

**IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA, FIRST DISTRICT**

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CASE NO.: 1D08-5638

L.T. NO.: 08-CA-2944

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RICHARD I. WENNET, candidate for election to the office of Circuit  
Court Judge, in and for the Fifteenth Judicial Circuit, Group 23,  
Appellant,

vs.

WILLIAM S. "BILL" ABRAMSON, candidate for election to the office  
of Circuit Court Judge, in and for the Fifteenth Judicial Circuit, Group 23;  
ELECTION CAVASSING COMMISSION OF THE STATE OF FLORIDA;  
KURT S. BROWNING, as SECRETARY OF STATE;  
DEPARTMENT OF STATE, DIVISION OF ELECTIONS; PALM BEACH  
COUNTY CANVASSING BOARD; and ARTHUR ANDERSON, as PALM  
BEACH COUNTY SUPERVISOR OF ELECTIONS,  
Appellees.

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**ANSWER BRIEF OF APPELLEE  
WILLIAM S. "BILL" ABRAMSON**

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## STATEMENT OF THE CASE<sup>1</sup>

Appellee WILLIAM S. “BILL” ABRAMSON (“Abramson”) adopts in part the Statement of the Case and Facts submitted by Appellant RICHARD I. WENNET (“Wennet”), specifically pages 1 through the bottom of page 3 of Wennet’s Initial Brief (concluding with the paragraph on page 3 beginning “Due to the fact that there was a 3,478 vote difference . . . .”). Thereafter, Abramson offers the following Statement of the Case:

After the September 5, 2008 declaration from the Elections Canvassing Commission that it was “unable to determine the true vote for this office and has excluded such returns from this certificate[,]” Abramson filed an Emergency Complaint, alleging that the recounts that had occurred were not complete in that they were not based on all of the ballots cast at the election. *See* Wennet App. 2, Emergency Compl. for Declaratory Relief or, in the Alternative, to Contest Election. Abramson also alleged that the Palm Beach Canvassing Board and Arthur Anderson, the Palm Beach County Supervisor of Elections, could only account for 99,045 ballots, some 3,478 fewer than the 102,523 persons who cast

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<sup>1</sup> Abramson also submits an Appendix with additional pleadings that form the Record in this appeal. Abramson will refer to the Appendix submitted with Wennet’s Initial Brief as “Wennet App.,” and will refer to the Appendix submitted with his Answer Brief as “Abramson App.” Abramson also refers this Court to the “High Profile Case” section of Leon County Clerk’s website, <http://www.clerk.leon.fl.us>, which contains copies of all papers filed in the trial court below.

ballots in Palm Beach County on August 26, 2008. *See* Wennet App. 2, ¶ 25. Wennet filed a Counterclaim for Declaratory Relief only. *See* Abramson App. 2.

The Elections Canvassing Commission, Kurt Browning, as Secretary of State, and the Department of State, Division of Elections, admitted that “the total number of votes cast in the race for Circuit Judge, Fifteenth Circuit, Group 23, certified by the Palm Beach County Canvassing Board following the machine and manual recounts was less than the number of votes cast in that race as certified by the Palm Beach County Canvassing Board in its first unofficial returns.” *See* Abramson App. 3, State Defendants’ Answer to Emergency Compl., at ¶ 25. Wennet also conceded that “after the conclusion of the mandatory manual recount that Supervisor Anderson and the Palm Beach County Canvassing Board determined that a total of 99,045 ballots were cast” and that “certain records appeared to indicate that 102,523 votes were cast in Palm Beach County with respect to the Primary Election.” Abramson App. 2, ¶¶ 19 and 25.

Palm Beach County election officials thereafter conducted a reconciliation process, which confirmed that 102,713 ballots—more than the 102,523 ballots originally reported—were cast in the election. The ballot reconciliation efforts are described in detail in a Memorandum from Brad Merriman to the Supervisor of Elections. *See* Wennet App. 3. No party objected to this reconciliation process at the trial court.

