

**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 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.

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**STATE DEFENDANTS' RESPONSE TO MOTION FOR NEW ELECTION**

Defendants ELECTIONS CANVASSING COMMISSION OF THE STATE OF FLORIDA, KURT S. BROWNING, as SECRETARY OF STATE, and DEPARTMENT OF STATE, DIVISION OF ELECTIONS, collectively, the "State Defendants," files this limited response to Wennet's Motion for New Election. The State Defendants address only two issues: (1) the County Defendants' authority to reconcile ballot counts after the official returns were certified by the Canvassing Board; and (2) the Court's authority to issue its September 17, 2008 Order Directing Recount of Ballots in Election for the Office of Circuit Judge, in and for the 15th Judicial Circuit, Group 23.

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**I. The County Defendants Had Authority to Reconcile the Ballots.**

Defendant/Counter-Plaintiff Wennet asserts the County Defendants<sup>1</sup> acted outside their authority by undertaking a reconciliation effort after the Canvassing Board had certified its official results in the race for 15th Judicial Circuit, Group 23 (the “race”). The State Defendants disagree, and assert the reconciliation efforts were both necessary and appropriate.

As Wennet acknowledges in his motion, the purpose of this effort was not to canvass the returns for the race, but rather to attempt to reconcile the total ballot counts reported on election night with the total ballot counts from the subsequent machine and manual recounts. (Wennet Motion at 9, quoting memorandum of B. Merriman to A. Anderson dated Sept. 15, 2008). A dual purpose was to identify recommendations to be implemented prior to the general election. *Id.* These efforts had no impact on Wennet; they were purely internal efforts aimed at determining the cause of the discrepancies and determining what procedures should be implemented in November to avoid a similar occurrence. These efforts were squarely within the County Defendants’ purview to evaluate their performance in carrying out the election and to prepare a report of the “conduct of the election” to the Department of State. § 102.141(9)(a), Fla. Stat. (2008). The conduct of election report must address, among other things, “all equipment or software malfunctions . . . and the steps that were taken to address the malfunctions,” “all staffing shortages or procedural violations by employees or precinct workers . . . and the steps that were taken to correct such issues,” “instances where staffing or equipment were insufficient to meet the needs of the voters,” and “*any additional information regarding*

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<sup>1</sup> The record reflects that Brad Merriman, Assistant County Administrator of Palm Beach County, led the reconciliation effort at the request of the Supervisor of Elections. Therefore, Mr. Merriman may have been acting as an agent of the Supervisor of Elections. Furthermore, the Palm Beach County Canvassing Board was actively engaged in the reconciliation process. Accordingly, this memorandum simply refers to the reconciliation effort as having been conducted by the “County Defendants.”

*material issues or problems associated with the conduct of the election.” Id. (emphasis added).*

In order to fulfill these and other responsibilities in carrying out election activities, the County Defendants took appropriate steps to resolve the discrepancies in ballot counts between election night and subsequent recounts for this race.<sup>2</sup>

Any analogy of the County Defendants’ reconciliation efforts in this judicial race to the varying county recount procedures in the 2000 presidential race is entirely inappropriate. The County Defendants’ reconciliation efforts were at all times aimed at total ballot counts, not votes for the individual candidates. At no time did the County Defendants’ reconciliation process involve “recounting” any “votes” for Wennet or Abramson and at no time did the County Defendants certify new or amended results to the Department of State as a result of their reconciliation efforts. In short, the County Defendant’s reconciliation efforts were an internal matter entirely within their authority which had no effect upon the official results. To the extent Wennet believes the *methods* used by the County Defendants to reconcile the total number of ballots yielded erroneous counts which were subsequently incorporated in the court-ordered recounts, this is an appropriate ground to be raised in a contest action filed pursuant to section 102.168, Florida Statutes (2008). It is not a basis for challenging the reconciliation process as a matter of law.

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<sup>2</sup> The Canvassing Board clearly should have completed this reconciliation prior to filing its official returns. *See* § 102.112(1), Fla. Stat. (2008). The State Defendants do not condone the practice followed in this case, but nevertheless disagree with the contention that as a matter of law once the Canvassing Board certified its returns it was divested of any authority to conduct further investigation or reconciliation.

## II. This Court Had Authority to Issue the Order Directing Recount.

Wennet also contends this Court lacked authority to order a recount once the Elections Canvassing Commission declined to certify the results of the race. Again, the State Defendants disagree.

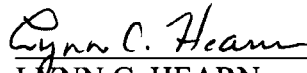
Both Abramson's complaint and Wennet's counterclaim seek, in part, declaratory relief pursuant to Chapter 86, Florida Statutes. "The court has power to give as full and complete equitable relief as it would have had it such proceeding had been instituted as an action in chancery." § 86.111, Fla. Stat. (2008); *Price v. Tyler*, 821 So. 2d 1121 (Fla. 2004). Therefore, the Court has wide latitude in fashioning a remedy in this declaratory judgment action. Although Abramson's complaint in the alternative alleges an election contest under section 102.168, Florida Statutes, Wennet's argument that the court may not act in equity to order a recount is unfounded. "The existence of another adequate remedy does not preclude a judgment for declaratory relief. § 86.111, Fla. Stat. (2008). "[T]he use of declaratory judgments should be liberally construed and their boundaries elastic." *Jackson v. Federal Insurance Company*, 642 So. 2d. 56, 58 (Fla. 4th DCA 1994). Therefore, the Court was within its authority in this declaratory judgment action to grant equitable relief by ordering a recount to assist the Court in rendering its judgment in this case.

Even if the action proceeded solely as an election contest pursuant to section 102.168, Florida Statutes (2008), Wennet's contention that the Court lacks authority to order anything other than a new election is unfounded. It is true that section 102.168 does not expressly identify a recount as available relief; in fact it does not expressly list *any relief* whatsoever. The legislature cannot be presumed to have created a statutory cause of action with no remedy; nor can the absence of an express remedy presumed to be a limitation on the Court's jurisdiction.

Wennet appears to contend that the only available remedy in this case (and perhaps any contest action) is special election pursuant to section 100.101, Florida Statutes (2008). This contention is flawed. It is the Governor, not the court, who is authorized by the Election Code to call a special election. § 100.141(1), Fla. Stat. (2008). Additionally, a special election called pursuant to the Election Code will entail a new qualifying period (opening the door for new applicants) and a new special primary election date as well as the special election date. *Id.* § 100.141(2). Wennet's request that the race be placed on the November 2008 general election ballot is inconsistent with these provisions; hence, according to his own argument, beyond the Court's authority.

In sum, the State Defendants believe it was within the Court's authority to order a recount under the facts presented in this case. If Wennet asserts that the manner in which the recount was conducted yielded erroneous results, this is an appropriate ground to be raised in a contest action filed pursuant to section 102.168, Florida Statutes (2008). It is not a basis for challenging the recount process as a matter of law.

Respectfully submitted,



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Kurt S. Browning, Secretary of State,  
and Department of State, Division of Elections

### Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following by e-mail and by U. S. Mail this 2nd day of October 2008, to:

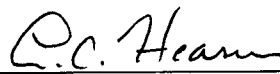
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