No. 20-165

IN THE

Supreme Court of the United States

IN RE THE PATERNITY OF B.J.M.
ANGELA L. CARROLL,
Petitioner,
v.

TIMOTHY W. MILLER,
Respondent.

On Petition For Review To The Wisconsin Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STEPHANIE L. FINN
COUNSEL OF RECORD
HERRICK & HART, S.C.
116 W. GRAND AVENUE
P.O. BOX 167
EAU CLAIRE, WI 54702
(715) 832-3491
steph@eauclairelaw.com

Counsel for Respondent

QUESTION PRESENTED

Was the Wisconsin Supreme Court correct in determining that, under the totality of the facts and circumstances, Respondent Miller rebutted the presumption that trial court Judge Bitney acted fairly, impartially, and without prejudice and that Miller established a serious risk of actual bias?

The Wisconsin Supreme Court properly considered and applied ***Caperton v. A.T. Massey Coal Co.,*** 556 U.S. 868 (2009) – with six of the seven justices holding that ***Caperton*** presents a very high standard and agreeing that most matters relating to judicial disqualification do not rise to a constitutional level. The Decision was based not on a deviation from, or extension of, ***Caperton***, but, instead, on its proper application to the specific facts -- with the majority of State Court Justices (4-3) finding the particular facts of this case to be extraordinary and egregious.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported at 2020 WI 56, 392 Wis.2d 49, 944 N.W.2d 542.(Pet. App. 1a-77a) The opinion of the Wisconsin Court of Appeals is reported at 2019 WI App 10, 386 Wis.2d 267, 925 N.W.2d 580.(Pet. App. 78a-92a) The opinion and order of the Barron County, Wisconsin Circuit Court are unreported.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

At its core, this is a fact-bound dispute whose resolution is of little broad importance to anyone other than the immediate parties and review is not warranted.

The Petitioner's recitation of facts is inaccurate as to what the facts of the case were and what the Court of Appeals and the Majority found them to be. This was not a Facebook friendship and nothing more. This was not some random friend among thousands. The court found that this was a purposeful campaign by Petitioner/Carroll to provide information to the judge, outside of the court room, regarding issues in the case, during the very time period that the judge was deciding her case, in an attempt to influence his decision. The judge failed to explain his actions in accepting Petitioner's friendship request, failed to deny that he saw Petitioner's posts, and failed to provide any explanation as to why he did not disclose these communications, despite being provided ample opportunity to provide such explanations. Ultimately, the judge ruled overwhelmingly in favor of the Petitioner, contrary to the recommendation of the guardian ad litem and other evidence, upon which the Petitioner ended her Facebook involvement by posting, fait accompli, "The Honorable Judge has granted everything we requested" "...I'll be bouncing off fb [Facebook]..."

The Wisconsin Supreme Court properly applied this Court's ***Caperton*** analysis to the outlandish and obviously offensive facts of this case to affirm

the Court of Appeals' determination that a new trial was warranted. Even without the due process analysis, the Court of Appeals decision that was up on review also relied on State law principles to disqualify Judge Bitney and remand for a new trial. Therefore, this Court's jurisdiction needs not be invoked.

Nor does the Wisconsin Supreme Court Decision make precedent or set forth any reviewable issue regarding judicial use of social media. At most, in dicta, the Justices were united in simply cautioning judges to be careful of how they use social media tools – a wholly unremarkable suggestion.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

A. Barron County Wisconsin Circuit Court:

Recusal was first raised in Barron County, Wisconsin circuit court. Miller filed a post-trial motion for reconsideration seeking to disqualify Judge Bitney, the trial judge, and requested a new hearing with a new judge. The basis for the motion was both legal and equitable. In addition to arguing that due process required a fair and impartial tribunal, Miller also specifically relied on Wis. Stat. §806.07 [Wisconsin's version of FRCP 60], seeking relief from judgment based on newly discovered evidence (i.e., Judge Bitney and Carrol's commencement of a Facebook relationship and communications relevant to the issues before the court while the case was pending), as well as requesting relief based on equitable grounds. Wisconsin Stat. §806.07 authorizes a court to vacate judgments or otherwise grant relief on various

equitable grounds. ***Larry v. Harris***, 2008 WI 81, ¶18, 311 Wis.2d 326, 752 N.W.2d 279.

