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

REPLY BRIEF OF ANGELA L. CARROLL

SCHWARTZ LAW FIRM
Brandon M. Schwartz (#1084533)
Michael D. Schwartz (#1018933)
600 Inwood Avenue N., Suite 130
Oakdale, Minnesota 55128
Telephone: 651-528-6800
Facsimile: 651-528-6450
Email: brandon@mdspalaw.com
Email: michael@mdspalaw.com
Attorney for Joint-Petitioner-Respondent-Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

RULES:

ARGUMENT

I. THIS COURT SHOULD REVERSE THE COURT OF APPEALS' PROHIBITION OF THE JUDICIAL USE OF ESM.

Judge Bitney[1] was Facebook "friends" with Ms. Carroll. So too were Mr. Miller's sister, the GAL, and two of Mr. Miller's witnesses. Ms. Carroll and Judge Bitney had no communications whatsoever regarding this case, there was no subjective bias, and there was no allegation that Mr. Miller was treated unfairly by Judge Bitney. On these facts, Mr. Miller has not offered any proof to rebut the presumption that Judge Bitney acted fairly, impartially and without prejudice. The Court should reaffirm its precedent presuming judges are fair, impartial and act without prejudice and reverse the Court of Appeals' Decision having the effect of prohibiting the judicial use of ESM.

Mr. Miller's Brief ignores that not one, but two separate Barron County judges made findings that Mr. Miller committed domestic abuse against Ms. Carroll. (App. 18-21; R59, App. 101-102 (finding 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). Instead, Mr. Miller attempts to portray Ms. Carroll is a partygoer who he speculates changed her Facebook profile to gain an advantage in the custody dispute. *Miller Brief*, p. 10-11,

[1] For consistency, Mr. Carroll will utilize herein the same definitions and abbreviations as set forth in her original Brief.

28, 38. But the record establishes that Mr. Miller and each of his witnesses acknowledged that Ms. Carroll is a good mom and had nothing negative to say about her. (App. 81-84).[2] Indeed, the focus of the underlying custody dispute was Mr. Miller's domestic abuse, not Ms. Carroll's parenting abilities.

Amber Miller, Mr. Miller's sister, was Facebook "friends" with Judge Bitney. (App. 47; R105). So too were the GAL and two of Mr. Miller's witnesses (Riley Kummet and Amanda Delawyer). (App. 125-127). Mr. Miller does not offer any explanation as to how Judge Bitney

---

[2] Mr. Miller inaccurately asserts: "Carroll recanted and requested the [2011] restraining order be dropped because she did not want Miller to be convicted of a crime he did not commit." *Miller's Brief*, p. 4. Ms. Carroll credibly testified during the trial that she recanted regarding the 2011 domestic abuse as a result of an emotional plea from Mr. Miller's mother, not because the domestic abuse did not occur. (R128, p. 200-202).

Mr. Miller inaccurately asserts: "Carroll alleged that Miller violated the 2016 injunction on two occasions thereby justifying her request to move." *Miller's Brief*, p. 5. Mr. Miller's violations of the 10-year Domestic Abuse Restraining Order issued on August 18, 2016 (R59, App. 101-102) were during Christmas of 2016 (R132, p. 266-67) and during a wrestling match in March of 2017 (R132, p. 230). Both respective events were months after Ms. Carroll filed her Motion. (R1).

Mr. Miller cites to "R132" and "R133" a number of times on page 5 of his Brief. Pursuant to the January 16, 2018 Index, "R132" is a Cover Letter to Judge Bitney from Heather Pauls and "R133" is a Supplemental Order. Mr. Miller's citations appear to be inaccurate.

