

IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 1D08-5638

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

Appellant,

v.

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

Appellees.

INITIAL BRIEF

GLENN T. BURHANS, JR.
Florida Bar No. 605867
BRIDGET K. SMITHA
Florida Bar No. 0709581
GREENBERG TRAUIG, P.A.
101 East College Avenue
Tallahassee, FL 32301
Telephone (850) 222-6891
Facsimile (850) 681-0207

Counsel for Appellant

TABLE OF CONTENTS

Table of Authorities	ii
Statement of the Case and Facts.....	1
Summary of Argument.....	6
Argument	8
A. The Standard of Review is <i>De Novo</i>.....	8
B. The Recount Authorized By the Circuit Court Conflicts With the Legislative Intent to Replace Discretionary Recounts With a Uniform Procedure that Mandates a Special Election.....	9
C. The Circuit Court Did Not Have the Power to Grant the Equitable Relief of a Discretionary Recount.	14
D. The Extra-Statutory Recount Conducted By the County Conflicted With the Statutorily Prescribed Procedures.....	16
E. The Judgment Effectively Denied Wennet the Right to Contest the Election.	19
Conclusion.....	21
Certificate of Compliance.....	22
Certificate of Service.....	23

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Armstrong v. Harris</i> , 773 So. 2d 7 (Fla. 2000)	8
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	16, 18, 19
<i>Crescent Miami Center, LLC v. Florida Dept. of Revenue</i> , 903 So.2d 913 (Fla. 2005)	15
<i>Department Of State, Division Of Elections v. Martin</i> , 885 So.2d 453 (Fla. 1 st DCA 2004).....	8
<i>Engle Homes, Inc. v. Krasna</i> , 766 So.2d 311 (Fla. 4 th DCA 2000)	14
<i>Ex Parte Beattie</i> , 124 So. 273 (Fla. 1929)	15
<i>Gore v. Harris</i> , 772 So.2d 1243 (Fla. 2000)	9, 16
<i>Kinzel v. City of North Miami</i> , 212 So.2d 327 (Fla. 3d DCA 1968).....	16
<i>Lake Tippecanoe Owners Ass'n Inc. v. National Lake Developments, Inc.</i> , 390 So.2d 185 (Fla. 2d DCA 1980).....	14
<i>Millinor v. Smith</i> , 144 So. 333 (Fla. 1932)	15
<i>Racetrac Petroleum, Inc. v. Delco Oil, Inc.</i> , 721 So.2d 376 (Fla. 5 th DCA 1998).....	8
<i>Reform Party of Fla. v. Black</i> , 885 So.2d 303 (Fla. 2004)	8

<i>Sancho v. Smith</i> , 830 So.2d 856 (Fla. 1 st DCA 2002).....	8
<i>Smith v. Crawford</i> , 645 So.2d 513 (Fla. 1 st DCA 1994).....	19
<i>State v. Chillingworth</i> , 143 So. 294 (Fla. 1932).....	16
<i>State v. Gerow</i> , 85 So. 144 (Fla. 1920).....	13
<i>Treadwell v. Town of Oak Hill</i> , 175 So.2d 777 (Fla. 1965).....	14
<i>Wexler v. Lepore</i> , 878 So.2d 1276 (Fla. 4 th DCA 2004).....	14
<i>Williams v. Keyes</i> , 186 So. 250 (Fla. 1939).....	14

STATUTES

Fla. Stat. Ch. 102 (2008).....	10, 18, 19
§ 97.021(23), Fla. Stat. (2008).....	11
§ 97.021(37), Fla. Stat. (2008).....	11
§ 100.101(1), Fla. Stat. (2008).....	8, 13, 21
§ 102.111(1), Fla. Stat. (2008).....	12
§ 102.112, Fla. Stat.	3
§ 102.112(2), Fla. Stat. (2008).....	12, 19
§ 102.112(3), Fla. Stat. (2008).....	12, 19
§ 102.131, Fla. Stat. (2008).....	3, 12
§ 102.141(7)(c), Fla. Stat. (2008)	2, 11, 12, 17, 18
§ 102.166, Fla. Stat. (2000).....	2, 9