In addition to due process and Wis. Stat. §806.07, Miller argued disqualification was warranted by Wis. Stat. §757.19(2)(g), that a judge "shall" disqualify himself when the judge determines that, for any reason, it appears he cannot act in an impartial manner, and Wisconsin Supreme Court Rules 60.02 and 60.03(2) which set forth State standards of judicial conduct and prohibit a judge from "permit[ting] others to convey that they are in a special position to influence the judge...."

Judge Bitney denied the motion for relief under Wis. Stat. §806.07 stating that there was no subjective or objective bias on his part that would require recusal or disqualification.

B. Wisconsin Court of Appeal District III:

Miller appealed to the Wisconsin Court of Appeals, renewing the due process and State law arguments stating, "[d]isqualification for perceived conflict or appearance of bias is based not only in due process considerations, but also in statutory law and judicial conduct codes." In granting Miller a new trial, the Wisconsin Court of Appeals relied both on due process considerations and, in part, on these State rules:

> ¶27 Fourth, although a violation of an ethical rule does not, standing alone, show that a judge's conduct offends due process, we may consider Wisconsin Supreme Court Rules (SCR) when considering a claim of objective bias. *See* ***State v. Pinno***, 2014 WI 74, ¶94, 356 Wis.2d 106, 850 N.W.2d 207. Here, Judge Bitney's actions arguably implicate multiple rules that stress the importance of an independent

and impartial judiciary. *See, e.g.*, SCR 60.02 ("An independent and honorable judiciary is indispensable to justice in our society"); SCR 60.03(1) ("A judge...shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); SCR 60.04(1)(g) ("A judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding..."). Again, these ethical rules do not directly address judicial use of ESM. But as the comment to SCR 60.03(1) notes:

> The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in [SCR chapter 60].

We have already explained how Judge Bitney's actions in this particular case created a great risk of actual bias and a resulting appearance of partiality; we cannot ignore this appearance merely because there is no direct prohibition in our ethical rules against judicial use of ESM. Instead, because these rules reinforce the obligation of the judiciary to both remain—and appear to remain—impartial, they reinforce our conclusion that Judge Bitney's actions were impermissible.

C. Wisconsin Supreme Court:

Miller again argued due process and violation of State judicial rules. The Wisconsin Supreme Court focused on the due process arguments, with the Majority (4-3) finding the extreme facts gave rise to a ***Caperton*** due process disqualification. Justice Ziegler discussed the State rules in her concurrence, acknowledging that a violation of ethics or recusal rules did not automatically constitute a due process violation.

While the Decision was four to three, six of the seven Justices concurred that the holding in ***Caperton*** applied, that it was a very difficult or high standard to meet, and that it would take only an extreme or rare set

of facts to meet the ***Caperton*** test. That said the Majority, as had the Wisconsin Court of Appeals, found the facts to be just so extreme. In this regard, the difference among the Justices was not based on the applicable law, but on the facts. The Majority all concurring that the facts conclusively established a serious risk of actual bias based on objective and reasonable perceptions.

D. Facts as determined by the court:

Judge Bitney was the sole decision-maker and factfinder in a pending multiple day, highly contested, child custody trial. Petitioner/Carroll, the mother, requested a Facebook friendship with Judge Bitney immediately after final briefs in the case were submitted but before the judge rendered his decision. Judge Bitney personally and affirmatively accepted the friendship request. In the 25 days that ensued between accepting the Facebook request and Judge Bitney's decision, Carroll reacted to or commented on Judge Bitney's Facebook posts a minimum of at least 20 times, or more. Her continued communications with him by liking and commenting on his posts was found to be purposefully saying, hey "remember me" and "we are like-minded." She was providing information about herself to the judge outside of court while the judge was considering her case. Not only did the court find that this activity was relevant to the decision-making process in a custody proceeding where Carroll's character, fitness, and credibility were paramount, but the court found striking that a portion of her Facebook

