

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF
FLORIDA
FOURTH DISTRICT**

CONGRESSMAN ROBERT WEXLER,

CASE NO.: 4D03-3816

L.T. Case No.CA-03-01205-AH

Plaintiff,

vs.

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

Defendants.

**INITIAL BRIEF OF APPELLANT
CONGRESSMAN ROBERT WEXLER**

On Appeal from Final Judgment of Dismissal of the
Circuit Court in and for Palm Beach County, Florida

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PREFACE

This is an appeal from a Final Order of Dismissal With Prejudice of a Complaint containing two counts, Declaratory Relief and Injunctive Relief. Appellant, Congressman Robert Wexler, will be referred to as the Plaintiff, while Appellees, Theresa LePore, Supervisor of Elections for Palm Beach County, Florida and Secretary of State of Florida, Glenda E. Hood will be referred to respectively as "Defendant, LePore", and "Defendant, Hood". Reference to the record will be made by the symbol "R", plus page number and "Supp. R." plus page number. All emphasis will be provided by the undersigned unless otherwise stated.

STATEMENT OF CASE AND FACTS

After the 2000 Presidential Election debacle in Florida exposed major systemic problems in voting systems and procedures, the Florida Legislature amended many existing election law statutes and enacted a number of new election statutes. The Legislative scheme created certain shared and individual responsibilities on the part of the Defendants, Hood and LePore, and mandated that new election systems were to be purchased or provided in each county by the Board of County Commissioners. (R 2-3)

Subsequent to such statutory revisions, the Defendant, Hood certified and approved a number of voting systems including several touch screen paperless

voting systems. The Legislature had enacted statutes that established standards for voting systems and required that there be manual recounts of “undervotes” in the event of very close elections and in the event of election contests. (R 4)

Defendant, Hood was responsible to adopt rules in order to establish minimum standards for new voting systems, for provisional approval of hardware and software for use with such systems, to approve the voting systems prior to use throughout the State of Florida, to continuously review the voting system's certification standards, and to reexamine any system or any part thereof which had previously been approved for the purpose of updating the certification of the system. (R 3-4)

In turn, Defendant, LePore was responsible to develop local procedures for using one of the approved voting systems, submit such local procedures to Defendant Hood, recommend to the Palm Beach County Board of County Commissioners which voting system it should purchase, operate the system in Palm Beach County, and monitor and report problems in the system to the Defendant Hood. (R 3-4)

Based on the Defendant LePore’s recommendation, the Palm Beach County Board of County Commissioners purchased a paperless touch screen voting system called the "Sequoia AVC Edge Voting System Release 3.1". Fourteen additional counties also used paperless voting systems and three other counties in the State of

Florida utilized the same "Sequoia AVC Edge Voting System Release 3.1". The other 52 counties utilize an optical scan voting systems which permit a manual recount. (R 4)

In the spring 2002, the "Sequoia AVC Edge Voting System Release 3.1" was first used in Palm Beach County. The first use in Wellington involved a runoff election for a seat on the city commission. The election was within the statutorily mandated margin requiring a manual recount of the undervotes. However, a manual recount of undervotes is impossible with the "Sequoia AVC Edge Voting System Release 3.1". Because the Plaintiff was extremely concerned with the inability of the touch screen voting systems to perform manual recount, he wrote a letter to the Defendant Hood in July 2003, to no avail. (R 5; 10-12)

Most recently, in January 2004, a single issue special election was held to fill the open seat vacated by Rep. Connie Mack in Florida Legislative District 91, which in part, lies in Palm Beach County. The margin of victory was 12 votes and 134 votes were invalidated as "undervotes". "Sequoia AVC Edge Voting System Release 3.1" was used in that election. Once again, a manual recount of such undervotes was rendered impossible by both the Sequoia Touch Screen Voting System in Palm Beach County as well as the touch screen voting system in use in Broward County, and a manual recount was thus not accomplished. (R 5)

On January 16, 2004, Plaintiff, Congressman Robert Wexler, filed this lawsuit shortly after the District 91 special election results became public. Simultaneously, Plaintiff filed a motion to expedite the case which was granted. The trial court established an abbreviated briefing schedule regarding preliminary motions, and scheduled a hearing on February 6, 2004 for the anticipated Motions.

