IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

Case No. 3D23-0712
L.T. Case No. 2017 CA 022854

FLORIDA POWER & LIGHT COMPANY,
a Florida Corporation

Petitioner/Defendant

vs.

HEYDI VELEZ, MIRIAM PEREZ, MIRIALIS RIVERO, RUBENS N. MENDIOLA, ENRIQUE ARGUELLES, and JOSE A. ZARRUK, Individually and on behalf of all others similarly situated,

Respondents/Plaintiffs.

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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I.
Introduction

Respondents are the Plaintiffs below. Respondents request that the Court deny the Petition for Writ of Prohibition ("Petition") filed by Florida Power & Light Company (“FPL”). FPL seeks a writ of prohibition requiring the trial judge, the Honorable David C. Miller, to disqualify himself from further presiding in this case alleging that its Motion for Disqualification was legally sufficient. As the record demonstrates, however, the trial judge properly denied the Motion as legally insufficient and did not attempt to refute the allegations of bias in the Motion and affidavits. Accordingly, the Petition should be denied.

This Petition is the second petition for writ of prohibition and the fourth interlocutory proceeding filed by FPL in this Court. Moreover, the Motion to disqualify the trial judge was the latest in a long line of dilatory tactics employed by FPL to derail and delay the adjudication of this cause. In the last month, after the trial judge specially set this case for trial in November, FPL has focused on removing the judge. FPL has attempted to remove the division judge by seeking transfer to the complex business litigation division (after six years of litigation without any hint that the case belonged in that division leading to a denial of that motion by the administrative judge) and now by suggesting disqualification (denied by the trial judge). FPL is

desperately seeking a continuance of the trial specially set for November.

The real issue before this Court is whether FPL satisfied the requirements for disqualification of the trial judge or whether this Petition is yet another attempt to continue the trial of this case. FPL has provided this Court with a grossly incomplete, self-serving version of the procedural background of this case, implying that the trial judge has treated it unfairly. In order to do so it has twisted words beyond comprehension so that the trial judge's mere use of any plural first person pronoun – "we" and "us" – means that the judge has aligned himself against FPL. Contrary to the hyperbole employed, there is nothing in this record that would give any rational party an objective fear that it will not receive a fair trial.

II.
ARGUMENT

FPL IS NOT ENTITLED TO PROHIBITION RELIEF
The Motion for Disqualification Was Not Legally Sufficient

The requirements for disqualification of a trial judge were established, in part, to prevent the process from being abused by one party for purposes of delay. *Pasteur Med. Ctr., Inc. v. Wellcare of Fla., Inc.,* 943 So. 2d 144, 147 (Fla. 3d DCA 2006). That is the real issue before this Court -- whether FPL satisfied the requirements for disqualification or whether this is yet another attempt to grind this action, which is nearing conclusion, to a

screeching halt.

The requirements for disqualification were established, in part, to prevent the process from being abused by the pernicious practice of judge shopping. *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983) ("The requirements set forth in [Florida statutes and rules] were established to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding."); *Pasteur Med. Ctr., Inc. v. Wellcare of Fla., Inc.,* 943 So. 2d 144, 147 (Fla. 3d DCA 2006) ("The requirements for disqualification were established, in part, to prevent the process from being abused by one party for purposes of delay, and to prevent judge and master shopping, unrelated to the fairness and impropriety of the proceeding."); *Crespo v. Crespo*, 762 So.2d 568, 570 (Fla. 3d DCA 2000) ("By unjustly disqualifying a judicial officer for no acceptable reason, the order below serves improperly to encourage the pernicious practice of judge-and-master-shopping so prevalent in our legal culture.")

The Motion is pretextual. It followed quickly on the heels of the case being set for trial and it came shortly after FPL's failed attempt to remove

the trial judge and the special set trial through a transfer to the complex business litigation division. This judge shopping is exactly what the Rule is meant to prevent.

Rule 2.330(d) provides that a motion to disqualify must show either that "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" or that the judge is an interested party, related to an interested party, related to the counsel, or a material witness for or against one of the parties to the cause. Fla. R. Jud. Admin. 2.330(d). FPL did not allege that the trial judge was an interested party, related to an interested party, related to the counsel, or a material witness for or against one of the parties to the cause. It travelled under the first prong but utterly failed to allege any specifically described objective conduct that betrayed prejudice or bias of the judge.