activity in that 25 day period was relevant to her main disputed allegation against Miller --domestic violence. (Pet. App. 19a -20a) Noticeably, she had changed her Facebook persona to support her position in the custody dispute including changing her pictures and posts from party posts to posts of the family and children. Judge Bitney did not unfriend Carroll, disclose the Facebook friendship, or disclose the interactions. Judge Bitney did not deny seeing any of Carroll's Facebook posts, comments, or reactions, or her profile page. Judge Bitney's decision was grounded in a conclusion that Miller had engaged in domestic violence against Carroll, was overwhelmingly in favor of Carroll, and uprooted the pre-existing physical placement of the child -- which was contrary to the guardian ad litem's recommendation. On the day his decision was issued, Carroll both acknowledged the judge for giving her everything she requested and announced she was leaving Facebook. (See facts generally at Pet. App. 4.a-10a, 17a-22a,42a-53a)

REASONS FOR DENYING THE PETITION FOR WRIT

I. The Wisconsin Supreme Court properly stated and applied the *Caperton* due process analysis to the extraordinary facts of this case.

The Majority could not have been clearer that it was applying this Court's due process analysis outlined in ***Caperton***. For the Majority, Justice Dallet explained:

> ¶24 To assess whether the probability of actual bias rises to the level of a due process violation, we apply, verbatim, the standard from ***Caperton***. We ask whether there is "a serious risk of actual bias—

> based on objective and reasonable perceptions." ***Caperton,*** 556 U.S. at 884. "Due process requires an objective inquiry" into whether the circumstances "would offer a possible temptation to the average . . . judge to...lead him not to hold the balance nice, clear and true." ***Id.*** at 885 (omissions in original) (quoting ***Tumey v. Ohio***, 273 U.S. 510, 532, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927)). We acknowledge that it is the exceptional case with "extreme facts" which rises to the level of a "serious risk of actual bias." ***Id.*** at 886-87; **id.** at 876 ("[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." (quoted source omitted)).

(Pet. App.16a) The Majority then applied the ***Caperton*** standard to the specific facts, assuming that Judge Bitney acted fairly, impartially, and without prejudice, but concluding that Miller has rebutted this presumption by showing "a serious risk of actual bias." ***Caperton***, 556 U.S. at 884. The court focused on the specifics facts including: (1) the timing of the Facebook friend request and Judge Bitney's affirmative acceptance; (2) the volume of Carroll's Facebook activity and likelihood Judge Bitney viewed her posts and comments; (3) the content of the Facebook activity as it related to the context and nature of the pending proceeding; and (4) Judge Bitney's lack of disclosure.(Pet. App. 17a)

Justice Ziegler's concurrence re-iterated the Majority's holding that most matters of judicial recusal do not raise to a constitutional level, and that it is indeed only a very rare set of egregious facts, as were present here, that may implicate due process concerns. (Pet. App.58a-59a). The Dissent even likewise agreed that recusal/disqualification while rare and to be used sparingly and narrowly, is constitutionally required only when actual bias is

present, "or when the facts of a case are so extreme as to constitute a serious risk of actual bias."(Pet. App.63.a) The Decision appropriately set forth the standard – serious risk of actual bias. The difference between the Majority and Dissent being not the law, but the facts.

II. The Wisconsin Supreme Court Decision is a product of the extreme facts, not a misapplication or extension of due process law.

The Wisconsin Supreme Court appropriately conducted a ***Caperton*** due process analysis. The determining factor was not a relaxing of the test, but, instead, the egregious facts. Far from the innocuous Facebook friendship or social media connection that Petitioner paints, the Wisconsin Court of Appeals and the Majority of the Wisconsin Supreme Court specifically found a concerted effort by Petitioner to unduly influence the trial court judge, a campaign of ex parte communications between the Petitioner and the judge directly relevant to the issues pending before the judge as sole decisionmaker, an apparent successful campaign to influence the judge based on a decision favoring Petitioner contrary to the guardian ad litem's recommendations, and not only a lack of disclosure by the judge as to these communication during the pending litigation but, when confronted, no explanation by the judge despite being given ample opportunity.

