STATE OF WISCONSIN
IN SUPREME COURT
CASE NO. 2017-AP-002132

In re the Paternity of B.J.M.

Timothy W. Miller,

Joint-Petitioner-Appellant,

v.

Angela L. Carroll,

Joint-Petitioner-Respondent-Petitioner,

ON REVIEW OF A DECISION OF THE COURT OF APPEALS DATED FEBRUARY 20, 2019 REVERSING THE CIRCUIT COURT OF BARRON COUNTY THE HONORABLE J. MICHAEL BITNEY, PRESIDING

BRIEF OF ANGELA L. CARROLL

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. In this matter of first impression, without any allegation of subjective bias, without any allegation that objective facts existed that Barron County Circuit Court Judge J.M. Bitney ("Judge Bitney") treated Timothy W. Miller ("Mr. Miller") unfairly, and when there were no electronic social media ("ESM") communications between Angela L. Carroll ("Ms. Carroll") and Judge Bitney regarding the merits of the underlying case, does being a "friend" on Facebook alone overcome the presumption that judges are fair, impartial, and capable of ignoring any biasing influences thereby constituting a due process violation and thus a bright-line rule prohibiting the judicial use of ESM?

HOW THE LOWER COURTS RULED:

Judge Bitney denied Mr. Miller's post-order Motion holding that the Facebook "friendship" did not satisfy either the subjective or objective prong of the judicial bias inquiry. (Record ("R") 120, Appendix ("App.") 58).

The Court of Appeals, without reaching the merits of Mr. Miller's pattern of serious incidents of interspousal battery, reversed the Circuit Court and held that the presumption of Judge Bitney's impartiality had been rebutted and a due process violation occurred based solely on the Facebook "friendship" by and between Ms. Carroll and Judge Bitney. (App. 14).

2. In this matter of first impression, does "liking" a Facebook post unrelated to the pending litigation or commenting on a Facebook post unrelated to the pending litigation constitute an ex parte communication between a party and a judge?

HOW THE LOWER COURTS RULED:

Judge Bitney held that because he did not "like" any Facebook posts, respond to any Facebook posts, or conduct any ESM communication (or otherwise) with Ms. Carroll, there were no ex parte communications. (App. 46-47).

The Court of Appeals held that because Judge Bitney accepted Ms. Carroll's Facebook "friend" request and because Judge Bitney may have viewed Ms. Carroll's Facebook posts, which there were no facts in the record to support actually happened, there may have been ex parte communications. (App. 11-12).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By accepting this Petition for Review, this Court has recognized the importance of the issues presented herein that warrant publication of its decision. Ms. Carroll respectfully requests oral argument to further address and discuss with this Court these matters of first impression in Wisconsin: (1) a claim of judicial bias arising from a judge's use of ESM; and (2) the issue of ESM "posts", "likes" or "comments" unrelated to the pending or impending case constituting ex parte communications.

STATEMENT OF THE CASE.

I. Description of the Nature of the Case.

This case originated in Barron County Circuit Court when Ms. Carroll moved to modify legal custody, physical placement and child support as a result of Mr. Miller's serious pattern of domestic abuse.

II. The Circuit Court's Disposition of the Case.

On August 30, 2016, Ms. Carroll filed her Motion to Modify Legal Custody, Physical Placement and Child Support. (Record ("R") 1). The Circuit Court appointed a Guardian ad Litem ("GAL") on November 1, 2016. (R23). The Circuit Court conducted the hearing on Ms. Carroll's Motion on June 7-8, 2017. (R128; R129). On July 14, 2017, the Circuit Court granted Ms. Carroll's Motion to Modify Legal Custody and Physical Placement. (R92). On August 1, 2017, the Circuit Court entered its Order memorializing the findings, conclusions and orders set forth in the July 14, 2017, Decision Regarding Custody, Placement and Child Support. (R97). The Circuit Court found, in pertinent part, as follows:

> The Court finds by the greater weight of credible evidence that Miller has engaged in a pattern of domestic abuse against the child's mother, Angela Carroll.
> …
> The domestic abuse perpetrated by Miller against Carroll is not an isolated incident, but rather, includes a long-standing pattern of domestic violence that involved manipulation, intimidation, verbal abuse (in person and by text messaging) and physical abuse directed at Carroll in an effort to control her life.
> …

> Furthermore, the potential setbacks of such a move are clearly outweighed by the ongoing danger that Miller poses to Carroll and the adverse and traumatic impact that domestic abuse has had and will continue to have on her and [Bruce][1] should the parties continue to reside near each other and share legal custody and physical placement of their son.
> …
> Miller did not provide the Court with any credible evidence to rebut the statutory presumption against awarding joint legal custody in cases involving domestic abuse, such as this one.

(Appendix ("App."). 18-21).

On August 21, 2017, Mr. Miller filed his Motion for Reconsideration. (R103). On August 31, 2017, the Circuit Court entered the Stipulation for Order on Child Support. (R112).

The Circuit Court considered briefing and heard oral argument on October 6, 2017 with regards to Mr. Miller's Motion for Reconsideration. (R130). Mr. Miller's Motion was denied from the bench (*Id.*). The Circuit Court held from the bench, in pertinent part, as follows:

> And again, in this case, the allegations, the testimony and evidence that I found credible and weighty was the domestic abuse was not isolated but that it was a long-standing pattern that had been going on for most of their relationship that Angela and Tim had.
> …
> And as I think I made it clear in my decision, the Court found not only by the preponderance of the evidence but the Court found by what I would characterize as clear, satisfactory, and convincing evidence that there has been a pattern of such abuse between Miller and Carroll and that had a significant impact on the Court's decision to award her sole primary custody/primary physical placement, which leads to the next

[1] For consistency, Ms. Carroll will utilize the same pseudonym for the parties' minor son as utilized by the Court of Appeals.

> analysis or issue about whether or not the Court put that much emphasis on that; even if I could consider that, did the Court gave that too much weight to the exclusion of all the other factors set forth.

(App. 52-54).

