IN THE SUPREME COURT OF FLORIDA

DAVID BIVENS,
Appellant,

v.

CASE NO.: SC08-2322
Lower Tribunal No.: 1D07-5688

CITY OF LAKELAND and
CLAIMS CENTER,

Appellees.
_____/

Petition for All Writs Relief, Or Alternatively, For Leave To File Writ Of Coram Nobis In The District Court

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BASIS FOR INVOKING THE COURT'S JURISDICTION

Petitioner, David Bivens, invokes this Court's original jurisdiction to issue "writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction", as provided in Article 5, Section 3(b)(7), of the Constitution of the State of Florida, and Florida Rule of Appellate Procedure 9.030(a)(3). *See* Art. V, §3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(3). In conjunction therewith, Petitioner invokes this Court's jurisdiction as the final arbiter of the due process requirements of the Florida Constitution. *See* Art. I, §9, Fla. Const.

STATEMENT OF THE CASE AND FACTS

A. Background.

The instant petition is directed to Judge Paul Hawkes and Judge James Wolf, First District Court of Appeal, State of Florida. Judge Hawkes and Judge Wolf are parties to this petition. *See* Fla. R. App. P. 9.100(e)(2)

Petitioner is a Firefighter who has worked for the City of Lakeland (hereinafter Respondent) for more than twenty (20) years. (V1, 14)(V6, 1252-3). In 2005, Petitioner was diagnosed with hypertension and a form of heart disease known as microvascular angina (MVA). (B1V1, 163)(B1V2, 209). On April 27, 2005, Petitioner experienced a disabling event related to his hypertension including elevated blood pressure, chest pains, shortness of breath, and severe headaches.

(V7, 1209).[1] Petitioner brought a claim for compensability for his hypertension to the Judge of Compensation Claims (JCC) pursuant to §112.18, Florida Statutes. (BIV3, 459-469).

Section 112.18, Florida Statutes, creates a presumption for firefighters and law enforcement officers that hypertension, heart disease, and tuberculosis are work-related. *See* §112.18, Fla. Stat.[2] Petitioner sought compensability of both his

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[1] The type of hypertension Petitioner was diagnosed with is referred to as "essential" or "primary" hypertension, meaning the hypertension is of an unknown etiology or cause. (V1, 75); (V2, 305-7, 341). By definition, essential or primary hypertension is systemic arterial hypertension. (B1V2, 331). Meaning, when somebody has essential hypertension the systemic arteries (i.e. the arteries that travel from the heart to supply blood to the body) are elevated in pressure. (B1V2, 331). Most cases of hypertension, possibly ninety-nine percent (99%) of cases, are cases of essential hypertension. (V2, 305). All hypertension as we commonly know it is arterial and cardiovascular in nature, in that it refers to elevated blood pressures in the arteries and its effect on the cardiovascular system. (V1, 64-66); (V2, 305-7). **The record is undisputed that the instant Claimant's hypertension is both arterial and cardiovascular in nature**. (V2, 330); (BIV1, 157); (BIV2, 331-332); (V1, 64-66); (V2, 305).

[2] When the cause for the hypertension is known, it is referred to as "secondary" hypertension. (V1, 75). Section 112.18, Florida Statutes, does not distinguish essential hypertension from secondary hypertension. *Id.* Instead, § 112.18, Florida Statutes, provides that "hypertension", generally, is covered. *Id.* To be entitled to the statutory presumption of compensability of §112.18, Florida Statutes, a claimant must satisfy the following four (4) elements:

1. The claimant is a firefighter, law enforcement or corrections officer;
2. The claimant successfully passed a physical examination upon entering into "any such service" as a firefighter or law enforcement officer;
3. The claimant suffers from a covered condition: hypertension, heart disease, or tuberculosis; and,
4. That the condition suffered has resulted in total or partial disability or death.

hypertension and MVA. (V6-7, 1196-1213). Petitioner also sought impairment benefits for his conditions under Section 440.15(3), Florida Statutes, based upon a 30% rating for hypertension and a 10% rating for MVA. (BIV1, 61-70).[3]

There is no dispute in the medical testimony that Petitioner's hypertension is arterial or cardiovascular in nature. (BIV2, 200-355). Thus, the EMA was not specifically asked to address that point. (BIV2, 200-355). Nonetheless, the EMA testified that the Claimant's hypertension is "a cardiovascular disease." (V2, 330)(BIV1, 157) (emphasis added). In fact, Respondent's own IME testified that the Claimant suffers from "systemic arterial hypertension." (BIV2, 331-332) (emphasis added). The uncontroverted evidence in the record is that Petitioner's essential hypertension was both cardiovascular (B1V1, 157) and arterial (BIV2, 331-2) in nature.