Because the Decision is fact-based, much of it is devoted to setting forth those facts. Justice Dallet, writing for the Majority, found the "extreme facts of this case" as follows: The court first considered the timing of the

Facebook communication, both when Carroll sent the friend request and when Judge Bitney affirmatively accepted it. Although Judge Bitney had "thousands" of Facebook friends, Carroll was not an established "friend." Instead, she was a current litigant who requested to be Judge Bitney's friend only after she testified at a contested evidentiary hearing in which he was the sole decision-maker. Judge Bitney had presided over the case since August of 2016; yet, Carroll friended him after he heard the evidence and the final briefs were submitted, but before he rendered a decision. The timing of the friend request implied that Carroll wanted to influence Judge Bitney's decision on her motion to modify legal custody, physical placement, and child support. (Pet. App. 17a-18a)

The court found significant that Judge Bitney took the affirmative step of accepting Carroll's "friend request" prior to issuing a written decision on her motion. Noting that sending a Facebook friend request does not automatically mean that the users become "friends." A user can decline a friend request or simply ignore it. But by accepting Carroll's request, Judge Bitney accepted access to off-the-record facts that were relevant to the dispute, namely information regarding Carroll's character and parental fitness. (Pet. App. 18a) The court noted that Carroll made a purposeful switch in her Facebook persona to support her position in the custody dispute, including changing her pictures and posts from party type pictures and posts to family pictures and posts about children and family. (Pet. App.18a)

Acceptance of Carroll's friend request enabled Judge Bitney to view Carroll's Facebook profile and see her posts, "reactions," comments, and "shares" on his constantly refreshing News Feed. Carroll's request, and Judge Bitney's acceptance, put Carroll in a different position than Miller and caused an improper asymmetry of access. (Pet. App.19a)

In assessing whether there was a "serious risk of actual bias, "the court found important the likelihood that Judge Bitney would have seen Carroll's Facebook activity as an important factor. The court found Carroll engaged with and "reacted to" a significant number of Judge Bitney's Facebook posts. Carroll "liked" at least 16 of Judge Bitney's posts, primarily related to prayers and Bible verses, "loved" two other posts, and commented on two posts regarding his knee surgery, including sending him "prayers." Judge Bitney would have received a Facebook notification for each of Carroll's reactions and comments....Carroll's Facebook activity also included "liking" and "sharing" posts and articles related to domestic violence awareness, and showing she was "interested in" an event promoting domestic violence awareness. (Pet. App. 19a) Importantly, the court found that Judge Bitney never denied seeing these communications and himself was likewise very active on Facebook during the period. The court specifically found that the significant number of undisclosed contacts between Judge Bitney and Carroll in the 25 days before Judge Bitney rendered a decision entirely in Carroll's

favor increased the likelihood of a serious risk of actual bias. (Pet. App. 19a-20a)

To assess the serious risk of actual bias, the court considered these communications against the context and nature of the pending litigation. The court found this was a custody dispute in which Judge Bitney was the sole factfinder regarding the character and parental fitness of Miller and Carroll. His decision on the placement and custody was necessarily driven by his personal evaluation of both parties, as their personal lives were relevant and the subject of extensive testimony from 15 witnesses. Carroll and Miller had an opportunity at the hearing to portray themselves in the best light. However, the court found Carroll was provided with additional opportunities to do this for 25 days through her access to Judge Bitney via Facebook. (Pet. App. 20a)

Reviewing the communications, the court found that the Facebook activity, including 18 "reactions" and two comments, was relevant to the decision-making process in a proceeding like this one, where Carroll's character, fitness, and credibility were paramount. Carroll was allowed the opportunity to give Judge Bitney additional information about herself and an extra "remember me" almost 25 different times during the time period when the matter was under advisement, all unbeknownst to Miller. By reacting to and engaging with Judge Bitney's posts, Carroll was effectively signaling to Judge Bitney that they were like-minded and, for that reason, she was

trustworthy. (Pet. App. 21a) The court found that she was conveying to him off-the-record information about her values, character, and parental fitness--additional evidence Miller did not have the opportunity to rebut. These communications in this type of proceeding led the court to conclude: "Under a 'realistic appraisal of psychological tendencies and human weaknesses,' this off-the-record information about Carroll, created a serious risk of actual bias. ***Caperton***, 556 U.S. at 883 (quoted source omitted)." (Pet. App. 21a)

