIVISION

WS SSIR OWNER, LLC,

Plaintiff,

v.

Case No.: 25-CA-2734

CAPTIVA CIVIC ASSOCIATION, INC.,
and CCA FOUNDATION, INC.,

Defendants.

_____ /

**DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION TO DISQUALIFY**

Defendants, CAPTIVA CIVIC ASSOCIATION, INC. ("CCA") and CCA FOUNDATION, INC. ("Foundation") (collectively, "Defendants"), respond in opposition to Plaintiff WS SSIR Owner, LLC's ("Plaintiff") Motion to Disqualify because it is both procedurally and legally insufficient. The Court should enter a one-sentence order denying the Motion, without further comment or explanation, on or before May 8, 2026.¹ In support thereof, Defendants state the following:

I. ARGUMENT

A. Legal Standard Governing Motions to Disqualify

"A motion to disqualify is governed substantively by section 38.10, Florida Statutes, . . . and procedurally by Florida Rule of Judicial Administration 2.330." *Law Offices of Herssein &*

¹ Although the Court may not comment on the substantive disqualification allegations made by Plaintiff, it is proper for Defendants to file a response. *See, e.g., Ellis v. Henning*, 678 So. 2d 825, 828 (Fla. 4th DCA 1996) (noting that in a disqualification proceeding, "it is the safer practice for the judge to remain silent and let the adversarial party supply the response") (citation and internal quotations omitted); *Sands Pointe Oceana Beach Resort Condo. Ass'n, Inc.*, 251 So. 3d 950, 959–60 (Fla. 3d DCA 2018) (considering responses filed by the adversarial party in opposition to a motion to disqualify the trial judge).

Herssein, P.A. v. United Servs. Auto. Ass’n, 271 So. 3d 889, 893 (Fla. 2018) (quoting *Gregory v. State*, 118 So. 3d 770, 778 (Fla. 2013)). Disqualification of a judge is required when a party “makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party.” § 38.10, Fla. Stat. However, the trial judge’s alleged bias or prejudice must create a well-grounded fear in a reasonably prudent person that he or she would not receive a fair hearing or trial. *Herssein*, 271 So. 3d at 893–94. Thus, a “mere ‘subjective fear’ of bias will not be legally sufficient; rather, the fear must be objectively reasonable.” *Arbelaez v. State*, 898 So. 2d 25, 41 (Fla. 2005) (citation omitted). In light of this reasonably objective standard, “an adverse ruling is not a legally sufficient ground to disqualify the trial judge”. *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000). *See also Lambrix v. State*, 124 So. 3d 890, 903–04 (Fla. 2013) (“[T]he fact that a judge has previously made adverse rulings is not an adequate ground for recusal.”) (citation omitted); *Rivera v. State*, 717 So. 2d 477, 481 (Fla. 1998) (“The fact that the judge has made adverse rulings in the past against the [movant], or that the judge has previously heard the evidence, or allegations that the trial judge had formed a fixed opinion [adverse to the movant] . . . are generally considered legally insufficient reasons to warrant the judge’s disqualification.”) (citation omitted).

As applicable to this case, “[a] motion to disqualify shall set forth all specific and material facts upon which the judge’s impartiality might reasonably be questioned, including . . . [that] the party reasonably 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(e)(1). A judge considering an initial motion to disqualify must take the facts alleged as true so long as not refuted by the record and is limited to determining the legal sufficiency of the motion without further comment.

See Fla. R. Jud. Admin. 2.330(h); *Wall v. State*, 238 So. 3d 127, 143 (Fla. 2018). Thus, evaluation of the legal sufficiency of a motion to disqualify requires determining “whether the facts alleged, which must be assumed to be true, would place a reasonably prudent person in fear of not receiving a fair and impartial trial.” *Herssein*, 271 So. 3d at 894 (citation and internal quotations omitted).