§ 102.166(1), Fla. Stat. (2008).....	11, 17, 18
§ 102.166(4), Fla. Stat. (2000).....	9
§ 102.166(5), Fla. Stat. (2000).....	9
§ 102.168(2), Fla. Stat.(2008).....	20
§ 102.168(3)(e), Fla. Stat. (2000)	10
§ 102.168, Fla. Stat. (2000).....	10, 19, 20
§ 102.168(8), Fla. Stat. (2000).....	10

STATEMENT OF THE CASE AND FACTS¹

This is an appeal of the Final Declaratory Judgment and Order Denying Motion for New Election rendered on October 20, 2008 (i) granting declaratory judgment to the extent Plaintiff requested to be relieved from insecurity and uncertainty with respect to his rights and status with regard to the August 26, 2008 election for the office of Circuit Judge in and for the Fifteenth Judicial Circuit, Group 23; (ii) holding that the court had the authority to order the recount of election results at issue; and denying Judge Wennet's motion for a new election (App. 1).²

On August 26, 2008 ("Primary Election Day"), the State of Florida conducted a primary election for numerous offices, including the office of Circuit Court Judge, in and for the Fifteenth Judicial Circuit, Group 23 (the "Group 23 Election"). The first set of unofficial returns for the Group 23 Election were timely submitted by the Palm Beach County Canvassing Board to the Department of State and appeared to indicate that there were 45,375 votes for Abramson and 45,358 votes for Wennet (90,733 votes cast in that race), and a total of 102,523 ballots cast. (App. 2, Compl. ¶ 17; Compl. Ex. A). Because the apparent margin of victory was less than one

¹ The following facts, supported in the official elections records, concerning the election at issue are not in dispute.

² Referenced to the attached appendix are cited to as "(App. #)".

half of one percent of the votes cast in that race, the Elections Canvassing Commission ordered a machine recount for the election pursuant to Section 102.141(7) on August 29, 2008. (App. 2, Compl. ¶¶ 20, 21)

As a result of the machine recount conducted pursuant to Section 102.141(7), the Palm Beach County Canvassing Board timely submitted a second set of unofficial returns to the Department of State on August 30, 2008, which appeared to indicate that there were 42,973 votes for Wennet and 42,912 votes for Abramson; an apparent victory for Wennet by 61 votes. (App. 2, Compl. ¶¶ 23, 24). Because the result of the machine recount indicated a margin of victory of less than one quarter of one percent of the votes cast for that race, Elections Canvassing Commission ordered a manual recount of the undervotes and overvotes pursuant to Section 102.166 on August 29, 2008. (App. 2, Compl. ¶ 21; Compl. Ex. B). Palm Beach County Canvassing Board conducted the manual recount of the undervotes and the overvotes, the result of which appeared to indicate that there were 43,932 votes for Wennet and 43,872 votes for Abramson -- or, a margin of victory for Wennet of 60 votes. (App. 2, Compl. ¶¶ 26, 28, 29, Compl. Ex. C).

Palm Beach County Canvassing Board certified the official returns indicating that Wennet received 43,932 votes to Abramson's 43,872 votes and timely submitted them to the Department of State. (App. 2, Compl. Ex.

E; Official Certification of Election Results and Conduct of Election Report). In certifying the official returns, the 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.

(App. 2, Compl. Ex. E “**Official** Certificate of County Canvassing Board”).

Due to the fact that there was a 3,478 vote difference in the unofficial returns reported on election night and those certified after the recounts, the Elections Canvassing Commission refused to certify the result and in its Official Certificate stated:

Due to an irregularity appearing in the returns for the race of Circuit Judge 15th Circuit, Group 23, the Elections Canvassing Commission 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).

(App. 2, Compl. Ex. “F”).

After the statutory recount procedures had run their course and the result certified to -- but not approved by -- the Elections Canvassing Commission, Palm Beach County (a non-party to this suit), with the consent of the Supervisor of Elections, tasked an assistant county administrator to attempt to reconcile the discrepancies in the ballot totals. This effort was not

ordered by the circuit court, but rather was conducted “to attempt to reconcile the discrepancy between the total ballot count that was reported from the August 26, 2008 primary election, and the total ballot count from the recount that was conducted on August 29-30, 2008.” *See* Memorandum of B. Merriman to A. Anderson, dated 9/15/2008 (App. 3). A second purpose was to “recommend any necessary changes to the process for implementation prior to the November 4, 2008 election.” *Id.* The unofficial hand count of all paper ballots cast produced the result of 100,002 ballots.

