

IN THE FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

Case No. 1D08-5638

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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,*

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.*

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**REPLY BRIEF**

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## INTRODUCTION

While contemplating whether a recount could be ordered, the trial court asked: “What procedure does the statute provide for in this instance?” Counsel for the State Appellees accurately responded that no procedure existed. Indeed, counsel for all parties agreed that the situation at hand was unprecedented. As detailed in Wennet’s Initial Brief, the trial court proceeded to order a recount and the Palm Beach County Canvassing Board proceeded to conduct the recount in derogation of the statutorily prescribed procedure.<sup>1</sup>

None of the Appellees have provided any authority in support of the proposition that the trial court and the Canvassing Board can act in conflict with the procedure mandated by the Election Code by, respectively, authorizing and engaging in the ad hoc reconciliation/recount process. Under this theory: (i) statutory deadlines and procedures can simply be ignored; (ii)

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<sup>1</sup> The State Appellees contend that nothing in the trial court’s order directing the recount departed from the Legislature’s removal of discretion from the local canvassing boards regarding when and how recounts are conducted. State Appellees’ Answer Brief, pg. 12. Although the court ordered that the recount be conducted in accordance with the procedures of Chapter 102, the procedure implemented did not comply with the statutory mandate for when or how the recount must be conducted. As explained in the Initial Brief, the recount was not conducted within the statutorily prescribed deadlines. *See* Section 102.141(7)(c); *see also* Section 102.122(2)-(3). Moreover, the Canvassing Board violated the mandatory statutory recount procedure by conducting multiple and partial recounts.

ballots can be tallied, “reconciled” and canvassed for several weeks on end; and (iii) an unlimited number of recounts can be conducted in any fashion desired. This is not only contrary to law, but it also undermines confidence in -- and the legitimacy of -- our elections system.

No case has ever held that the statutory elections deadlines and procedures can be ignored in this manner; this Court should not countenance the attempt to read the statutory provisions out of existence. *Smith v. Crawford*, 645 So.2d 513, 525 (Fla. 1st DCA 1994) (“It is axiomatic that courts may not rewrite legislation or fashion new law that they deem to be ‘fair’ and ‘just.’ [I]t is not the court’s duty or prerogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court.”) (quoting *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984)).

The statutory deadlines and procedures not only provide a uniform and non-discretionary mechanism for canvassing the returns, they also serve an important role in assuring the prompt reporting of results so that any disputes can be timely resolved under the compressed calendar inherent in the election season. That function has been eroded to prejudicial effect here. The county’s ad hoc reconciliation spanned several weeks -- tying up the ballots and tabulation machines virtually up to the Supervisor’s deadline for preparing the machines for the general election. That delay effectively put

the resolution of the litigation at the trial level on hold for nearly one month and denied Wennet the opportunity to take discovery and conduct a full investigation of the voting machines.<sup>2</sup> The prejudice is undeniable and the danger of allowing the unrestricted reconciliation process is quite real as the limited testing conducted on the machines clearly demonstrated that several voting machines malfunctioned in counting ballots that should not have been counted and rejecting ballots that should have been counted.

Appellees conspicuously ignore that the statutorily prescribed canvassing, recount, and certification procedures were exhausted when the Elections Canvassing Commission certified that it was unable to determine the true vote for the office at issue. There is no provision under Florida law allowing the Canvassing Board to disregard its own certified result and turn back the clock, search for "missing" ballots, and begin the canvassing process anew once it believes it has found enough ballots. Where, as here, no person was elected to office pursuant to the mandatory statutory

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<sup>2</sup> Election contests are permitted only under four circumstances explicitly set out under Section 102.168(3), Florida Statutes. Wennet did not have a ground for contesting the election -- and therefore could not contest the election -- until he could show "receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." *Id.* at (3)(c). Thus, lacking sufficient time to examine the machines prior to their process for the general election, Wennet was unable to timely contest the election.

procedures, the only remedy provided by law is to hold a new election pursuant to Section 100.101(1).

Lacking any support for the trial court's authority to order the recount in derogation of the statutory procedures, Appellees principally rely upon pleas to equity. This, however, is misdirection and misses the mark. No one disputes that the will of the voters is paramount. Wennet does not seek to interfere with the right of voters to cast their votes effectively. To the contrary, Wennet seeks to restore the people's confidence and to ensure that every lawful vote that is cast gets counted. Given the uncertainty that has loomed over this post-election morass, the only means authorized by Florida law for doing so is to conduct a new election. By holding a new election, the will of the voters can be exercised and determined free from the stain of doubt.