The court also found it striking that a portion of Carroll's Facebook activity was related to her main allegation against Miller at the contested hearing: domestic violence. Carroll "shared" third-party posts related to domestic violence, "reacted" to articles about the effects of domestic violence, and showed herself as "interested in" a domestic violence awareness event. Allegations of domestic violence formed the basis for Carroll's motion to modify child custody and placement, and a finding of domestic violence formed the basis for Judge Bitney's decision. Carroll's Facebook activity supported her allegation that Miller had committed domestic violence against her and that she should therefore be awarded custody. But unlike the information presented at the hearing, Miller was unaware that Judge Bitney had access to this off-the-record information. (Pet. App. 21a-22a)

Finally, the court considered and found Judge Bitney's lack of disclosure, at any point, in any way or form, as an important factor in assessing the serious risk of actual bias. (Pet. App.22a) The court found that

Bitney could have initially ignored or denied Carroll's friend request and disclosed the request to the parties. He could have also disclosed the Facebook friendship when he received notification of Carroll's reactions to his posts, unfriended Carroll on Facebook, or changed his security settings to hide her posts from appearing on his News Feed. Instead, Judge Bitney failed to disclose the friendship or other Facebook activity, and the friendship was discovered only after Judge Bitney issued his decision. Because of Judge Bitney's lack of any means of disclosure, Miller was unable to review the interactions between Judge Bitney and Carroll and have an opportunity to refute what Judge Bitney might have seen Carroll post or share. (Pet. App. 23a-24a)

Based on the facts the court held:

> ¶35 The totality of the circumstances and the extreme facts of this case, viewed objectively, rise to the level of a serious risk of actual bias, which rebuts the presumption of Judge Bitney's impartiality.

(Pet. App.17a-24a)

Justice Ziegler conducted an in depth analysis of the ***Caperton*** decision compared to the specific facts of this case to emphasize both the Majority's and Court of Appeals' determination that this was far from an ordinary recusal case and that there was more here than simply an appearance of impropriety. (Pet. App.37a-38a) Justice Ziegler characterized this as a "perfect storm of extreme and extraordinary facts" wherein Petitioner seized on the judge's acceptance of her Facebook request to

correspond with and influence the judge during a pending proceeding establishing a serious risk of actual bias. (Pet. App. 42a-44a) Carroll offered, and Judge Bitney accepted, access to off-record facts relevant to the litigation during the time when he was deciding whether she was the more fit parent. (Pet. App. 45a-46a). The commencement of the Facebook interaction and the many Facebook communications occurred during the decision-making phase of the proceedings where Judge Bitney was the sole decision-maker. Moreover, the content of the Facebook communications was objectively poised to evidence to the judge that Carroll had the same values and beliefs as the judge and was, therefore, the better parent. (Pet. App.46a.-47a) The fact that Judge Bitney allowed Carroll to be in a position to objectively influence him, and she seized that opportunity, unbeknownst to Miller until after Judge Bitney issued his decision, Ziegler found to be even more extraordinary than ***Caperton***.(Pet. App. 47a)

"While there is objective evidence of communication from one party to the judge over and over at the same time the judge was deciding the case, there is hardly anything in the record to refute it or demonstrate that the contact was of no moment." (Pet. App. 48a) Of note, Judge Bitney could have denied seeing Carroll's various reactions to and comments on his Facebook posts. But he did not. Nor did he deny seeing Carroll's Facebook posts relating to domestic violence. Nor did he deny viewing her Facebook profile. He could have explained the safeguards he has in place. He could have

explained how he manages his Facebook account. But he did not. Rather, Judge Bitney admitted that the parties "presented accurately the substance of the interaction between Miss Carroll and the Court on Facebook" and that, on the day he and Carroll became Facebook friends, his decision had not yet been "reduced to writing." The record establishes one party was communicating with the judge during the pendency of a case where the judge, not a jury, is the decision-maker. (Pet. App. 48a-50a)

