

IN THE CIRCUIT COURT OF THE 20<sup>TH</sup> JUDICIAL CIRCUIT  
IN AND FOR COLLIER COUNTY

CASE NO.: 11-2020-  
CA-003427-0001-XX

MASON CLASSICAL ACADEMY, INC.,  
A Florida not for profit corporation

Plaintiff,

v.

THE SCHOOL BOARD OF COLLIER COUNTY,  
FLORIDA,

Defendant.

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**PLAINTIFF'S MOTION FOR DISQUALIFICATION OF TRIAL JUDGE**

Plaintiff, MASON CLASSICAL ACADEMY, INC., A Florida not for profit corporation ("Plaintiff" or "MCA"), by and through undersigned counsel, hereby files this MOTION FOR DISQUALIFICATION OF TRIAL JUDGE KRIER pursuant to Florida Rule of Judicial Administration 2.330 and Section 38.10, Florida Statutes, and as grounds therefore states as following:

1. The Honorable JUDGE ELIZABETH KRIER ("Trial Judge") conducted a hearing in the matter of *Scott Moore v. Mason Classical Academy, Inc.*, Case No. 20-CA-1471 on September 1, 2020 relating to a former MCA employee's public whistleblower complaint.

2. The hearing was limited to two issues to be determined regarding a prima facie case of whether the plaintiff in the matter, Scott Moore, was protected under Florida's Public Whistleblower Act.

3. During the ruling portion of the evidentiary hearing, the Trial Judge made statements far beyond those contemplated by or reasonably related to the boundaries of the

evidentiary hearing or the issues to be determined. Below are certain statements made by the Trial Judge which were made clearly against the interests of MCA which plainly establish why MCA believes it will not receive a fair trial in the instant case:

This is, if true -- which, again, I can only rule on -- all I can say is that there is a prima facie case that this was a serious conflict of interest, and that was a secret; whether by design or not, I don't know. **I don't have any evidence about that.** But there had been a preliminary discussion with the principal prior to the March 23rd meeting. So this whole project was on the road already. *Transcript P. 3.*

It was a significant conflict of interest. **We're talking about using partially public money to pay for a contract that might possibly, but maybe not -- of course, that wasn't disclosed -- have some positive effect, personally, for a board member.** There's no place in government or public -- public organizations where that's okay. That at least needs to be disclosed, and that was not done at that original meeting. *Transcript P. 4.*

So this was -- **there may not have been a contract presented, but this was definitely moving forward with this project,** and the conflict of interest should have been -- it's arguable that it should have been disclosed immediately at that March 23rd meeting. *Transcript P. 5.*

Just because the board of directors determines that there's not a conflict doesn't mean there wasn't or there wasn't a proposed one or a possible one. *Transcript P. 5.*

And I would note, **and I may note again that this board, apparently, has had some difficulties in terms of its actions and functioning within the fairly stringent confines of what boards of directors can and cannot do, especially in dealing with public entities.** *Transcript P. 5.*

I'm not saying that anybody has any malintent but, nevertheless, **there has been a track history previously of the board really not understanding its obligations.** *Transcript Pgs. 5-6.*

This is a possible violation of the law that affects the public health, safety, and welfare because charter schools use public money. They are -- they are, to some extent, governed by the laws governing public entities. **It was a violation of law to some extent. Again, I'm not making a determination on all of the specifics, but it was a very -- it's a prima facie case of a very serious possible conflict of interest.** *Transcript Pgs. 6-7.*

Just because he's not a stockholder or an officer does not mean that he would not in some way have benefited. **Again, I don't have any evidence of that.** That's something that would have to be considered down the road. *Transcript P. 7.*

And I would also caution you -- **again, I didn't pull this case law up, but I'm sure that it exists because I did an exhaustive review of the case law a couple years ago. You're not allowed to terminate him** -- you know, you can't re-hire him tomorrow and then the next day say, okay, now you're an at-will employee. We're terminating you. None of the appellate courts find that that's reasonable. So you guys are going to have to deal with it -- deal with what you've got. *Transcript P. 11.*

A true and correct copy of the excerpt of the transcript of proceedings (ruling) from the September 1, 2020 hearing is attached hereto.