Abramson filed a Motion to Compel Recount of Ballots in Election for the Office of Circuit Court Judge, in and for the 15th Judicial Circuit, Group 23,” on September 12, 2008, and, *inter alia*, brought to the trial court’s attention that the missing ballots had been found. *See* Abramson App. Tab 4. On September 17, 2008, the trial court rendered its Order Directing Recount of Ballots for the Office of Circuit Court Judge, in and for the 15th Judicial Circuit, Group 23, ordering the Palm Beach County Canvassing Board to recount the ballots in accordance with statutory procedures provided in Section 102.141(7), Florida Statutes, and if necessary, Section 102.166(1), Florida Statutes (the “Recount Order”). *See* Abramson App. Tab 5.<sup>2</sup>

As a result of the court-ordered recount, the Palm Beach County Canvassing Board submitted the official returns for the August 26, 2008 election, in which Abramson received 45,531 votes and Wennet received 45,470 votes. On September 29, 2008, the Elections Canvassing Commission certified Abramson the winner.

Wennet thereafter moved for a new election, but did not contest the election as provided in Section 102.168, Florida Statutes. On October 20, 2008, the trial

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<sup>2</sup> The trial court also issued, in response to Wennet’s *ore tenus* motion, an Order Placing Race on General Election Ballot, placing the judicial race on the November 4, 2008 general election ballot, to preserve all potential remedies available to the parties. *See* Abramson App. Tab 6. The trial court additionally issued an Anti-Spoliation Order, which preserved the “election materials” in compliance with the Florida Election Code. *See* Abramson App. Tab 7.

court rendered the Declaratory Judgment and Order Denying Motion for New Election, which held in pertinent part:

The court finds that the candidates were entitled to have the Palm Beach County Canvassing Board fulfill its ministerial duty to canvass all of the votes cast in the election at issue and that his legal duty, upon compliance with the court's order, has been fulfilled. The candidates were also entitled to have the returns upon this full accounting certified by the Elections Canvassing Commission in compliance with this court's order, and that occurred on September 29, 2008. The Elections Canvassing Commission has determined and certified that Mr. Abramson has been elected to the office of Circuit Judge, in and for the Fifteenth Judicial Circuit, Group 23.

Wennet App. 1, p. 17.

Wennet appealed the trial court's Final Declaratory Judgment and Order Denying Motion for New Election on November 17, 2008, some 28 days after the trial court rendered the judgment and some 13 days after the November 4, 2008 general election.

## SUMMARY OF ARGUMENT

The election laws of this state must be construed consistently with the important constitutional right of voters to cast their votes effectively. In this matter, where it was undisputed that approximately 3,500 ballots that were known to exist but were unaccounted for, it was entirely within the trial court's discretion, under the Declaratory Judgment Act, to order a recount pursuant to the standards set forth in Chapter 102, Florida Statutes.

Further, the trial court was correct in denying Wennet's motion for a special election, because Section 100.101(1), Florida Statutes, which authorizes special elections, does not apply to this matter. Section 100.101(1) requires a new election "[i]f no person has been elected at a general election to fill an office which was required to be filled by election at such general election." Here, the Elections Canvassing Commission did not initially find that "no person had been elected[,] but rather, that it was unable to determine who was elected, based on irregularities on the face of the returns. The trial court's Recount Order fully effectuated the rights of the voters to have their votes counted and a candidate chosen for this office.

The Recount Order directed the Elections Officials to conduct the necessary recounts as provided in Sections 102.141(7) and 102.166(1), Florida Statutes, and fully comported with the statutory requirements for a recount. Further, given the

incomplete nature of the “original” second set of unofficial returns, the second set of unofficial returns rendered after the Recount Order were the proper set of returns certified to the Department of State, and which were ultimately certified by the Elections Canvassing Commission.

Finally, Wennet failed to timely bring an Election Contest, as provided in Section 102.168, Florida Statutes, despite an opportunity to do so.

## ARGUMENT

**Standard of Review:** Abramson agrees with Wennet that the standard of review is *de novo*.

### **I. The Trial Court Was Well Within its Authority to Order a Recount and to Deny a New Election.**

Both Abramson and Wennet sought declaratory relief under Chapter 86, Florida Statutes. As the trial court noted, the Declaratory Judgment Act is to be liberally construed. *See also Jackson v. Federal Ins. Co.*, 643 So. 2d 56, 58 (Fla. 4th DCA 1994) (“the use of declaratory judgments should be liberally construed and their boundaries elastic.”). Section 86.11, Florida Statutes, provides that “[t]he court has power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as an action in chancery.” Further, Section 86.111, Florida Statutes, provides that “[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief.”

Wennet’s primary argument, in Sections B and C of the Argument section of his Initial Brief, is that the 2001 Florida Legislature’s amendments to Sections 102.166 and 102.168, Florida Statutes, precluded the relief ordered by the trial court, i.e., a judicially-ordered recount. Wennet refers to the revision of Section 102.168, Florida Statutes, and specifically, the Legislature’s decision to remove from circuit judges the discretion to provide appropriate relief in the election contest phase. However, Wennet did not file an election contest, and while the

Legislature also amended the procedure of Section 102.166, it did not place restrictions or remove any authority of a trial court in such a procedure. The Legislature did away with election protests in the 2001 amendments to Section 102.166.<sup>3</sup> The nature of Abramson's Emergency Complaint was for declaratory relief of, in the alternative, for an election contest. Wennet's Counterclaim was for declaratory relief only.

Wennet's argument does not take into account the decisions of Florida courts that have concluded that the election laws of this state must be construed consistently with the important constitutional right of voters to cast their votes effectively. As stated by the Florida Supreme Court in *Boardman v. Esteva*, 323 So. 2d 259, 263 (Fla. 1975):

[T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. The contestants have direct interests certainly, but the office they seek is one of high public service and utmost importance to the people, thus subordinating their interests to that of the people. Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we might risk the unnecessary and unjustified muting of the public voice. ***By refusing to recognize an otherwise valid exercise of the right of a citizen to***

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<sup>3</sup> See Section 42, Chapter 2001-40, Laws of Florida (deleting the right to protest the returns of an election as erroneous by petition filed with the appropriate canvassing board).

***vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.***

(Emphasis added).

Consistent with this overriding principle, the Florida Supreme Court has directed that election laws must be construed consistently with the important constitutional right of voters to cast their votes effectively. *See Krivanek v. Take Back Tampa Political Committee*, 625 So. 2d 840, 844 (Fla. 1993) (“We acknowledge that election laws should be liberally construed in favor of an elector.”); *State ex rel. Carpenter v. Barber*, 144 Fla. 159, 198 So. 49 (Fla. 1940) (“It is the intention of the law to obtain an honest expression of the will or desire of the voter.”). The right of voters to cast their votes effectively has long “rank[ed] among our most precious freedoms.” *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

The United States Supreme Court explained:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

*Id.* at 31. *See also Cobb v. Thurman*, 957 So. 2d 638, 644 (Fla. 1st DCA 2006).

As noted by the trial court, Florida courts confronting the issue of irregularities in elections have held that a recount is the proper remedy. For example, in *Ex Parte Battie*, 98 Fla. 785, 124 So. 273, 275 (Fla. 1929), the Florida Supreme Court held:

The law is well settled that the common law writ of mandamus cannot be employed to contest the results of an election or to try the title to office, but it may be employed to require the performance of a ministerial duty on the part of the canvassing board of returning officers such as to correctly and accurately count and make due return of the votes cast at an election. [A candidate has] a clear legal right to a correct and accurate count of votes cast for and against him at the election brought in question, and mandamus was a remedy available to [a candidate] to enforce this right.

Similarly, in *State ex rel. Millinor v. Smith*, 144 So. 333, 335 (Fla. 1932), the Florida Supreme Court stated:

The right to a correct count of the ballots in an election is a substantial right which it is the privilege of every candidate for office to insist on, in every case where there has been a failure to make a proper count, call, tally, or return of the votes as required by law, and this fact has been duly established as the basis for granting such relief.

*See also State v. Pritchard*, 111 Fla. 122, 149 So. 58, 59 (Fla. 1933) (“Every ballot cast in an election must be definitely accounted for by the election officials.”); *State ex rel. Peacock v. Latham*, 125 Fla. 788, 170 So. 472 (Fla. 1936); *Hornsby v. Hilliard*, 189 So. 2d 361 (Fla. 1966).

These and subsequent cases all hold that it is absolutely within the discretion of a court to order a recount so that ballots for a particular election are counted. *See, e.g. State ex rel. Peacock v. Latham*, 125 Fla. 788, 170 So. 472 (Fla. 1936); (ordering that a recount be conducted under the “Order of this Court”); *Hornsby*, 189 So. 2d at 361. In *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 721 (Fla. 1998), the Florida Supreme Court endorsed the power of a trial court

to direct the recounting of disputed ballots, noting that the “appellant moved the court to order a manual recount of the absentee ballots. The Court granted the motion, and the clerk of the circuit court conducted a recount, which was observed by representatives of both parties.”

