

SCANNED

IN THE CIRCUIT COURT OF THE  
SECOND JUDICIAL CIRCUIT IN  
AND FOR LEON COUNTY,  
FLORIDA

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

Plaintiff,

v.

Case No.: 2008-CA-2944

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.

-----  
RICHARD I. WENNET,

Counter-Plaintiff,

v.

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

Counter-Defendants.  
\_\_\_\_\_ /

08 OCT 20 PM 3:35

0:06  
BOB INZER  
CLERK CIRCUIT COURT  
LEON COUNTY, FLORIDA

FILED

IN  
COMPUTER  
E.A.

**DECLARATORY JUDGMENT AND  
ORDER DENYING MOTION FOR NEW ELECTION**

THIS CAUSE came before the court upon the Plaintiff Abramson's "Emergency Complaint for Declaratory Relief or, in the Alternative, to Contest Election" filed on September 8, 2008, Counter-Plaintiff's Motion for New Election filed on September 29, 2008, and upon Counter-Plaintiff's Counter-Claim seeking declaratory relief which was filed on September 11, 2008. The parties have all agreed that the question of whether this court had the authority to order the recount as required by its Order Directing Recount of Ballots in Election for the Office of Circuit Court Judge, in and for the 15<sup>th</sup> Judicial Circuit, Group 23 entered September 17, 2008, is a question of law. Having considered the pleadings and memoranda, arguments of counsel, the applicable law and being otherwise fully advised in the premises, the court finds the Plaintiff and Counter-Plaintiff are entitled to a declaratory judgment to relieve them from the insecurity and uncertainty with respect to their rights and status with regards to the August 26, 2008 election for the office of Circuit Judge in and for the Fifteenth Judicial Circuit, Group 23.

**Factual Background**

Plaintiff, Mr. William S. Abramson, and Counter-Plaintiff, Mr. Richard I. Wennet, were the only two candidates for the office of Circuit Judge in and for the

Fifteenth Judicial Circuit, Group 23, in an election held on August 26, 2008. The first set of unofficial returns submitted by the Palm Beach County Canvassing Board reflected that Mr. Abramson received 45,375 votes and that Mr. Wennet received 45,358 votes. Because this first set of unofficial returns reflected that Mr. Abramson defeated Mr. Wennet by less than one-half of one percent, the Elections Canvassing Commission ordered a recount pursuant to section 102.141(7), Florida Statutes.

The result of the recount required by section 102.141(7), Florida Statutes, as shown in the second set of unofficial returns submitted by the Palm Beach County Canvassing Board, reflected that Mr. Abramson received 42,912 votes and that Mr. Wennet received 42,973 votes. Because the second set of unofficial returns reflected that Mr. Wennet defeated Mr. Abramson by less than one-fourth of one percent, a manual recount of the “over-votes” and “under-votes” cast in the election was conducted pursuant to section 102.166(1), Florida Statutes.

At the conclusion of the Palm Beach County Canvassing Board’s attempt to conduct the recount required by section 102.166(1), Florida Statutes, the Palm Beach County Canvassing Board submitted its official returns. This set of official returns reflected that Mr. Abramson received 43,872 votes and Mr. Wennet received 43,932 votes.

On September 5, 2008, pursuant to section 102.131, Florida Statutes, the Elections Canvassing Commission declared that it was unable to determine who was elected for the office of Circuit Judge in and for the Fifteenth Judicial Circuit, Group 23. Specifically, the Elections Canvassing Commission 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 § 102.131, Fla. Stat. (2008).

The Plaintiff, Mr. Abramson, alleged in his Emergency Complaint that the recounts conducted by the Palm Beach County Canvassing Board pursuant to sections 102.141(7) and 102.166(1), Florida Statutes were incomplete in that they were not based on all of the ballots cast in the August 26, 2008 election. Specifically, the Plaintiff alleged that the Palm Beach County Canvassing Board and Arthur Anderson, Palm Beach County Supervisor of Elections, could not account for 3,478 ballots cast in the election. 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.” *State*

*Defendants' Answer to Emergency Complaint*, at ¶ 25. Indeed, Mr. Wennet 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 record appeared to indicate that 102,523 votes were cast in Palm Beach County with respect to the Primary Election.” Wennet’s *Answer and Counterclaim*, ¶¶ 19 and 25.