In the interim, the Palm Beach County Board of County Commissioners, an original Defendant, agreed to settle the matter with the Plaintiff and were therefore voluntarily dismissed from the lawsuit. (R 45)

On January 26, 2004, Defendant, LePore filed a Motion to Dismiss with Prejudice and Motion for Change of Venue to Leon County. (R 23-35) On February 2, 2004, Plaintiff filed his Memorandum of Law In Response to Defendant, LePore's Motion to Dismiss and on the same date, Defendant, Hood filed a Motion to Dismiss. (Supp. R) The Trial Judge did not rule from the Bench at the hearing on Defendants' Motion to Dismiss and Motion for Change of Venue, and instead took the matter under advisement.

On February 11, 2004, the Trial Court entered an Order Granting Defendants' Motion to Dismiss and determined that the Motion for Change of Venue was Moot. (R 53-62) The Trial Court stated, on page 5 of the Order that, "Permitting the Plaintiff to amend his complaint to allege that the lack of a paper ballot violates his constitutional rights would be futile". (R 58) On February 26,

2004, Plaintiff submitted a proposed Final Order of Dismissal With Prejudice, which the Trial Court granted. This appeal ensued. (R 63-64)

SUMMARY OF ARGUMENT

The Trial Court Erred in Dismissing Plaintiff's Complaint with Prejudice for lack of standing. The Trial Court Erred in finding that Plaintiff's Complaint fails to state a cause of action, and that further amendments would be futile. Finally, even though the trial court found that the motion to transfer was moot, the Trial Court, in dicta held that venue should properly be in Leon County which also is erroneous and thus must be addressed herein.

The Order Granting Defendants' Motion to Dismiss and determining Motion for Change of Venue as Moot is organized under three headings. Plaintiff will therefore organize his arguments seriatim addressing the Trial Court's error under each heading.

ARGUMENT

A. The Trial Court Erred In Its Construction and Interpretation of Plaintiff's Complaint and Ignored Clear, Unequivocal Statutory Requirements Alleged in the Complaint.

A proper reading of Plaintiff's Complaint indicates that Plaintiff alleged that the Florida Constitution and Statutes mandate that the voting systems and procedures for each elector in the State of Florida require that there be the

capability to comply with the requirements for a manual recount of undervotes contained in Florida Statutes 102.141, and 102.166. (R 1-12) Neither the remedy, nor the ability to bring this problem to Court are contingent upon a showing that there is an opposed election, and a pleading predicting that the election will be extremely close.

The Plaintiff's Complaint alleged the following:

2. Plaintiff, CONGRESSMAN ROBERT WEXLER, is both a Congressman representing the 19th Congressional District of Florida, as well as a registered voter in Palm Beach County, Florida.

3. Article VI Section 1 of the Florida Constitution provides:

SECTION 1. Regulation of elections.--All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law; however, the requirements for a candidate with no party affiliation or for a candidate of a minor party for placement of the candidate's name on the ballot shall be no greater than the requirements for a candidate of the party having the largest number of registered voters.

SECTION 2. Electors.--Every citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered.

SECTION 5. Primary, general, and special elections.--

(a) A general election shall be held in each county on the first Tuesday after the first Monday in November of each even-numbered year to choose a successor to each elective state and county officer whose term will expire before the next general election and, except as provided herein, to fill each vacancy in elective office for the unexpired portion of the term. A general election may be suspended or delayed due to a state of emergency or impending emergency pursuant

to general law. Special elections and referenda shall be held as provided by law.

(b) If all candidates for an office have the same party affiliation and the winner will have no opposition in the general election, all qualified electors, regardless of party affiliation, may vote in the primary elections for that office. . . .

