IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

AVATAR PROPERTY & CASUALTY INSURANCE COMPANY,

CASE NO: 3D19-1110
LT CASE NO: 18-CA-023492

Petitioner,

v.

PAUL AND BETHANNE KLUGERMAN,

Respondents.
_____/

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

It was the first day of the trial period for this case, and Petitioner Avatar Property & Casualty Insurance Company ("Avatar") had gotten itself into hot water.

The problem had started with the September 10, 2018 discovery requests served by its insureds, Respondents Paul and Bethanne Klugerman ("the Klugermans"). On March 8, 2019, the Klugermans filed a motion to compel discovery responses. (Respondent's Appendix ("RA") 14). The court ordered Avatar to respond to all discovery requests within ten days, and ruled that "all objections except those based upon privilege are waived." (RA 33)

The March 21 deadline came and went. On April 4, 2019, the Klugermans filed a "Motion for Order to Show Cause and for Sanctions" because Avatar did not respond. (RA 35). Avatar did not respond.

And then came May 20, 2019, the absolute deadline for completion of all discovery, as established in the February 5, 2019 order setting trial. (RA 9, 11). Still, Avatar did not respond.

On May 28, 2019, Avatar actually propounded its first discovery requests: two sets of interrogatories, two requests for production,[1] and a request for admissions. Along with the requests, it finally served its discovery responses.[2] (RA 3-4).

This time, the failure to comply with discovery deadlines was inadvertent. Accordingly, on Wednesday, May 29, 2019, Avatar filed a "Motion for Relief from Admissions" asking for "an order granting relief from technical admissions." (RA 57). Avatar attached a letter from Robin Pero, an associate at Butler Weihmuller Katz Craig, LLP., averring that "the deadline to respond to Plaintiff's discovery responses was inadvertently overlooked." (RA 59-60).

Along with the motion for relief from admissions, on May 29, 2019, Avatar filed a motion to continue the trial. (RA 61). Avatar complained that it "has not been allowed to take a single deposition." Moreover, the Motion for Summary Judgment that had remained un-noticed since Avatar filed it in November "must be heard

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[1] The significance of the May 10, 2019 "Defendant's third request for production" is not immediately clear. (RA) The Klugermans objected to the untimely discovery propounded on May 28, 2019. (RA)

[2] Avatar's position seems at odds with the April 26, 2019 "Notice of Compliance with the February 5, 2019 Court Order." (RA). That notice purports to include six exhibits, including discovery responses.

before the matter proceeds to trial." It also contended that the case was not ready to try because "on May 28, 2019, Avatar served its discovery requests and is awaiting Plaintiff's responses." (RA 63-64).

On May 31, 2019, Avatar set the Motion for Relief from Admissions for hearing with "Notice of Uniform Motion Calendar Hearing." (RA 70). In most respects, the notice looks like any other. In a footnote, however, Avatar explained that it did not, in fact, necessarily intend that the motion be heard on that date:

> Pursuant to case authority, this motion is required to be brought before the Court before trial. The motion will be heard only in the event the case is called to trial this day or before the trial starts on any other day during the week that it was listed. If it is not called for trial during the designated week, it will be brought before the Court in the future.

The *ex parte* contact Avatar decries so vehemently in the Petition occurred at the hearing it now argues it never set.

The Klugermans believe that, even as a general proposition, Avatar cannot disclaim responsibility for setting the hearing and then failing to attend. But here there are specific facts that call into question its failure to take responsibility for clearly noticing and cancelling the hearing. The hearing was an "add-on," i.e. noticed fewer than five business days in advance during a trial period. Thus, the court's procedures required Avatar to call the judge's assistant for permission to add it to the June 4, 2019 calendar. At that point, or when counsel for Avatar cleared the

date with the Klugermans' counsel, the condition should have been explained and counsel should have affirmatively undertaken to communicate whether Avatar considered the condition fulfilled before trial. Avatar does not contend that it took any steps to aid the efficient handling of its conditional notice of trial.