As it related to the Facebook "friendship" with Ms. Carroll, Judge Bitney held as follows:

> THE COURT: …I don't know that there's been anything stated on the record or indicated by me, and I will certainly confirm that again this morning, to indicate that I have a **subjective bias** in favor of Miss Carroll. **I don't**.
> …
> Mr. Schwartz presented accurately the substance of the interaction between Miss Carroll and the Court on Facebook. **None of it had anything to do with this case**. The **Court did not respond**, other than to accept the Facebook friendship request to any of the posts made by Carroll. The **Court did not like any posts, respond to any posts, or conduct any communication ex parte or otherwise with Carroll, other than simply accepting the Facebook friendship request**. And that was done long after the custody hearing was concluded.
>
> And the reason I say that is because in this case, although the decision hadn't come down from the Court yet, **a decision on whether to award Miss Carroll full custody was made long before the friendship request was ever tendered**.
> …
> I can also tell counsel, I think most of you know this, and if you don't, it's going to be clear now, **I'm friends with a lot of people**. I'm friends with a lot of people connected to this case. If people don't know this, there were six people involved in this case that were friends of mine on Facebook. They included the GAL, whose recommendation I disagreed with. They included witnesses on behalf of Miller, including Mr. Kummet and Ms. DeLawyer. I think there was even a reference to the fact that I may have been a friend at some point in time to Miller's sister before I was unfriended, so if there's a running tally of the six people that I knew in this

> courtroom while this case was pending, four of them were on Miller's side of the tally or ledge, and two were on Carroll's. One was Carroll that came in after the hearing and one was Ms. Moran who testified as a witness on her behalf.
> …
> I can assure counsel and I can assure, most importantly, Miller that **none of these Facebook friendships that I have had, among the thousands that I have, had anything to do with my decision in this case**. My **decision was based upon the evidence and testimony** that I heard from the witness stand and in this courtroom during the two days of the custody hearing and on that alone. I don't think it can be fairly said, then, that a reasonable person in the circumstances of Miller or others, knowing all these facts and circumstances, would seriously call into question the Court's objectivity or impartiality because **the Court simply accepted a friendship request without more**.

(App. 44-48).

The Circuit Court subsequently entered its Order Denying Motion for Reconsideration on October 10, 2017. (R120).

On October 26, 2017, Mr. Miller filed his Notice of Appeal. (R121). The Supplemental Order to October 10, 2017 Order Denying Motion for Reconsideration was entered on December 19, 2017. (R133).

III. The Court of Appeals' Disposition of the Case

The Court of Appeals did not reach Mr. Miller's argument that the Circuit Court erroneously exercised its discretion in granting Ms. Carroll's Motion. (App. 2, 14). Instead, the Court of Appeals reversed the Circuit Court by holding that Judge Bitney was "objectively biased" due to his Facebook "friendship" with Ms. Carroll. (App. 2, 14).

Notwithstanding that there were no allegations of subjective bias, notwithstanding that there were no objective facts that Judge Bitney treated Mr. Miller unfairly, and notwithstanding that there were no ESM communications between Ms. Carroll and Judge Bitney regarding this case, the Court of Appeals held that being a "friend" on Facebook alone overcame the presumption that judges are fair, impartial, and capable of ignoring any biasing influences and thus constituted a violation of Mr. Miller's due process rights. (App. p. 2, 14). The Court of Appeals further held, in radically expanding the definition of ex parte communications, that, while "there is no evidence Judge Bitney ever directly observed the third-party posts" by Ms. Carroll and while there was not a single ESM communication between Judge Bitney and Ms. Carroll regarding the case, "ex parte communication occurred to the extent Judge Bitney and Carroll viewed each other's Facebook posts." (App. 4, 11).

IV. Statement of Facts Relevant to the Issues Presented for Review.

Mr. Miller has a long criminal history. In 2003, he pled no contest to bail jumping-misdemeanor. (App. 87-88). Mr. Miller pled no contest to disorderly conduct in 2006. (App. 89-90). He was also found guilty due to a no contest plea to battery in 2006. (App. 91-92). In 2008, Mr. Miller pled no contest to THC and drug paraphernalia possession. (App. 93-94). In 2010, Mr. Miller pled guilty to disorderly conduct. (App. 95-97). Mr.

Miller pled guilty to criminal damage to property and disorderly conduct in 2011 (which involved Carroll and Bruce) (R54).

Ms. Carroll's Motion was filed on August 30, 2016, (R4), twelve (12) days after the Circuit Court[2] issued a 10-year Domestic Abuse Injunction against Mr. Miller, in favor of Ms. Carroll, finding by a preponderance of the evidence:

> There is a substantial risk the respondent may commit 1st degree intentional homicide under §940.01, Wis. Stats., 2nd degree intentional homicide under §940.05, Wis. Stats., 1st, 2nd, or 3rd degree sexual assault under §§940.225(1), (2) or (3), Wis. Stats., or 1st or 2nd degree sexual assault under §§948.02(1) or (2), Wis. Stats., against the petitioner resulting in an injunction order for not more than 10 years.

(R59, App. 101-102).

Ms. Carroll is an excellent mother. In fact, Mr. Miller and his own witnesses each testified that Ms. Carroll is a good mom and had nothing negative to say about Ms. Carroll. (App. 81-84).

Ms. Carroll has three boys – L.W. who was 16 years-old at the time of the hearing, E.W. who was 12 years-old at the time of the hearing and Bruce (the joint child of Ms. Carroll and Mr. Miller) who was 6 years-old at the time of the hearing. L.W. and E.W. both have a strong relationship with and are good role models for Bruce. (App. 61-64).

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[2] Judge Babler issued the 10-year Domestic Abuse Injunction against Mr. Miller. Thus, two separate Barron County judges (Judge Babler and Judge Bitney) have made findings regarding Mr. Miller's domestic abuse against Ms. Carroll.

Ms. Carroll credibly testified regarding Mr. Miller's abuse getting progressively worse after Bruce was born on August 19, 2010. (App. 65-66). Ms. Carroll and Mr. Miller were not living together when Bruce was born and Ms. Carroll was the primary caretaker for Bruce. (App. 66). From the time of Bruce's birth until he was two years-old there was no consistent physical placement schedule with Mr. Miller. (App. 67).