B. Failure to Include Good Faith Certification

At the outset, Plaintiff’s Motion to Disqualify should be denied because it does not include the required good faith certification. “A motion to disqualify shall . . . include a separate certification by the attorney for the party, if any, that the motion and the client’s statements are made in good faith.” Fla. R. Jud. Admin. 2.330(c)(5) (emphasis added). *See also* Plaintiff’s Motion at ¶ 3 (acknowledging this requirement). Further, “[w]henver a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party,” that affidavit “shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.” § 38.10, Fla. Stat. (emphasis added).

Plaintiff’s Motion to Disqualify violates Florida Rule of Judicial Administration 2.330(c)(5) and section 38.10 of the Florida Statutes because it does not contain any certification that the motion and the client’s statements are made in good faith. The Court should deny the motion on this basis alone. *See Hammond v. Eastmoore*, 513 So. 2d 770, 770 (Fla. 5th DCA 1987) (denying writ of prohibition following judge’s denial of motion to disqualify after finding that the motion was legally insufficient because “there is no certificate of counsel that the motion is made in good faith”); *Santisteban v. State*, 72 So. 3d 187, 193 (Fla. 4th DCA 2011) (finding that “the

trial court did not err in denying the motion [to disqualify] as legally insufficient” where “counsel did not separately certify that the motion and the client’s statements were made in good faith”).

C. Legally Insufficient Allegations of Prejudging the Case

Plaintiff’s Motion to Disqualify should also be summarily denied because it fails to make legally sufficient allegations that Judge Shenko prejudged the case. Plaintiff moves for disqualification on the basis that “the Court’s impartiality might reasonably be questioned because the Court’s statements at the March 23, 2026, hearing indicate that the Court has prejudged the case, in that it has already determined that the Final Judgment ‘indicated the 912 units included hotel units’—a central disputed issue to be determined in this case.” Plaintiff’s Motion at ¶ 4. As a result, Plaintiff “fears that it will not receive a fair trial in this Court.” *Id.* at ¶ 8.

However, a party cannot cherry-pick portions of the record to create the illusion of bias or prejudice. *Wall*, 238 So. 3d at 143 (citing *Gregory v. State*, 118 So. 3d 770, 780 (Fla. 2013)). While a court must generally take allegations in the motion as true, it does not have to blindly disregard the status of the record that completely contradicts the movant’s allegations underlying the claim of bias or prejudice. *See id.* (rejecting assertion in motion to disqualify that was directly contradicted by the transcript); *Pilkington v. Pilkington*, 182 So. 3d 776, 780 (Fla. 5th DCA 2015) (denying petition for writ of prohibition because review of status of the record was permissible). Further, “the context of the hearing and history of the case as reflected in the record are relevant to understanding whether a movant has a well-founded fear of judicial bias.” *Wall*, 238 So. 3d at 143. *See also Wilson v. Renfro*, 91 So. 2d 857, 860 (Fla. 1956) (“A disqualifying prejudice does not result ipso facto merely from the fact that the trial judge has ruled adversely to the party who seeks to disqualify him.”); *Clark v. Clark*, 159 So. 3d 1015, 1017 (Fla. 1st DCA 2015) (“It is well-settled that adverse rulings are insufficient to show bias.”).

To support its assertion that “the Court has prejudged the case”, Plaintiff relies on two sentences from the transcript of the March 23, 2026 hearing on Defendants’ Motion for Protective Order (“Hearing Tr.”): “The original order. Where I indicated the 912 units included hotel units, is that one of the issues that’s still up on appeal, or has that been resolved?” Hearing Tr. at 19:1–3. However, when read in the context of the rest of the hearing and the history of the case, those two sentences cannot give a reasonably objective person a well-grounded fear of an unfair trial or hearing. *Herssein*, 271 So. 3d at 893–94; *Wall*, 238 So. 3d at 142–43.