4. Continually, the Trial Judge acted in a hostile and intimidating manner to governing board members of MCA during the governing board members' testimony which further illustrates MCA's feelings of prejudice and bias against MCA.<sup>1</sup>

5. These statements made by the Trial Judge, including direct accusations of criminal conduct, MCA's failure to understand its obligations under Florida law, and misuse of public funds, without citing to any evidence of these allegations, clearly undermine MCA's trust in the required impartiality judges are expected to uphold.

6. Although the instant case is not criminal in nature, MCA and its governing board members cannot help but feel that the statements and accusations made against them by the Trial Judge unequivocally amount to bias or prejudice against MCA which will render a fair and impartial trial impossible should the Trial Judge preside over the matters presently before the honorable court.

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<sup>1</sup> A full copy of the September 1, 2020 hearing was not ordered and the undersigned was not the attorney of record. As such, a full copy of the September 1, 2020 hearing transcript will be ordered and supplemented to this honorable court once received with specific citations highlighting the statements giving rise to MCA's feeling of prejudice and bias by the Trial Judge.

7. Additionally, the Trial Judge has served on a board of directors with the current superintendent of the Defendant, Dr. Patton in the organization titled *Leadership Collier*.

8. Section 38.10, Florida Statutes, provides:

Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified.

9. In addressing an initial motion to disqualify, the trial judge shall proceed as follows pursuant to Rule 2.330 of the Florida Rules of Judicial Administration:

**(f) Determination – Initial Motion.** The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

10. Florida Rule of Judicial Administration 2.330(f) requires a judge to grant disqualification if the motion to disqualify is “legally sufficient.” A motion is legally sufficient if “the facts alleged (which must be taken as true) would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial.” *Brofman v. Fla. Hearing Care Ctr., Inc.*, 703 So. 2d 1191, 1192 (Fla. 4th DCA 1997).

11. The Commentary to Canon 2A, Florida Code of Judicial Conduct, explains that being a judge necessarily limits a judge’s personal freedom, which seemingly includes serving on a board of directors with a party that is currently before the court:

A judge must avoid all impropriety and the appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore

accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Fla. Code Jud. Conduct, Canon 2A, cmt.

12. MCA genuinely believes that MCA will not be able to receive a fair trial on any issues in this cause at any hearings conducted before this Honorable Court as MCA believes that the Trial Judge is biased against MCA based on the above statements of this Court. These statements are not mere mental impressions, these statements make direct criminal accusations against individual governing board members and undermine the legality of MCA as a public charter school and non-profit entity in Florida. MCA does not believe that the Trial Judge can rule in an unbiased manner based on these prior statements made outside the scope of the previous hearing and the affiliation of the Trial Judge to the most senior employee of the Defendant.

13. MCA fears that the Trial Judge's hostile actions and statements in Case No. 20-CA-1471 appear to suggest that the Trial Judge is partial to a position adverse of MCA in which this Trial Judge cannot consider the issues with neutrality.

14. MCA genuinely fears that the School Board of Collier County, the Defendant in this matter, particularly its superintendent Dr. Patton, may also have influence over the court conducting these proceedings, such is sufficient to justify the granting of this Motion irrespective of whether the Trial Judge believes this to be true or not.

15. MCA has a well-founded fear that MCA has not and will not receive fair hearings or a fair trial on any issues that have come or will come before this Trial Judge on account of the facts and circumstances hereinabove set forth, including making statements accusing MCA of committing crimes without evidence, using public funds in a manner contrary to the public health, safety, and welfare without evidence, and MCA not operating within the confines of laws

regulating public entities, again, without evidence. *See Gates v. State*, 784 So.2d 1235 (Fla. 2d DCA 2001).

16. It is not a question of how the matter is perceived by the Court, but rather the feeling of prejudice against MCA which resides in MCA's viewpoint in addition to MCA's basis for such feeling. *See Wargo v. Wargo*, 669 So. 2d 1123 (Fla. 4th DCA 1996).

17. The standard to be applied by this Court in ruling on this motion is whether a reasonable person or entity would, on the basis of the stated facts which are presumed to be true, fear that the person or entity cannot get a fair trial with the judge presiding. *Heir v. Fleet*, 642 So. 2d 669 (Fla. 4th DCA 1994). A reasonably prudent person would indeed believe that actions of the Trial Judge set forth herein would be unable to fairly and neutrally preside over this matter.

18. That, through its actions, affiliations, conduct, and apparent partiality and hostility towards MCA, the Trial Judge has demonstrated a palpable bias or prejudice against MCA to such a degree and extent as to adversely affect MCA and cause MCA to legitimately question whether it would ever be possible during this matter to have this Trial Judge dispassionately and objectively adjudicate the merits of MCA's prayers for relief.

19. In the event the trial judge expresses another reason for denying the motion, or "takes issue" with the motion either personally or through counsel, the judge is required to disqualify herself regardless of the sufficiency of the motion. *Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978).

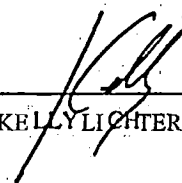
20. This Motion is being promptly presented to the Court for immediate ruling in accordance to the timeframes set forth in Florida Statutes and the Florida Rules of Judicial Administration.

21. No previous Motion or request for disqualification of any judge in this action has been filed.

WHEREFORE, the MCA respectfully requests that this Honorable Court grant the Motion for Disqualification of Trial Judge and thereafter take no further action in this matter.

[SIGNATURE PAGE TO FOLLOW]

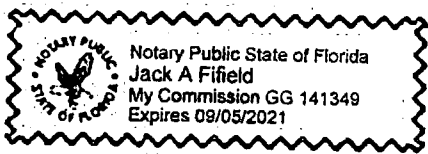
**I AM AWARE THAT I AM SWEARING OR AFFIRMING UNDER OATH TO THE TRUTHFULNESS OF THE CLAIMS MADE IN THIS MOTION FOR DISQUALIFICATION OF TRIAL JUDGE AND THAT THE PUNISHMENT FOR KNOWINGLY MAKING A FALSE STATEMENT INCLUDES FINES AND/OR IMPRISONMENT.**

  
\_\_\_\_\_  
KELLY LICHTER, BOARD PRESIDENT

STATE OF FLORIDA            )  
  :  
COUNTY OF COLLIER        )

The foregoing instrument has been acknowledged before me this   6   day of NOVEMBER 2020, by KELLY LICHTER, who is personally known to me or who provided sufficient identification.





Notary Public \_\_\_\_\_  
Commission Stamp

- Personally known  
 I.D. Presented: \_\_\_\_\_

**CERTIFICATE OF GOOD FAITH**

The instant sworn application and Motion for Disqualification of Trial Judge is made in good faith and the verification and statements made by MCA are also made in good faith and not for any improper purpose.

/s/ Jeffrey S. Wood  
JEFFREY S. WOOD  
Counsel for MCA  
Date: November 6, 2020

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 6th day of November, 2020, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served on the Honorable Elizabeth Krier either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner.

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*/s/ Jeffrey S. Wood*

By \_\_\_\_\_  
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IN THE CIRCUIT COURT FOR THE 20TH JUDICIAL CIRCUIT  
IN AND FOR COLLIER COUNTY, FLORIDA  
CIVIL ACTION

CASE NO. 20-CA-1471

SCOTT MOORE, an individual,

Plaintiff,

v.

MASON CLASSICAL ACADEMY, INC., a  
Florida not for profit corporation.

Defendant.

