

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY,
FLORIDA.

CASE NO.: 502004CA000491XXXXMBAA

CONGRESSMAN ROBERT WEXLER,

Plaintiff,

vs.

THERESA LEPORE, SUPERVISOR OF
ELECTIONS FOR PALM BEACH
COUNTY, FLORIDA; PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS;
SECRETARY OF STATE, GLENDA E. HOOD,

Defendants.

**MEMORANDUM OF LAW IN RESPONSE TO
LEPORE'S MOTION TO DISMISS WITH PREJUDICE/FOR
CHANGE OF VENUE**

This Honorable Court has ordered all Memoranda of law by the parties to be submitted by Monday, February 02, 2004. Plaintiff will therefore receive Defendant, GLENDA E. HOOD'S motion at the same time that Plaintiff's Memorandum of Law must be submitted. It is anticipated that the Defendant, GLENDA E. HOOD will make many, if not all, of the arguments Defendant, LEPORE has asserted, however, in an abundance of caution, Plaintiff respectfully reserves the right to file a short supplemental response to an additional arguments raised by Defendant, HOOD.

Defendant, LEPORE mischaracterizes Plaintiff's Complaint. Perhaps the best place to start this responsive Memorandum is to clear up exactly what this complaint says and in what terms it is couched.

1. There should be no doubt that Plaintiff's complaint is one that arises because the Defendant's conduct violates the Plaintiff's constitutional rights. Indeed, the third paragraph of Plaintiff's complaint quotes Article VI Section I of the Florida Constitution.

2. Further, within each of the two counts of Plaintiff's complaint, Plaintiff repeatedly refers to acts and omissions of the Defendants as violations of constitutional rights, and prays, in both counts, that the Defendants be ordered to take steps in order to correct their respective constitutional and statutory violations.

3. The United States Supreme Court in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964) said beginning at page 1377:

"Undeniably the Constitution of the United States protects the rights of all qualified citizens to vote, in state as well as in federal elections. . . . It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, Ex parte Yarborough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274, and to have their votes counted, *Untied States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355; In *Mosley* the Court stated that it is 'as equally unquestionable that the right to have one's vote counted is as open to protection as the right to put a ballot in a box.' 238 U.S. at 386, 35 S.Ct. 926, 59 L.Ed. 1340, *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281, nor destroyed by alteration of ballots, see *United States v. Classic*, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368, nor diluted by ballot-box stuffing Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717, *Untied States v. Siebold*, 100 U.S. 385, 64 S.Ct. 1001, 88 L.Ed. 1341. As the Court stated in *Classic*, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have then counted.

4. The Supreme Court recently, after the 2000 election in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525 (2000) said as it pertained to the recount controversy:

"Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practical procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary, as required by Fla. Stat. Ann. §101.015 (Supp. 2001)."

5. Defendant, LEPORE argues incorrectly that there was no duty imposed her upon her at all to utilize a voting system which requires her to implement procedures for a manual re-count. Moreover, the Defendant, LEPORE, suggests that if any problem exists, it rests solely in the hands of the Secretary of State. In other words, there really is nothing that she could do.

6. Defendant, LEPORE attempts to misdirect this Court's attention away from statutes that Plaintiff asserts in his Complaint which place specific statutory duties upon her. Apparently, the Defendant LEPORE, despite her personal experience in the 2000 election, is suggesting that she had no role whatsoever in bringing us, in Palm Beach County, to our present status where votes are still not being properly counted, and there is no capability of performing a manual recount. Frankly, it boggles the mind.

7. The Defendant, LEPORE, recommended to the County that it implement a paperless voting system prior to 2002 election cycle. It is apparent that the Defendant

did not consider and/or communicate to the county commissioners that the touch screen, paperless voting system that she recommended be purchased would not permit a manual recount. Palm Beach County, along with fourteen (14) other counties purchased touch screen paperless voting systems. The other 52 counties utilize an optical scan voting systems, which do permit a manual recount.