Given these irregularities, the issue as to whether the Palm Beach County Canvassing Board fulfilled its ministerial duty to count all of the votes cast in the election as required by sections 102.141(7) and 102.166(1), Florida Statutes, was in serious question in light of the express allegations that these irregularities in the returns were caused by the apparent “disappearance” of approximately 3,500 ballots. Soon after the instant complaint and counter-claim were filed, it was brought to the court’s attention that these missing ballots were found.<sup>1</sup>

At the conclusion of a “reconciliation process,” Palm Beach County election officials confirmed that *more than* 102,523 ballots were cast in the election at issue.<sup>2</sup> Accordingly, it became clear to the court that the Palm Beach County Canvassing

---

<sup>1</sup>See “Plaintiff’s Motion to Compel Recount of Ballots in Election for the Office Circuit Court Judge, in and for the 15th Judicial Circuit, Group 23” filed on September 12, 2008.

<sup>2</sup>Specifically, the Palm Beach County canvassing officials determined that a total of 102,713 ballots were cast in the August 26, 2008 election.

Board had failed to fulfill its ministerial duty to count all of the ballots cast during the statutory recount procedures, considering uncontested allegations that after the conclusion of the mandatory manual recount previously described Supervisor Anderson and the Palm Beach County Canvassing Board could account for only 99,045 ballots. Therefore, the court ordered that a recount take place in accordance with the statutory procedures.

At the conclusion of the court ordered recount, pursuant to this court's order, the Palm Beach County Canvassing Commission re-submitted official returns which it asserts were based on all of the votes cast in the election. On September 29, 2008, the Elections Canvassing Commission certified these official returns and determined and declared that Mr. Abramson was elected to the office of Circuit Judge, in and for the Fifteenth Judicial Circuit, Group 23.

#### **Nature of the Declaratory Judgment Act**

It is well established that the Declaratory Judgment Act is to be liberally construed. Indeed, the statute itself so provides. The act is "substantive and remedial. Its purpose is to settle and afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be liberally administered and construed." § 86.101, Fla. Stat. More specifically, under the Declaratory Judgment Act, "[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.” § 86.111, Fla. Stat. The Fourth District Court of Appeal has stated that the declaratory judgment act exists “to render practical help in ending controversies which have not reached the stage where other legal relief is immediately available.” *Jackson v. Federal Insurance Company*, 643 So. 2d 56, 58 (Fla. 4th DCA 1994). Accordingly, “the use of declaratory judgments should be liberally construed and their boundaries elastic.” *Id.*

Given the lack of clarity of the applicable law as to the circumstances presented by this case, the court finds it necessary to relieve Mr. Abramson and Mr. Wennet from doubt as to their legal status and rights with respect to the office of Circuit Judge, in and for the Fifteenth Judicial Circuit, Group 23. Accordingly, the court finds that it has jurisdiction to proceed under the declaratory judgment to relieve the parties from the uncertainty as to their rights and status concerning the election at issue.

#### **The Court’s Common Law Authority as to Election Proceedings**

“At common law, except for limited application of quo warranto, there was no right to contest in court any public election, because such a contest is political in nature and therefore outside the judicial power.” *McPherson v. Flynn*, 397 So. 2d

665, 667 (Fla. 1981). However, although the right to contest an election at common law was limited, the Florida Supreme Court has held that:

The law is well settled that the common law writ of mandamus cannot be employed to contest the result of an election or 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.

*Ex Parte Beattie*, 124 So. 273, 275 (Fla. 1929)(emphasis added).

Similarly, in *State ex rel. Millinor v. Smith*, 144 So. 333, 335 (Fla. 1932), the court explained that:

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.

Accordingly, the court finds it was within its common law authority when it ordered Palm Beach County elections officials to correctly and accurately count and make due return of all the votes cast at an election, especially under the circumstances of this case where it was uncontested by any party that approximately 3500 ballots known to exist were unaccounted for.