The Dissent takes issue with the facts. Contrary to the Majority opinion, contrary Justice Ziegler's concurrence, and contrary to the Court of Appeals, Justice Hagedorn characterizes this as a relatively ordinary appearance of bias.(Pet. App. 63a-64a,73a) He dismisses what the others find as compelling factual evidence to be "ambiguous" (Pet. App. 69a) Much of his position is not based on the facts of the case, but instead on hypotheticals of a judge's potential interaction with the community members in scenarios or circumstances not here present. (Pet. App. 72a-73a). He surmises that maybe Judge Bitney did not see any of these posts despite Judge Bitney never having denied that fact.(Pet. App. 71a) He ignores that the parties admitted the record may not include all of Judge Bitney and Carroll's interactions. (Pet. App. 6a-9a) Even the two dissenters joining with him, Justices R. Bradley and Kelly, did <u>not</u> join in these "speculative factual" portions of the Dissent ("joined except for ...¶¶120-24..."). Armed with only hypotheticals and strained speculation, Justice Hagedorn himself conceded

there was a recusal wrong and an appearance of bias – he just was in the minority in finding it ordinary and not rising to due process levels. (Pet. App. 73a)

This then begs the question --what is there for this Court to review? As Justice Ziegler noted, while the Dissent believed the facts did not support a due process violation, every Justice did find fault with Judge Bitney's actions such that an ordinary recusal claim would certainly be supported under the Wisconsin Code of Judicial Conduct even absent a due process analysis (Pet. App. 53a-55a) There exist independent reasons aside from due process to support the determination that a new trial is warranted. The due process arguments were intertwined with what was originally an equitable claim for relief from judgment under Wis. Stat. §806.07, along with State judicial ethical rules regarding recusal and impropriety.

III. The Decision is supported by independent reasons aside from due process and grounded in Wisconsin recusal rules.

There are adequate and independent state-law grounds for disqualifying Judge Bitney. While the Wisconsin Supreme Court may have upheld the Court of Appeals disqualification and grant of a new trial based on ***Caperton*** due process, they also did not reverse the alternate grounds for disqualification as had been argued by Miller in the lower courts and relied upon at least in part by the Court of Appeals.

As set forth above, Miller had originally brought his motion not only on due process grounds but also based on Wis. Stat. §806.07 alleging newly discovered evidence and equity.

The Court of Appeals found a due process violation but also, seemingly aside from due process, found that Judge Bitney acted impermissibly under the State judicial ethics citing to Wisconsin Supreme Court Rules (SCR) 60.02, 60.03(1), 60.04(1)(g), the comments to SCR 60.03(1), as well as ***State v. Pinno***, 2014 WI 74, ¶94, 356 Wis.2d 106, 850 N.W.2d 207. (Pet. App. 89a-90a) Additionally, the Court of Appeals supported its determination of remand for a new trial based on prohibited ex parte communications (Pet. App. 88a-89a) Miller had advanced these arguments, aside from due process, to the Wisconsin Supreme Court, arguing:

> Disqualification for perceived conflict or appearance of bias is based not only in due process considerations, but also in statutory law and judicial conduct codes. See ***Caperton v. A. T. Massey Coal Co.***, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) recognizing that the appearance of impropriety may violate constitutional due process protections but, even if not rising to a constitutional violation, the appearance of impropriety may still violate judicial codes, statutes, or the professional standards of the bench and bar, requiring disqualification. ***Id*** at 556 U.S. 889-890.
>
> The Wisconsin legislature has spoken directly to the issue through Wis. Stat. §757.19(2)(g) which makes clear recusal is required if there is the *appearance* of partiality – even if no actual partiality is established:
> (2) Any judge *shall disqualify himself* or herself from any civil or criminal action or proceeding when one of the following situations occurs: ...
> (g) When a judge determines that, for any reason, he or she cannot, *or it appears* he or she cannot, act in an impartial manner. [Emphasis added].