8. Did the Defendant, LEPORE even consider these alternative systems? Did the Defendant LEPORE even consider whether the touch screen voting system, when she was recommending it to the Palm Beach County Commission, enabled a manual recount as required by the Florida Statutes, if necessary? Did the Defendant, LEPORE pursuant to her responsibility under F.S. 101.015 (4)(b) establish written procedures to ensure accuracy and security in her county? Did the Defendant, LEPORE, prior to the election in Wellington in the year 2002 or in the recent election pertinent to the four precincts involved in District 91 submit any revision to the security procedures especially as it pertained to manual recounts pursuant to F.S. 101.015 (4)(c)?

9. The Defendant, LEPORE is a member of the county canvassing board. F.S. 101.595 requires the Defendant, LEPORE to report to this Department of State the total number of over votes and under votes. Did the Defendant, LEPORE do so after the problems in the election in Wellington in 2000? Has the Defendant, LEPORE done so in response to the District 91 election? Respectfully, all of these questions will be resolved in this lawsuit, but not at the Motion to Dismiss stage.

ARGUMENT

Plaintiff Has Standing to Bring This Action

1. Plaintiff Is Not Bringing This Suit In His Official Capacity

10. It is true that the Plaintiff is a Congressman. The voters of his District have deemed fit in the past several election cycles to bestow that title upon him. However, Plaintiff did not bring this Complaint in his official capacity as a governmental official. Instead, Plaintiff is bringing this claim in his dual status as a registered voter and a candidate for election (re-election). In that regard, the Court's attention is respectfully directed to paragraphs 26 and 31 in his Complaint.

2. Plaintiff Has Standing In His Capacity As Both a Citizen and As a Candidate for Reelection

11. Defendant, LEPORE, suggests that the "Rickman Rule" precludes standing for the Plaintiff herein. Nothing could be further from the truth. Recently, the Florida Supreme Court in School Board of Volusia County v. Clayton, 691 So.2d 1066 (Fla. 1997) reaffirmed, the exceptions to such rule, that a Plaintiff seeking standing must allege a special injury or a constitutional challenge. Here, each of those exceptions apply.

12. The Defendant, LEPORE cites to a recent case from the First District, Alachua County v. Scharps, 855 So.2d 195 (Fla. 1st DCA 2003) in support of her standing arguments. A close reading of that case instead supports plaintiff's standing. The First District cited to its previous decision of Sancho v. Smith, 830 So.2d 856 (Fla. 1st DCA 2002) saying:

"election supervisors brought a declaratory judgment and injunctive action attacking a statute limiting a ballot summary for a proposed constitutional amendments to 75 words, but exempting summaries submitted by joint resolution of legislature from the brevity requirement. As Scharps does here, the complaint brought an equal protection challenge under the Fourteenth Amendment of the United States Constitution, claiming the statute created an unconstitutional burden on those in the future who would submit a proposed amendment by citizen had no standing to bring the equal protection claim because "constitutional rights are personal:"

A party who is not adversely affected by a statute generally has no standing to bring argue that the statute is invalid. We acknowledge that courts have made an exception to this rule if the party asserting the claim is protecting the rights of non-parties who are unable to challenge the statute on their own. However, the exception does not apply here. Citizens who are adversely affected by the exemption in section 101.161(1), Florida Statutes (2000), can make the argument for themselves. *1d.* at 864 (citations omitted); *see also Sieniarecki*, 756 So.2d at 76 ("[C]onstitutional rights are personal in nature and generally may not be asserted vicariously.").

... **Because Schrap's cannot assert that he personally has suffered discrimination, and citizens who are denied the right to place their non-binding referrals on ballots can make the argument for themselves, Schrap's has no standing.**" (emphasis added)

13. Sancho v. Smith, supra was issued the same day the First District Court of Appeal issued a decision in Florida Association of Realtors v. Smith, 825 So.2d 532 (Fla. 1st DCA Sept. 18 2002). Whereas the First District in Sancho v. Smith denied declaratory and injunctive relief over the wording of a ballot summary of a proposed constitutional amendment because the elections supervisor were the plaintiffs. Florida Association of Realtors v. Smith, supra, on the other hand, was an action brought by citizens against the State seeking declaratory and injunctive relief asking the Court to declare a ballot summary from a separate constitutional amendment invalid. The First

District reversed the trial court and granted the relief requested without a word as to the standing of the voters themselves to bring the declaratory and injunctive claim pertinent to the upcoming ballot.