The JCC in its final order held that: (1) Petitioner's hypertension is not covered under §112.18, Fla. Stat.; and (2) Petitioner's MVA is covered under

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§112.18, Fla. Stat.; (V1, 21). Once a claimant establishes these four (4) elements, his condition is considered work-related by operation of law, and the burden shifts to the employer/carrier to prove it is not work related. *See* §112.18, Fla. Stat.; *Caldwell v. Division of Retirement*, 372 So. 2d 438, 441 (Fla. 1979).

[3] During the course of JCC proceedings a conflict ensued in the Parties' expert medical testimony regarding (1) Petitioner's impairment rating and (2) whether Petitioner suffered from MVA. (BIV8, 1443-1446, 1490-3). The JCC appointed an Expert Medical Advisor (EMA) to settle the conflict. (BIV8, 1443-1446, 1490-3). The EMA ultimately agreed with Petitioner's Independent Medical Expert (IME) and assigned a 30% rating for hypertension. (V2, 341).

§112.18, Fla. Stat. (V7, 1209-13). The JCC specifically determined the medical evidence established Petitioner suffers from "essential hypertension": a "systemic arterial hypertension." (V7, 1210); (V4, 459-69) (emphasis added).

B. The District Court Opinion And Mandate.

Both Parties appealed parts of the JCC's final order to the First District Court of Appeal (hereinafter District Court). (V10, 1516-1534). Petitioner appealed the JCC's finding that his essential hypertension is not compensable. *Bivens v. City of Lakeland*, 993 So. 2d 1100 (Fla. 1st DCA 2008); (V10, 1516-1534). Respondent cross-appealed the JCC's finding that Petitioner's MVA is compensable. *Id.* (V10, 1516-1534). On October 2, 2008, the District Court rendered its opinion, cited at *Bivens v. City of Lakeland*, 993 So. 2d 1100 (Fla. 1st DCA 2008) (hereinafter Opinion). The Opinion (1) reversed the JCC's finding that Petitioner's MVA was compensable, and (2) affirmed the JCC's finding that Petitioner's essential hypertension is not compensable. *Id.*[4]

Importantly, in affirming the JCC's finding that Petitioner's essential hypertension is not compensable under §112.18, Fla. Stat., the District Court held "there is no record evidence that the JCC could rely on demonstrating essential hypertension is arterial or cardiovascular in nature." *Id.* at 1102. In fact, the

[4] On November 25, 2008, the District Court issued its mandate in the underlying appeal (hereinafter Mandate).

record is undisputed that the instant Claimant's hypertension is both arterial and cardiovascular in nature. (V2, 330); (BIV1, 157); (BIV2, 331-332); (V1, 64-66); (V2, 305). However, because the District Court held Petitioner's hypertension is not a covered condition it did not address whether Petitioner's hypertension is disabling. *Id.*

Petitioner attempted to move for rehearing on the basis that the District Court overlooked, ignored, or disregarded facts in the record, specifically, the plain and uncontroverted record evidence demonstrating that Petitioner's essential hypertension is both cardiovascular (B1V1, 157) and arterial (BIV2, 331-2) in nature. It appears that the District Court did not consider Petitioner's rehearing motion. Instead, the District Court denied a series of routine procedural motions related to Petitioner's motion for rehearing, including Petitioner's motion to accept the motion for rehearing as timely filed.[5]

Petitioner subsequently sought review in this Court based on the theory that the District Court had, implicitly, declared §112.18, Fla. Stat., invalid by finding, inter alia, that Petitioner's hypertension is not a covered condition, a finding in stark contrast to the plain and unambiguous text of §112.18, Fla. Stat. (SCIB, 9-25). *Id.* This Court initially appeared inclined to accept the case for review and