The fact that there was necessarily a delay between the original election proceedings and the proceedings flowing from the order of this court does not deprive this court of jurisdiction to issue a writ of mandamus compelling the re-certification of corrected results. *State ex rel. Clendinen v. Denkle*, 173 So. 2d 452 (Fla. 1965).

Mr. Wennet argues that the court's common law authority to compel election officials to correctly and accurately count and make due return of the votes cast at an election was superseded by the 2001 amendments to the election code that followed the 2000 presidential election. Under the circumstances that existed at the time of the first hearing by this court resulting from the requests by both parties to declare their respective rights, the court emphatically disagrees.

### **2001 Amendments to the Election Code**

Mr. Wennet is correct that Chapter 102, Florida Statutes provides a specific statutory framework for certifying the results of the election and conducting recounts. However, the court's order compelling Palm Beach County election officials to conduct a recount did not conflict with that statutory framework. Essentially, by ordering the recount, the court compelled the Palm Beach County Canvassing Board to comply with its ministerial duty to count all the votes returned to them.

Sections 102.141(7) and 102.166(1), Florida Statutes, clearly contemplate that County Canvassing Boards carry out the task of conducting recounts when such recount procedures are triggered pursuant to statute. “The duties of officers designated to canvass election returns are mainly ministerial, involving no judicial discretion, and the performance of such duties may be compelled by mandamus.” 21 Fla. Jur 2d., Elections, § 153 (2008). Indeed, in this context, the word “canvass” means “to formally count ballots and report the returns.” *Black’s Law Dictionary*, (8th ed. 2004).

The court finds that Mr. Wennet’s theory that this court lacked authority to compel the Palm Beach County Canvassing Board to fulfill its ministerial duty to count all of the votes duly returned them to be unsound. Consider the following hypothetical situation. Suppose that during a statutorily mandated recount process, a county canvassing board counted only ten percent of the votes cast at an election, then simply decided to stop and submit official returns based only on that ten percent of the ballots cast. In such a situation, the Elections Canvassing Commission would, almost certainly, decline to certify such official returns pursuant to section 102.131, Florida Statutes. Under Mr. Wennet’s theory, the only possible remedy in such a scenario would then be a new election. The court does not agree. County canvassing boards have a ministerial duty to count all of the ballots cast in an election, and when

it is uncontested that this duty was not complied with and when such compliance is not an impossibility, mandamus will lie to compel a county canvassing board to fulfill this clear legal duty.

As to Mr. Wennet's argument that the County Canvassing Board failed to comply with the election code in fulfilling its ministerial duties, such a claim would properly be presented in an election contest action pursuant to section 102.168, Florida Statutes. It should be noted, however, that even if the Palm Beach County Canvassing Board was grossly negligent, in terms of compliance with the election code, in conducting the court ordered recount, the election results certified by the Board should be upheld so long as they reflect the will of the voters. *Beckstrom v. Volusia County Canvassing Board*, 707 So.2d 720 (Fla. 1998). Mr. Wennet's remedy for non-compliance with the statute regarding the recount process that he felt led to erroneous results would be an election contest action brought pursuant to section 102.168, Florida Statutes.

Counter-Plaintiff Wennet argues that there have been numerous partial recounts conducted in violation of the statutory scheme. The Court notes that there have only been two statutorily mandated recounts. The initial count required by section 102.141(7) and the second recount mandated by section 102.166(1), Florida Statutes. The court ordered these recounts to be completed after all parties

acknowledged at the hearings in these proceedings that, during these recounts, approximately 3,500 votes cast by the electors and initially counted, were unaccounted for and not been included in the returns reported to State Elections officials. Although difficult and time consuming, the court's directives merely required the completion of statutorily mandated procedures. At no time was the county canvassing board ordered to include or exclude any specific ballots or precincts in its reconciliation and count, nor were any specific procedures directed other than to comply with applicable statutes and rules and regulations applicable to the process. The mandated scheme required the determination of the total number of ballots casts, which candidate received how many votes, the returns to be reported to the appropriate State election officials, and to have a winner declared by the Elections Canvassing Commission. At each and every hearing held in these proceedings, the Court declared that it was the responsibility of the county canvassing board to reconcile and count the votes, and the duty of the Elections Canvassing Commission to determine whether the returns submitted to it were facially sufficient so as to allow it to certify the winner pursuant to Chapter 102. But most importantly, it was not the Court's responsibility to count votes or declare the winner. The statutory scheme has been completed. Section 102.168, Florida Statutes sets forth the rights of the parties to challenge irregularities in that process.