Mr. Miller misrepresents the contents of Ms. Carroll's final Facebook post. *Miller's Brief*, p. 9, 46 ("Perhaps mission accomplished?"). Contrary to the implication that Ms. Carroll utilized Facebook to gain an advantage in the custody dispute, after being granted full physical and legal custody of Bruce and due to the resulting time requirements, Ms. Carroll stated: "I'll be bouncing off fb to focus all my attention on [Bruce] and helping him through these tough changes." (R107, Exhibit B).

appeared partial against him by being Facebook "friends" with Ms. Carroll, but it was acceptable for Mr. Miller's sister and Mr. Miller's witnesses to be "friends" with Judge Bitney.

Instead, Mr. Miller argues that the timing of the Facebook "friendship" creates the appearance of impropriety. *Miller Brief*, p. 17. But, an individual who had no private communications with the judge regarding the pending case (thus there was nothing to disclose) does not present a legitimate concern of impropriety, irrespective of timing. In fact, this Court's precedent that "[t]here is a presumption that a judge acted fairly, impartially, and without prejudice", *State v. Herrmann*, 867 N.W.2d 772, 774 (Wis. 2015), mandates that there must be more than an innocuous Facebook "friendship" such as what occurred here. There must be communications between the party and the judge regarding the case. There must be private messages between the party and the judge. There must be more to rebut the presumption. Otherwise[3], affirming the Court of Appeals' Decision imposes a mandate prohibiting the judicial use of ESM and reversing this Court's precedent regarding judicial bias.

Mr. Miller's Brief ignores the undisputed fact that there was no allegation of subjective bias and no allegation that objective facts existed

[3] Mr. Miller's Brief relies heavily upon commentary on the Court of Appeals' Decision. *Miller Brief*, p. 14-16. Ms. Carroll will rely upon the case law and ethics opinions from across the Country that support her position and not news articles lacking any precedential value.

that Judge Bitney treated Mr. Miller unfairly. (App. 6). Instead, Mr. Miller's Brief heavily relies upon speculation and conjecture. Mr. Miller speculates, on multiple occasions, that Judge Bitney viewed Ms. Carroll's Facebook page, *Miller Brief*, p. 9, 10, 17, 26-27, 28, 38, 39, that Judge Bitney must have seen that Ms. Carroll "liked" posts related to preventing domestic abuse,[4] *Id*., p. 9, 17, 26-27, 28, 38, 39, and that had Judge Bitney viewed Ms. Carroll's Facebook page that may have impacted his decision. *Id.*, p. 10.[5] But there are absolutely no facts in the record to support this speculation and conjecture. Rather, the record evidences that Ms. Carroll and Judge Bitney had absolutely no communications regarding this case and that Judge Bitney did not view any of Ms. Carroll's Facebook posts, likes or comments:

> 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 Ms. Carroll. The Court did not like any posts, respond to any posts, or conduct any communication ex parte or otherwise with Ms. Carroll, other than simply accepting the Facebook friendship request.

(App. 45-46). Mr. Miller's speculation and conjecture is insufficient to overcome the presumption that "circuit court judges try to be fair and

[4] It should go without saying that preventing domestic violence should be a goal of all. Arguing that a post on Facebook regarding domestic violence caused Judge Bitney to turn from an advocate for domestic violence to an opponent of domestic violence strains credibility.

[5] This allegation ignores that Judge Bitney had made up his mind long before the Facebook "friend" request. (App. 46).

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). Mr. Miller has not pointed to any actual proof that Judge Bitney was unfair and partial and therefore has failed to overcome the presumption.[6]

Barren from Mr. Miller's Brief is a rule, statute, case, or ethics opinion in which, as here, there was: 1) a Facebook "friendship" between a party and judge; 2) with no allegation of subjective bias; 3) with no allegation of objective facts that the opposing party was treated unfairly; 4) the opposing party's own sister and other witnesses were also Facebook "friends" with the judge; 5) with no ex parte communications between the judge and the party; and 6) when two of the three judges in that county had found the opposing party engaged in domestic abuse, served as the basis for overcoming the presumption that judges are fair, impartial, and capable of ignoring any biasing influences. To the contrary, the overwhelming majority of cases and ethics opinions which address the judicial use of ESM support the conclusion that this Facebook "friendship" and these facts fail to overcome the presumption.[7]

---

[6] Notably, the GAL did not file a memorandum supporting Mr. Miller's Motion.