7. The abovementioned various statutory revisions and new statutes required each of the Defendants to fulfill certain responsibilities.

8. The Defendant, Secretary of State, GLENDA E. HOOD, pursuant to Fla. Stat. §101.015 was responsible to adopt rules in order to establish minimum standards for new voting systems, for provisional approval of hardware and software for use with such systems and to approve the voting systems prior to use throughout the State of Florida. Moreover, such statute required the Division of Elections to continuously review the voting system's certification standards.

9. Pursuant to Fla. Stat. §101.5605, Defendant, Secretary of State, GLENDA E. HOOD, was responsible to approve or disapprove any voting system, to maintain any report pertinent to such system, and further, to reexamine any system or any part thereof which had previously been approved for the purpose of updating the certification of the system.

10. Fla. Stat. §101.506 established minimum standards for requirements to be utilized by the Defendant, Secretary of State, GLENDA E. HOOD, pertinent to approval of electronic or electro mechanic voting systems.

11. Pursuant to Fla. Stat. §101.015, the Defendant, THERESA LEPORE, Supervisor of Elections for Palm Beach County, was required to establish written procedures to assure accuracy and security in Palm Beach County and was further, in the event revisions were required to such security procedures, required to submit them to Co-Defendant, Secretary of State, GLENDA E. HOOD, at least 45 days prior to election.

12. Pursuant to Fla. Stat. §101.5604 the Defendant, THERESA LEPORE, had a responsibility to consult with and advise the Board of County Commissioners for Palm Beach County.

13. Pursuant to Fla. Stat. §101.5604, the Defendant, PALM BEACH COUNTY BOARD OF COUNTY COMMISSIONERS had the responsibility to adopt, purchase, and procure voting systems approved by Co-Defendant, Secretary of State, GLENDA E. HOOD.

14. Fla. Stat. §102.141 and 102.166, establish when and what type of recount must take place in the election process and further require the Defendant, Secretary of State, GLENDA E. HOOD to adopt specific rules for each certified voting system prescribing recount standard and procedures.

15. The Defendants, and each of them, pursuant to their respective and shared statutory duties, developed procedures for, approved, purchased and operated a voting system now utilized in Palm Beach County called "Sequoia AVC Edge Voting System Release 3.1".

16. The aforesaid voting system, "Sequoia AVC Edge Voting System Release 3.1" is a paperless voting system. . . .

21. Because of the Defendants and each of their violations of their aforesaid respective and shared statutory duties, a manual recount was impossible and thus not accomplished.

22. Indeed, the Defendants and each of them did not even have any guidelines/procedures for manual recounts. When inquiries were made to the Defendant, GLENDA E. HOOD, she refused to even put guidelines/procedures for recount into writing. (R 1-5)

Here, the Trial Court noted that it was limited to the four corners of Plaintiff's Complaint, and was required to treat all allegations as true, and construe all reasonable inferences in the light most favorable to the Plaintiff. (R 53-62) Despite making that correct statement of law, the Trial Court did just the opposite

and erred in construing Plaintiff's Complaint. The Trial Court's Order on page 2 states that Plaintiff brought his Complaint in both his official capacity and as a private citizen. (R 54) The Court ignored unequivocal allegations in the Complaint that bely that finding.

Plaintiff's Memorandum of Law explained the capacity in which Plaintiff filed suit, and Plaintiff's Counsel at the Hearing reiterated that the Plaintiff was in this suit in his dual capacity as a Palm Beach County voter and as a candidate in the current election cycle. (R 1, 6, 8; 100-102)

The Trial Court further erred in construing that Plaintiff's allegations against Defendant LePore were limited to her failure to comply with her statutory duties under the Electronic Voting Systems Act. F.S. §101.5601 et. seq. (R 54-55) Although Plaintiff in his Complaint at paragraph 6 referred to the Electronic Voting Systems Act, the allegations against Defendant LePore included statutory duties contained in the Election Code Statutes including F.S. §101.015, 102.141 and 102.166. (R 3-4)