### **Sections 102.131 and 100.101(1), Florida Statutes**

Mr. Wennet contends that whenever the Elections Canvassing Commission fails to certify the results of an election pursuant to section 102.131, “no one” is elected and a new election must take place pursuant to section 100.101(1), Florida Statutes. The court cannot agree.

The Elections Canvassing Commission’s section 102.131 finding is that it is “unable to determine the true vote.” The court finds that power of the Elections Canvassing Commission to decline to certify results pursuant to section 102.131 based on a finding that it is unable to determine the true vote due to irregular or false returns exists to protect the voters from the effects of irregular or fraudulent returns. *State ex rel. H. Bisbee v. Board of State Canvassers*, 17 Fla. 29 (Fla. 1879).

However, the Elections Canvassing Commission did not declare that “no person has been elected.” Rather, the Commission found that it was unable, in light of the obvious irregularities on the face of the returns, to determine *who* was elected. Accordingly, the court finds that section 100.101(1), Florida Statutes has no application to this case.

The court would note that the Counter-Plaintiff has never directly challenged the Elections Canvassing Commission’s decision not to certify the official returns initially submitted by the Palm Beach County Canvassing Board. Even if such a

challenge were offered, however, the court would reject it. Initially, the court would note that this case is distinguishable from *Bisbee*. In *Bisbee*, the county canvassing board counted every vote duly returned to it, but it came to the attention of the Elections Canvassing Commission, then known as the State Canvassing Board, that some votes cast were not actually returned to the county canvassing board. Such is not the case here. The issue presented in this case is the effect of a county canvassing board not counting all of the ballots received by that board. The court in *Bisbee* specifically distinguished its holding in that case from such a situation.

“What the court might say if it was alleged by the respondents that a portion of the returns received by the county board from the precincts had been without cause or arbitrarily suppressed, may not be appropriate to this case, for no such charge is made.” *Bisbee, supra*.

Furthermore, it seems clear, given the obvious failure by the Palm Beach County Canvassing Board to account for approximately 3,500 votes, that the Elections Canvassing Commission did not abuse its discretion by declining to certify the returns based on its finding that the returns were too irregular on their face to determine the true vote. Mandamus is a discretionary remedy. *Davis v. State*, 982 So. 2d 1246 (Fla. 5th DCA 2008). Although it is a legal remedy, it is governed by equitable principles. *Dickenson v. Stone*, 251 So. 2d 268 (Fla. 1971). It would be

unjust indeed to compel the Elections Canvassing Commission to certify results known to be erroneous due to the errors of the Palm Beach County Canvassing Board.

Finally, considering the Elections Canvassing Commission's September 29, 2008 certification, it is difficult to see what beneficial result would obtain from granting any claim to compel the Elections Canvassing Commission to certify the results of the election. *City of Winter Garden v. Norflor Const. Corp.*, 396 So. 2d 865 (Fla. 5th DCA 1981).

#### **Applicability of the Election Contest Statute**

To the extent the parties initially sought to contest the results of the election pursuant to section 102.168, Florida Statutes, the court finds that such an election contest action has not been brought before the court. Section 102.168(1), Florida Statutes, provides that "*the certification of election...of any person to office...may be contested in the circuit court by any unsuccessful candidate for such office...or by any elector qualified to vote in the election related to such candidacy...*" (emphasis added). *See also, McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981).

At the time of the filing of the "Emergency Complaint for Declaratory Relief or, in the Alternative, to Contest Election," no winner had been certified by the Elections Canvassing Commission. Section 102.168(2), Florida Statutes, provides that such an action must be filed "with the clerk of the circuit court 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.” As the court previously noted, the election results were certified by the Elections Canvassing Commission on September 29, 2008, after the Court ordered the completion of the recount. As of the date hereof, no such election contest claim has been filed challenging the September 29, 2008, official certification of results by the Elections Canvassing Commission.