Moreover, during trial periods parties with add-on motions must contact the judge's office the day before the hearing, to ensure that the judge is not busy with trial. (RA 68). Why would anyone insert such a confusingly-worded condition when contact with the judicial assistant and opposing counsel should occur the day before? And although another "conditional" filing was appropriately captioned and clear in its import, this notice of hearing was neither. [3]

Nevertheless, Avatar steadfastly maintains its belief that Judge Miller's bias alone is the proximate cause of its situation. Because this case turns on how Judge Miller, court staff and opposing counsel reasonably should have construed Avatar's notice of hearing, and whether the events that followed would seem to a reasonable observer to demonstrate bias, the May 31, 2019 Notice of Uniform Motion Calendar Hearing is reproduced on the next page.

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[3] A. 202 ("**CONDITIONAL MOTION TO STAY PROCEEDINGS PENDING APPELLATE REVIEW**", which clearly requests a stay "in event [sic] the Court denies Avatar's 'Motion for Judicial Disqualification,' and only in that event.")). Additionally, Avatar edited the language in this footnote for its second notice of hearing in this case. (RA 132 (explaining more clearly in footnote that "If this matter is called to trial on June 10, 2019, then it will be heard before trial. Otherwise, the hearing will remain scheduled for June 11, 2019.")).

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

PAUL KLUGERMAN and
BETHANNE KLUGERMAN,

Plaintiffs,

vs.

AVATAR PROPERTY & CASUALTY INSURANCE COMPANY,

CASE NO: 2018-023492-CA-01

Defendant.
_____/

NOTICE OF UNIFORM MOTION CALENDAR HEARING

Thomas J. Morgan, Jr., Esquire
Morgan Law Group, P.A.
55 Merrick Way, Suite 404
Coral Gables, Florida 33134
mlg.eservice@yahoo.com

PLEASE TAKE NOTICE that a hearing will be held before The Honorable David C. Miller, the Dade County Courthouse, 73 West Flagler Street, Room 525, Miami, Florida 33130, on **June 4, 2019, at 8:00 a.m.**, or as soon thereafter as same may be heard, on:[1]

Avatar Property and Casualty Insurance Company's
"Motion for Relief from Admissions"

TIME RESERVED: 5 minutes.

The undersigned attorney ☒ will be / ☐ will *not* be securing the services of a court reporter.

PLEASE BE GOVERNED ACCORDINGLY.

[1] Pursuant to case authority, this motion is required to be brought before the Court before trial. The motion will be heard only in the event the case is called to trial this day or before the trial starts on any other day during the week that it was listed. If it is not called for trial during the designated week, it will be brought before the Court in the future.

On June 3, 2019, the Klugermans filed a response, objecting to relief from the admissions because "for over eight months, Defendant failed to respond to those Requests for Admissions, as well as to the other discovery requests served by Plaintiffs, finally serving responses to discovery on May 28, 2019, three business days before the start of the trial period and after the discovery deadline in this matter." (RA 75).

When June 4, 2019 came, Avatar and its counsel were not present at the motion calendar at 8:00 am. The circuit court issued its order denying the motion for relief from admissions. (RA 80). The Order entered states that the motion for relief is "DENIED. Defendant not present in courtroom by 8:45 a.m.". It further provides that "Defendant's motion for continuance is also denied."

On June 6, 2016, Avatar filed a Motion for Reconsideration of the June 4, 2019 order. (RA 82). According to Avatar, the motion for relief from admissions was not noticed for hearing on June 4. Avatar explained that the Notice of Hearing had made it "clear that it would be heard that day, if and only if, the trial went forward on the scheduled date." (second emphasis in the original). Because "the Court did not require Avatar, or its counsel, to appear on June 4, 2019, for trial . . . there would be no hearing on the Motion for Relief." (RA 83).

"To make matters worse, the Court took up and ruled upon Avatar's 'Motion to Continue Trial' even though it was not even conditionally set for hearing, and,

without Avatar, or its counsel, being present." Avatar alleged that "the substance of the case was discussed without Avatar's knowledge or consent, *ex parte*." This bare allegation was not supported by any item in the record. And, "To make matters even worse, Avatar has been made aware of this Court's apparent distaste for insurance companies." This allegation was similarly devoid of support in the record in this case, instead relying on a published opinion in another case. (RA 83 (citing *Great Am. Ins. Co. of New York v. 2000 Island Blvd. Condo Ass'n, Inc.*, 153 So. 3d 384, 385 (Fla. 3d DCA 2014))).