At the start of the county’s reconciliation, a count utilizing previously determined totals and a machine count resulted in a total of 102,721 total ballots cast. 9/17/2008 Supp. Reconciliation Report. Based upon the county’s Supplemental Reconciliation Report, the circuit court authorized a second machine recount that was conducted on September 19 and 20, 2008, resulting in 45,233 votes for Abramson and 45,118 votes for Wennet (90,351 votes cast in that race), and a total of 102,750 ballots cast. A second manual recount of over and undervotes was conducted on September 21, 2008, resulting in 45,176 votes for Abramson and 45,175 votes for Wennet (90,195 votes cast in that race), and a total of 102,586 ballots cast.

Because the canvassing board still could not reconcile the total number of ballots cast, it did not certify the result of the recounts conducted

September 19-21. Instead, a third machine recount limited to 54 designated precincts was conducted; approximately 1800-1900 ballots were counted in this partial machine recount, which was conducted on September 22, 2008. The result of the partial third machine recount was apparently somehow reconciled and added to the totals for the previous machine and manual recounts and was reported as the "Second Unofficial" Return as follows: 45,223 votes for Abramson, 45,118 votes for Wennet, for a total number of votes cast for the race of 90,351.³ A third manual recount of approximately 160 overvotes and undervotes that were sorted, but not counted, in the partial machine recount of September 22 was conducted on September 23, 2008. Adding the result of the partial third manual recount to the prior results, the canvassing board made its last tally: 45,531 votes for Abramson, 45,470 votes for Wennet, for a total number of votes cast in the race of 91,001, and a total number of ballots cast of 102,746.

The Canvassing Board certified the result on September 24, 2008 and filed the official return with the Department of State for consideration by the Elections Canvassing Commission, which certified the result September 29, 2008. (App. 4).

³ This, in fact, is the second "Second Unofficial" Return reported for this race. (App. 2, Compl. Ex. E).

SUMMARY OF ARGUMENT

This appeal involves a matter of first impression -- whether the judicial branch has the authority to grant equitable relief in the form of ordering a recount of election results after the statutorily prescribed canvassing and recount procedures have been exhausted and the Elections Canvassing Commission has certified under Florida law that it is unable to determine the true vote for the office at issue.

Due to seemingly endless litigation and the inability to reconcile the vast and varied ad hoc recount procedures utilized by the counties in the 2000 presidential election fiasco, the 2001 Florida Legislature amended the election code to make clear its intent to replace discretionary recounts with a uniform mandatory procedure. The Legislature provided a clear and unambiguous statutory framework for (i) canvassing election results, (ii) conducting mandatory machine and manual recounts under certain explicit conditions, and (iii) reporting and certifying the results of same. Significantly, the Legislature provided for only *one* machine recount and only *one* manual recount. Where the winner cannot be determined through this process, the Legislature specifically provided that the sole remedy is to hold a special election.

Despite this clear legislative intent, the circuit court -- when faced with the situation in which no party had been elected -- purported to exercise its equitable power to permit additional machine and manual recounts. The circuit court exceeded its authority by ordering equitable relief in derogation of the statutorily prescribed procedure. Not only did the county conduct multiple machine and manual recounts, but it conducted partial recounts as well; neither of which is permitted by Florida Statutes. Although the ballots were counted and recounted, in whole and in part, nine times, the county obtained different tabulations each time and was ultimately unable to determine whether the second official return actually represented the complete universe of ballots cast. In an election decided by 61 votes, the numerous and varying results released by the Canvassing Board demonstrates that such an ad hoc recount process is not well calculated to sustain the confidence that all citizens must have in the outcome of elections.

Finally, the circuit court effectively denied Wennet the right to contest the election. Wennet had only a ten day window within which to file a complaint contesting the election. The circuit court, however, failed to render a judgment on the controversy -- a necessary prerequisite to contesting the election -- until well after the ten day window expired.

Wennet therefore seeks an order reversing the circuit court's Judgment of October 20, 2008 with directions that the circuit court declare that no person has been elected and that a special election must be held pursuant to Section 100.101(1), Florida Statutes.