To present a legally sufficient basis for disqualification, a party must demonstrate a well-grounded fear that it will not receive a fair trial. *Ault v. State*, 53 So. 3d 175, 204 (Fla. 2010); *Mansfield v. State*, 911 So.2d 1160, 1170 (Fla. 2005). A party's mere subjective fear is legally insufficient. *Ault*, 53 So. 3d at 204. "[R]ather, the fear must be objectively reasonable." *Mansfield*, 911 So. 2d at 1171 (quoting *Arbelaez v. State*, 898 So.2d 25, 41 (Fla. 2005)). The party seeking disqualification bears the

burden of establishing this well-founded fear of not receiving a fair trial. *R.M.C. v. D.C. ,* 77 So. 3d 234, 236 (Fla. 1st DCA 2012); *Corie v. City of Riviera Beach*, 954 So. 2d 68 (Fla. 4th DCA 2007).

The trial judge is to consider only the legal sufficiency of the motion. *See Bundy v. Rudd,* 366 So. 2d 440, 442 (Fla. 1978); Fla. R. Jud. Admin. 2.330(f). The judge must determine if the facts alleged, assumed to be true, would cause a reasonable person to have a well-founded fear that he or she will not receive a fair and impartial trial before the presiding judge. *See Sybers v. State,* 709 So. 2d 128, 129 (Fla. 1st DCA 1998).

To be legally sufficient, a motion to disqualify must demonstrate "some actual bias or prejudice so as to create a reasonable fear that a fair trial cannot be had." *Downs v. Moore,* 801 So. 2d 906, 915 (Fla. 2001) (citations and internal quotation marks omitted). The facts and reasons given for disqualification of a trial court judge must be such that the actions of the trial court judge show personal bias or prejudice. *Rolle v. Birken*, 984 So. 2d 534, 535 (Fla. 3d DCA 2008). In assessing the legal sufficiency of a motion, the court must determine whether "the alleged facts would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial." *Pasteur,* 943 So. 2d at 147; *see also MacKenzie v. Super Kids Bargain Store, Inc.,* 565 So. 2d 1332, 1334-35

(Fla. 1990). Moreover, the fear of judicial bias must be objectively reasonable; the subjective fears of a party seeking the disqualification of the judge are not reasonably sufficient to justify a well-founded fear of prejudice. *Mansfield v. State,* 911 So. 2d 1160, 1171 (Fla. 2005). The "motion for disqualification must contain an actual factual foundation for the alleged fear of prejudice". *Fischer v. Knuck,* 497 So. 2d 240, 242 (Fla. 1986). *See also May Investments, Inc. v. Lisa, S.A.,* 814 So. 2d 471,472 (Fla. 3d DCA 2002).

FPL has not demonstrated a well-founded fear of bias or prejudice. To the contrary, the limited "facts" alleged in the motion to disqualify barely reflect upon the trial judge. The claimed conduct by the trial judge fails to demonstrate any personal bias or prejudice and cannot be interpreted as creating in FPL an objectively reasonable fear of not receiving a fair and impartial trial. The trial judge's suggestion of possible damages models in no way transformed the judge into an advocate. The language used by the judge is not subject to dispute. The comments were made in open court and transcribed. There was no prejudgment of any evidence and no ruling. The judge did not make any findings of fact. To the contrary, the judge merely suggested alternative damages models that might or might not be helpful, adopted, or accepted by either side.

Where a judge's comments are directed to the issue the court is currently handling, a motion to disqualify can be denied. *NexusVC v. Hieg Partners, LLC*, 347 So. 3d 440, 446 (Fla. 3d DCA 2022). And, in fact, the judge was denigrating the Respondents' damages model: "I don't know if we want to deal with people talking about what was in their refrigerator, you know, I had to throw out my fish sticks, and I want $3.95 for my fish sticks. We're not doing that." [T. P. 51 Ll. 13 – 17.] Importantly, the judge was clear that he had made no decision and was merely tossing ideas out: "But I'm not sure if that's practical, so I'm still listening, because I haven't decided anything, other than at this point I think Florida Power & Light doesn't want to send the notice, plaintiff will send the notice." [P. 53 Ll. 13-18]. This is a far cry from a judge advocating for the Respondents.