[5] It is worth noting that the motion to accept the rehearing as timely filed was denied even though the time for service of the motion for rehearing was tolled due a pending motion for extension under Rule 9.300(b), Fla. R. App. P.

scheduled oral argument. *See Bivens v. City of Lakeland*, 14 So.3d 241 (Fla. 2009). However, the Court ultimately declined jurisdiction. *Id.*

C. Recusal Proceedings.[6]

On October 20, 2010, based on facts first exposed in September, 2010, Petitioner moved to recuse Judge Hawkes and Judge Wolf for de novo review by the District Court of the underlying appeal with a new panel of judges. On September 23, 2010 *The St. Petersburg Times* first broke the story of the intimate political relationship between Judge Hawkes and Respondent's (Below-Appellee's) counsel, State Representative Dennis Ross, in the funding of Judge Hawkes' pet project, the new District Court courthouse, and specifically, the workers' compensation division in the District Court courthouse.

Well known in most legal circles and by much of the local public by now, *The St. Petersburg Times* reported that in April, 2008 Judge Hawkes circulated an e-mail amongst District Court Judges (1) lionizing Respondent's (Below-Appellant's) counsel as a "hero" for helping to secure funding for the new District Court courthouse, and (2) asking the other District Court Judges to express their gratitude and personally thank Respondent's (Below-Appellant's) counsel for his

[6] Many of the facts contained in this section are matters of public record and/or have been reported in published news reports, which are cited herein.

efforts.[7] In April, 2008 the underlying appeal was pending. Rep. Ross served as lead counsel of record for Respondents (Below-Appellees) in the underlying appeal. Neither Judge Hawkes nor Respondent's (Below-Appellant's) counsel

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[7] *See* The St. Petersburg Times, September 23, 2010, Lucy Morgan, *E-mail names 'heroes' who got legislative funding for 'Taj Mahal' courthouse*, available via the World Wide Web at http://www.tampabay.com/news/politics/e-mail-names-heroes-who-got-legislative-funding-for-taj-mahal-courthouse/1123335. ("The $48 million courthouse for the 1st District Court of Appeal has been panned for its opulence at a time when money is tight. Plans initially called for each judge to get a 60-inch flat-screen TV in his or her mahogany-paneled chambers, and for each judge to get a private bathroom and kitchen, with granite countertops. Some extras were scrapped after the negative publicity. Recent news stories told how money to build the 'Taj Mahal' courthouse was slipped through as an amendment to an unrelated, 142-page transportation bill on the last day of the 2007 legislative session. Lawmakers were quick to condemn the over-the-top features and the legislative process that funded them, which is why lawmakers who generally can't get enough of being treated as heroes want no part of the 'heroes' e-mail. 'I certainly don't want to take any credit for it,' Rep. Will Weatherford, R-Wesley Chapel, said of making the list. The courthouse is 'a disaster, a monstrosity. I doubt that people in the Legislature had any idea what they were doing.' ... Dated April 29, 2008, the e-mail exchanged by judges on the building committee and court staffers encouraged them to personally thank those who helped secure the funding. It listed seven House members, five senators, three lobbyists, six Senate and 10 House staffers, and then-Florida State University president T.K. Wetherell. ... [L]awmakers named 'heroes' [by Judge Hawkes include] ... Rep. Dennis Ross, R-Lakeland ..."). *See* The St. Petersburg Times, October 10, 2010, Lucy Morgan, *In 'Taj Mahal' tale, questions raised in judicial ruling*, available via the World Wide Web at http://www.tampabay.com/news/politics/article1126982.ece. ("The [*The St. Petersburg*] *Times* recently published a list of legislators the 1st District Court called 'heroes' for helping it get the money to build the new courthouse. One name jumped off the page to litigants and lawyers involved in workers' compensation cases: Rep. Dennis Ross. ... Ross is an insurance lawyer who specializes in defending workers' comp cases. [Ross] ... said he helped the 1st District Court get extra money to create a workers' compensation staff to help with cases.") (emphasis added).

disclosed their political relationship, or Respondent's (Below-Appellant's) counsel's relationship with the District Court, during the entirety of the underlying appeal.