ARGUMENT

THE JUDGMENT SHOULD BE REVERSED BECAUSE THE CIRCUIT COURT DID NOT HAVE AUTHORITY TO ORDER ADDITIONAL RECOUNTS

A. The Standard of Review is *De Novo*.

“An order in a declaratory judgment action is generally accorded a presumption of correctness on appellate review. However, to the extent that decision rests on a question of law, the order is subject to full, or de novo, review on appeal.” *Reform Party of Fla. v. Black*, 885 So.2d 303, 310 (Fla. 2004) (internal citations omitted) *citing Sancho v. Smith*, 830 So.2d 856, 861 (Fla. 1st DCA 2002); *see also Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000) (“the standard of review for a pure question of law is de novo”); *Department Of State, Division Of Elections v. Martin*, 885 So.2d 453, 456 (Fla. 1st DCA 2004) (finding de novo standard of review applicable to statutory interpretation) *citing Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So.2d 376, 377 (Fla. 5th DCA 1998) (“judicial interpretation of Florida statutes is a purely legal matter and therefore subject to de novo review”);

see also Gore v. Harris, 772 So.2d 1243, 1252 (Fla. 2000) (“the trial court in the contest action does not sit as an appellate court over the decisions of the Canvassing Board. Accordingly, while the Board's actions concerning the elections process may constitute evidence in a contest proceeding, the Board's decisions are not to be accorded the highly deferential “abuse of discretion” standard of review during a contest proceeding”).

B. The Recount Authorized By the Circuit Court Conflicts With the Legislative Intent to Replace Discretionary Recounts With a Uniform Procedure that Mandates a Special Election.

Until the 2000 presidential election fallout, canvassing boards had the discretion to order a precertification manual recount of select precincts in the election protest phase⁴ and circuit judges had the discretion to provide any appropriate relief in the election contest phase.⁵ *See* §§ 102.166 and

⁴ Prior to 2001, upon request by any candidate or political party prior to certification, the county canvassing board had the discretion to authorize a manual recount of at least three precincts. § 102.166(4)(a) and (c), Fla. Stat. (2000). If the manual recount indicated an error in the vote tabulation that could affect the outcome of the election, the county canvassing board was required to: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the Department of State to verify the tabulation software; or (c) manually recount all ballots. § 102.166(5), Fla. Stat. (2000).

⁵ Prior to 2001, the circuit judge had the power to “fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong,

102.168, Fla. Stat. (2000), respectively. The months of chaos -- marred by inconsistent recount procedures, a complete lack of uniformity, and a seemingly infinite sea of litigation -- were a direct result of the unregulated discretion exercised at the local level. The 2001 Florida Legislature immediately countered by eliminating the canvassing boards' discretion to order recounts. Similarly, the 2001 Legislature limited both the scope of claims available in an election contest as well as the circuit courts' discretion to fashion any orders and provide relief in a contest.⁶ Instead, the Legislature replaced discretion with a statutory framework for conducting mandatory recounts; providing that such recounts would occur only under certain specified circumstances.

and to provide any relief appropriate under such circumstances.”
§ 102.168(8), Fla. Stat. (2000).

⁶ In addition to removing the discretionary recount power from canvassing boards, the 2001 amendments to Chapter 102 limited the scope and relief available under the election contest statute, section 102.168. First, the Legislature removed the broad catchall provision for contesting an election on the basis of “any other cause or allegation which would show that a person other than the successful candidate was the person duly nominated or elected to the office in question.” § 102.168(3)(e), Fla. Stat. (2000). Second, the Legislature struck the provision that the circuit judge “may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances. § 102.168(8), Fla. Stat. (2000).

Pursuant to this non-discretionary recount procedure, recounts are automatically triggered in two instances. *First*, where the first set of unofficial returns indicates a margin of victory of one-half of one percent or less, then a mandatory machine recount of all ballots must be conducted; the result is reported to the Department of State as the second set of unofficial returns and must be filed no later than 3 p.m. on the fifth day after any primary election. § 102.141(7)(c), Fla. Stat. (2008). *Second*, where the second set of unofficial returns indicates a margin of victory of one-quarter of one percent or less, then a manual recount of the overvotes and undervotes is conducted. § 102.166(1), Fla. Stat. (2008).⁷ A manual recount must be made “of the overvotes and undervotes cast in the entire geographic region for such office or ballot measure.” *Id.* “A manual recount may not be ordered, however, if the number of overvotes, undervotes, and provisional ballots is fewer than the number of votes needed to change the outcome of the election.” *Id.*

⁷ An “[o]vervote” means that the elector marks or designates more names than there are persons to be elected to an office or designates more than one answer to a ballot question, and the tabulator records no vote for the office or question.” § 97.021(23), Fla. Stat. (2008). An “[u]ndervote” means that the elector does not properly designate any choice for an office or ballot question, and the tabulator records no vote for the office or question.” § 97.021(37), Fla. Stat. (2008).