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EXCERPT TRANSCRIPT OF PROCEEDINGS

(Ruling)

DATE TAKEN: September 1, 2020  
TIME: 1:30 p.m. - 3:59 p.m.  
PLACE: (All parties remote.)  
BEFORE: Honorable Elizabeth Krier

Stenographically Reported by:  
Terri L. Lewis, FPR  
Fort Myers Court Reporting

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APPEARANCES

On behalf of the Plaintiff:

BENJAMIN H. YORMAK, ESQUIRE  
Yormak Employment & Disability Law  
9990 Coconut Road  
Bonita Springs, Florida 34135  
byormak@yormaklaw.com

On behalf of the Defendant:

JONATHAN E. KANOV, ESQUIRE  
Marshall, Dennehey, Warner, Coleman & Goggin  
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Also Present: Scott Moore, Plaintiff  
Kelly Lichter, Mason Classical

\* \* \* \* \*

1           (The following is the requested excerpt of  
2           proceedings.)

3           THE COURT: All right. Well, I happen to  
4           agree. And as I'm sure both of you understand,  
5           this is a pretty cut-and-dried portion of the  
6           statute. I'm not allowed to get too far into the  
7           weeds in terms of the validity or the ultimate  
8           success of the allegations with regard to the  
9           conflict. So it's pretty two-dimensional in terms  
10          of what I am allowed to look at. And one is, did  
11          he engage in any protected conduct? And I find  
12          that, in fact, he did.

13          This is, if true -- which, again, I can only  
14          rule on -- all I can say is that there is a prima  
15          facie case that this was a serious conflict of  
16          interest, and that was a secret; whether by design  
17          or not, I don't know. I don't have any evidence  
18          about that. But there had been a preliminary  
19          discussion with the principal prior to the  
20          March 23rd meeting. So this whole project was on  
21          the road already.

22          The March 23rd meeting, they already had  
23          information that they could put together; perhaps  
24          not to give the exact specifics of the numbers but  
25          to definitely give a significant proposal. Whether

1 or not there was a contract or not, this conflict  
2 of interest should have been disclosed at that  
3 first meeting as well as all of the specifics for  
4 what it might have meant to Mr. Bolduc, which I  
5 haven't heard any evidence about. But certainly he  
6 was employed by this company at the time of the  
7 March 23rd meeting.

8 It was a significant conflict of interest.  
9 We're talking about using partially public money to  
10 pay for a contract that might possibly, but maybe  
11 not -- of course, that wasn't disclosed -- have  
12 some positive effect, personally, for a board  
13 member. There's no place in government or  
14 public -- public organizations where that's okay.  
15 That at least needs to be disclosed, and that was  
16 not done at that original meeting.

17 The second meeting where a member of the  
18 public raised it, the argument from Mr. Kanov was  
19 that, oh, he just merely repeated it. But, in  
20 fact, the testimony was that Mr. Moore investigated  
21 it, and then he did his job and communicated it.

22 The argument that this was not a contract, it  
23 was just next steps, I didn't see anything in the  
24 minutes that anybody else was considering or  
25 proposing that any other organizations be contacted

1 for bids. So this was -- there may not have been a  
2 contract presented, but this was definitely moving  
3 forward with this project, and the conflict of  
4 interest should have been -- it's arguable that it  
5 should have been disclosed immediately at that  
6 March 23rd meeting.

7 Okay. And, again, the disclosure that  
8 Mr. Bolduc eventually put into the record, I think,  
9 lays out the timeline very clearly as to he was  
10 definitely involved financially with this company  
11 prior to the March 23rd meeting.

12 Just because the board of directors determines  
13 that there's not a conflict doesn't mean there  
14 wasn't or there wasn't a proposed one or a possible  
15 one.

16 And I would note, and I may note again that  
17 this board, apparently, has had some difficulties  
18 in terms of its actions and functioning within the  
19 fairly stringent confines of what boards of  
20 directors can and cannot do, especially in dealing  
21 with public entities.