### **SUMMARY OF ARGUMENT**

Appellees have failed to provide any caselaw to refute Wennet's plain reading of Section 100.101(1), Florida Statutes. Instead, Appellees rely upon principles of equity. However, principles of equity support Wennet's position that the public is entitled to an election free from skepticism and that a new election would afford the public the right to cast their votes effectively. Regardless, Wennet is not aware of -- nor have Appellees

provided -- caselaw to the effect that a trial court may provide relief in conflict with statutory procedure.

## ARGUMENT

### **APPELLEES FAIL TO PROVIDE AUTHORITY FOR THE TRIAL COURT TO ACT IN DEROGATION OF THE STATUTORY FRAMEWORK.**

Appellees invite this Court to ignore the statutory framework installed by the Legislature in 2001. Such a request should be declined as the Florida Supreme Court has recognized:

that the development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature.

*Gore v. Harris*, 773 So.2d 524, 526 (Fla. 2000). Justice Pariente, in providing a detailed analysis of the discretionary scheme that failed in 2000, aptly noted:

It would thus seem appropriate that any revised statutory scheme should include more specific standards to govern the exercise of county canvassing boards' discretionary authority in a statewide election.

*Id.*, 773 So.2d at 533 (Pariente, J., concurring).

In 2001, the Legislature did exactly that and eliminated any discretion of the canvassing boards to conduct recounts in any election except under statutorily specified circumstances; similarly, it expressly circumscribed the circuit courts' discretionary authority in the elections process.<sup>3</sup> Appellees fail to offer any support as to why the statutes should be disregarded.

First, the caselaw relied upon by Appellees for the proposition that the trial court had equitable jurisdiction has been supplanted by the 2001 legislative amendments. Such cases are clearly distinguishable and unavailing as every one of them predates the non-discretionary recount procedures and other limitations implemented in 2001 -- in most cases by several decades. The 2001 Legislature is presumed to have been aware of this caselaw when it expressly limited the discretion of the courts and canvassing boards. *See, e.g., Crescent Miami Center, LLC v. Florida Dept.*

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<sup>3</sup> Although Abramson admits that the Legislature amended Section 102.168, Florida Statutes to alter the trial court's role, he attempts to draw an inference from the fact that "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." Abramson Answer Brief, pg. 7 - 8. Any attempted inference, however, is misleading as Section 102.166 does not provide trial courts with discretionary authority to order a recount or to act in derogation of the mandatory recount procedure provided under this section. Rather, Section 102.166 provides a mandatory procedure completely devoid of discretion. The attempt to distinguish the amendment to Section 102.168, Florida Statutes on the basis that Section 102.168 is not at issue in this appeal is likewise unavailing. The significance of the amendment to Section 102.168 is the legislative intent to remove all discretion from the statutory procedure.

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 a “reconciliation” and recount not contemplated by statute would be to ignore the 2001 revisions and to return to the same unbridled discretion that produced the 2000 presidential election recount fiasco. Thus, the 2001 revisions -- eliminating discretionary recounts and limiting the circuit courts’ role in elections matters -- control and supersede any contrary inference sought to be drawn from those earlier cases.<sup>4</sup>

Even assuming, *arguendo*, that the Court has wide latitude in fashioning a remedy in a declaratory judgment action, none of the parties have provided any authority to suggest that the remedy fashioned may be in derogation of statutory procedure. As detailed in the Initial Brief, the

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<sup>4</sup> The cases cited by Appellees are also distinguishable in that they predate Section 100.101(1) or did not involve circumstances under which no person was elected to office. In the cases predating Section 100.101(1), the recount did not contradict the procedure provided by statute as the courts at that time had the authority to act in equity to order a recount. To the extent the remaining cases did not involve circumstances under which Section 100.101(1) would even apply, Appellees do not provide any authority to refute application of this provision to the case at hand. As fully set out in the Initial Brief, “an election is a political matter as to which courts of equity have, and should have, nothing to do.” *Treadwell v. Town of Oak Hill*, 175 So.2d 777, 778 (Fla. 1965).

Legislature did not provide for a second machine recount nor a third manual recount much less a partial machine recount or a partial manual recount. Rather, the mandatory statutory procedure provides that, where no person has been elected -- as made clear when the Elections Canvassing Commission certified that it could not determine the true vote -- a new election must be held in accordance with Section 100.101(1).<sup>5</sup> None of the parties have demonstrated that the Court may act in derogation of this procedure.

Second, the caselaw relied upon by Appellees for the general proposition that voters must be afforded the right to cast their votes effectively is self-evident, undisputed, and not at issue here. Appellees fail to show how a new election would deny voters this right. In fact, the right of voters to cast their vote effectively is better served by holding a new election as opposed to further recounts of questionable accuracy obtained

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<sup>5</sup> Although there is no caselaw on point regarding the interpretation of Section 100.101(1), Florida Statutes, the meaning is clear from a plain reading of the statute. Whether phrased as “no person being elected” or as “unable to determine the true vote” -- a matter of semantics -- the result is the same: a new election must be held where, after completion of the mandatory statutory procedure, no person has been declared the winner. It bears repeating that the Election Code provides for only one machine and one manual recount.

through processes of questionable legitimacy.<sup>6</sup> Regardless, the cases relied upon by Appellees provide no support for the proposition that the trial court can ratify the ad hoc reconciliation and order a recount in derogation of the statutorily prescribed procedures.