In 2011, Ms. Carroll had been home feeding Bruce on a Sunday night, who was just six months-old at the time, when Mr. Miller came into her house like a "freight train". Ms. Carroll remembers her hair being pulled and being spit on and Mr. Miller screaming at her. Bruce was sitting in his high chair crying during the abuse. (App. 68-69). Ms. Carroll testified that there was pushing, shoving and at some point she ended up in the hallway and Mr. Miller had her by the throat. She remembers Bruce screaming and before Mr. Miller left her house, he slapped Ms. Carroll in the face, again. (App. 70). During the abuse in 2011, Ms. Carroll was afraid for her life. (App. 71).

Mr. Miller also testified regarding the 2011 abuse that he pushed Ms. Carroll to get away from her and punched a hole in the wall/door while Bruce was in the other room. (App. 85). Mr. Miller testified that he saw photocopies of bruising around Ms. Carroll's neck from the 2011 incident. (App. 139).

From 2011 through 2016, Mr. Miller continued to threaten violence against Ms. Carroll. (App. 72-73). In 2016, Mr. Miller threatened Ms. Carroll that he was going to end up in prison for killing her. (App. 73-74). Ms. Carroll testified that Mr. Miller sent her threatening text messages, consistent with the following, from 2011 until the August 2016 abuse from which the 10-year Domestic Abuse Injunction was issued:

> Do your shit some where else. I will beat the both of you. That's a promise. Don't care about the law.
> …
> Stay out of my neighborhood. Could care less who You see. I beat people for fun. I will beat a motherfucker just for thinking he can come in my hood. You been warned
> …
> Like I said I can't stand you
> You are the enemy. Every day I get up. It's a war. You wanna come to my battle field.
> Better be ready
> You will feel the rath
> …
> You want to fight
> That's my specialty
> I will attack every fuckin angle I can. I will make it my job
> Lets fuckin go
> …
> You and whoever will go down hard. Its commin. You don't Evan know.
> Talk some shit. I will be there now!!!! You fuckin bitch. Can't stand you

(App. 75-77; App. 98-100).

On August 9, 2016, a day Mr. Miller had placement of Bruce, he came over to Ms. Carroll's home while she and her son, E.W. (eleven-years old at the time), were home. Mr. Miller saw Ms. Carroll at her desk while

she was on a work conference call. (App. 78-80). Mr. Miller came into Ms. Carroll's home and made threats to her stating he was going to prison and that he was going to kill her. Mr. Miller also threatened Ms. Carroll that he would hire someone to kill her if he had to, but that he was going to end up in prison. Ms. Carroll stated she was afraid for her life. Ms. Carroll believed Mr. Miller when he stated he was going to prison and when he stated he was going to make sure it was worth it. (App. 80). Mr. Miller acknowledged that Ms. Carroll's son was home when he threatened to kill her (although he alleged he only swore at her). (App. 86).

Ultimately, a 10-year Domestic Abuse Restraining Order was entered against Mr. Miller in Ms. Carroll's favor. (R59, App. 101-102). Mr. Miller acknowledged, as he must, that Judge Babler made a determination, by a preponderance of the evidence, that there was a substantial risk that Mr. Miller may commit first-degree intentional homicide or second-degree intentional homicide against Ms. Carroll. Mr. Miller, a represented party at the time, further acknowledged that he did not appeal this determination. (App. 101).

FACEBOOK:

Judge Bitney and Ms. Carroll did not become Facebook "friends" until June 19, 2017, after the close of evidence and the evidentiary hearing. (App. 103). In this regard, Ms. Carroll was one of Judge Bitney's 2,045 Facebook "friends", including the GAL, Riley Kummet (who testified on

behalf of Mr. Miller), and Amanda Delawyer (who testified on behalf of Mr. Miller). (App. 125-127).

Ms. Carroll "liked" 18 of Judge Bitney's posts, 12 of which were Bible verses, three related to Judge Bitney's knee surgery, one related to a restaurant, one related to advice for kids and grandkids, and one of which was a picture of the American flag. (App. 103-124). None of these "likes" were regarding this matter or any of the witnesses involved in this matter. (*Id.*). Further, Judge Bitney did not "like" any of Ms. Carroll's posts. (*Id.*).

On only two occasions, both after the hearing in this matter, did Ms. Carroll comment on Judge Bitney's Facebook page – both times related to Judge Bitney's knee surgery (information which all parties were made aware of following the two-day evidentiary hearing). (App. 108, 110). Judge Bitney did not comment on any of Ms. Carroll's posts or respond to Ms. Carroll's well-wishes regarding his surgery. (App. 103-124). There was absolutely no evidence submitted that Ms. Carroll and Judge Bitney engaged in any ex-parte communications or that Judge Bitney ever viewed Ms. Carroll's Facebook page or posts. (App. 45-46).

ARGUMENT

I. A FACEBOOK "FRIENDSHIP" ALONE SHOULD NOT OVERCOME THE PRESUMPTION THAT JUDGES ARE FAIR, IMPARTIAL, AND CAPABLE OF IGNORING ANY BIASING INFLUENCES.

This case, a matter of first impression in Wisconsin, presents a real and significant question of due process law under the United States and Wisconsin Constitutions regarding an allegation of judicial bias arising from a judge's use of ESM. A Facebook "friendship" alone, which is all that occurred here, should not overcome the presumption that judges are fair, impartial and capable of ignoring any biasing influences. Judges should not be forced to forfeit their right to associate with their friends or associates and should not be condemned to live a life of a hermit, but rather should be able to remain active in their community. Facebook (or other ESM), is a way for these elected officials to remain active in their communities. However, under the Court of Appeals' Decision that having only an ESM connection with the potential of viewing (not actually viewing) a party's Facebook profile and the potential to communicate with a party (not actually communicating) created an appearance of partiality, judges of this State must now remove themselves completely from all ESM. The Court of Appeals' Decision created a bright-line rule against the judicial use of ESM, disregarded this Court's precedent presuming judges act fairly, impartially, and without prejudice, and should not stand.

The right to an impartial judge is fundamental to the notion of due process under both the United States and Wisconsin Constitutions. *In re Murchison*, 349 U.S. 133, 136 (1955); *State v. Washington,* 266 N.W.2d 597, 609-610 (Wis. 1978); *State v. Goodson*, 771 N.W.2d 385, 389 (Wis. Ct. App. 2009). "There is a presumption that a judge acted fairly, impartially, and without prejudice." *State v. Herrmann*, 867 N.W.2d 772, 774 (Wis. 2015) *citing Goodson*, 771 N.W.2d at 389; *State v. Gudgeon*, 720 N.W.2d 114, 121 (Wis. Ct. App. 2006). "A defendant may rebut the presumption by showing that the **appearance of bias reveals a great risk of actual bias**." *Herrmann*, 867 N.W.2d at 774 (emphasis added). There is a presumption that "circuit court judges try to be fair and impartial in their conduct of trials, and this **presumption must be overcome by proof** except in extreme cases of structural error." *State v. Carpure*, 683 N.W.2d 31, 41 (Wis. 2004) (emphasis added).

"[O]nly in the most extreme cases would disqualification based on *general* allegations of prejudice or bias be constitutionally required." *Carpure*, 683 N.W.2d at 44 (emphasis in original). "Otherwise, most matters relating to judicial disqualification [do] not rise to a constitutional level." *Id*. (internal quotation omitted) *quoting FTC v. Cement Institute*, 333 U.S. 683, 702 (1948). The United States Supreme Court "has recognized only a few circumstances in which an appearance of bias necessitates recusal to ensure due process of law." *Greenway v. Schriro*,

653 F.3d 790, 806 (9th Cir. 2011). Typically, the United States Supreme Court has only mandated recusal where a judge has a direct, personal, or substantial connection to the outcome of the case or to its parties. *See, e.g., In re Murchison*, 349 U.S. at 136 (concluding that "no man is permitted to try cases where he has an interest in the outcome"); *Tumey v. State of Ohio*, 273 U.S. 510, 523 (1927) (concluding that judges should not preside over cases if they have a "direct, substantial pecuniary interest" in the outcome); *see also Caperton v. A.T. Massey Coal Co., Inc.,* 556 U.S. 868, 872 (2009) (concluding that "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable" where a party has a substantial donor to judge's election campaign).

"Instead, matters of kinship, personal bias, state policy, [and] remoteness of interest would seem generally matters of legislative discretion." *Carpure*, 683 N.W.2d at 44 *quoting Tumey* 273 U.S. at 523. The Wisconsin Legislature codified seven statutory situations that require judicial disqualification. Wis. Stat. § 757.19(2). The focus of this case is on whether Judge Bitney could not, or appeared that he could not, act in an impartial manner. Wis. Stat. § 757.19(2)(g).

The test for judicial bias comprises two inquiries: "[a] subjective test based on the judge's own determination of his or her impartiality and an objective test based on whether impartiality can reasonably be questioned." *State v. Walberg*, 325 N.W.2d 687, 693 (Wis. 1982); *Gudgeon*, 720 N.W.2d

at 121. There is no claim of subjective bias in this matter. Instead, the question is whether there was any objective bias which "asks whether a reasonable person could question the judge's impartiality." *Gudgeon*, 720 N.W.2d at 121; *Walberg*, 325 N.W.2d at 692.

1. Judge Bitney's was not subjectively bias.

Judge Bitney unequivocally held that he had no subjective bias requiring his recusal. This determination is "binding", *Walberg,* 325 N.W.2d at 693, *State v. Pirtle*, 799 N.W.2d 492, 504 (Wis. Ct. App. 2011) *citing State v. McBride*, 523 N.W.2d 106, 110 (Wis. Ct. App. 1994), and Mr. Miller did not appeal Judge Bitney's ruling in this regard: "Miller does not contend the circuit court was subjectively biased." (App. 6).

2. A reasonable person could not question Judge Bitney's impartiality.

Whether a reasonable person could question a judge's impartiality based on a Facebook "friendship" is an issue of first impression in Wisconsin. Objective bias can exist in two situations: (1) where there is the appearance of bias or partiality; or (2) where objective facts demonstrate that a judge treated a party unfairly. *Goodson*, 771 N.W.2d at 389. Mr. Miller did <u>not</u> assert that there were any objective facts that demonstrated that Judge Bitney treated him unfairly. (App. 6). Mr. Miller instead argued that objective bias existed due to the appearance of impropriety. (*Id*.).

The question for this Court is whether a Facebook "friendship" alone, during which no Facebook communications (or otherwise) occurred regarding the case and during which no Facebook "likes" occurred involving the case, could lead a reasonable person to conclude "that the average judge could not be trusted to 'hold the balance nice, clear, and true' under all the circumstances." *Gudgeon*, 720 N.W.2d at 122 *quoting In re Murchinson*, 349 U.S. at 136. Because a Facebook "friendship" alone does not reveal "a great risk of actual bias", the presumption of impartiality should hold. *See Herrmann*, 867 N.W.2d at 775 ("the appearance of partiality violated due process only where the apparent bias revealed a great risk of actual bias." (Internal quotation omitted) *quoting In re Murchinson*, 349 U.S. at 136)). As such, Ms. Carroll respectfully asserts that this Court reverse the Court of Appeals thereby: (a) providing significant guidance to lower courts, attorneys and parties of this State regarding the use of ESM; (b) returning the judicial disqualification analysis to this Court's precedence; and (c) aligning Wisconsin law with the formal opinions of the American Bar Association and other state bar associations.

a. Because a Facebook "friendship" alone does not reveal a great risk of actual bias, Mr. Miller's due process rights were not violated.

"Facebook is an online social network where members develop personalized web profiles to interact and share information with other

members." *Lane v. Facebook, Inc.*, 696 F.3d 811, 816 (9th Cir. 2012). "The type of information members share varies considerably, and it can include news headlines, photographs, videos, personal stories, and activity updates." *Id*. "Members generally publish information they want to share to their personal profile, and the information is thereby broadcasted to the members' online "friends" (i.e., other members in their online network)." *Id*.

"[T]he use of the word "friend" on social media is different from the traditional meaning of the word. The same is true for the word "like." In the social media context, "friending" and "liking" are methods of exchanging, both by sending and receiving, information." New Mexico Advisory Committee on the Code of Judicial Conduct, *Advisory Opinion Concerning Social Media* (App. 143).

> Merely "friending" a person on Facebook or "liking" a particular page, does not necessarily mean the two are friends in the traditional sense or that anyone actually likes, in the traditional way, the user's posts. In this manner, "friending," "liking," or subscribing to a particular page or posting may not be seen as an endorsement.

Id. (App. 144); *Youkers v. State*, 400 S.W.2d 200, 206 (Tex. Ct. App. 2013) ("Merely designating someone as a "friend" on Facebook "does not show the degree or intensity of a judge's relationship with a person." ABA Op. 462. One cannot say, based on this designation alone, whether the judge and the "friend" have met; are acquaintances that have met only

once; are former business acquaintances; or have some deeper, more meaningful relationship. Thus, the designation, standing alone, provides no insight into the nature of the relationship.").

While Wisconsin has not issued an ethics opinion on the subject[3], the American Bar Association and other ethics opinions issued throughout the Country persuasively provide that no reasonable person could question a judge's impartiality based upon a Facebook "friendship" alone such as here. On September 5, 2019, the American Bar Association issued Formal Opinion 488 providing relevant guidance. (App. 248-254). Formal Opinion 488 was issued to "address judges' obligation to disqualify themselves in proceedings in which they have social or close personal relationships with the lawyers or parties other than a spousal, domestic partner, or other close family relationship." (App. 248). The American Bar Association examined whether a judge's impartiality could reasonably be questioned under the same standard at issue here: "(a) evaluated against an objective reasonable person standard; and (b) depends on the facts of the case." (App. 249). Noting that "[j]udges are ordinarily in the best position to assess whether their impartiality might reasonably be questioned when lawyers or parties with whom they have relationships outside of those

[3] (App. 2, 6, 157).

identified in Rule 2.11(A)[4] appear before them" and that the "ultimate decision of whether to disqualify is committed to the judge's sound discretion", importantly the American Bar Association stated that: "judges must avoid disqualifying themselves too quickly or too often lest litigants be encouraged to use disqualification motions as a means of judge-shopping, or other judges in the same court or judicial circuit become overburdened." (App. 249).

On point, the American Bar Association defines a judge and party, or judge and lawyer, as an "acquaintance" when their interactions are "relatively superficial, such as being members of the same place of worship, professional or civil organization, or the like" and "greet each other amicably and are cordial when their lives interact." (App. 249). Formal Opinion 488 continues by conclusively opining: "[j]udges need not disqualify themselves in proceedings in which they are acquainted with a lawyer or party", (App. 249-250), and:

> Evaluated from the standpoint of a reasonable person fully informed of the facts, a judge's acquaintance with a lawyer or party, standing alone, is **not a reasonable basis for questioning the judge's impartiality**. A **judge therefore has no obligation to disclose his or her acquaintance with a lawyer or party to other lawyers or parties in a proceeding**. A judge may, of course, disclose the acquaintanceship if the judge so chooses.

(App. 251) (emphasis added).

[4] Model Code of Judicial Conduct 2.11 (A)(1-7) is substantially similar to Wis. Stat. § 757.19(2)(a-g).

Most notably to this matter, Formal Opinion 488 applies to a Facebook "friendship" and provides:

> Social media, which is simply a form of communication, uses terminology that is distinct from that used in this opinion. Interaction on social media does not itself indicate the type of relationships participants have with one another either generally or for purposes of this opinion. For example, Facebook uses the term "friend," but that is simply a title employed in that context. A judge could have Facebook "friends" or other social media contacts who are acquaintances, friends, or in some sort of close personal relationship with the judge. The proper characterization of a person's relationship with a judge depends on the definitions and examples used in this opinion.

(App. 249-250, n. 11).

Here, the record is absolutely barren that Ms. Carroll and Judge Bitney were anything more than "acquaintances" as defined by the American Bar Association. Indeed, there is no evidence that Judge Bitney and Ms. Carroll had "a degree of affinity greater than being acquainted with a person" to make them "friends" and certainly no evidence that Judge Bitney and Ms. Carroll met the definition of "close personal relationships" set forth in Formal Opinion 488. (App. 251-253). Evaluated from the standpoint of a reasonable person fully informed of all the facts, facts which reveal that: (1) absolutely no communications between Ms. Carroll and Judge Bitney took place on Facebook (or otherwise); (2) Ms. Carroll was one of Judge Bitney's more than 2,000 "friends" on Facebook; (3) Judge Bitney was actually "friends" with more witnesses that testified

favorably to Mr. Miller than Ms. Carroll; (4) Mr. Miller asserted no actual bias against him by Judge Bitney; and (5) Judge Bitney lives in a rural town in which he is a prominent public figure, there was no reasonable person who could question Judge Bitney's impartiality.

The American Bar Association also issued Formal Opinion 462, *Judge's Use of Electronic Social Networking Media*, consistent with Formal Opinion 488, which provides, in relevant part:

> Simple designation as an ESM connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person. **Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection**.

(App. 161-162) (emphasis added); *see also* Tennessee Judicial Ethics Committee, *Advisory Opinion No. 12-01* (App. 166-167).

The Arizona Supreme Court Judicial Ethics Advisory Committee, *Advisory Opinion 14-01* similarly opined:

> The JEAC concludes that the Arizona Code of Judicial Conduct does not impose a per se disqualification requirement in cases where a litigant or lawyer is a "friend" or has a similar status with a judge through a social or electronic networks.

(App. 171).