> The Wisconsin Supreme Court Rules are in accord that the appearance of partiality is unacceptable. SCR 60.02 provides:
>
> > An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.
>
> Section 60.03 provides: "*A judge shall avoid* impropriety *and the appearance of impropriety* in all of the judge's activities. (1) A judge shall respect and comply with the law and shall act at all times in a manner that *promotes public confidence in the integrity and impartiality of the judiciary*. (2) A judge may not allow... social...or other relationships to influence the judges judicial conduct or judgment. *A judge may not...convey or permit others to convey the impression that they are in a special position to influence the judge...*" [Emphasis added]

Miller's Wisconsin Supreme Court Brief p.20-22. So too Miller argued State standards for communication between litigants and decision-makers prohibited the communications between Carroll and Judge Bitney while her case was under consideration, making analogy to State pattern Jury Instructions prohibiting such contact:

> WIS JI-Civil 50: CONDUCT
> We will stop, or "recess," from time to time during the trial. You may be excused from the courtroom when it is necessary for me to hear legal arguments from the lawyers. If you come in contact with the parties, lawyers (interpreters) or witnesses do not speak with them. For their part, the parties, lawyers, (interpreters) and witnesses will not contact or speak with the jurors....
>
> Do not seek information regarding the public records of any party or witness in this case. Any information you obtain outside the courtroom could be misleading, inaccurate, or incomplete. Relying on this information is unfair because the parties would not have the opportunity to refute, explain, or correct it.
>
> Judge Bitney even agreed that a litigant friending a juror during deliberations would *certainly* call into question the jury's decision(R134,p320)[Emphasis added] This is no different, and even

> more concerning, as it involves undisclosed contact, during "deliberation" with the sole decision maker.

Miller's Supreme Court Brief p.30-31. Miller argued the State statute for recusal applied:

> The mandate that the integrity of the judiciary be free from even the appearance of partiality is so great that a judge can be disqualified post-hearing or post-decision. In ***Liljeberg v. Health Services Acquisition Corp.***, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), the losing party discovered 17 months after trial that the judge appeared to have had a serious conflict of interest. The judge claimed to have been unaware of the conflict, but the losing party nevertheless sought to have the judgment vacated. Interpreting section 455(a) of the Judicial Code, the United States Supreme Court held, that if an objective observer would believe that the judge should have known of the conflict, then the judge may be retroactively disqualified. The Court further held that, in appropriate cases, final judgments may be vacated for this reason.
>
> Although interpreting the federal rule for disqualification for the appearance of partiality, the underpinning of ***Liljeberg*** applies. Both the federal rule, 28 USC 455, and [Wis.Stat.] §757.19(2)(g) require that a judge shall disqualify himself when it appears he cannot act in an impartial manner and/or his impartiality might reasonably be questioned.

Miller's Supreme Court Brief p. 40-41. A new trial was warranted even without a due process violation because, as Miller argued, the error was not harmless:

> Even if, *arguendo*, not structural error, the error was not harmless. The burden of proving no prejudice is on the beneficiary of the error, Carroll. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222(1985) This is especially so because she instigated the error. The contact was ex parte. By definition, the opposing party is not aware of the information given in secret to the judge. That prevents the party from countering such information with evidence. When one party is unaware of the evidence or information used by a judge to decide a dispute and is unable to challenge it, our adversary system breaks down. Without knowing the effect this communication had on the

> decision, this Court cannot conclude that the error was harmless. Because demonstration of prejudice in this kind of case is a practical impossibility, prejudice must necessarily be implied.
>
> Nor can it be said that the outcome would be the same in the absence of the error. While Carroll points to some evidence to support the judge's decision, there was also substantial competing evidence supporting a different result. Tellingly, the GAL (who had *not* seen Carroll's Facebook page prior to Judge Bitney's decision (R106)), reached an opposite conclusion as to placement – thereby intrinsically establishing a reasonable possibility that a neutral decision maker would have reached a different outcome. ***Martindale v. Ripp***, 2001 WI 113, ¶32, 246 Wis.2d 67, 89, 629 N.W.2d 698. As such, confidence in the outcome is undermined thereby affecting Miller's substantial rights per Wis. Stat. §805.18.
>
> Taking all this into consideration it cannot be said that the error was harmless. Instead, it more likely appears that the error played a role in the Judge's decision.