Once the recount is complete, the results from the machine recount are combined with the manual recount and certified as the official result by the canvassing board. § 102.141(7)(c), Fla. Stat. (2008). The statute does not contemplate any additional recounts. Moreover, the statute expresses the deliberate intent to prevent the recount process from delaying certification of a winner. If the recount procedure is delayed, and the returns are not filed with the Department of State by 5 p.m. on the seventh day following a primary election, the recount “**shall be ignored** and the results on file at that time shall be certified by the department.” § 102.112(2), (3), Fla. Stat. (2008) (emphasis added).

Upon filing with the Department, the canvassing board’s certified official returns are examined by the state Elections Canvassing Commission, charged with certifying the returns of the election and declaring who has been elected to office. § 102.111(1), Fla. Stat. (2008). Where, however, the returns are so irregular or false that the Elections Canvassing Commission is unable to determine the true vote for any office, the commission may not declare a winner for that race. § 102.131, Fla. Stat. (2008). In such circumstances, where no person has been declared the winner, no person has thus been elected to the office. The Legislature specifically contemplated instances in which no person has been elected to office. In response, the

Legislature did not provide for additional recounts, but rather provided one form of relief: “a special election or special primary election shall be held ... if 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.”⁸ § 100.101(1), Fla. Stat. (2008).

Here, the Elections Canvassing Commission was unable to determine a winner despite the exhaustion of the mandatory machine recount and manual recount. Once the Elections Canvassing Commission declined to certify the results of the Group 23 race, the statutorily prescribed recount procedures terminated and neither candidate could be declared the winner. Section 100.101(1) was therefore triggered and a special election was required be held. This special election is statutorily mandated; the statutes do not provide for any other remedy. Thus, the circuit court’s authorization of the discretionary recount directly undermines the legislative intent to

⁸ For non-partisan judicial races, such as the election at issue here, the primary election is the equivalent of the general election. *State v. Gerow*, 85 So. 144, 146 (Fla. 1920) (“Primary election laws and laws governing general elections are so interwoven that together they comprise the election machinery of the state, and the rights, duties, privileges, and powers granted or imposed by one are equivalent to those granted or imposed by the other, in so far as the processes of the courts may be invoked to enforce or protect them”).

proceed with a special election rather than to fuddle through numbers that may never add up and related litigation

C. The Circuit Court Did Not Have the Power to Grant the Equitable Relief of a Discretionary Recount.

As set out above, Florida Statutes explicitly provide only one remedy -- a special election -- under circumstances such as this where no person has been elected to office. Florida law is clear that where such express statutory procedures and remedies are present, courts cannot act in equity to grant relief outside of, or in conflict with, the statutory provisions.⁹ *Lake Tippecanoe Owners Ass'n Inc. v. National Lake Developments, Inc.*, 390 So.2d 185 (Fla. 2d DCA 1980) (“The court may not exercise its equity powers when there is an adequate remedy at law”); *see also Williams v. Keyes*, 186 So. 250, 261 (Fla. 1939) (court cannot order equitable relief that violates controlling election statutes); *Engle Homes, Inc. v. Krasna*, 766 So.2d 311 (Fla. 4th DCA 2000) (declining to act in equity where “the [Interstate Land Sales Full Disclosure Act] provides its own remedy and

⁹ Moreover, “[e]quity is usually reluctant to interfere in any way with an election.” *Treadwell v. Town of Oak Hill*, 175 So.2d 777, 778 (Fla. 1965) (“It has frequently been said that . . . an election is a political matter as to which courts of equity have, and should have, nothing to do”); *see also Wexler v. Lepore*, 878 So.2d 1276, 1282 (Fla. 4th DCA 2004) (“The rule is well settled that equity will neither determine questions involving rights that are purely political nor will it undertake the protections of such rights by the writ of injunction”).

where there is a statutory or remedy at law, this court will not exercise its equitable jurisdiction”). The circuit court nonetheless proceeded in equity to order additional recounts of the ballots cast for the Group 23 race that conflicted with the statutorily prescribed procedure.