### **Conclusion**

Although the court was compelled to conclude that the Palm Beach County Canvassing Board failed to fulfill its ministerial duty of counting all of the ballots cast in the August 26, 2008 during the statutorily mandated recount process of described above, the court finds that this abrogation of duty was not malicious, and no allegations of fraud or intentional misconduct have been set forth in any pleading filed with this court.

Accordingly, based on the conclusions of law and facts articulated above, it is **ORDERED** and **ADJUDGED** that:

- 1.) Plaintiff's and Counter-Plaintiff's complaints for declaratory judgment are hereby **GRANTED** to the extent they request to be relieved from insecurity and uncertainty with respect to their rights and status with regards to the August 26, 2008 election for the office of Circuit Judge

in and for the Fifteenth Judicial Circuit, Group 23. 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 this legal duty, upon compliance with this 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.

- 2.) No election contest action under section 102.168, Florida Statutes has been properly brought before this court. As the Florida Supreme Court has explained, "Since there is no common law right to contest elections, any statutory grant must necessarily be construed to grant only such rights as are explicitly set out." *McPherson, supra*, at 668.
- 3.) For the reasons previously articulated by the court, Counter-Plaintiff Wennet's request to be declared the winner as prayed for his counter-claim, and his Motion for New Election, are hereby DENIED.

- 4.) All further request for relief by Abramson contained in his initial complaint filed herein are determined to be moot in light of the certification of Abramson as the winner following the court ordered recount, the denial of Counter-Plaintiff's Motion for New Election, and the absence of any pending contest of election claim pursuant to section 102.168, Florida Statutes.
- 5.) Any votes cast for either candidate in the November 4, 2008 general election shall not be counted or reported.
- 6.) Motions for rehearing, clarification or reconsideration shall not be authorized or considered by the court.
- 7.) Each party shall pay its own costs and attorney's fees and go hence without further day.

**DONE and ORDERED** in Tallahassee, Leon County, Florida, this 20<sup>th</sup>  
day of October, 2008.



**CHARLES A. FRANCIS**  
Chief Judge

Signed OCT 20 2008  
Original to Clerk OCT 20 2008  
Copies sent OCT 20 2008

**Copies furnished to:**

Glenn T. Burhans, Jr., Esq.  
Bridget K. Smitha, Esq.  
Greenberg Traurig, P.A.  
101 East College Avenue  
Tallahassee, FL 32301  
Email: [burhansg@gtlaw.com](mailto:burhansg@gtlaw.com)  
Email: [smithab@gtlaw.com](mailto:smithab@gtlaw.com)

Gerald F. Richman , Esq.  
Richman Greer, P.A.  
Suite 1504  
250 Australian Avenue South  
West Palm Beach, FL 33401  
Email: [grichman@greer.com](mailto:grichman@greer.com)

David I. Shiner , Esq.  
Peter J. Sosin , Esq.  
Shiner & Sosin, P.A.  
30 Southeast 7th Street, Second Floor  
Boca Raton, FL 33432-6134  
Email: [david@sslawgroup.com](mailto:david@sslawgroup.com)  
Email: [peter@sslawgroup.com](mailto:peter@sslawgroup.com)

Mark Herron , Esq.  
Messer, Caparello & Self, P.A.  
2618 Centennial Place  
Tallahassee, FL 32308  
Email: [mherron@lawfla.com](mailto:mherron@lawfla.com)

J. Reeve Bright , Esq.  
Bright, Pack & Associates  
135 Southeast 5th  
Delray Beach, FL 33483-5256  
Email: [reeve@brightandchimera.com](mailto:reeve@brightandchimera.com)

Ron Labasky , Esq.  
Young van Assenderp  
Avenue Gallie's Hall  
225 South Adams Street, Suite 200  
Post Office Box 1833  
Tallahassee, FL 32302  
Email: [rlabasky@yvlaw.net](mailto:rlabasky@yvlaw.net)

Lynn Hearn, General Counsel  
Florida Department of State  
R.A. Gray Building  
500 South Bronough Street  
Tallahassee, FL 32399  
Email: [lchearn@dos.state.fl.us](mailto:lchearn@dos.state.fl.us)