On August 19, 2008, mere months after the Judge Hawkes/Rep. Ross "hero" e-mail was circulated, the District Court entertained oral argument in the underlying appeal. Rep. Ross argued the case for Respondents. The District Court ultimately held in favor of Rep. Ross' client on all issues on appeal.

On October 20, 2010, less than one (1) month after the *The St. Petersburg Times* story first broke, Petitioner moved to recuse Judge Hawkes based on Judge Hawkes' relationship with Respondent's (Below-Appellant's) counsel. Petitioner argued that to any reasonably prudent person, the appearance here of impropriety, partiality, and bias by Judge Hawkes in favor of Respondent based on Judge Hawkes' relationship with Respondent's counsel would be glaring. Judge Hawkes sent his April, 2008 email lionizing Respondent's (Below-Appellant's) counsel as a "hero" to Judge Wolf. For that reason Appellant requested Judge Wolf to recuse himself as well.

On November 16, 2010, Judge Hawkes denied the portion of Petitioner's recusal motion directed to him. On November 29, 2010, Judge Wolf denied the portion of Petitioner's recusal motion directed to him.

This petition follows.

STATEMENT OF THE NATURE OF THE RELIEF SOUGHT

Petitioner asks this Court to vacate the Opinion and Mandate, and on remand to appoint appellate judges from a Court of Appeal other than the First District to review the underlying appeal de novo. Alternatively, Petitioner asks this Court for leave to file in the District Court a petition for writ of error coram nobis for de novo review by appellate judges appointed from a Court of Appeal other than the First District, with instructions that in the event the alleged facts in the petition are proven true the writ shall issue.

ARGUMENT

I. This Court Has Jurisdiction Over This Petition.

Petitioner invokes this Court's constitutional authority to issue "all writs necessary to the complete exercise of its jurisdiction." *See* Art. V, §3(b)(3), Fla. Const. This Court has expressly recognized its "power to issue all writs necessary to the complete exercise of its jurisdiction." *City of Tallahassee v. Mann,* 411 So.2d 162, 163 (Fla. 1981). While the all writs provision is not an independent basis for the Court's jurisdiction (*see Roberts v. Brown*, 43 So. 3d 673, 677 (Fla. 2010)), it does function "as an aid to the Court in exercising its 'ultimate jurisdiction,' conferred elsewhere in the constitution." *Williams v. State*, 913 So. 2d 541, 543 (Fla. 2005) (citing *Florida Senate v. Graham*, 412 So. 2d 360, 361 (Fla. 1982)).

Two (2) separate bases exist here for the Court to exercise jurisdiction. First, pursuant to settled precedent this Court has jurisdiction to issue a writ of prohibition to the District Court based on Judge Hawkes' and Judge Wolf's denial of Petitioner's recusal motion. *See* Art. V, §3(b)(3), Fla. Const.

In *5-H Corp. v. Padovano*, 708 So. 2d 244 (Fla.1997) this Court held that an appellate judge's denial of a recusal motion is reviewable by this Court by petition for writ of prohibition. *Id.*; *see also Sutton v. State*, 975 So. 2d 1073, 1076-1077 (Fla. 2008) ("Once a basis for disqualification has been established, prohibition is both an appropriate and necessary remedy.") (citing *Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978)). "[T]his Court adheres to the doctrine of stare decisis." *Dorsey v. State*, 868 So. 2d 1192, 1199 (Fla. 2003). Pursuant to the rule established in *5-H Corp.*, supra, this Court has jurisdiction to issue a writ of prohibition to the District Court based on Judge Hawkes' and Judge Wolf's denial of Petitioner's recusal motion. *Id.*; *see also Sutton*, supra, at 1076-1077.[8]

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[8] In *Sutton*, supra, this Court held, in the context of a denial of a recusal motion, that a writ of prohibition does not only act preventively and is the proper avenue to review the denial. *Id.* at 1076-1078. Thus, for instance, the fact that in *5-H Corp.*, supra, the underlying appeal was still pending, while here the underlying appeal is not pending (due only to the fact that Petitioner was not and could not reasonably have been aware of the facts warranting prohibition until September, 2010), is of no moment to this Court's jurisdiction or analysis. *See* Art. V, §3(b)(3), Fla. Const.; *Sutton*, supra, at 1077-1078 ("As the petitioners correctly argue, a petition for writ of prohibition is technically sought to prevent the judge from proceeding further in the action, rather than to correct legal error, due to its status as an original proceeding. ... Although this distinction is correct in a formalistic sense,