14. Congressman Wexler's claim also meets the special injury exception to the asserted "Rickman Rule". He has a special injury, as a voter, in Palm Beach County, which presently has a system that does not comply with the Florida Statutes and that alone should be enough.

15. Additionally, as a candidate for re-election Congressman Wexler has a special interest in ensuring that the votes for him and his opponent(s) will be properly recorded, reported, counted and if necessary, recounted.

16. Congressman Wexler, as a candidate for re-election should not be placed in the same position, if the outcome of his election fits within the statutory scheme to mandate a manual recount, and there are undervotes and/or overvotes that must be manually recounted, as those candidates in a City Council election in Wellington in 2002 and in the recent District 91 special election who could not receive a mandatory manual recount.

17. Last year, in Kelly v. Harris, 331 Fed.3rd 817 (11th Cir. 2003) the court considered whether a registered Republican had the standing to challenge the constitutionality of the Florida Democratic party's requirement that it political office candidate sign a loyalty oath. The 11th Circuit held that in that case there was no standing saying:

"Appellant cannot establish any injury under the facts as he has plead them. Two possible injuries can be immediately

rejected. First, Appellant does not allege that he has been excluded from a democratic primary ballot or party office. Such an alleged injury would surely satisfy the requirement of an injury in fact, yet Appellant makes no such allegation. Second, Appellant has not been injured with respect to his ability to vote in the Florida Democratic Party primary. Again, such an alleged injury would supply the necessary injury in fact, but as a registered Republican, Appellant is not eligible to vote in a Democratic primary to choose Democratic nominees for Congressional offices. [FN3]

FN3. Nor is this a case in which the Appellant can claim his right to vote is being diluted, see *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d. 663 (1962), nor that he is being denied to the right to join others to seeking ballot access for the candidate of his choice. See, *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002); *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996). Indeed, Appellant does not allege that he wishes to vote for whomever the nominee of the Democratic Party may turn out to be.

Appellant's complaint focuses on the general election, where he argues his choices are constrained by the effects of the Democratic Party loyalty oath. Even in a general election, however, there is no possible injury in fact. Appellant remains free in the general election to vote for independent or third-party candidates who have not signed any party's loyalty oath, including possible write-in candidates. [FN4] Appellant's argument that no write in or third-party candidates qualified for a recent election is beside the point; Appellant suffers no cognizable injury from the mere absence of an alternative candidate on the ballot."

18. It should be patently obvious that for the very reasons that the plaintiff did not have standing in *Kelly v. Harris*, the Plaintiff, Congressman Wexler herein certainly does have standing.

19. Defendant, LEPORE cites to a California case Southwest Voter Registration Education Project v. Shelley, 344 Fed.3rd 914 (9th Cir. 2003) for the proposition that Plaintiff's complaint is futile. However, the California case involved a petition to stop an election itself because of the voting systems to be utilized in various districts. The court in Shelley refused to enjoin the election itself. It should be apparent that the Plaintiff, Congressman Wexler is not seeking to enjoin any election, what the Plaintiff is seeking to do herein is to ensure that Defendants will follow Florida law and provide systems that will be utilized in the upcoming election which comply with existing Florida constitutional and statutory law. In that regard, the Defendants do not point to the recent Illinois case of Black v. McGuffage, 209 F.Supp.2nd 889 (N.D. Ill. 2002) which involved a suit for declaratory and injunctive relief filed by voters themselves pertinent to voting equipment flaws and challenged the state certification and approval of various voting systems. The court held that the plaintiffs had standing to bring such a claim and denied the defendants' Motion.

The Defendants' Motions to Change Venue Should be Denied.

20. The Defendant, LEPORE also seeks to change venue from this Court to the Circuit Court in Leon County, Florida based upon the mistaken belief that granting the Defendant Secretary of State, Glenda E. Hood, home venue privilege is required or warranted. It is not. As we discuss below, whether to grant a change of venue is within the discretion of this Court. On the circumstances present, it would be an abuse of discretion to transfer venue.

I. The home venue privilege is not absolute and is open to exceptions.

21. The privilege granted to governmental entities to be sued in the county where their headquarters are located (the “home venue privilege”) is a concept derived from the judicial development of the common law, rather than from legislative action. Board of County Commissioners, etc. v. Grice, 438 So.2d 392 (Fla. 1983). The home venue privilege, therefore, is not absolute, but subject to exceptions, one of which arises when the presumed purpose of the doctrine [asserted to be that it “promotes orderly and uniform handling of state litigation and helps to minimize expenditure of public funds and manpower” Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362, 364 (Fla. 1977)] would not be fulfilled by a change of venue.

22. The present case is a prime example of the need for recognition of the exception. Here, three distinct governmental entities, each generally recognized as having a home venue privilege, have been joined in the same action involving common questions of fact and law. To grant the Defendant Hood the privilege, is to deny it to the remaining two defendants. To sever any of the Defendants from the action would defeat the purpose for which the doctrine exists (i.e., to minimize the expenditure of public funds and manpower and to promote an orderly and uniform development of the law). *Id.*

II. The “Sword-Wielder” exception to the home venue privilege applies to the facts of this case.

23. In the instant matter, the Plaintiff seeks protection against the denial by the State of Florida, and the other Defendants, of the constitutionally protected right to a fair election process which comports with the requirements of law. (Complaint,

paragraphs 23-26, 30). The Complaint alleges that a threatened denial of rights is taking place in Palm Beach County.

24. In Cayman Manufacturing, Inc. v. State, Department of Revenue, 833 So.2d 177, 180 (Fla. 4th DCA 2002), the Court held that when an “action for declaratory judgment to obtain ‘direct judicial protection’” from an action of the State is sought, the sword-wielder exception to the home venue privilege applies. That rule provides that when the State itself is acting to deny a constitutional right, upon which the Plaintiff is suing, the home venue privilege does not apply. Board of Medical Examiners v. Kadivar, 482 So.2d 501 (Fla. 4th DCA 1986). In Cayman Manufacturing, supra, the Court reversed the trial court’s decision to transfer venue to Leon County upon the motion of the defendant state agency.

25. So, too, in Dyna Span Corporation v. State, Department of Insurance, 509 So.2d 1234 (Fla. 4th DCA 1987), the trial judge was reversed as a result of granting a state agency’s motion to transfer venue from Palm Beach County to Leon County. The action involved the claim that the state agency was acting to deprive the plaintiff of a protected right. “A suit may be filed in the county where the agency action threatens a constitutional right.” *Id.*

26. On the other hand, in State, Department of Insurance v. Accelerated Benefits Corporation, 817 So.2d 1086 (Fla. 4th DCA 2002), the district court of appeal affirmed the exercise of discretion by a trial judge in declining to grant the state agency the home venue privilege it sought by motion to transfer venue. Citing the earlier decision in Board of County Commissioners, etc. v. Grice, supra, the Fourth District

concluded that when a state governmental agency is jointly sued with other defendants for whom venue outside of Leon County is appropriate, “[t]he policy reasons behind the home venue privilege would not be well served by the strict application of the rule...” Accelerated Benefits Corporation, 817 So.2d at p. 1088.

27. In the case *sub judice*, the circumstances are even more compelling since the joint Defendants, each governmental entities, themselves have a home venue privilege in addition to the statutory venue prescribed by Section 47.011, Florida Statutes.