Avatar also filed a "Motion for Judicial Disqualification," demanding that the circuit court "timely enter an order of disqualification, and proceed no further." (RA 139). Avatar stated that "On June 4, 2019, the Court engaged in *ex-parte* communication with Plaintiffs' lawyer about the subject matter of the litigation without the consent of Avatar. In fact, not only did the Court have *ex-parte* communications with Plaintiffs' lawyer about the subject matter of the litigation, it ruled on multiple motions filed by Avatar." Avatar again presented no evidence or precise allegations regarding the conduct of the hearing.

According to Avatar "Little more needs to be said. . . the law is well-established that a motion for judicial disqualification based on *ex-parte* communications, in and of itself, is legally sufficient." (RA 103).

The *ex parte* contact was not the only reason Avatar purportedly feared that Judge Miller could not fairly judge the case. "Avatar [had] learned another disturbing fact" regarding Judge Miller himself. Specifically, in 2014, this Court had reversed an order denying an insurance company's motion to disqualify him, commenting on the judge's "palpable distrust" and "contemptuous" view of counsel's "willingness to accept judicial pronouncements." (RA 105 (citing *Great Am. Ins. Co. of New York*, 153 So. 3d at 585)). "Now, knowing the events discussed above . . . Avatar does not believe that it will be treated fairly and impartially in this Court." (RA 106/A. 144).

Judge Miller denied the motion for disqualification. Avatar then filed the Petition for a Writ of Prohibition that is currently before the Court.

LEGAL STANDARDS

Every lawyer has a right to "ensure that the proceedings against their clients are presided over by a neutral and fair tribunal." *Nudel v. Flagstar Bank*, 52 So. 3d 692, 695 (Fla. 4th DCA 2010). Canon 3(B)(5) of Florida's Code of Judicial Conduct provides that judges must "perform judicial duties without bias or prejudice." When a judge's "impartiality might reasonably be questioned," a judge should withdraw. *Livingston v. State*, 441 So. 2d 1083, 1087 (1983).

But even though a movant must swear to their existence, a party's subjective fears of bias are not grounds for disqualifying a judge. *Randolph v. State*, 853 So. 2d 1051, 1064 (Fla. 2003). The complaining party must allege facts that would "place a reasonably prudent person in fear of not receiving a fair and impartial trial." *Livingston*, 441 So. 2d at 1087. Withdrawal is only appropriate when circumstances are "reasonably sufficient to justify a well-founded fear of prejudice." *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986).

Appearances count. When a party claims that a judge is biased and must withdraw, courts consider the claims with an eye toward objective notions of fairness, "to ensure public confidence in the integrity of the judicial system." *5-H Corp. v. Padovano*, 708 So. 2d 244, 247 (Fla. 1997); *see also* Fla. Code Jud. Conduct, Canon 2 (addressing "appearance of impropriety" as well as actual

propriety) and Canon 3(b)(5)(extending prohibition on actual bias to "words or conduct" that manifest bias or prejudice).

The prohibition against *ex parte* contact is an important part of maintaining the appearance of impartiality. "Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties." *Rose v. State*, 601 So. 2d 1181, 1183 (Fla. 1992) (emphasis added). But "[a]n ex-parte communication by a judge is not, per se, a ground for disqualification as a matter of law." *Nassetta v. Kaplan*, 557 So. 2d 919, 921 (Fla. 4th DCA 1990) (cited with favor in *Patton v. State*, 784 So. 2d 380, 391 (Fla. 2000)). To be legally sufficient, "A motion asserting an ex parte communication as grounds for disqualifying a judge must allege the communication with specificity and must demonstrate prejudice." *R.J. Reynolds Tobacco Co. v. Alonso*, 268 So. 3d 151 (Fla. 4th DCA 2019). Avatar fails to meet this burden, preferring to travel under innuendos rather than facts.