Wennet argues that the decades of caselaw supporting a recount—and the substantive right of the voters to have their votes counted—are inapplicable because the Legislature stripped the circuit courts of their broad discretion to order recounts. First, as mentioned above, the Legislature changed the trial court’s role in election contests under Section 102.168, Florida Statutes, but made no similar alteration to the recount statute, Section 102.166, Florida Statutes; Wennet failed to contest the election, and so this argument is unpersuasive. Second, the circuit court had ample common law authority to compel the election officials to recount the votes cast at the election. Third, to be discussed in the next section, the recount ordered by the trial court comported fully with the statutory procedures prescribed by the amendments to Chapter 102, Florida Statutes.

Wennet argues that a new, special election must be held pursuant to Section 100.101(1), Florida Statutes. Section 100.101(1) requires a new election “[i]f no person has been elected at a general election to fill an office which was required to be filled by election at such general election.”

Interpreting the predecessor to Section 100.101, the Florida Supreme Court held that “special elections of officers are held only to fill vacancies in the office of Congressman or members of the Legislature, or when there has been no choice of an officer who should have been elected at a general election.” *Davis ex rel. Taylor v. Crawford*, 95 Fla. 438, 116 So. 41, 44 (Fla. 1928). This is not what happened here; either Wennet or Abramson should have been elected at the August 26, 2008 election. Further, the Elections Canvassing Commission did not declare that “no person had been elected.” Instead, it found that it was unable to determine who was elected, based on the irregularities on the face of the returns.

The Recount Order fully effectuated the right of voters to have their votes counted and a candidate chosen for this office:

The first order of business is to ascertain the number of votes cast for each candidate in the Election, consistent with the procedures set forth in Chapter 102, Florida Statutes; next, it has to have that vote certified by the Defendant Palm Beach County Canvassing Board to the Defendant Department of State; and then for the Defendant Elections Canvassing Commission to certify a winner of the Election.

Abramson App. 5, p. 2, ¶ D.

A special election is thus not authorized under these circumstances, because the “true vote” was properly tallied.

**II. The Recount Ordered by the Trial Court and Carried Out by the Election Officials was Consistent with Statutory Recount Procedures.**

The first set of unofficial returns reported by the Palm Beach County Canvassing Board to the Department of State pursuant to Section 102.141(5), Florida Statutes, provided a seventeen-vote victory for Abramson. *See* Wennet App. 2, Ex. A. Thereafter, the Elections Canvassing Commission ordered a machine recount pursuant to Sections 102.141(6) and (7), Florida Statutes. *See* Wennet App. 2, Ex. B. The second set of unofficial returns from that recount indicated a sixty-one-vote victory for Wennet, but that 3,478 fewer ballots were accounted for compared to the first set of unofficial returns. *See* Wennet App. 2, Ex. C. The Palm Beach County Canvassing Board attempted a subsequent manual recount, which continued to indicate fewer ballots cast than what was indicated in the first set of unofficial returns.

Significantly, the Department of State and the Elections Canvassing Commission, in their answer to the Emergency Complaint, admitted that the total number of votes certified by the Palm Beach County Canvassing Board following the machine and manual recounts was less than the number of votes cast in the race as certified by the Palm Beach County Canvassing Board in its first official returns. *See* Abramson App. 3, at ¶ 25. In his Answer as well, Wennet acknowledged that after conclusion of the mandatory manual recount the Palm

Beach County Canvassing Board determined that a total of 99,045 votes were cast, and likewise admitted that certain records appeared to indicate that 102,524 votes were cast in the primary election. *See* Abramson App. 2, at ¶¶ 19, 25.