The Maryland Judicial Ethics Committee also persuasively opined that "the mere fact of a social connection does not create a conflict", (App. 187), and the Ethics Committee of the Kentucky Judiciary's *Formal Judicial Ethics Opinion JE-119* similarly opined:

> While the nomenclature of a social networking site may designate certain participants as "friends," the view of the Committee is that such a listing, by itself, ***does not reasonably*** convey to others an impression that such persons are in a special position to influence the judge.
> …
> The consensus of this Committee is that participation and listing alone do not violate the Kentucky Code of Judicial Conduct, and specifically **do not "convey or permit others to convey the impression that they are in a special position to influence the judge**."
> …
> In the final analysis, the reality that Kentucky judges are elected and should not be isolated from the community in which they serve tipped the Committee's decision.

(App. 193, 194, 196)(emphasis added).

Also on point, *Opinion 13-39* from the State Bar of New York provides:

> The Committee believes that the mere status of being a "Facebook friend," without more, is an insufficient basis to require recusal. **Nor does the Committee believe that a judge's impartiality may reasonably be questioned** (*see* 22 NYCRR 100.3[E][1]) or that there is an **appearance of impropriety** (*see* 22 NYCRR 100.2[A]) based solely on having previously "friended" certain individuals who are now involved in some manner in a pending action.

(App. 195)(emphasis added).

The Utah Ethics Advisory Committee opined:

> (1) May a judge be "friends" or accept "friend" requests from lawyers who appear before the judge?
>
> Answer: Yes. Being friends with someone is not a violation of the Code of Judicial Conduct. Furthermore, the designation of someone as a "friend" on a website such as Facebook does not indicate that the person is a friend under the usual understanding of the term. Many

> Facebook users have hundreds or even thousands of "friends." Whether someone is truly a friend depends on the frequency and the substance of contact, and not on an appellation created by a website for users to identify those who are known to the user.

(App. 206); s*ee also* Ohio Board of Commissioners on Grievances and Discipline, *Opinion* 2010-7 ("A judge may be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge.") (App. 273).

As set forth in the various ethics opinions cited above, Wisconsin should provide guidance to judges, attorneys and parties and adopt the same rationale that a reasonable person could not question the impartiality of a judge based on a Facebook "friendship" alone (particularly here when Judge Bitney had over 2,000 friends and had no communications with Ms. Carroll regarding this case or the contents of this case).

While the Court of Appeals recognized that "[t]hese authorities conclude that judicial use of ESM, standing alone, generally does not require judicial disqualification", (App. 7), the Court of Appeals sought to distinguish these numerous ethics opinions from across the Country by relying upon the distinguishable facts and dicta of *State v. Thomas*, 376 P.3d 184 (N.M. 2016) as "particularly instructive". (App. 7). In *Thomas*, the district court judge posted on Facebook about the trial. *Id*. at 189. ("I am on the third day of presiding over my 'first' first-degree murder trial as a judge" and "In the trial I presided over, the jury returned guilty verdicts

for first-degree murder and kidnapping just after lunch. Justice was served. Thank you for your prayers."). Judge Bitney made no Facebook posts about this case. Further, the New Mexico Supreme Court made no holding regarding Facebook posts, but rather cautioned the judicial use of ESM in dicta. *Id*. at 187 and 199 ("we need not decide whether social media posts by the district court judge about the case before him also would have required reversal"). Simply, the Court of Appeals' reliance upon *Thomas* was misplaced.

Case law throughout the Country is in accord with the preceding ethics opinions that being Facebook "friends" alone is insufficient to overcome the presumption that judges are fair, impartial, and capable of ignoring any biasing influences. The Florida Court of Appeals issued a persuasive decision in *Law Offices of Herssein v. United Servs. Auto. Ass'n*, 229 So.3d 408 (Fl. Ct. App. 2017) regarding judicial disqualification based on the judge and lawyer representing a potential witness and potential party to the litigation being Facebook "friends". In support of the petition, an affidavit was submitted, similar to the affidavits submitted here, stating:

> [b]ecause [the trial judge] is Facebook friends with Reyes, [the executive's] personal attorney, I have a well-grounded fear of not receiving a fair and impartial trial. Further, based on [the trial judge] being Facebook friends with Reyes, I…believe that Reyes, [the executive's] lawyer has influenced [the trial judge].

Id. at 409.

The Florida Court of Appeals reviewed the request under a reasonably prudent person standard similar to Wisconsin's second prong. *Id.* In rejecting the request for disqualification, the Court held as follows:

> We agree with the Fifth District that **"[a] Facebook friendship does not necessarily signify the existence of a close relationship."** We do so for three reasons. First, as the Kentucky Supreme Court noted, "**some people have thousands of Facebook 'friends.'**" *Sluss v. Commonwealth*, 381 S.W.3d 215, 222 (Ky. 2012).
> …
> Because a "friend" on a social networking website is not necessarily a friend in the traditional sense of the word, we hold that the mere fact that a judge is a Facebook "friend" with a lawyer for a potential party or witness, without more, **does not provide a basis for a well-grounded fear that the judge cannot be impartial or that the judge is under the influence of the Facebook "friend."**

Id. at 412 (emphasis added). *See also State v. Forguson*, 2014 WL 631246 (Tenn. Crim. App. 2014) (App. 197-208) (holding that there was not a sufficient showing of proof that trial judge could not be impartial as "thirteenth juror" when trial judge was Facebook "friend" of confidential informant and the record did not show the length of the Facebook relationship or the extent or nature of the interactions); *State v. Madden*, 2014 WL 931031 (Tenn. Crim. App. 2014) (App. 209-219) (holding that criminal defendant failed to establish bias of trial court judge although judge had numerous community ties and a Facebook connection with one of the State's witnesses).