Petitioner does not cite to, and Respondent has not discovered, any cases holding that impermissible *ex parte* contact occurred when a party failed to attend a hearing noticed by the complaining party using a "conditional notice of hearing."

In deciding whether to grant a motion for prohibition, courts should also keep in mind the potential for misuse of the procedures that govern inquiries into judicial bias. Here, there is a unique need 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 proceedings." *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983) (explaining that requiring withdrawal of district court judge who initiated a bar complaint against counsel in another case would create a tool for "underhanded 'judge shopping' and 'forum shopping). "A lawyer cannot disagree with the court and deliberately provoke an incident rendering the court disqualified to proceed further." *State ex rel. Fuente v. Himes*, 36 So. 2d 433 (Fla. 1948).

ARGUMENT

This Court is called to decide whether Judge Miller's conduct in this case gives rise to an appearance of bias.

To Avatar, it apparently appears a rogue court in Miami is lawlessly deciding motions *ex parte* at unscheduled hearings. To the Klugermans, on the other hand, it looks like Avatar got exactly what was coming to it. It ignored discovery deadlines for more than six months, disregarded the order setting trial, and now argues that no hearing should have occurred because it was for court staff and opposing counsel to figure out whether its notice of hearing actually noticed a hearing.

In determining whether disqualification is warranted, Courts are not bound to ignore the moving party's role in creating the situation.[4] *See*, *e.g.*, *Cooper Tire & Rubber Co. v. Rodriguez*, 997 So. 2d 1124, 1125-26 (Fla. 3d DCA 2008) (explaining that "Cooper Tire could and should have" taken steps to resolve inconvenience created by entry of order granting *ex parte* request to move hearing). Parties who willfully complicate scheduling matters can make *ex parte* contact difficult to avoid. *Nudel v. Flagstar Bank*, 52 So. 3d 692, 693-94 (Fla. 4th DCA 2010) (describing

[4] In another writ of prohibition case, the largest insurance defense firm in Florida sought to disqualify Judge Miller from 38 cases after a newly-minted partner ran against him in a primary. Here, as there, the Klugermans believe that the "entire basis for the motion was created by the moving party." *Lawyers Debate Cole Scott's Move to Throw Judge David Miller Off Cases*, Fla. Bus. Rev. (Online) April 23, 2018. (RA 110).

permissible instances of ex-parte contact caused where one party refused to use uniform motion calendar, claiming that ten minutes would not suffice for any of its motions). To rule in Avatar's favor here would be to invite further abuse, while to rule for the Klugermans would ensure that those who endeavor to lay cunning traps continue to do so at their own peril.

The cases Avatar cites do not apply here. In one, a trial judge "sent the Attorney General's Office a twenty-one paragraph email containing various arguments 'intended to assist you in rebutting entitlement to a stay'" in a pending case. *Masten v. State*, 159 So. 3d 996, 997 (Fla. 3d DCA 2015). Another case, cited three times, is bereft of any detail on the "ex parte hearing on the motion seeking leave to communicate with current employees of the corporate petitioners" filed in a false claims act case. *Caremark Rx, Inc. v. State ex rel. Crist*, 902 So. 2d 276, 276 (Fla. 1st DCA 2005).

Avatar cites *Rose v. State*, 601 So. 2d 1181, 1183 (Fla. 1992), for the proposition that "The impartiality of a trial judge must be beyond question." (Petition at 12). But in that death penalty case, the trial judge had summarily denied a Rule 3.850 motion pursuant to the state attorney's *ex parte* proposed order even though the state's answer conceded that an evidentiary hearing was required. 601 So. 2d at 1182. It was in that context the *Rose* court observed that "The most

insidious result of *ex parte* communications is their effect on the appearance of the impartiality of the tribunal." *Id.* at 1183.