To the extent Appellees dismiss this failure to comply with statutory procedure as proper only for an election contest proceeding, Appellees are mistaken. Although this failure may provide grounds for an election contest pursuant to Section 102.168(3), Florida Statutes, for the purposes of this appeal, Wennet is challenging this failure to comply as evidence of the trial court's lack of authority to order the recount. The trial court's failure to adhere to the mandatory statutory procedure -- and the resulting ad hoc recount conducted at the sole discretion of the County Canvassing Board --

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<sup>6</sup> The Palm Beach County Appellees' suggestion that they stopped counting "only when all the ballots had been tabulated" is inaccurate and any inference as to finality is circular. See Palm Beach County Appellees' Answer Brief, pg. 8. It is inaccurate because there are ballots that the County cannot account for. See Affidavit of Gerald F. Richman dated October 6, 2008, attached at App. 1, ¶ 11. The contention is circular to the extent the number reached is "final" simply because it is the result of the last count that they conducted; there is no dispute that that number changed every time the ballots were "reconciled." Nor can there be any doubt that another counting would yield yet another result. Although there was only time to conduct limited testing on the machines, such testing demonstrated that several voting machines malfunctioned in counting ballots that should not have been counted and rejecting ballots that should have been counted. See Aff. of Gerald F. Richman dated October 6, 2008, attached at App. 1.

are precisely the conduct sought to be curbed by the 2001 amendments to the Election Code and is precisely the reason why a new election must be held under Section 100.101(1), Florida Statutes.

Appellees have failed to provide any authority to suggest that the 2001 Legislature did not intend to replace the rampant and flagrant use of discretion with a uniform recount procedure. Lacking any authority to support their position, and lacking any authority to counter Wennet's plain reading of Section 100.101, Florida Statutes,<sup>7</sup> Appellees have failed to show that the trial court had authority to order a recount in conflict with the statutory procedure.

### CONCLUSION

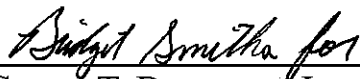
The undisputed facts are simple: the election was held; the ballots canvassed; statutorily mandated machine and manual recounts were conducted; the results were timely certified and reported by the Canvassing Board to the Department; and the Elections Canvassing Commission

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<sup>7</sup> Instead, the State Appellees posit that "there are no conceivable policy reasons for prohibiting a court from ordering a recount when, as here, the responsible board has refused to certify results because the local board has not fulfilled its statutory duty to count and reconcile all the ballots." See Answer Brief of State Appellees, pg. 13. The 2001 Legislature fresh in the wake of the 2000 presidential election morass, however, may very well have made the calculated decision that it would be less costly and damaging to our electoral system to start over with a new election under Section 100.101(1), Florida Statutes than to muddle through protracted litigation that would only produce a result fraught with doubt.

certified under Florida law that it was unable to determine the true vote for the office at issue. In short, the statutorily prescribed canvassing and recount procedures were exhausted and no winner was declared. Under such circumstance, there is no basis in statute nor decisional law authorizing any further recounts nor other relief except the ordering of a new election.

What occurred in the canvassing of the Group 23 election and the subsequent post-election calamity was unfortunate and grossly unfair to the voters of Palm Beach County. The errors and uncertainty that plagued the entire ordeal should not be compounded by allowing a result spawned from an unauthorized and illegitimate process to survive.

  
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**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.*

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GLENN T. BURHANS, JR.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 9th day of December, 2008 to the following:

<p>Lynn Hearn General Counsel Florida Department of State R.A. Gray Building 500 South Bronough Street Tallahassee, FL 32399 E-mail: lchearn@dos.state.fl.us <i>Attorney for Elections Canvassing Commission of the State of Florida; Kurt Browning, as Secretary of State; Department of State, Division of Elections</i></p>	<p>Ron Labasky John Thomas LaVia, III Young van Assenderp Gallie's Hall 225 South Adams Street, Suite 200 Post Office Box 1833 Tallahassee, Florida 32302 E-mail: rlabasky@yvlaw.net jlavia@yvlaw.net <i>Attorney for Palm Beach Canvassing Board; Arthur Anderson, as Palm Beach County Supervisor of Elections</i></p>
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GLENN T. BURHANS, JR.