In support of this ultra vires action, the circuit court subsequently reasoned that by ordering the recount it was merely “compell[ing] the Palm Beach County Canvassing Board to comply with its ministerial duty to count all the votes returned to them.” (App. 1, pg. 9). The flaw in this logic, however, is that the circuit court relies on a 1929 Florida Supreme Court case for common law authority to impose this duty. *See Ex Parte Beattie*, 124 So. 273, 275 (Fla. 1929); *see also Millinor v. Smith*, 144 So. 333, 335 (Fla. 1932). The Legislature is presumed to have been aware of this caselaw when it -- decades later -- stripped the circuit courts of their broad discretion to order recounts. *Crescent Miami Center, LLC v. Florida Dept. of Revenue*, 903 So.2d 913, 918 (Fla. 2005) (“Florida’s well-settled rule of statutory construction [is] that the legislature is presumed to know the existing law when a statute is enacted, including ‘judicial decisions on the subject concerning which it subsequently enacts a statute.’”). To permit reliance upon decades old caselaw for authority to conduct discretionary recounts would be to undo the import of the 2001 Legislative amendments and to

revert back to the disparate procedures and standards that spawned the 2000 presidential election debacle.

Simply put, no discretion exists for any court or official elections body to order ad hoc, multiple recounts in contravention of the clear, mandatory recount procedures set forth in the statute.¹⁰ Since the circuit court was without discretion to order a recount beyond that contemplated by the statutory framework, any results arising from same are void *ab initio*. *State v. Chillingworth*, 143 So. 294, 295 (Fla. 1932) (finding that although “each and every order or decree made in the suit to foreclose the trust deed prior to the order of disqualification was made through oversight and was harmless, nevertheless they were void for lack of authority to enter them”).

**D. The Extra-Statutory Recount Conducted By the County
Conflicted With the Statutorily Prescribed Procedures.**

Even if the circuit court had the power to order a recount in equity, the circuit court was constrained to avoid fashioning a remedy in derogation of statutory procedure. Nonetheless, the recount was conducted with the same lack of standards and uniformity that plagued the 2000 presidential election

¹⁰ The rationale for this principle is clear. *Gore v. Harris*, 772 So.2d 1243, 1261 (Fla. 2000) (“the need for accuracy must be weighed against the need for finality”) *rev'd on other grounds Bush v. Gore*, 531 U.S. 98 (2000); *Kinzel v. City of North Miami*, 212 So.2d 327, 328 (Fla. 3d DCA 1968) (“As to this type litigation [statutory action for an election contest] there is a public interest in promptness and finality of decision”).

fallout and that was sought to be avoided by the 2001 amendments. Lacking any oversight or delegated procedure, the county had free reign in its reconciliation efforts; resulting in the ballots being counted nine times, both officially and unofficially. Not surprisingly, different tabulations were produced each time. Continuously changing tabulations were returned not only for the ballots cast for each candidate, but also for the total number of votes cast for Group 23 and the total number of ballots cast in the entire county. Although ultimately unable to determine whether the second official return actually represents the complete universe of ballots cast -- and therefore to reconcile the varying returns -- the Palm Beach County Canvassing Board simply stopped counting. Despite the inability to determine the true number of total ballots cast, the Board certified the second official return.

Moreover, the procedure used by the Board starkly diverged from the solitary machine recount provided under Section 102.141(7)(c) and the single manual recount procedure provided under Section 102.166(1). Since the Board could not certify the result of its second machine and second manual recounts of September 19 - 21, it conducted a *partial* machine recount of approximately 1800 - 1900 ballots from 54 precincts and, from

that, conducted a manual recount of approximately 160 overvotes and undervotes. Nowhere in the Florida Statutes are partial recounts permitted.¹¹

Conducting multiple and partial recounts of select precincts not only violates the plain language of the statutes, but also constitutes the type of “unequal evaluation of ballots” rejected by the Supreme Court. *Bush v. Gore*, 531 U.S. 98, 106 (2000). The discretionary nature of such a subjective and selective process “raises concerns of uniformity and completeness” of the process. *Gore v. Harris*, 773 So.2d 524, 531 (Fla. 2000) (Pariente, J., concurring). Furthermore, it evokes the concerns exposed in 2000 and underscores the Legislature’s elimination of such discretion in the recount process. The numerous and varying results released by the Canvassing Board demonstrates that such an ad hoc process “is not well calculated to