As a result, on September 5, 2008, the Elections Canvassing Commission met to certify the results of the primary election on August 6, 2008, and with respect to this office, it was unable to certify that either candidate was elected at the primary election. *See* Wennet App. 2, Ex. F. The Elections Canvassing Commission's refusal to certify the results of this election on September 5, 2008 was consistent with the provisions of Section 102.131, Florida Statutes. In interpreting a prior statute that authorized the Board of State Canvassers to lay aside and not include in its canvass county returns when it appeared to them that such returns were "so irregular, false, or fraudulent" that the Board could not "determine the true vote" for any office, the Florida Supreme Court held that "[t]he words 'true vote' (used in the statute) indicate the vote actually cast, as distinct from the legal vote." *State of Florida ex rel. Bisbee v. Board of State Canvassers*, 17 Fla. 29 (Fla. 1879). In that instance, the Court stated:

The judgment of the board may be invoked to lay aside a county return and omit to include it in the statement and determination of the result of the election, when it shall appear to them that the return is 'so irregular, false or fraudulent' that it does not show the true vote, but does represent votes not cast according to the precinct returns made to them . . . .

*Id.*

Thus with acknowledgement that the returns from the Palm Beach County Canvassing Board were “irregular” and that it “was unable to determine the true vote for this office,” it was appropriate that the trial court to act to assure the right to a correct count of the ballots in the election.

The trial court’s Recount Order directed the Palm Beach County Canvassing Board to conduct a machine recount of the ballots and to prepare a second set of unofficial returns as provided in Section 102.141(7), Florida Statutes. *See* Abramson App. 5. The Recount Order further provided that if the machine recount indicated that a candidate is defeated by one-quarter of one-percent or less of the votes cast in the Election, the Palm Beach County Canvassing Board shall conduct a manual recount as provided in Section 102.166(1), Florida Statutes. The Recount Order also provided that at the completion of these recount procedures, the Palm Beach County Canvassing Board shall certify the returns of the Election to the Department of State, and upon receipt, the Elections Canvassing Commission shall certify the results of the election and declare the winner.

The Palm Beach County Canvassing Board was unable to complete the recount prescribed in Sections 102.141(6) and (7), Florida Statutes, because of the

discrepancy in the numbers of ballots cast and counted for this race on election night and in the statutorily mandated machine and manual recounts.<sup>4</sup>

The procedure contained in the Recount Order fully comports with the statutory requirements for a recount. Further, given the incomplete nature of the “original” second set of unofficial and official returns, determined by the Elections Canvassing Commission to be “irregular,” the second set of unofficial and official returns rendered in accordance with the Recount Order and certified to the Department of State “correctly and accurately count[ed] and make due return of the votes cast at an election.” *Ex Parte Battie*, 98 Fla. 785, 124 So. 273, 275 (Fla. 1929). The Elections Canvassing Commission thereafter certified this set of returns on September 29, 2008.

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<sup>4</sup> In fact, it was Abramson’s position that, by operation of Section 102.141(7)(c), he should be declared the winner of the election. *See* Wennet App. 2, Count I. Obviously, the facts changed when Palm Beach County reconciled the misplaced ballots.

### **III. Wennet Failed to Timely Bring an Election Contest.**

The Elections Canvassing Commission certified the results of this election on September 29, 2008. *See* Abramson App. 8. Pursuant to Section 102.168(2), Florida Statutes, Wennet, as the unsuccessful candidate for this race, could have filed a complaint “within 10 days after midnight of the date the last board responsible for certifying the results officially certifies the results of the election being contested.” Wennet never brought an election contest pursuant to Section 102.168, Florida Statutes.

Wennet claims that he was effectively denied the ability to contest the election because he did not have sufficient time to examine the voting machines, given the Palm Beach County Supervisor of Elections’ need to prepare for the November 4, 2008 general election. However, Wennet was a party to the lawsuit filed by Abramson and actively participated in it, which included his filing of a Counterclaim. Wennet’s representatives were present for the recounts that were conducted for this race. In fact, Wennet’s attorney submitted an affidavit detailing what he felt were problems with the recount procedure. *See* Wennet App. 6. In other words, it appears that Wennet had an opportunity to file an election contest, but chose not to do so. For Wennet to wait until after the statutory time period for contesting an election has run, and after the November 4, 2008 general election has occurred, to raise this issue is disingenuous.

**CONCLUSION**

Based on the foregoing, Appellee William S. "Bill" Abramson respectfully requests that this Court affirm the Final Declaratory Judgment and Order Denying Motion for New Election rendered by the trial court on October 20, 2008.

Respectfully submitted,

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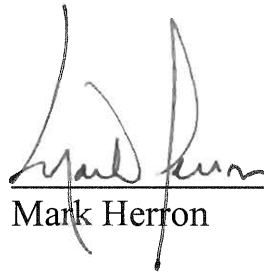
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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.



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