Second, this Court has jurisdiction because Judge Hawkes' and Judge Wolf's denial of Petitioner's recusal motion violates the due process requirements of the Florida Constitution. *See* Art. I, §9, Fla. Const. It is hornbook constitutional law that this Court is "the final arbiter of questions arising under the Florida Constitution." *In re Advisory Opinion to the Governor*, 509 So. 2d 292, 302 (Fla. 1987). Judge Hawkes and Judge Wolf have, or to a reasonably prudent person would appear to have, a personal bias concerning Respondent's (Below-Appellant's) counsel. *See* Canon 3 E(1)(a) of the Florida Code of Judicial Conduct ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including ... where the judge has a personal bias or prejudice concerning a party or a party's lawyer.") (emphasis added). Under the present facts, particularly the facts disclosed in September, 2010 by the *The St. Petersburg Times*, a reasonably prudent person in Petitioner's position would fear not receiving a fair and impartial trial from Judge Hawkes and Judge Wolf. Therefore, Judge Hawkes and Judge Wolf were required to recuse themselves to afford Petitioner a fair trial in a fair tribunal. *Id.*

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from a functional perspective, this writ provides the opportunity for review of the allegedly erroneous action of the lower court. Thus, although the mechanics may differ ... review by direct appeal ... and discretionary review by petition for writ of prohibition may operate in functionally the same manner if review is accepted.") (internal citation omitted). There is no requirement in the Florida Rules of Appellate Procedure that a petition for writ of prohibition be filed within a certain time period of the order to be reviewed. *See* Fla. R. App. P. 9.100(e).

In any due process analysis, "[i]t is axiomatic that 'a fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2259 (2009) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). "Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (citing *In re Murchison*, supra, at 136). The United States Supreme Court in discussing the Federal Constitution's due process requirement in the context of a disqualification motion has held that actual bias is not a requirement. *See* U.S. Const., Am. XIV. "Due process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Caperton*, supra, at 2265 (citing *In re Murchison*, supra, at 136).

Similarly, this Court has repeatedly held that in determining whether a recusal motion is legally sufficient "a determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1334-1335 (Fla. 1990) (citing *Livingston v. State*, 441 So. 2d 1083, 1087 (Fla.1983)). Justice England in a self-disqualification order in this Court reasoned:

> I believe it essential that judges contemplate the appearance of partiality at every turn. The acceptance of court-made justice delivered by imperfect humans relies heavily for its existence on the respect of the citizenry for

> those who dispense it. In order for the courts to remain as a civilized alternative to less acceptable means of resolving disputes, the public in general, and parties and their counsel in particular, must be reassured regularly that causes brought to the judiciary are decided on the law alone.

Department of Revenue v. Golder, 322 So.2d 1, 1 (Fla. 1975) (England, J.).

In light of the facts and circumstances present here, Judge Hawkes' and Judge Wolf's presence as arbiters of the underlying appeal would, unquestionably, "place a reasonably prudent person in fear of not receiving a fair and impartial trial", and thus, the allegations set forth in Petitioner's recusal motion are legally sufficient at law. *MacKenzie*, supra, at 1334-1335; *Livingston*, supra, at 1087.

Therefore, this Court, as the final arbiter of questions arising under the Florida Constitution has jurisdiction to determine whether Judge Hawkes' and Judge Wolf's denial of Petitioner's recusal motion violates due process requirements. *See* Art. V, §3(b)(3), Fla. Const.; Art. I, §9, Fla. Const.

Alternatively, Petitioner petitions this Court for leave to file in the District Court a petition for writ of error coram nobis with instructions that in the event Petitioner proves the alleged errors of fact true then the writ shall issue and the Opinion and Mandate shall be reversed. This Court long ago settled that in Florida "[t]he writ of error coram nobis is applicable to both civil and criminal cases."