Avatar draws directly on *Wade v. Wade*, 123 So. 2d 697, 698 (Fla. 3d DCA 2013) to argue that "the lower tribunal 'denied [Avatar] a most basic right of due process and reasonably caused [Avatar] to fear that [it] would not receive a fair and impartial hearing." (Petition, at 12). In *Wade*, the trial judge suspended the mother's timesharing at an emergency hearing, while the father was conducting direct examination of the parenting coordinator, before the mother could cross-examine. 123 So. 2d at 697-98. The trial judge also ordered the mother undergo a psychological evaluation, and denied her any opportunity to present testimony from her own psychiatrist, who was present. *Wade*'s inapplicability is clear when the quoted portion is cited in context and without alteration:

> By announcing its ruling, adopting one of the recommendations of the Father's witness before the Mother was afforded an opportunity to cross-examine the witness or present any evidence on the issue, and by ordering a psychological evaluation of the Mother, again without giving the Mother an opportunity to present evidence, the trial judge denied the Mother a most basic right of due process and reasonably caused her to fear that she would not receive a fair and impartial hearing.

Id. at 698. And in *State ex rel. Davis v. Parks*, 141 Fla. 516, 518, 194 So. 613, 614 (1939), the judge had "admitted prejudice against relator's counsel" in the course of previous prohibition proceedings. Obviously "the cold neutrality of an impartial

judge" is suspect when the judge admits bias against a party's attorney. (Petition at 13).

Avatar also contends that "The motion to dismiss [sic] was a substantive matter, not one within the exception" for purely administrative matters. (Petition at 10 (discussing Canon 3(B)(7)(a), Fla. Code Jud. Conduct)). No motion to dismiss is at issue here. Moreover, it appears that the exception does not apply because "the right to be heard according to law" has been afforded to a party who sets and then disregards a hearing. Such a party has not had any matter decided without fair notice. *Rose*, 601 So. 2d at 1183. Nevertheless, to the extent that anything that happened at the June 4, 2019 hearing, can truly be considered *ex parte*, the Klugermans ask the Court to apply the administrative exception, because the matters were merely a motion to continue the trial and a motion set for hearing by the party who did not appear.

Avatar has presented the Court with no basis to agree that "the trial court and Plaintiffs counsel necessarily discussed" the merits of the motions. (Petition at 8). Indeed, Judge Miller's order explains that the motion for relief from admissions was instead denied because Avatar was "not present in court room by 8:45 a.m." for the 8:00 am hearing. (RA 81). Especially with trial looming June 10, 2019, the Court committed no error by denying Avatar's motion for failing to appear at a hearing it set.

Obviously, a transcript would aid the Court's review. No transcript is available. The Klugermans ask the Court to hold Avatar responsible for the lack of any transcript, because it assumed responsibility for securing the services of a court reporter in its Notice of Hearing. (RA 71 (representing that "The undersigned attorney will be securing the services of a court reporter")).

This is not to imply that *ex parte* contact is permissible so long as a transcript is created. The Klugermans agree with Avatar's not-relevant-here observation that "The Canon of Judicial Conduct contains no exception for *ex parte* communications made in the presence of a court reporter who transcribes the communication." (Petition at 10). Avatar's extraneous observation nevertheless makes a fair point to transition into discussion of another recent Writ of Prohibition case featuring counsel for Avatar arguing that "ex parte" communications occurred when it failed to attend a scheduled hearing. *Praca v. Safepoint*, No. 2018-13490-CA and 3D18-2348; *see Nudel*, 52 So. 3d at 695 (remarking on "repetitive attempts at disqualification" and drawing inference that counsel's purpose was to achieve a strategic advantage and/or frustrate the efficient function" of the judiciary). In *Praca*, where there was a transcript, this Court denied counsel's petition.

In the *Praca* case, a hearing was set for October 10, 2018 on three motions. The hearing had been set nearly a month before, on September 12, 2018. Nevertheless, only two days before the hearing, SafePoint filed a motion to cancel

the hearing on October 8, 2018. Counsel now argued that the hearing had been set "unilaterally" without "making a reasonable effort to confer with opposing counsel." (RA 116) He argued that "Plaintiff's lawyer is no novice. She knows exactly what she is doing. Plaintiffs' lawyer knows that SafePoint's attorney would have to travel from Tampa, Florida, a drive of at least 9 hours both ways, to attend any hearing." (RA 117).