The Texas Court of Appeals provided relevant guidance here in *Youkers*, 400 S.W.3d at 205. Similar to Wisconsin, there was no Texas rule, canon of ethics, or judicial ethics opinion prohibiting a judge's use of Facebook. *Id*. In holding that the judge's Facebook "friendship" with the victim's father was insufficient to show bias as a basis for recusal, the *Younkers* Court held:

> Allowing judges to use Facebook and other social media is also consistent with the premise that judges do not "forfeit [their] right to associate with [their] friends and acquaintances nor [are they] condemned to live the life of a hermit. In fact, such a regime would ... lessen the effectiveness of the judicial officer." Comm. on Jud. Ethics, State Bar of Tex., Op. 39 (1978). Social websites are one way judges can remain active in the community. For example, the ABA has stated, "[s]ocial interactions of all kinds, including [the use of social media websites], can ... prevent [judges] from being thought of as isolated or out of touch." ABA Op. 462. Texas also differs from many states because judges in Texas are elected officials, and the internet and social media websites have become campaign tools to raise funds and to provide information about candidates. *Id.; see also* Criss, *supra,* at 18 ("Few judicial campaigns can realistically afford to refrain from using social media to deliver their message to the voting public. Social media can be a very effective and inexpensive method to deliver campaign messages to the voting public").

Id.

Here, Ms. Carroll was one of Judge Bitney's over 2,000 Facebook "friends". They had no communications regarding the case, the witnesses, or the evidence. They had no private messages. And yet the Court of Appeals held that this innocuous ESM "friendship" served as the basis to find that the presumption of Judge Bitney's impartiality had been rebutted.

Judges are people too. Certainly a judge should not have ESM communications with a party regarding their pending or impending case. A judge also should not make Facebook posts regarding their pending cases. But, such as here, when a judge has over 2,000 Facebook "friends", there were no communications regarding the case, no posts regarding the case, no subjective bias, and no unfair treatment of the opposing party, the Court of Appeals' Decision acts as a blanket bright-line rule prohibiting all judges from using any ESM. In light of the foregoing and the substantial evidence supporting Ms. Carroll's underlying Motion, at worst, the Facebook "friendship" between Judge Bitney and Ms. Carroll constituted a harmless error as there was not a reasonable possibility that the "friendship" contributed to the outcome of Ms. Carroll's Motion. *See Martindale v. Ripp*, 629 N.W.2d 698, 707 (Wis. 2001) ("For an error to affect the substantial rights of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue…A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome." (internal quotations and citations omitted); Wis. Stat. § 805.18(1) ("The court shall, in every state of an action, disregard any error or defect in the…proceedings which shall not affect the substantial rights of the adverse party."); Wis. Stat. § 805.18(2) ("No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of…error as to any matter

of…procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.").

The Court of Appeals' Decision has the effect of requiring all judges to terminate all ESM because one of their tens, or hundreds, or even thousands of Facebook "friends" may someday appear in their court. This should not stand. The impact of the Court of Appeals' Decision does not further justice, or protect constitutional rights, but rather sentences judges to the life of a hermit. In this case, and on these facts, Mr. Miller received a fair trial before an impartial judge. Mr. Miller is upset that he lost on the merits, not because of the Facebook "friendship". But Mr. Miller must understand that his domestic abuse, not ESM, was the pivotal fact leading to this result.

Ms. Carroll respectfully requests that Judge Bitney's decision be reinstated in its entirety.

II. "LIKING" A FACEBOOK POST AND COMMENTING ON FACEBOOK POSTS UNRELATED TO THE PENDING ACTION DO NOT CONSTITUTE EX PARTE COMMUNICATIONS BETWEEN A PARTY AND A JUDGE.

The Court of Appeals' holding conflicts with the Wisconsin Supreme Court Rules defining ex parte communications, has nearly limitless implications on what does, and what does not, constitute ex parte communications, and must be reversed. The Court of Appeals held that Ms. Carroll had ex parte communications with Judge Bitney because of the "friend" request from Ms. Carroll to Judge Bitney and because the two may have viewed each other's Facebook posts. But, there were no communications between Ms. Carroll and Judge Bitney on Facebook (or otherwise) regarding the case. There were no Facebook "likes" or Facebook posts by and/or between Ms. Carroll and Judge Bitney regarding the case and there was absolutely no evidence that Judge Bitney ever viewed Ms. Carroll's Facebook page. Ms. Carroll respectfully requests this Court reverse the Court of Appeals' rewriting of the Wisconsin Supreme Court Rules in this matter of first impression.

SCR 60.04(1)(g) provides that a "judge may not initiate, permit, engage in or consider ex parte communications ***concerning a pending or impending action or proceeding***[.]" (emphasis added). The plain language of the Rule indicates that ex parte communications are a violation of the

Rule only when they concern "a pending or impending action or proceeding."

Here, there were no communications by and between Ms. Carroll and Judge Bitney concerning the "pending…action". To the contrary, in addition to the Facebook "friend" request, Ms. Carroll "liked" 18 of Judge Bitney's posts, 12 of which were Bible verses, three related to Judge Bitney's knee surgery, one related to a restaurant, one related to advice for kids and grandkids, and one of which was a picture of the American flag. (App. 103-124). Judge Bitney did not "like" any of Ms. Carroll's posts, did not respond to Ms. Carroll's well-wishes on his surgery, or comment on any of Ms. Carroll's posts. (*Id.*).

Indeed, there is not a single reference in the record to any communications by and between Ms. Carroll and Judge Bitney concerning the action as acknowledged by the Court of Appeals: "None of these "likes" or comments were directly related to the pending litigation." (App. 3). Further, while Mr. Miller will likely ask this Court to extrapolate that Judge Bitney must have viewed Ms. Carroll's Facebook "newsfeed" at some unknown point, "there is no evidence Judge Bitney ever directly observed the third-party posts" by Ms. Carroll. (App. 4). Yet, the Court of Appeals held that the "Facebook connection between Carroll and Judge Bitney involved ex parte communications" and that an "ex parte communication

occurred to the extent Judge Bitney and Carroll viewed each other's Facebook posts." (App. 11).

The Court of Appeals' Decision drastically expanded the definition of "ex parte communication" set forth in SCR 60.04(1)(g). No longer is an "ex parte communication" limited to communications concerning the pending or impending action, but now includes any communication or potential communication with a judge irrespective of the subject matter and irrespective of whether the judge actually received or viewed the communication. This new definition of "ex parte communication" creates limitless concerns both in the ESM context and in personal interactions with judges.