[7] *See Ms. Carroll's Brief*, p.23-31 discussing and analyzing the ethics opinions and cases from across the County; *see also Law Offices of Herssein v. United Servs. Auto. Ass'n*, 271 So.3d 889, 897-899 (Fl. 2018) (examining the ethics opinions from across the Country, which majority of

Mr. Miller tacitly acknowledges the well-reasoned decision of the Florida Supreme Court in *Law Offices of Herssein* by failing to address the same. *See Law Offices of Herssein*, 271 So.3d 897-899. Rather than seek to distinguish the numerous ethics opinions supporting reversal of the Court of Appeals' Decision (acknowledging that "generally judges may use ESM", *Miller Brief*, p. 35) or the persuasive decision of *Law Offices of Herssein*, Mr. Miller cites three distinguishable cases. *Miller Brief*, p. 23-24.

In *Chace v. Loisel*, 170 So.3d 802, 803 (Fl. Ct. App. 2014), a party refused the Facebook "friend" request from the judge. Thereafter, the party asserts that she was "attribut[ed] most of the marital debt" and her former spouse received a "disproportionately excessive alimony award" because the judge "retaliated against Petitioner after she did not accept the ["friend"] request." *Id*. Mr. Miller, however, has not alleged that Judge Bitney retaliated against him. (R104). Indeed, Mr. Miller has not argued that he was treated unfairly, at all, by Judge Bitney. (*Id*.).

The one page grant of the petition in *Hachenberger v. Hachenberger*, 135 So.3d 413 (Fl. Ct. App. 2014) (Miller App. 97)

---

ethics opinions support Ms. Carroll's position here, and holding: "[i]f traditional "friendship," without more, does not reasonably convey or permit others to convey the impression that they are in a special position to influence the judge, then surely Facebook "friendship" – which exists on an even broader spectrum than traditional "friendship" and is regularly more casual and less permanent than traditional "friendship" – does not reasonably convey such an impression.").

provides little detail, only stating reliance upon *Chace*, 170 So.3d 802 which contained an allegation of retaliation that is glaringly barren here.

Frazier v. Frazier, 2016 WL 4498320 (Tenn. Ct. App. 2016) is likewise distinguishable. (Miller App. 87-96). In *Frazier*, neither the husband nor the wife were residents of Rhea County, but rather were residents of Bradley County. (*Id.*). Husband and wife jointly met with attorney Howard Upchurch who advised them to file their divorce in Rhea County and began to prepare a marital dissolution agreement and permanent parenting plan. (*Id.*). Thereafter, Attorney Upchurch filed the complaint for divorce, the marital dissolution agreement, and the permanent parenting plan in Rhea County on behalf of husband. (*Id*. at 90-91). Wife subsequently retained independent counsel and sought to retract her agreement to the marital dissolution agreement and permanent parenting plan. (*Id*. at 91).

Wife subsequently learned that the presiding judge had previously worked for Attorney Upchurch and the two had attended college football games together and consumed alcohol together, which were depicted on Instagram. (*Id*.). Based upon the personal friendship of the presiding judge and opposing counsel, the wife made a motion seeking the judge's recusal. (*Id*.).

Contrary to Mr. Miller's representation, the crux of the issue in *Frazier* was not that wife had sent the presiding judge an Instagram "follow" request, but rather:

> recusal [of the judge] was sought on the basis that the Judge's personal and extrajudicial activities with Mr. Upchurch, as reflected on social media, created the appearance of bias or prejudice on the part of the Judge.