It is natural for a judge to form preliminary impressions and opinions on how a case should proceed to trial. That does not mean he prejudges the issues. "A judge may form mental impressions and opinions during the course of presentation of evidence so long as she does not prejudge the case." *Brown v. Pate*, 577 So. 2d 645, 647 (Fla. 1st DCA 1991). *See also Barnett v. Barnett*, 727 So.2d 311, 312 (Fla. 2d DCA 1999); *Wolfson v. Wolfson*, 159 So. 3d 394 (Fla. 3d DCA 2015).

This is especially true in a class action. FPL misapprehends the unique role of a judge in a class action. As explained in her treatise addressing the judge's unique role in class actions, Professor Barbara J. Rothstein states: "While party submissions may influence your judgment about the merits, keep in mind that the parties have their own interests in supporting the settlement. You may need to look elsewhere for information that will allow you to take an independent and hard look at the merits of the claims and defenses." *See* Federal Judicial Center, Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges 8* (*3d ed. 2010*) at 13. It is clear that when Judge Miller was speaking about "us" and "we" coming up with a solution in a prior class action, he was dealing with a settlement: "We had to be very creative in the Engle Trust case, and it got -- we distributed, gosh, a half a billion dollars in about a year." [T. P. 51 Ll. 18 – 21.]

Next, FPL makes a mountain out of a molehill regarding this exchange with a neighbor:

> Let me tell you, I spoke to a neighbor the other day, I said, by the way, there's a class action, and, you know, you're going to be part of a class, you'll get a notice of some kind, I don't know what's coming. He said, 'well, I have no idea, I have no idea how

long I lost power, I was out of town.' I hadn't even thought of that. A lot of people left town. There were a lot of people gone."

[T. P. 53 Ll. 6 – 14.]

An ex parte communication by a judge is not, per se, grounds for disqualification. Such communication would have to be prejudicial in some way. *Nassetta v. Kaplan*, 557 So. 2d 919, 921 (Fla. 4th DCA 1990). The Florida Supreme Court has held that ex parte communications even with one party's counsel are permitted if they regard purely administrative matters not involving the merits of the case. *Arbelaez v. State*, 775 So. 2d 909, 916 (Fla. 2000) (finding no impropriety where trial judge communicated with counsel ex parte regarding a deadline to respond to a motion and a hearing date); *Rodriguez v. State*, 919 So. 2d 1252, 1275 (Fla. 2005) (ex parte communication about the evidentiary nature of an upcoming hearing).

Here, nothing more than a very innocuous conversation with a neighbor is alleged. The trial judge's comments must be read in context with the rest of the colloquy which took place. *Rolle v. Birken*, 984 So. 2d 534, 536 (Fla. 3d DCA 2008). Nothing of substance was addressed and certainly nothing other than a purely ministerial function was discussed: "you'll get a notice of some kind". The full extent of that conversation ends with the neighbor then telling the trial judge that he left town during Hurricane Irma.

Judge Miller then comments to the parties in open court that absent residents may present a problem. That is it. That is the sum total of this exchange that supposedly causes FPL to fear that it will not receive a fair trial.

If such a fear does exist, it is subjective and without any rational basis. FPL's subjective fears did not justify a well-grounded fear of prejudice and were, therefore, legally insufficient to justify disqualification. *Fischer v. Knuck,* 497 So. 2d at 241-42 (defendant's subjective perceptions of trial judge's facial expressions and body language were not "reasonably sufficient" to justify "well-founded fear" of prejudice); *see also Kowalski v. Boyles,* 557 So. 2d 885, 886-87 (Fla. 5th DCA 1990) (noting that the "facts" alleged in the affidavits were subjective, not objective, facts "and as such are not reasonably sufficient to create a well-founded fear"), and see *Lukacs v. Ice*, 227 So. 3d 222, 224 (Fla. 1st DCA 2017) “A mere subjective fear will not suffice; it must be objectively reasonable.”