# Appendix

**AFFIDAVIT OF GERALD F. RICHMAN**

I, GERALD F. RICHMAN, state the following:

1. I am an attorney for Judge Wennet during the numerous recount processes and have personal knowledge of the matters set forth herein.
2. On or about September 21, 2008, the Palm Beach County Canvassing Board could not certify the election after the second manual recount because there was a discrepancy of 156 ballots (which turned out to be 160 ballots). These ballots were subsequently found in a third partial machine recount and I was present when those ballots were run through a high speed scanner and were then manually recounted. I was one of the observers. During this manual recount, I observed that 156 of the ballots were clearly undervotes, and I also saw that four of the ballots which had previously been rejected by the high speed scanner were then determined by the Canvassing Board to be a vote for either Mr. Abramson or Judge Wennet. These ballots were clearly marked votes and it appears that they should have been counted by the high speed scanner. In other words, the voter connected the arrow and they should have been counted by the high speed scanner but in fact had not been counted.
3. During the manual recount of under votes and over votes which occurred on September 20, 2008, it was also reported to me by an observer on behalf of Judge Wennet that there were two bins of approximately 51 ballots each that had been rejected by the high speed scanners as undervotes when in fact most of them appeared to have been marked sufficiently to have been counted by the high speed scanner.

Appendix 1

4. Accordingly, I requested on behalf of Judge Wennet that the four ballots that had been counted as votes by the Canvassing Board but had been rejected by the high speed scanner during the second machine recount be tested by two different high speed scanners. I also requested that the bins containing the 51 ballots each that had been identified by the observer similarly be tested by two high speed scanners.

5. Pursuant to an Order of this Court entered nunc pro tunc on October 3, 2008, those ballots were located and tests performed by two randomly selected high speed scanners, out of the total of eight high speed scanners at the Supervisor of Elections ("SOE") tabulating center that had been used in the machine recounts. Counsel and observers from both sides were present as the SOE staff ran the tests pursuant to Court Order.

6. The tests of the four ballots that had been previously rejected but that were later accepted by the Canvassing Board resulted this time in both high speed scanners counting three of the four ballots.

7. Tests were then conducted on the 102 ballots referenced in paragraph 2 above that had previously been rejected as under votes but which were determined by the manual recount to have been voted 51 votes for Mr. Abramson and 51 votes for Judge Wennet.

8. When those 102 votes were run through the same two randomly selected high speed scanners, in the first run with machine number "2", eleven of the 51 ballots that had been previously rejected by the machine but manually counted for Mr. Abramson were now counted by the machine for Mr. Abramson and 40 were rejected. Of the other 51 ballots that had been previously rejected by the machine recount, but manually recounted for Judge Wennet, only two were accepted and 49 were rejected.

9. An entirely and dramatically different result was then obtained by the machine recount from high speed scanner number "7": of the 51 ballots that had previously been rejected as undervotes for Mr. Abramson but that were then manually recounted for Mr. Abramson, the machine this time accepted 41 ballots and rejected only 10; and with regard to Judge Wennet whereas the first machine (#2) had accepted two ballots for Judge Wennet and rejected 49, machine number "7" accepted 49 and rejected two. Moreover, it clearly appeared that as to some of the ballots, the machines had counted ballots that should not have been counted and counted others that should have been counted originally by machine.

10. Because of the time constraints involved and the necessity to have approximately 1000 machines and the eight high speed scanners maintained and reprogrammed for the general election, there was no practical way to retest and examine all the machines or even to examine all of the eight high speed scanners to determine the basis for the inconsistencies and glaringly apparent malfunctions. Similarly, given the fact that the Elections Canvassing Commission did not certify the election until September 29, 2008 after having previously denied certification on September 5, 2008, Judge Wennet has been seriously prejudiced by the delays in the multiple recount process with regard to any contest to be pursued under Florida Statute, Section 102.168, as well as any other relief to which he may be entitled.

11. I also note that from documents provided by the SOE subsequent to the recounts, there are only 102,056 signatures accounted for whereas the final certification of the Palm Beach County Canvassing Board is 102,746 ballots counted.

Under penalties of perjury, I declare that I have read the foregoing affidavit and the facts stated in it are true.

Dated: 10/6/08

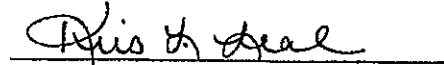
  
GERALD F. RICHMAN

STATE OF FLORIDA

COUNTY OF PALM BEACH

The foregoing instrument was acknowledged before me this 6th day of October, 2008 by Gerald F. Richman ~~who is personally known to me or has produced~~ \_\_\_\_\_ as identification and who did/did not take an oath.



  
NOTARY PUBLIC

Kris L. Leal  
Printed Name of Notary  
Commission No.:  
My commission expires: