

**IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT  
IN AND FOR LEON COUNTY, FLORIDA  
CIVIL DIVISION**

WILLIAM S. "BILL" ABRAMSON,  
candidate for election to the office  
of Circuit Court Judge, in and for the  
Fifteen Judicial Circuit, Group 23,

*Plaintiff,*

vs.

Case No. 2008 CA 002944

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

*Defendants.*

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RICHARD I. WENNET,

*Counter-Plaintiff,*

vs.

WILLIAM S. "BILL" ABRAMSON, *et al.*,

*Counter-Defendants.*

**ANSWER AND COUNTERCLAIM**

Defendant, Richard I. Wennet, files this Answer and Counterclaim in response to Plaintiff's *Emergency Complaint for Declaratory Relief or, in the Alternative, to Contest Election*, and states as follows:



1. Admitted that the Complaint purports to state an action for declaratory relief or, in the alternative, an action to contest an election under Section 102.168, Florida Statutes; denied that plaintiff has properly stated a claim for same and denied that plaintiff is entitled to any relief thereunder.

2. Admitted.

3. Admitted that a portion of the referenced statute is quoted accurately, otherwise denied.

4. Admitted.

5. Admitted.

6. Denied that the Elections Canvassing Commission is a state “agency”, otherwise admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18. Admitted that the first set of unofficial returns appeared to indicate that Abramson received 17 more votes than Wennet; otherwise denied.

19. Admitted that certain records appeared to indicate that 102,523 total votes were cast in Palm Beach County with respect to the Primary Election; denied that this number represents the correct number of total votes cast in Palm Beach County with respect to the Primary Election at issue; admitted that the first set of unofficial returns appeared to indicate that 90,733 votes were cast in the challenged election; denied that this number represents the correct number of total votes cast in the challenged election.

20. Admitted that the referenced statute provides for an automatic machine recount; the Court is respectfully referred to the referenced statute for a complete statement of its contents.

21. Admitted that the Elections Canvassing Commission ordered a mandatory machine recount pursuant to Section 102.141(7), Florida Statutes.

22. Admitted that the second set of unofficial returns following a recount conducted pursuant to Section 102.141(7) must be submitted by the Palm Beach County Canvassing Board to the Elections Canvassing Commission no later than 3:00 p.m. on the fifth day after the primary election.

23. Admitted.

24. Admitted.

25. Denied that the second set of unofficial returns from the machine recount was incomplete; admitted 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; otherwise denied.

26. Admitted.

27. Admitted.

28. Admitted that Palm Beach County Canvassing Board conducted a manual recount in accordance with Section 102.166, Florida Statutes; otherwise denied

29. Admitted that, after the manual recount, the Palm Beach County Canvassing Board certified the following vote totals: 43,872 for Abramson and 43,932 for Wennet -- providing Wennet with a 60 vote margin of victory; otherwise denied.

30. Denied.

31. Denied.

32. Admitted.

33. Admitted.

34. Admitted.

### **Count II**

35. Admitted.

36. Admitted that the paragraph attempts to quote a portion of the referenced statute; the Court is respectfully referred to the statute for a complete statement of its contents.

37. Denied.

38. Denied.

39. Denied.

40. Denied.

### **Count III**

41. The responses to paragraphs 1 - 34 are realleged.

42. Admitted that the Complaint purports to contest the result of the election; denied that Plaintiff properly states a claim for same or that he is entitled to any relief thereunder.

43. Admitted that the Complaint purports to contest the result of the election; denied that Plaintiff properly states a claim for same or that he is entitled to any relief thereunder.

44. Admitted.

45. Denied.

46. Denied.

### **Count III**

47. The responses to paragraphs 1 - 34 are realleged.

48. Admitted that the Complaint purports to contest the result of the election; denied that Plaintiff properly states a claim for same or that he is entitled to any relief thereunder.

49. Admitted that a portion of the referenced statute is accurately quoted; the Court is respectfully referred to the statute for a complete statement of its contents.

50. Admitted.

51. Denied.

52. Denied.

### **AFFIRMATIVE DEFENSES**

1. Sections 102.141 and 102.166, Florida Statutes, required mandatory machine and manual recounts, respectively, under the circumstances here; both such recounts were conducted in accordance with law and thereby voided and/or superseded any prior reported set of unofficial returns.