(Miller App. 93).[8]

Here, there was no subjective bias by Judge Bitney against Mr. Miller. Mr. Miller has not asserted that he was treated unfairly by Judge Bitney. And Mr. Miller cannot point to any proof to overcome the presumption that Judge Bitney acted fairly and impartially.[9] Indeed, the record is barren of any objective bias upon which a "reasonable person could question [Judge Bitney's] impartiality." *State v. Gudgeon*, 720 N.W.2d 114, 121 (Wis. Ct. App. 2006); *State v. Walberg*, 325 N.W.2d 687, 692 (Wis. 1982). Thus, the Court of Appeals' Decision must be reversed. To hold otherwise imposes a rule prohibiting the judicial use of ESM and

---

[8] Notably, the *Frazier* Court agreed that "[t]he mere existence of a friendship between a judge and an attorney is not sufficient, standing alone, to mandate recusal." (Miller App. 84) *citing State v. Madden*, 2014 WL 931031 (Tenn. Crim. App. 2014) relied upon by Ms. Carroll. *See* (App. 2019-219).

[9] At worst, the Facebook "friendship" was harmless error requiring reversal of the Court of Appeals. Because Mr. Miller has not alleged that Judge Bitney was actually biased, only that there was an appearance of impropriety, there has not been a structural constitutional error. *See State v. Pinno*, 850 N.W.2d 207, 222 (Wis. 2014) (providing, in relevant part, that a "biased judge" is part of the "limited class of structural error").

would radically alter this Court's precedent[10] that judges of Wisconsin are presumed fair and impartial.

II. THE COURT OF APPEALS' DRASTIC EXPANSION OF THE DEFINITION OF EX PARTE COMMUNICATIONS MUST BE REVERSED.

This Court will search Mr. Miller's Brief in vain for any communication by and between Ms. Carroll "concerning a pending or impending action or proceeding" – the very definition of ex parte communications. SCR 60.04(1)(g). In this respect, and as set forth *supra*, Mr. Miller can only offer speculation and conjecture that Judge Bitney must have, at some unknown, undisclosed, and barren from the record time, viewed Ms. Carroll's Facebook profile. But that does not constitute ex parte communications and the Court of Appeals' Decision has limitless implications regarding ex parte communications both in the ESM context and otherwise. The Court of Appeals' Decision must be reversed.

Mr. Miller argues that the Court of Appeals did not find ex parte communication between Ms. Carroll and Judge Bitney. *Miller Brief*, p. 25.

[10] Additionally, holding that a Facebook "friendship" alone mandates recusal would also require rewriting the Code of Judicial Conduct. SCR 60.03(2) expressly contemplates that a judge will have "family, social, political or other relationships", but not to allow such relationships to "influence the judge's judicial conduct or judgment". There is no argument that any "relationship" with Ms. Carroll influenced Judge Bitney's judicial conduct or judgment and, thus, affirming the Court of Appeals' Decision mandates the amendment to SCR 60.03(2) to a judge now may not have "family, social, political or other relationships…even if such relationships do not influence the judge's judicial conduct or judgment." This result indeed condemns judges to a life of a hermit.

To the contrary. Notwithstanding that is was undisputed that no communications between Ms. Carroll and Judge Bitney occurred on Facebook (or otherwise) regarding the case, the Court of Appeals held: "ex parte communication occurred to the extent Judge Bitney and Carroll viewed each other's Facebook posts." (App. 11). Given that it was undisputed that Ms. Carroll and Judge Bitney had no messages concerning the pending action, given that there were no facts in the record that Judge Bitney ever actually viewed Ms. Carroll's Facebook posts (App. 45-46), and given that there were no Facebook posts concerning the pending matter (App. 103-124), this is a dramatic expansion of the definition of ex parte communications.

Not only does the Court of Appeals' Decision prohibit all judges from using ESM, the Decision would also prevent an attorney from attending a continuing legal education seminar in which a judge was a presenter, would prevent a litigant from saying "hi" to the judge at a coffee shop, and would prevent the judge from saying "thank you" to a litigant that held the door at a local restaurant. Based on the Court of Appeals' Decision, essentially any communication between a litigant or attorney with a presiding judge, or a judge that someday could preside over their matter, would be prohibited. The Court of Appeals' sweeping expansion of the definition of ex parte communications should not stand.