22 I understand that it's very limiting. It's  
23 very difficult. It's very easy for people to step  
24 outside the lines. I'm not saying that anybody has  
25 any malintent but, nevertheless, there has been a

1 track history previously of the board really not  
2 understanding its obligations.

3 So the fact that the board determined that  
4 there wasn't a conflict does not mean that there  
5 wasn't a conflict or wasn't a possible conflict,  
6 and it was a pretty serious one.

7 All right. The fact that there was a  
8 decision -- in looking at Mr. Bolduc's timeline  
9 that he presented during his testimony that a  
10 decision on whether to contract with Captivated  
11 Health was supposed to be made on April 15th and  
12 this disclosure was made on March 26th, I mean, it  
13 demanded immediate action from your compliance  
14 officer. And the fact that no business went  
15 forward afterwards, that is not relevant to whether  
16 or not there was a possible conflict at the time  
17 that it occurred.

18 This is a possible violation of the law that  
19 affects the public health, safety, and welfare  
20 because charter schools use public money. They  
21 are -- they are, to some extent, governed by the  
22 laws governing public entities. It was a violation  
23 of law to some extent. Again, I'm not making a  
24 determination on all of the specifics, but it was a  
25 very -- it's a prima facie case of a very serious



1 possible conflict of interest.

2 Just because he's not a stockholder or an  
3 officer does not mean that he would not in some way  
4 have benefited. Again, I don't have any evidence  
5 of that. That's something that would have to be  
6 considered down the road. But it's -- you know,  
7 people benefit in all kinds of different ways from  
8 these types of contracts, including bonuses at the  
9 end of the year from their employers, et cetera.

10 All right. So that's my determination on the  
11 issue of whether or not Mr. Moore engaged in  
12 protected conduct. I find that he did.

13 Number 2, who did he communicate it to? I  
14 find that he communicated it to an appropriate  
15 local official pursuant to the statute. Despite  
16 being instructed to, or perhaps being instructed to  
17 contact the attorney, we all forget Mr. Moore is an  
18 attorney. Mr. Moore was the compliance officer.  
19 Mr. Moore had it within not only his job scope but  
20 also his intelligence to make these types of  
21 determinations. That's what he was being paid to  
22 do.

23 And this was not a litigation situation where  
24 he wasn't allowed to communicate with the board  
25 except through an attorney. So the fact that he

1           communicated this possible conflict to the board of  
2           directors, as was his job, he also communicated it  
3           to his direct superior, the principal. So that is  
4           a red herring in terms of whether or not he  
5           communicated it to an appropriate local official.  
6           He did. He communicated it to the board of  
7           directors.

8           And, you know, they addressed this possible  
9           conflict at a later time. The fact that he did not  
10          communicate it to the school board, I find it  
11          interesting that that's the argument, because, you  
12          know, 30 minutes ago or an hour ago there was an  
13          allegation of, oh, my gosh, he mistakenly  
14          communicated something to the Collier County School  
15          Board back in September, and that was part of what  
16          you're using against him to fire him except that  
17          you wanted him to do it this time. So that doesn't  
18          make any sense. Again, that's just a red herring.

19          And, again, I said already -- I already made  
20          the finding with regard to attorneys, okay.

21          Now, with regard to the determination that  
22          this communication was not made in bad faith,  
23          again, he was the compliance officer. Not only was  
24          he a whistleblower, but this was his job. This is  
25          what he was supposed to be doing. This is what he

1 was paid to do.

2 It's clear that there was an investigation  
3 that was required. He did the investigation after  
4 the disclosure was made by a member of the public,  
5 not by anybody that should have made the disclosure  
6 but by a member of the public, and he communicated  
7 the importance of what he considered to be an  
8 important issue to the board by filing this notice.