Miller's Supreme Court Brief p. 46-48. Thus, there is ample State law support for the outcome aside from solely due process.

IV. The Decision does not prohibit judicial use of social media. Nor does it open a floodgate of due process judicial recusal claims.

Petitioner incorrectly equates the facts of this case to a run of the mill social media friendship. Petitioner ignores the specific findings from both the Court of Appeals and the Wisconsin Supreme Court Majority that it was something far more – an attempt to improperly influence the judge. The Wisconsin Supreme Court was very clear in holding that this is a very limited Decision, and that it is a very rare situation where due process considerations are implicated in a recusal case. Far from innocuous social media relationships or a judge saying hello at church as Petitioner maintains, this was a concerted effort by her to use social media to influence the judge before

whom her case was pending, that the judge knowingly accepted and did not dispute that he saw, and that was not disclosed by the judge to the other litigants. The Decision does not breed gamesmanship to try to use social media to obtain a recusal. It wasn't Miller that was doing anything on social media. It was the actions of Petitioner and the judge that created this untenable situation. Litigants such as Petitioner who are found to have undertaken such actions should not be permitted to benefit therefrom, and certainly this Court should not come to their purported rescue.

Nor does the Decision require judges be social media hermits or prohibit normal use of social media for election campaigns or as members of the community. As the Majority noted, Carroll failed to distinguish how these posts and communications on social media were any different than if the two had communicated by letter. (Pet. App. 21a) It was not just the connection, it was the content, the volume, and the timing.

The Decision does not set any rule or test for judicial use of social media, and certainly comes nowhere close to prohibiting it. At best any such ruminations were dicta and even then made clear that this case was not about setting social media guidelines but about whether or not, as between these litigants and these facts, the line was crossed and Miller should get a new trial. The Majority simply stated the obvious, "judges should be cautious when using social media and appreciate the risk..."(Pet. App. 23a) Justice Ziegler stated in the concurrence, "I strongly urge my colleagues on the bench

to weigh the advantages and disadvantages of using electronic social media...."(Pet. App. 57a) Justice Dallet's concurring opinion, with which Justice Hagedorn joined, stated, "there is nothing inherently inappropriate about a judge's use of social media...In fact, the use of social media platforms can benefit judges...[a] judge's Facebook connection to a party or an attorney, without more, does not rebut the presumption of impartiality...."(Pet. App. 60a) This Decision simply does not stand for the ban on social media that Petitioner portrays.

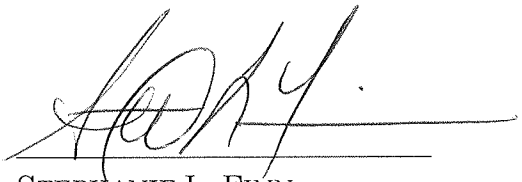
CONCLUSION

Given the extreme facts of this case it has little effect outside of the particular case. The Wisconsin Supreme Court properly applied this Court's ***Caperton*** analysis to these extreme facts. The case is too fact-specific and idiosyncratic to merit the Court's attention. Even if not supported solely by a ***Caperton***, the case for disqualification of Judge Bitney was undeniably met and supported by the State law arguments.

The real-world impact of the Decision is not as great as Petitioner would have the Court believe. No rules or prohibitions with regard to judicial use of social media were created or can be inferred. At most the Wisconsin Supreme Court cautioned, in dicta, that judges should be careful when using social media and weigh the advantages and disadvantages.

Dated: September 11, 2020

Respectfully submitted,



STEPHANIE L. FINN
COUNSEL OF RECORD
FOR RESPONDENT
HERRICK & HART, S.C.
116 W. GRAND AVENUE
P.O. BOX 167
EAU CLAIRE, WI 54702
(715) 832-3491
steph@eauclairelaw.com