As acknowledged by Mr. Miller, the prohibition of ex parte communications is to avoid "the corrosive effects those communications can have on the adversarial process." *Miller Brief*, p. 29 *citing* Miller App. 170-180 (defining ex parte communications as those "concerning a pending or impending matter" (*Id*. at 175)). There have been absolutely no ex parte communications and no coercive effect on the adversarial process. The Court of Appeals should be reversed.

CONCLUSION

This case presents the Court with the opportunity to provide significant guidance to judges, attorneys and litigants of this State. Facebook was founded in 2004 (App. 242) and we now have a generation of people that have never known life without Facebook. There are over 1.59 billion daily active Facebook users and 2.41 billion monthly active Facebook users. Individuals "friend" celebrities and politicians on Facebook each day. No one reasonably believes that one of Michael Jordan's millions of Facebook "friends" or followers is able to persuade his opinion regarding his next shoe design. No one reasonably believes that one of Donald Trump's or Hillary Clinton's millions of Facebook "friends" or followers could change either of their respective political opinions. The same is true here that Judge Bitney's opinion on the merits of this case was unaffected by the fact that one of his thousands of Facebook "friends", Ms. Carroll, was a litigant before him.

Judge Bitney had no communication with Ms. Carroll regarding this case, there was no subjective bias, and Mr. Miller has not alleged that he was treated unfairly by Judge Bitney. This case was decided on the merits based on Mr. Miller's pattern of serious domestic abuse, not because of a Facebook "friendship". Affirming the Court of Appeals' Decision, on these facts, provides a bright-line rule prohibiting the judicial use of ESM. Reversing the Court of Appeals would return the analysis of judicial bias to this Court's prior precedent and would return the definition of ex parte communications to the definition set forth in the Code of Judicial Conduct. Ms. Carroll respectfully requests that the Court of Appeals' Decision be reversed.

Respectfully Submitted
SCHWARTZ LAW FIRM

Dated: October 10, 2019

Brandon M. Schwartz (#1084533)
Michael D. Schwartz (#1018933)
600 Inwood Avenue N.
Suite 130
Oakdale, Minnesota 55128
Telephone: (651) 528-6800
Facsimile: 651-528-6450
Email: brandon@mdspalaw.com
Email: michael@mdspalaw.com
Attorneys for Angela Carroll

FORM AND LENGTH CERTIFICATION

I hereby certify that this Reply 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 2,999 words.

Dated: October 10, 2019

Brandon M. Schwartz

.....

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

I hereby certify that:

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

I further certify that:

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

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

Respectfully Submitted
SCHWARTZ LAW FIRM

Dated: October 10, 2019

Brandon M. Schwartz (#1084533)
Michael D. Schwartz (#1018933)
600 Inwood Avenue N.
Suite 130
Oakdale, Minnesota 55128
Telephone: (651) 528-6800
Facsimile: 651-528-6450
Email: brandon@mdspalaw.com
Email: michael@mdspalaw.com
Attorneys for Angela Carroll

CERTIFICATE OF SERVICE

Pursuant to Wis. Stat. § 809.80(3)(b) and (4), I certify that on October 10, 2019, the required copies of this Reply Brief were delivered to a third-party commercial carrier (UPS) for delivery within 1 (one) business day to:

Clerk of Wisconsin - Supreme Court
110 E. Main Street
Madison, WI 53702

Stephanie L. Finn
David J. Rice
Herrick & Hart, S.C.
116 W. Grand Ave
Eau Claire, WI 54703

Laura Ann Sutton
2247 20 1/4 Street
Rice Lake, WI 54868

Dated: October 10, 2019

Brandon M. Schwartz