Lamb v. State, 107 So. 535, 538 (Fla. 1926).[9] The function of a writ of error coram nobis is to correct errors of fact. *State v. Woods*, 400 So. 2d 456, 457 (Fla. 1981). The frequently cited rule controlling writs of error coram nobis in this Court is as follows:

> The function of a writ of error coram nobis is to bring the attention of the court to a specific fact or facts then existing but not shown by the record and not known by the court or by the party or counsel at the trial, and being of such a vital nature that if known to the court in time would have prevented the rendition and entry of the judgment assailed.

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[9] Florida Statutes Section 2.01 codifies the Florida Legislature's adoption of the common law of England as it existed in 1776. *See* § 2.01, Fla. Stat.; *see also Florida Dept. of Health and Rehabilitative Services v. S.A.P*, 835 So. 2d 1091, 1007 n. 18 (Fla. 2002) ("The Florida Legislature's adoption of the common law as it existed prior to Florida's statehood is codified in section 2.01, Florida Statutes."). At common law in England, "a writ of error coram nobis issued from the Court of King's Bench to a judgment of that court." *Lamb*, supra, at 537. A writ of error coram nobis is both a common law and statutory right in civil cases in this State. *See* § 2.01, Fla. Stat. Florida Rule of Civil Procedure 1.540 abolishes writs of coram nobis in Circuit Court and County Court cases. *Id.*; *see also* Fla. R. Civ. P. 1.010 ("These rules apply to all actions of a civil nature ... in the circuit courts and county courts ..."). Florida Rule of Civil Procedure 1.540's abolishment of writs of coram nobis in Circuit Court and County Court cases has no impact on the instant proceedings because the Florida Rules of Civil Procedure do not apply here. *Id.* Instead, the Florida Rules of Appellate Procedure control. *See* Florida Rule of Judicial Administration 2.130 ("The Florida Rules of Appellate Procedure shall control all proceedings in the supreme court and the district courts ... notwithstanding any conflicting rules of procedure."). *Id.*; *see also* Fla. R. App. P. 9.010 ("These rules shall supersede all conflicting statutes and, as provided in Florida Rule of Judicial Administration 2.130, all conflicting rules of procedure."). *Id.* As the Florida Rules of Appellate Procedure have not abolished writs of error coram nobis this Court, until holding otherwise, remains free to issue such writs in civil cases. *See* § 2.01, Fla. Stat.; *Lamb*, supra, at 537; Fla. R. Jud. Admin. 2.130; Fla. R. App. P. 9.010.

Lamb, supra, at 538; *see also Woods*, supra, at 457 ("[T]o establish the sufficiency of an application for a writ of error coram nobis ... the alleged facts must be of such a vital nature that had they been known to the trial court, they conclusively would have prevented the entry of the judgment.").

Procedurally, this Court has found that an inferior court does not have jurisdiction to entertain a petition for writ of error coram nobis until a superior court grants a petitioner permission to seek such relief. *Woods*, supra, at 457. Before granting permission the superior court must determine whether the alleged facts if proven would warrant relief. *Id.* If permission is granted then the lower court only has authority to determine whether the alleged facts are true. *Id.* If the alleged facts are true the lower court has no discretion and must grant the writ of error coram nobis and set aside the underlying judgment. *Id.*

Based on the rule espoused by this Court in *Lamb*, supra, the Court should grant Petitioner leave to file a writ of error coram nobis in the District Court based on two grounds. First, the Court should grant Petitioner leave to file a writ of error coram nobis because the Opinion and Mandate are entered based on demonstrable errors of fact. (B1V1, 157) (BIV2, 331-2). The District Court in affirming the JCC's finding that the §112.18, Fla. Stat., presumption did not apply to Petitioner's essential hypertension held that "there is no record evidence that the JCC could rely on demonstrating essential hypertension is arterial or cardiovascular in

nature." *Bivens*, supra, at 1102. Contrary to that holding, the uncontroverted record evidence here shows that Petitioner's essential hypertension is both cardiovascular (B1V1, 157) and arterial (BIV2, 331-2) in nature.