Plaintiff’s complaint in this case provides that “the Final Declaratory Judgment the Court entered on February 5, 2025 [in the Declaratory Litigation, as defined in paragraph 18 of Plaintiff’s complaint], following the summary judgment hearing makes no mention of ‘hotel rooms’ or ‘hotel units’ and does not purport to limit the number of ‘hotel units’ permitted at the Resort, but rather states merely that the total amount of ‘dwelling units’ at the Resort is limited to 912.” Compl. ¶ 24. The summary judgment order entered on February 5, 2025 in the Declaratory Litigation (“2025 Summary Judgment Order”), which is of record in this case,² includes findings that the 912-unit density limitation referenced in the Settlement Agreement was inclusive of hotel room units. 2025 Summary Judgment Order at 1–2, ¶¶ 1–2, 4. And the only conduct that Plaintiff alleges constitutes a FDUTPA violation in this action is one sentence from CCA’s legal update: “If the Circuit Court decision is upheld, the County can never issue more than 912 building permits for hotel or residential dwelling units on South Seas regardless of the recommendation of the Hearing Examiner or the decision of the Commissioners in the current rezoning case.” Compl. ¶ 27.³

² See Docket No. 13 at 16–24; Docket No. 14 at 16–24.

³ The representations contained in Paragraph 1 of Plaintiff’s Motion to Disqualify misstate CCA’s legal update and are refuted by the record in this case. See Plaintiff’s Motion at ¶ 1 (“Defendants . . . have stated to the public that this Court’s Final Judgment in [the Declaratory Litigation] finds that the reference to 912 ‘dwelling units’ in the Mediated Settlement Agreement (‘MSA’) includes hotel room units. The central issue in this case is whether such statements are false or misleading because the Final Judgment does not declare that the 912 ‘dwelling units’ referenced in the MSA include hotel rooms.”) (emphasis added). CCA did not refer to the Final Judgment in its legal update.

The portion of the transcript cited by Plaintiff is not a basis for disqualification, as no reasonable person would objectively fear an unfair trial based on the court's statement and question at issue from the March 23, 2026 hearing. The Court did not prejudge the case because it has not "determined that the Final Judgment 'indicated the 912 units included hotel units'". Plaintiff's Motion at ¶ 4. Instead, the Judge was merely asking a clarifying question about his prior ruling in the 2025 Summary Judgment Order—not the final judgment. In fact, the portion of the transcript of which Plaintiff takes issue followed immediately after Defendants' counsel referenced the 2025 Summary Judgment Order:

11 [MR. WHITT:] And, Your Honor, I
12 will remind you -- you remember this because you keep asking the
13 same question. Didn't I make a ruling already in this case that
14 the 912 density limitation included hotel units? Yes, you did.
15 We set that out in our motion for protective order.
16 That was in the order [granting] summary judgment. I -- I appeared
17 before you at our motion for summary judgment in the underlying
18 case, and I said, Judge, we pled it. They're now raising this
19 issue. I don't think you need to -- to address it in order to
20 grant our summary judgment. But you went ahead and did so
21 because all of the record summary judgment evidence from our
22 side and from SSIR had all the underlying documentation.
23 You looked at it and you said it's clear. It's there
24 all the way back to the '73 zoning. The Court's already ruled
25 on that issue.

25 THE COURT: Thank you. . . .

1 The original order. Where I indicated the 912 units
2 included hotel units, is that one of the issues that's still up
3 on appeal, or has that been resolved on appeal?

4 MR. WHITT: That -- the -- the interesting --
5 interesting twist, Judge. That -- that is an issue I think that
6 may be considered by the Second DCA -- excuse me, the Sixth DCA.
7 The -- the appeal is still pending in the Sixth.

8 The Sixth just set oral argument in -- in one of those
9 cases, and I can't remember which one. If you remember, there
10 were two appeals. The county took an appeal, and SSIR took an
11 appeal. And I'm not quite sure. It may have been the county's.

12 THE COURT: I don't recall which one either, but yeah,

13 they're still upon there on appeal. Okay. Okay. Thank you.