9 Also, the arguments that your attorneys didn't  
10 think this was an issue, well, their competency is  
11 not before this court, but that is not something  
12 that the Court is willing to base its  
13 determinations on. Everybody blames their  
14 attorneys for what their attorneys allegedly told  
15 them. So I am basing my rulings based on what the  
16 people in this proceeding have told me.

17 He was clearly -- Mr. Moore was clearly  
18 terminated because of the communication. He was  
19 terminated very shortly after the communication was  
20 made. His email was interfered with, and it was  
21 very clear from the testimony that this was the  
22 reason that he was terminated.

23 It does not matter that he was an at-will  
24 employee. You are allowed to terminate people in  
25 an at-will employment state or an at-will

1 contract -- employment contract for any legal  
2 reason but not in retaliation for whistleblower  
3 communications or any impermissible grounds such  
4 as, you know, for example, somebody getting  
5 pregnant or race or religion or something of that  
6 nature. So at-will does not cover all manner of  
7 sins. He was terminated because of this  
8 communication, and that is the determination of the  
9 Court at this time.

10 His subsequent job -- and the other reason I  
11 can point to that he was terminated because of this  
12 communication is because his contract was not going  
13 to be over until, at the earliest, the middle of  
14 June, and yet he was terminated, I think -- was it  
15 the beginning of April? April 1st, I think it was.  
16 April 1st. So he was terminated before his  
17 contract was up. Despite whatever arguments you  
18 want to have about whether he was coming back or  
19 not coming back, et cetera, I think there's  
20 credible evidence that he was returning based on  
21 the communication with Ms. Vickaryous, who was his  
22 direct supervisor and in charge of that sort of  
23 thing.

24 Nevertheless, I don't think it matters. He  
25 had a contract through the middle or the end of

1 June, and he was terminated prior to that contract  
2 because of this communication.

3 And so I am granting the petition to reinstate  
4 him. And I would also caution you -- again, I  
5 didn't pull this case law up, but I'm sure that it  
6 exists because I did an exhaustive review of the  
7 case law a couple years ago. You're not allowed to  
8 terminate him -- you know, you can't re-hire him  
9 tomorrow and then the next day say, okay, now  
10 you're an at-will employee. We're terminating you.  
11 None of the appellate courts find that that's  
12 reasonable. So you guys are going to have to deal  
13 with it -- deal with what you've got.

14 All right. So, Mr. Yormak, you're going to  
15 need to prepare the order. I tried to make the  
16 findings in an organized manner, so hopefully  
17 that's not difficult to --

18 MR. YORMAK: Yep.

19 THE COURT: -- transcribe. I don't think I  
20 have to say this, but I'm not dictating this like  
21 you're used to in dictating machines, so please  
22 govern yourself accordingly in terms of grammar.

23 After you have circulated it to opposing  
24 counsel, please forward it to my office email  
25 address in Word format.

1           Any other rulings I need to make in connection  
2 with this petition?

3           MR. YORMAK: The timing of the reinstatement,  
4 Your Honor. We had, in the motion, requested it be  
5 retroactive to the date of termination.

6           THE COURT: Yes.

7           MR. YORMAK: Okay. Thank you, Your Honor.

8           THE COURT: All right. Thank you, everybody.

9           MR. YORMAK: Thank you.

10          MR. KANOV: Bye.

11          (Proceedings concluded at 3:59 p.m.)  
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1 STATE OF FLORIDA

2 COUNTY OF COLLIER

3 I, Terri L. Lewis, Notary Public for the State  
 4 of Florida, do hereby certify that the foregoing  
 5 proceedings were taken before me at the date and place  
 6 as stated in the caption hereto on Page 1 hereof; that  
 7 the foregoing computer-assisted transcription,  
 8 consisting of pages numbered 2 through 12, inclusive, is  
 9 a true record of my Stenograph notes taken at said  
 10 proceedings.

11 Dated this 4th day of September 2020.

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TERRI L. LEWIS, FPR  
 Notary Public, State of Florida  
 Commission No: GG 097505  
 Commission Expires: August 23, 2021