If simply the potential of viewing a party's Facebook "posts" constitutes ex parte communications, a judge cannot have any Facebook "friends" who are parties before them, attorneys practicing before them, or witnesses in cases they preside over as they would be having ex parte communications with each of these individuals each and every time they log on to Facebook. Under the Court of Appeals' Decision, if a judge views (or even does not view) a party's post about family, or cooking, or puppies, or babies (none of which are at issue in this hypothetical case), the judge just had an ex parte communication with the party. If the judge views the Facebook wedding announcement of an attorney practicing before her, that judge also just had an ex parte communication with an

attorney. None of the hypothetical Facebook posts had anything to do with the case, yet under the Court of Appeals' Decision would constitute ex parte communications implicating due process violations.

Outside of the ESM context, the Court of Appeals' new definition of ex parte communication would encompass a party seeing a judge overseeing their case and saying "hi" to him or her at a coffee shop. The same is true for an attorney who has a case before a judge who lectures at a continuing legal education seminar attended by the attorney. Each of these examples would now be considered ex parte communications and would be violations of SCR 60.04(1)(g).

The broad and radical expansion by the Court of Appeals of the definition of ex parte communication set forth in SCR 60.04(1)(g) requires reversal. SCR 60.04(1)(g) is intended to ensure an independent, fair and competent judiciary, but the "provisions of the Code of Judicial Conduct are [also] rules of reason." SCR Ch. 60 Preamble. In addition to being contrary to the plain language of the Rule, it is unreasonable to interpret "liking" Facebook posts unrelated to a pending action or even simply the potential to view such a post as an ex parte communication. And while this Court has not previously addressed this issue, other courts across the Country provide persuasive authority.

For instance, in *Onnen v. Sioux Falls Independent School District No. 49-5*, 801 N.W.2d 752, 757-58 (S.D. 2011) the South Dakota Supreme

Court examined whether a new trial should be granted when the judge received a Facebook message wishing him happy birthday from a "major witness" (similar to Ms. Carroll wishing Judge Bitney well from his knee surgery). The *Onnen* Court held that because the Facebook post did not concern the proceeding, by the plain language of South Dakota's Code of Judicial Conduct (similar to Wisconsin's Rule), an ex parte communication had not occurred. *Id*. The motion for a new trial was denied. *Id*.

The Tennessee Court of Appeals recently affirmed the denial of a motion to recuse the trial judge in a parental termination case when the judge and the foster mother were "friends" on Facebook, they wished each other happy birthday on Facebook, and the trial judge may have seen pictures the foster mother posted of the child at the heart of the case. *In re Charles R.*, 2018 WL 3583307 (Tenn. Ct. App. 2018) (App. 220-234). The Tennessee Court of Appeals held that those facts, similar to here, did not demonstrate any bias or impropriety and gave no credence to the allegation of ex parte communications simply due to the Facebook "friendship". (App. 228).

A comment on a judge's Facebook page unrelated to a pending matter is not the one-sided private communication having the potential to erode public confidences and create the appearance of partiality. To the contrary, in 2013, there were over 500 million daily Facebook members and more than three billion daily "likes" and comments. *Bland v. Roberts*,

730 F.3d 368, 385 (4th Cir. 2013). In 2016, the number of daily active Facebook users had grown to over one billion. *Wichmann v. Levine*, 2016 WL 4368136, n. 5 (E.D. Cal. 2016) (App. 241). Today, there are over 1.59 billion daily active Facebook users and over 2.41 billion monthly active users. *See* https://newsroom.fb.com/company-info/ (last visited September 9, 2019) (App. 243). Any comment on a judge's Facebook page or any "like" of a judge's post is broadcasted to all of the user's online "friends". *Lane*, 696 F.3d at 816. Thus, in this matter, not only would all of Judge Bitney's 2,045 Facebook "friends" and all of Ms. Carroll's Facebook "friends" been able to see any posts or "likes" between them, but potentially over 1.59 billion other daily or 2.41 billion other monthly Facebook users could too depending on respective privacy settings. This is hardly the one-sided private communication eroding public confidences or which would reasonably create an appearance of impropriety.

Ms. Carroll respectfully requests that this Court reverse the Court of Appeals' Decision and hold that "liking" or commenting on a judge's Facebook, when such "likes" or comments are wholly unrelated to any pending or impending matter, do not, as a matter of law, meet the definition of an ex parte communication.

CONCLUSION

With no subjective bias, with no allegation that Mr. Miller was treated unfairly, and with no ex parte communications by and between Ms. Carroll and Judge Bitney, the Court of Appeals' reversal of the Circuit Court based solely on Judge Bitney's acceptance of Ms. Carroll's Facebook "friend" request imposed a bright-line new rule of law that no judge can utilize ESM. In light of the plethora of evidence supporting Ms. Carroll's Motion and the absolute absence of any partiality by Judge Bitney, at worst, the Facebook "friendship" was harmless error. The Court of Appeals' Decision gave no credence to the facts and law mandating the award to Ms. Carroll of sole legal custody and physical custody of Bruce in light of Mr. Miller's serious pattern of domestic abuse. Allowing the Court of Appeals' Decision to stand sentences judges of this State to the life of a hermit and results in the drastic expansion of the definition of ex parte communications.

Ms. Carroll respectfully asserts that this Court should reverse the Court of Appeals. This matter presents this Court with the opportunity to adopt the ethical opinions from across the Country, consistent with this Court's precedent that judges are presumed fair and impartial, and issue an order providing guidance to judges, attorneys, and parties regarding ESM.

Ms. Carroll and her attorneys extend their appreciation to this Court for its considerations and courtesies in addressing these important issues.

Dated: September 11, 2019

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of this brief is 8,768 words.

Dated: September 11, 2019

Brandon M. Schwartz

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic Brief is identical in content and format to the printed form of the Brief filed as of this date.

A copy of this certificate has been served with the paper copies of this Brief filed with the court and served on all opposing parties.

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CERTIFICATE OF SERVICE

Pursuant to Wis. Stat. § 809.80(3)(b) and (4), I certify that on September 11, 2019, the required copies of this Brief and Appendix were delivered to a third-party commercial carrier (UPS) for delivery within 1 (one) business day to:

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