None of the trial judge's comments come close to rising to the level of providing an objectively reasonable fear that a fair trial cannot be had by FPL. In short, the Motion was not legally sufficient, and the trial judge correctly denied it as such. FPL alleged no comments made by the trial judge that would cause a reasonably prudent person to fear that it will not

receive a fair and impartial trial. In contrast with cases in which motions to disqualify have been deemed legally sufficient, there is no evidence here that the trial judge's communications with his neighbor were of a "specific and personalized nature" sufficient to warrant disqualification. *Valdes- Fauli v. Valdes-Fauli,* 903 So. 2d 214, 218 (Fla. 3d DCA 2005) (holding that disqualification was proper where the trial judge, among other things, specifically made derogatory comments to a party for seeking alimony). Nor is this a case that would support a reasonable fear of unfairness, such as when the judge has predetermined certain facts against a party, *see Kopel v. Kopel,* 832 So.2d 108, 108 (Fla. 3d DCA 2002), or questioned the credibility of a litigant. *See Campbell Soup Co. v. Roberts,* 676 So. 2d 435,436 (Fla. 2d DCA 1995). The judge here was talking about a possible damages model and the effect that absent residents could have on that. He was tossing ideas out. The neighbor came into the conversation because he left town during the storm. The judge wondered out loud what, if anything, absent residents could recover. Nothing suggests bias or prejudice.

To the contrary, the "facts" alleged in the motion to disqualify border on frivolous and "appear designed to frustrate the process by which [FPL] suffered an adverse ruling." *Fischer v. Knuck,* 497 So. 2d 240, 242 (Fla.

1986). FPL filed the legally insufficient motion to disqualify in yet another attempt to derail the trial and the conclusion of this case -- which is nigh. The Motion and this Petition are nothing more than transparent efforts to continue the trial so that FPL can avoid the entry of judgment against it. “We increasingly encounter 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). And this is exactly the type of abuse of process that this Court has refused to condone:

> Nothing operates more certainly to demean the profession of practicing law, than does the notion that effective advocacy condones stretching the boundaries of professional ethics in the name of pursuing client interests.

Visoly v. Security Pacific Credit Corp., 768 So. 2d 482, 485 (Fla. 3d DCA 2000); *see also Pasteur,* 943 So. 2d at 147 (noting that the requirements for disqualification are necessary to prevent an abuse of the process for purposes of delay); *Fondura v. State,* 940 So. 2d 489, 491 (Fla. 3d DCA 2006) (holding that trial judge's comment that defense counsel was "trying to shirk [his] responsibility" was not sufficiently prejudicial to place a reasonably prudent person in fear of not receiving a fair and impartial trial and noting that petitioner's motion "seemed another attempt to delay the

commencement of the trial").

This misuse of the disqualification process becomes particularly clear when FPL alleges that Judge Miller's description of how the *Engels Trust* class action was resolved after settlement somehow transforms him into an advocate here. There is nothing offensive about anything Judge Miller did in that case or said in this one. Nothing. A judge's role in a class action is unique. It is especially at the settlement phase that the judge is tasked with taking an active role. "Some courts 'have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class' and to impose 'the highest duty of care that the law requires.'" Federal Judicial Center, Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges 8* (*3d ed. 2010*) at 12, *citing Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002).

The trial judge correctly denied FPL's motion for disqualification as legally insufficient, and this Court should deny the Petition on the same basis. It is respectfully submitted that prohibition relief is not available.

III.
Conclusion

For all of the reasons set forth above, and based on the foregoing authorities, we respectfully ask this Court to deny Petitioners' Petition for

Writ of Prohibition.

IV.
CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2023, a true and correct copy of the foregoing was furnished through the Court's electronic portal to: counsel for FPL Alvin B. Davis, and Digna B. French, Esq. of Esquire Patton Boggs (US) LLP,; Luis E. Suarez, Esq.; Patricia Melville, Esq.; Mark J. Heise, Esq. Dorian Daggs, Esq.; and Thomas S. Ward, Esq., B.C.S. of HEISE SUAREZ MELVILLE, P.A.; Stuart H. Singer, Esq.; Sashi C. Bach, Esq.; and Pascual Oliu, Esq. of BOIES, SCHILLER & FLEXNER LLP; and Joseph Ianno, Jr., Esq. of FLORIDA POWER & LIGHT COMPANY.

/s/ J. Alfredo Armas

V.
CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief is submitted in Arial 14-point font and complies with Fla. R. App. P. 9.100(j).

/s/ J. Alfredo Armas