2. The Palm Beach County Canvassing Board properly certified the official results pursuant to Section 102.112, Florida Statutes, and in doing so stated:

We certify that pursuant to Section 102.112, Florida Statutes, **the canvassing board has compared the number of persons who voted with the number of ballots counted and that the certification includes all valid votes cast in the election.**

Compl. Ex. E (\*\*Official\*\* Certificate of County Canvassing Board) (emphasis added). Thus, the certified result reflects the full and fair expression of the will of the voters and such certification is presumed legal and correct as a matter of law.

3. Count I fails to state a cause of action because Abramson fails to allege (and ultimately cannot prove): (1) substantial noncompliance with statutory elections procedures on the part of the elections officials; and (2) that such substantial noncompliance was so pervasive that it thwarted the will of the people.

4. Count II fails to state a cause of action. Section 102.168 only authorizes a contest of the “certification of election” and requires that the contest be filed within 10 days after midnight of the date the last board responsible for certifying the results officially certifies the results of the election conducted.” § 102.168(1), (2). Count III challenges the Election Canvassing Commission’s decision not to certify Abramson as the winner of the election. Compl. 42. As alleged in the Complaint, the Canvassing Commission did not certify anyone as a winner and excluded the returns for the race at issue from its certificate of election. *Compare* Compl. ¶ 34, Ex. F (“Due to an irregularity appearing in the returns ... the Elections Canvassing Commission was unable to determine the true vote for this office and has excluded such returns from this certificate.”). The Elections Canvassing Commission’s failure to certify a result is not grounds for a challenge under Section 102.168.

5. Count III fails to state a cause of action. Count III challenges “the second set of unofficial returns submitted by Defendant Palm Beach County Canvassing Commission.” Compl. 48. Section 102.168 only authorizes a contest of the “certification of election” and

requires that the contest be filed within 10 days after midnight of the date the last board responsible for certifying the results officially certifies the results of the election conducted.” § 102.168(1), (2). The second set of unofficial returns was not certified as the official result of the election at issue and, therefore, is not subject to challenge pursuant to Section 102.168.

6. This court lacks subject matter jurisdiction over Counts II and III because plaintiff does not challenge a certified result of the Elections Canvassing Commission, *see* § 102.168.

7. The Elections Canvassing Commission, “[d]ue to an irregularity appearing in the returns for the race of Circuit Judge, 15<sup>th</sup> Circuit, Group 23, ... was unable to determine the true vote for this office and has excluded such returns from [its] certificate [of elections].” Accordingly, Abramson is not entitled to the relief requested and a special election must be ordered.

#### **COUNTER-CLAIM**

1. This is a counter-claim for declaratory relief pursuant to Chapter 86, Florida Statutes.

2. Counter-plaintiff, Honorable Richard I. Wennet, is a judge sitting on the Circuit Court in and for the Fifteenth Judicial Circuit, Group 23. At all relevant times, Wennet is and was a candidate for reelection to said office.

3. Counter-defendant William Abramson, at all relevant times, is and was Wennet’s only opponent for election for office of Circuit Court Judge, in and for the Fifteenth Judicial Circuit, Group 23.

4. Counter-defendant William Abramson, at all relevant times, is and was Wennet’s only opponent for election for office of Circuit Court Judge, in and for the Fifteenth Judicial Circuit, Group 23.

5. Counter-defendant Elections Canvassing Commission [“Canvassing Commission”] is a state agency created by Section 102.111, Florida Statutes, and, as soon as the official results of an election are compiled, it is charged with the duty and responsibility of certifying the returns of the elections and declaring and determining who has been elected for each federal, statewide, state and multi-county office.

6. Counter-defendant Kurt S. Browning is the Secretary of State of the State of Florida. He is the agency head of the Defendant Department of State. Pursuant to Florida’s elections code, Chapters 97-106, Florida Statutes, he is the chief election officer of the State of Florida, and has numerous duties and responsibilities with respect to the conduct of elections within the state, including the Defendant Elections Canvassing Commission.

7. Counter-defendant Department of State is a state agency created by Section 20.10, Florida Statutes. The Department of State is charged with giving to any person the election of whom is certified by the Defendant Elections Canvassing Commission a certificate of that person’s election. The Division of Elections is a sub-unit of the Defendant Department of State, established in Section 202.10, Florida Statutes, and it is charged with the responsibility of administering Florida’s election laws. The division of Elections provides staff services to Defendant Elections Canvassing Commission.

8. Counter-defendant Palm Beach County Canvassing Board is established and constituted in accordance with Section 102.141, Florida Statutes, and it is charged with canvassing and certifying the results of federal, state, and multi-county elections in Palm Beach County to the Defendant Department of State.