28. In the present case, the complaint specifically alleges that the actions of the Defendant Secretary of State Glenda E. Hood, which will deny the Plaintiff his constitutional and statutory right to a fair and proper election process, are taking place in Palm Beach County, within the geographical jurisdiction of this Court. The failures of the Defendant Hood are inextricably entwined with the alleged failures sought to be addressed in this proceeding, of the Defendants LePore and Palm Beach County Board of Commissioners.

29. Accordingly, venue is proper before this Court and the Defendants’ motions should be denied.

Plaintiff’s Complaint is Sufficient to Withstand a Motion to Dismiss

A. Standard For Motions To Dismiss

30. The well-established test for a Motion to Dismiss for failure to state a cause of action is to determine whether the pleader could prove **any** set of facts whatsoever in support of their claim. Wausau Insurance Company v. Haynes, 683

So.2d 1123 (Fla. 4th DCA 1996); Hillman Construction Corp. v. Wainer, 636 So.2d 576 (Fla. 4th DCA 1994); McWhirter Reeves et al v. Weiss, 704 So.2d 214 (Fla. 2nd DCA 1998) and Vantage View, Inc. v. Ball East Development Corp., 421 So.2d 728 (Fla. 4th DCA 1982).

31. A detailed discussion of the standard for Motions to Dismiss is contained in the Vantage View case, supra at page 731, wherein Judge Glickstein stated:

"Much of the time of this and other courts is consumed in hearing such procedural matters. This in large part results from the fact that professional customs and practices have a tendency to linger long after they are supposed to have been changed by duly promulgated rules, statutes [*731] or decisions It may well be that early common law pleading rules had certain advantages over the rules of modern pleading. The fact remains, however, that the rules have changed F.R.C.P. 1.110(b) requires "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." The Black's Law Dictionary definition of "ultimate facts" includes the following - -

The logical conclusions deduced from certain primary evidentiary facts ... Those facts found in that vaguely defined field lying between evidential facts on the one side and the primary issue or conclusion of law on the other ... The final resulting effect reached by processes of legal reasoning from the evidentiary facts....

In Conley v. Gibson, supra the U.S. Supreme Court also laid down the test which has become the standard criterion in Federal courts for determining the sufficiency of a complaint, and that is that a complaint "should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." This same quotation was set out with approval and italicized in the Florida case of Martin v. Highway Equipment Supply Co., Inc. supra 172 So.2d 246 (Fla. 2nd DCA 1965)].

This is another case proving that final disposition of a civil

action on the basis of bare bones pleading is a tortuous thing."

Plaintiff's Claim Does Present a Bona Fide Controversy

32. While the Defendant, LEPORE argues that Plaintiff's claim is allegedly based on a problem that "may occur in the future", such assertion is ludicrous. We know that the present voting system does not permit manual recounts. Lest the court be confused, the ability to manually recount votes requires that there be a something to be recounted. The present system does not allow such a recount because there is no actual backup for the vote with which or from which a recount can be asserted.

33. We know that there continues to be problems in Palm Beach County because there still are still some undervotes and/or overvotes.

34. Indeed the Hialeah Race Course, Inc. v. Gulfstream Park Racing Association, 210 So.2d 750 (Fla. 3rd DCA 1968) case cited by the Defendants supports Plaintiff's contention. The Hialeah Race Course case, supra, involved a motion to dismiss a declaratory judgment action, the trial court refused to dismiss the claim and the appellate court affirmed on the basis that the complaint did state a cause of action.

WHEREFORE, Plaintiff, CONGRESSMAN ROBERT WEXLER, respectfully requests that Defendants Motion to Dismiss be denied.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by FAX and U.S. Mail this February 2, 2004 to: J. MICHAEL BURMAN, ESQ., Burman, Critton, Luttier & Coleman, 515 N. Flagler Drive, Suite 400, West Palm Beach,

FL 33401; ANDREW J. McMAHON, ESQ., County Attorney's Office, 301 N. Olive Avenue, Suite 601, West Palm Beach, FL 33401 and GEORGE L. WAAS, ESQ., Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399.

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