Accordingly, the District Court overlooked, ignored, or disregarded unrefuted record evidence. (B1V1, 157) (BIV2, 331-2). In the event that the District Court would have properly recognized and digested the fact that Petitioner's essential hypertension is both cardiovascular and arterial in nature (which it is), then the sole reason the Opinion gave for finding Petitioner's essential hypertension non-compensable would have been disproven, and entry of the Opinion and Mandate on that ground would have, unquestionably, been prevented. (B1V1, 157) (BIV2, 331-2). *See Lamb*, supra, at 538.

Second, this Court should grant Petitioner leave to file a writ of error coram nobis in the District Court based on newly discovered evidence after entry of the Opinion and Mandate, specifically, the intimate political relationship between Judge Hawkes and Rep. Ross in the funding of the new District Court courthouse, a story first published in September, 2010. Until publication Petitioner was not aware of, and through the exercise of reasonable diligence could not have been aware of, the facts warranting recusal of Judge Hawkes and Judge Wolf (absent disclosure by those Judges). *Id.*

In the event this Court determines that it lacks jurisdiction over the instant petition then Petitioner respectfully requests that this petition be treated as a petition for writ of error coram nobis and transferred to the District Court for review. *See* Fla. R. App. P. 9.040(c) ("If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought ..."); Fla. R. App. P. 9.040(b)(1) ("If a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an appropriate court."). In the event the Court is inclined to take this approach, Petitioner further respectfully requests that the Court appoint members of a different Court of Appeal other than the First District Court of Appeal for determination. *See* Fla. R. Jud. Admin. 2.205(a)(4)(B); *see also Straley v. Frank*, 585 So. 2d 334 (Fla. 2d DCA 1991) (Fifth District Court of Appeal judges appointed by this Court to sit en banc as associate judges of the Second District Court of Appeal).

II. Judge Hawkes And Judge Wolf Have A Duty To Recuse Themselves From The Underlying Appeal, And Had An Affirmative Duty To Disclose Their Relationship To Opposing Counsel.

In *In re Estate of Carlton*, 378 So. 2d 1212 (Fla. 1979), this Court held that each appellate judge "must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances." *Id.* at 1216. While each appellate judge must himself determine a recusal motion directed to him, "[t]he legal sufficiency of the motion

is purely a question of law." *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1335 (Fla. 1990). Thus, where a legally sufficient claim is presented, an appellate judge does not have discretion to refuse to disqualify himself. *Id.* In determining whether a disqualification claim is legally sufficient, "a determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." *Id.* at 1334-1335 (citing *Livingston v. State*, 441 So. 2d 1083, 1086, 1087 (Fla.1983)).

A claim is legally sufficient, and an appellate judge does not have any discretion to refuse to disqualify himself, where recusal is required by Florida's Code of Judicial Conduct.[10] Here, Petitioner's recusal motion, which raises well-founded allegations that Judge Hawkes and Judge Wolf have a personal bias concerning Respondent's (Below-Appellant's) counsel, is legally sufficient as a matter of law. Specifically, Canon 3 E(1)(a) of the Florida Code of Judicial Conduct provides:

E. Disqualification.

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[10] *See, e.g., Stein v. State*, 995 So. 2d 329, 344 (Fla. 2008) ("Florida's Code of Judicial Conduct, Canon 3(E)(1), requires that a 'judge disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.'") (emphasis added); *Doorbal v. State*, 983 So. 2d 464, 501 (Fla. 2008) ("Canon 2 of the Code of Judicial Conduct requires a judge to 'act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,'" ...") (emphasis added); *Inquiry Concerning Miller*, 644 So.2d 75, 79 (Fla. 1994) (Overton, J., dissenting) ("The requirement in Canon 3 of the Code of Judicial Conduct that a 'judge should perform the duties of his office impartially' is basic to our system of justice.").

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer.

Id. (emphasis added).