Moreover, the motions were too complex to be scheduled through the Court's Uniform Motions Calendar, which was "not for complex and disputed issues going to the very core of the case." Appearing telephonically was "not an option, because, such would place SafePoint at an extreme disadvantage" in litigating the motion for protective order, motion to advance trial, and/or motion for a status conference. And anyway, counsel was in depositions on October 10, 2018, and could not attend a hearing. (RA 117).

When the time came for the scheduled hearing, as SafePoint explained in its motion to disqualify the judge, "SafePoint's attorneys honored their previous commitments. They did not fathom that Plaintiffs' lawyer would actually proceed with the hearing . . . . SafePoint and its attorneys most certainly did not expect the Court to allow an *ex-parte* hearing to occur." (RA 124). But, to SafePoint's disappointment, "that is exactly what transpired." Disqualification was warranted

"based on the Court having *ex-parte* communications with Plaintiffs' lawyer, hearing a motion *ex-parte*, and, making a ruling *ex parte.*"

In that case, as here, counsel for Avatar felt that "Little more needs to be said . . . the law is well-established that a motion for judicial disqualification, in and of itself, is legally sufficient, and disqualification is mandated." (RA 126). However, SafePoint did not prevail in this Court in the *Praca* case.

Also here as in *Praca* counsel emphasized that when a writ of prohibition is filed, the trial court "cannot dispute the allegations of the motion, add 'facts,' clarify any point, or, do anything, at all, to address the allegations." (RA 128; compare Petition at 11). Fortunately, the record in this case defends Judge Miller more effectively than his own words ever could. There is no indication of unfairness or bias, or of any action inconsistent with the Court's admonishment to be "more learned than witty," and to beware the appearance of impropriety that can arise when "an overspeaking judge" presides. *Great American Ins. Co.*, 153 So. 3d at 390.

Because Avatar does not show that a reasonable person would fear bias on Judge Miller's part, the Court should deny the petition for writ of prohibition.

CONCLUSION

The law favors decisions on merits, but not at any cost. Judges must ensure that litigants observe some basic level of respect for both the court and for other counsel. After months of failing to respond to discovery requests, Avatar missed the final deadline to respond, and also filed a series of belated discovery requests. Avatar filed a motion for relief from admissions, set it for hearing, did not cancel the hearing, and then did not show up. It is appropriate that consequences follow, notwithstanding Avatar's argument that the notice of hearing did not actually notice a hearing.

"[I]n the end, 'a judge must be permitted to judge.'" *Fetzner v. State*, 219 So. 3d 834, 838 (Fla. 4th DCA 2017). The Klugermans ask the Court to rule that the end has come, and that Judge Miller will be permitted to judge.

Respectfully submitted,

/s/ Gray Proctor

Thomas J. Morgan Jr., Esq.
MORGAN LAW GROUP, P.A.
Florida Bar No. 127612
55 Merrick Way, Suite 404
Coral Gables, FL 33134
Ph: (305) 569-9900
Email: mlg.eservice@yahoo.com
tmorgan@morganlawgroup.net

Gray Proctor, Esq.
LAW OFFICE OF GRAY PROCTOR
Florida Bar No. 48192
1108 East Main Street, Suite 803
Richmond, VA 23225
Ph: (888) 788-4280
Email: gray@allappeals.com

Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, via email through the efiling portal, this 17th day of June, 2019 to Curt Allen and Brian Hohman, of Butler Weihmuller Katz Craig LLP, 400 North Ashley Drive, Suite 2300, Tampa, FL 33602, at:

callen@butler.legal
bhohman@butler.legal
kwhite@butler.legal

and to

The Honorable David C. Miller, Dade County Courthouse, 73 West Flagler Street, Room 525, at Miami, Florida 33130-1731

/s/Gray R. Proctor
Attorney

CERTIFICATE OF TYPEFACE COMPLIANCE

I further certify that this brief is typed in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Gray R. Proctor
Attorney