9. Counter-defendant Arthur Anderson is the Supervisor of Elections of Palm Beach County. Defendant Arthur Anderson is charged with the duty and responsibility of conducting all federal, state, and county elections in Palm Beach County.

10. The election for Circuit Court Judge, in and for the Fifteenth Judicial Circuit, Group 23 [the "Election"] was held during on August 26, 2008.

11. The first set of unofficial returns reported 45,375 votes for Abramson and 45,358 votes for Wennet. Because the difference of 17 votes was less than one-half of one percent, an automatic machine recount was ordered to be conducted under Section 102.151(7), Florida Statutes.

12. Prior to the start of the machine recount, a test of the tabulating equipment was conducted as provided in Section 101.5614(5). *See* § 102.141(7)(a). That test indicated no error of the tabulation equipment. Section 102.141(7)(a) provides: "If the test indicates no error, the recount tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly."

13. Upon canvass of the machine recount, the Palm Beach County Canvassing Board timely reported the second set of unofficial returns of 42,973 votes for Wennet and 42,912 votes for Abramson within the statutory deadline established under Section 102.141(7)(c). Because the difference of 61 votes was less than one-quarter of one percent, a manual recount of the overvotes and undervotes was ordered and conducted pursuant to Section 102.166.

14. At the conclusion of the manual recount, the Palm Beach County Canvassing Board timely certified the official result of 43,932 votes for Wennet and 43,872 votes for Abramson (providing a margin of victory for Wennet of 60 votes). The Palm Beach County Canvassing Board also determined, by manually counting the actual undervotes and overvotes

sorted by the tabulating machines, that there were 11,241 undervotes and overvotes in the election.

15. In certifying the official result of the election, the Palm Beach County Canvassing Board stated:

We certify that pursuant to Section 102.112, Florida Statutes, **the canvassing board has compared the number of persons who voted with the number of ballots counted and that the certification includes all valid votes cast in the election.**

Compl. Ex. E (“\*\*Official\*\* Certificate of County Canvassing Board”) (emphasis added).

16. The official returns, as certified by the Palm Beach County Canvassing Board, were prepared in the good-faith execution of the board’s official duties, and are entitled to a presumption of legality and correctness. A certified election result can only be disturbed where the challenger proves: (1) substantial noncompliance with statutory elections procedures on the part of the elections officials; and (2) that such substantial noncompliance was so pervasive that it thwarted the will of the people.

17. Despite his inability meet such a high burden, Abramson claims that the result certified by the Palm Beach County Canvassing Board cannot stand. Moreover, the Elections Canvassing Commission has stated that “[d]ue to an irregularity appearing in the returns for the race of Circuit Judge, 15<sup>th</sup> Circuit, Group 23, [it] was unable to determine the true vote for this office and has excluded such returns from this certificate. See Section 102.131, Fla. Stat. (2008).” Compl. Ex. F. Section 102.131 provides that “[t]he Elections Canvassing Commission in determining the true vote shall not have authority to look beyond the county returns.” The Elections Canvassing Commission did not specify the alleged irregularity appearing in the returns nor did it provide any other basis for not including the official results as certified by the Palm Beach County Canvassing Commission in its Official Certificate.

18. Accordingly, although he was certified by the Palm Beach County Canvassing Commission as the winner of the election, Wennet is in doubt as to his rights with respect to the election and there exists a bona fide, actual, present practical need for a determination of which candidate won the election -- and is entitled to hold -- the office of Circuit Judge in and for the Fifteenth Judicial Circuit, Group 23.

**WHEREFORE**, Wennet prays that the Court:

- A. Order that Wennet be declared the winner of the August 26, 2008 election for the office of Circuit Judge in and for the Fifteenth Judicial Circuit, Group 23 and that a certificate confirming same be issued by the appropriate elections officials to Wennet.
- B. Enter a finding that Wennet is entitled to the office of Circuit Judge in and for the Fifteenth Judicial Circuit, Group 23.
- C. In the alternative, order a special election to be held in conjunction with the general election on November 4, 2008.
- D. Order all other appropriate relief as this Court deems proper and just.

**GREENBERG TRAUIG, P.A.**



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail with a courtesy copy via e-mail this 11<sup>th</sup> day of September, 2008, to the following counsel of record:

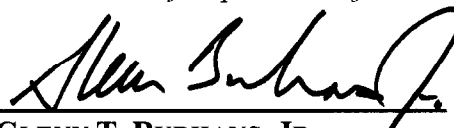
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