Hearing Tr. at 15:11–25, 18:25–19:13. The Court then proceeded to make a favorable ruling for Plaintiff and deny Defendants' Motion for Protective Order. Plaintiff either misinterprets or misrepresents the nature of the comments made by the Court, and such comments cannot serve as a basis for disqualification. As the Florida Supreme Court has made clear:

[A] motion made on a trial judge's statement in open court that does not accurately represent what has actually been said cannot comply with the requirement that an affidavit be made "in good faith." *See* § 38.10, Fla. Stat. (2011). Further, for the motion to be legally sufficient, a movant cannot simply pluck one word from a full sentence made by the trial judge and omit the remainder of the statement.

Gregory, 118 So. 3d at 780.

Finally, the cases Plaintiff cites in support of its disqualification argument are readily distinguishable and inapposite. *See Meredith v. Meredith*, 420 So. 3d 596, 598–99 (Fla. 5th DCA 2025) (reversing denial of wife's disqualification motion that was made after the wife's petition for domestic violence injunction was dismissed because the judge's remarks "about Duval County wasting resources [with that case] and his hope that a divorce court would hold Wife's petition against her in the future" would cause a reasonable person to conclude that he prejudged the case); *Real Estate Golden Invs. Inc. v. Ossandon Larrain*, 278 So. 3d 812, 813–14 (Fla. 3d DCA 2019) (granting petition for writ of prohibition disqualifying the trial court judge where, although no motion to stay was filed or referenced by the defendants, the judge "stated that he expected a motion to stay because the defendants appeal everything in this case and that he would deny such a motion if the defendants were to file one"); *Williams v. Balch*, 897 So. 2d 498, 498–99 (Fla. 4th DCA 2005) (quashing order denying disqualification where the judge "made comments signaling a predisposition against [the movant's] position before considering her evidence" and "actively participated in the proceedings exceeding the role of neutral arbiter seeking information");

Chmilarski v. Empire Fire, 340 So. 3d 563, 565–66 (Fla. 3d DCA 2022) (granting petition for writ of prohibition on trial court’s denial of motion to disqualify because, in its summary judgment order, the trial court pre-judged the movants’ entitlement to attorneys’ fees before any fee motion was filed and argued).

II. CONCLUSION

For the above reasons, Defendants respectfully request that this Court enter an order on or before May 8, 2026, stating that Plaintiff’s Motion to Disqualify is denied, without further comment.

Dated: April 24, 2026

/s/ Michael R. Whitt

Michael R. Whitt, Esq.

Florida Bar No. 725020

mwhitt@shutts.com

lwitt@shutts.com

FL-eservice@shutts.com

Jonathan T. Tortorici, Esq.

Florida Bar No. 1032589

jtortorici@shutts.com

ldeleary@shutts.com

SHUTTS & BOWEN LLP

1858 Ringling Blvd., Suite 300

Sarasota, Florida 34236

Phone: (941) 552-3500

Attorneys for Defendants Captiva Civic

Association, Inc. and CCA Foundation, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April, 2026, a true and correct copy of the foregoing was electronically filed and served through the Florida Court e-Filing Portal upon: ETHAN J. LOEB (EthanL@BLTHLaw.com; KerriR@BLHTLaw.com); E. COLIN THOMPSON (ColinT@BLHTLaw.com), STEVEN GIESELER (StevenG@BLHTLaw.com; MariaC@BLHTLaw.com), ALLISON DOUCETTE (AllisonD@BLHTLaw.com; MarjorieP@BLHTLaw.com), MATTHEW S. GARNETT (MatthewG@BLHTLaw.com; MarjorieP@BLHTLaw.com), ELLIOT P. HANEY (ElliotH@BLHTLaw.com), Bartlett Loeb Hinds Thompson & Angelos, 1001 Water Street, Suite 475, Tampa, FL 33602.

/s/ Michael R. Whitt
ATTORNEY