¹¹ The circuit court’s order required that the recount be conducted in accordance with the procedures of Chapter 102; specifically:

Defendant Palm Beach County Canvassing Board **shall conduct a machine recount** of the ballots and prepare a second set of unofficial returns **as provided in Section 102.141(7)**.... If the machine recount indicates that a candidate is defeated by one-quarter of one-percent or less of the votes cast in the Election, the Canvassing Board **shall conduct a manual recount as provided in Section 102.166(1)**, Florida Statutes.

Recount Order, ¶ 1 (emphasis added). Despite this clear directive, the statutorily mandated procedure was not followed.

sustain the confidence that all citizens must have in the outcome of elections.” *Bush*, 531 U.S. at 109.

The recount conducted pursuant to the circuit court’s supposed equitable powers contradicts the procedures provided for under Chapter 102 and the clear legislative intent to promote uniformity by limiting discretion. Florida Statutes do not permit a second machine recount, nor a second manual recount and most certainly do not permit partial recounts of select precincts at any stage. The county’s multiple recounts undermines the 2001 revisions to Chapter 102 and circumvents the Legislature’s attempt to replace unbridled discretion with uniform mandatory procedures. Moreover, the county’s second official return did not comply with Section 102.112(2) - (3), which provides that if the returns are not filed with the Department of State by 5 p.m. on the seventh day following a primary election, they “**shall be ignored** and the results on file at that time shall be certified by the department.” The Court cannot read this requirement out of existence. *Smith v. Crawford*, 645 So.2d 513, 525 (Fla. 1st DCA 1994).

E. The Judgment Effectively Denied Wennet the Right to Contest the Election.

The circuit court dismissed Wennet’s challenge to the ad hoc recount procedures utilized by the county as being remediable solely through an election contest action brought pursuant to Section 102.168, Florida Statutes.

However, as recognized by the circuit, “[a]t the time of the filing of the ‘Emergency Complaint for Declaratory Relief or, in the Alternative, to Contest Election,’¹² no winner had been certified by the Elections Canvassing Commission” and an election contest under Section 102.168 could not have been filed at that time. (App. 1, pg. 15). A winner was not in fact certified until September 29, 2004. (App. 4). However, by that time the Palm Beach County Supervisor of Elections had to begin preparing the voting machines for the general election. Wennet was provided only until 5:00 p.m. on October 3, 2008 to conduct a limited examination of certain tabulators. (App. 5). But because the machines had to be reprogrammed, Wennet was unable to fully test the accuracy of these tabulators to determine whether an appropriate basis for a contest existed.¹³ The evidence necessary for Wennet to challenge the Group 23 election has now been lost. Wennet was therefore effectively denied the ability to contest the election.¹⁴

¹² Abramson sought in the alternative to contest the election under Section 102.168. Compl., ¶ 1.

¹³ That limited investigation revealed malfunctioning of the tabulators. (App. 6).

¹⁴ Pursuant to Section 102.168(2), the complaint must have been filed within ten days after the Elections Canvassing Commission certified the results, or October 9, 2008.

CONCLUSION

The circuit court did not have authority to order additional recounts. The sole remedy in circumstances under which no person is elected to office is to hold a special election. The circuit court's order permitting additional recounts was in conflict with the statutorily prescribed procedure and undermined the 2001 legislative amendments to the Election Code. The Judgment entered October 20, 2008 must therefore be reversed with direction to declare that no person has been elected and that a special election must be held in accordance with Section 100.101(1).



GLENN T. BURHANS, JR.
FLORIDA BAR NO. 605867
BRIDGET K. SMITHA
FLORIDA BAR NO. 0709581
GREENBERG TRAUIG, P.A.
101 EAST COLLEGE AVENUE
TALLAHASSEE, FL 32301
TELEPHONE: (850) 222-6891
FACSIMILE: (850) 681-0207
RICHARDB@GTLAW.COM

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2). This document is submitted in Times New Roman 14-point font.



GLENN T. BURHANS, JR.