Petitioner's recusal motion alleges conduct of Judge Hawkes, and to a lesser extent Judge Wolf, that if proven true constitute grounds for disqualification within the purview of Canon 3 E(1)(a) of Florida's Code of Judicial Conduct. *Id.* Accordingly, the facts alleged in Petitioner's recusal motion as grounds for disqualification are sufficient as a matter of law. *Id.*; *MacKenzie*, supra, at 1335. This is a textbook situation "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton*, supra, at 2259 (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).[11]

Certainly, a reasonably prudent person would fear that he would not receive a fair and impartial trial from a judge who, while the person's trial was pending, sought to curry favor from the person's opposing counsel because the opposing counsel was a state legislature who could help to secure tens of millions of dollars

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[11] In *Caperton*, supra, the United States Supreme Court discussed multiple instances in which recusal has been required because a judge has had an improper financial interest in a case, even where the judge did not benefit directly. *Id.* at 2259-2261 (citing *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Monroeville,* 409 U.S. 57 (1972)).

($46.9 million to be precise) for a project aggressively lobbied for by the judge. *Id.* Where the judge lionized the person's opposing counsel as a "hero" in an email circulated to at least one other judge sitting on the person's case while the case was pending. *Id.* Such fear would be particularly warranted if the judge never disclosed these facts to the person. *Id.*

Additionally, Judge Hawkes and Judge Wolf, prior to rendering the Opinion and Mandate, had a clear affirmative duty to disclose Respondent's counsel's role in securing funding for the District Court courthouse to Petitioner. In *In re Frank* 753 So. 2d 1228 (Fla. 2000) this Court held that different standards govern disqualification and disclosure. *Id.* at 1238-1239. Specifically, "the standard for disclosure is lower ... [A] judge should disclose information in circumstances even where disqualification may not be required." *Id.* at 1239.

Disclosure was clearly required in this case. "A judge should disclose on the record information ... relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." Commentary to Canon 3 E(1) of the Florida Code of Judicial Conduct. In the context of disclosure, "Judges must do all that is reasonably necessary to minimize the appearance of impropriety." *In re Frank*, supra, at 1240. The appearance here of impropriety, partiality, and bias by Judge Hawkes in favor of Respondent based on Judge Hawkes' political relationship with Respondent's counsel is blatant and glaring.

Further, in the event that Judge Hawkes and/or Judge Wolf had disclosed the intimate political relationship between Respondent's counsel and the District Court, as both Judges were required to do in the underlying appeal, Petitioner would have promptly requested the District Court to recuse to allow disinterested judges from another Court of Appeal to decide the underlying appeal. Had disclosure been made a timely petition for writ of certiorari could and would have been filed with this Court upon rendition of the Mandate. Judge Hawkes and Judge Wolf's failure to disclose their relationship with Respondent's counsel, and the relationship between Respondent's counsel and the District Court, deprived this Court of certiorari jurisdiction and has materially prejudiced Petitioner.[12]

CONCLUSION

For the foregoing reasons, this Court should vacate the Opinion and Mandate, and remand the underlying appeal to the District Court for de novo review by Judges appointed from a Court of Appeal other than the First District. Alternatively, this Court should grant Petitioner leave to file a petition for writ of error coram nobis in the District Court, for de novo review by Judges appointed

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[12] Fla. R. App. P. 9.100(c)(1) requires petitions for certiorari be filed within thirty days of rendition of the order to be reviewed. *Id.*; *see also State v. Wagner*, 863 So. 2d 1224, 1226 n. 4 (Fla. 2004). Until publication of the September, 2010, *The St. Petersburg Times* articles, Petitioner was not aware, and through the exercise of reasonable diligence could not have been aware, of the facts warranting the recusal of Judge Hawkes and Judge Wolf. Judge Hawkes and Judge Wolf's violation of their duties to disclose have deprived this Court's certiorari jurisdiction to Petitioner's material prejudice. *Id.*

from a Court of Appeal other than the First District, with instructions that in the event the alleged facts are proven true the writ shall issue

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above has been furnished by via electronic mail and/or U.S. Mail on this 17th day of March 2011 to: Barbi Feldman, Esquire, Vecchio, Carrier & Feldman, P.A., 3308 Cleveland Heights Boulevard, Lakeland, FL 33803, Attorney for Appellees.

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CERTIFICATE OF TYPE FACE COMPLIANCE

I HEREBY CERTIFY that this Petition for All Writs Relief was computer-generated using Times New Roman fourteen point font on Microsoft Word, and thereby complies with the font standards as required by Fla. R. App. P. 9.210 for computer-generated briefs.

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