Moreover, the Trial Court overlooked the litany of statutes which established the duties of the Defendant, LePore. Such statutes were discussed in Paragraphs 8 and 9 of Plaintiff's Memorandum of Law in Response to Defendant, LePore's Motion to Dismiss. (Supp. R)

Lastly, the Trial Court further misconstrued Plaintiff's Complaint against Defendant, Hood, in finding that Plaintiff's need for adjudication turns on whether or not he draws opposition in the November 2004 election and whether the results are close enough to mandate a manual recount. (R 58)

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

First, the Trial Court erred in failing to recognize that Plaintiff was not bringing this case in his official capacity but instead alleged he was suing in his dual capacity as a registered voter and Congressman and that his constitutional rights had been violated. (R 1-12)

The Trial Court in dismissing the Complaint cited to the case of Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981). At the Motion to Dismiss hearing, Plaintiff's Counsel discussed the Markham case and stated:

"The *Department of Revenue versus Markham* was a case where the county appraisers in the State of Florida brought a declaratory judgment action and asked the courts how they should be doing their job. Headnote number three; property appraisers who had a clear statutory duty to comply with prescribed Department of Revenue regulations governing taxability of household goods and were not prevented from doing so by others clearly lacked standing for declaratory relief in their governmental capacities.

My client knows how to do his job as a congressman in the United States Congress. He is not

asking you to tell him how to do his job, and that's exactly what this Markham case was.

Headnote number one; public official may seek declaratory judgment only when he is willing to perform his duties, but is prevented from doing so by others. This has nothing to do with my client Congressman Wexler's asking you how to do his duties and someone stopping him from being a congressman in the United States Congress.

Paragraph number two, Your Honor, of our complaint, we say that he is a congressman as well as a registered voter in Palm Beach County, Florida. In the two counts for relief and in our notebook, we already said this in the memo just to make sure the record is clear. Paragraph number 26 in count number one, plaintiff, Congressman Robert Wexler, is in doubt as to his rights both as a voter and as a candidate for re-election. He knows how to do his job.

In the injunctive relief count, count number two, paragraph 31, plaintiff, Congressman Wexler, has no adequate remedy at law and he and all other Palm Beach County voters, as well as he in his capacity as a political candidate will suffer immediate an irreparable harm. If anything in this case is a red herring....” (R 102)

The Court went on to find that Plaintiff did not have standing as a private citizen under the “Rickman Rule” because he did not allege that he had suffered a special injury from the conduct of the public official or that he had suffered an injury different in kind from the public in general or that his constitutional rights had been violated. The Court cited to Rickman v. Whitehurst, et.al. 74 So.2d 205(Fla. 1917); U.S. Steel Corp. v. Save Sand Key, Inc., 303 So2d 9 (Fla.1974); and Alachua County v. Scharps, 855 So.2d 195,198 (Fla. 1st DCA 2003). (R 56)

The Trial Court's Ruling is erroneous, and flies in the face of both the Rickman case and long established precedent that allows a voter to bring an action in equity asserting violations of voting rights.

Recently, the Florida Supreme Court in School Board of Volusia County v. Clayton, 691 So.2d 1066 (Fla. 1997) reaffirmed the exceptions to such Rickman Rule that a Plaintiff seeking standing must allege a special injury or a constitutional challenge. Here, each of those exceptions apply and were alleged in the Complaint.

Indeed a close reading of the Scharps, supra, case cited by the Trial Court actually supports Plaintiff's standing argument. In Scharps, the First District cited to its previous decision of Sancho v. Smith, 830 So.2d 856 (Fla. 1st DCA 2002) and stated:

"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 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. *Id.* 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 Schraps 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, Schraps has no standing." (emphasis added)

In Sancho v. Smith, *supra*, the court denied equitable relief to the elections supervisors over the wording of a ballot summary of a proposed constitutional amendment because the elections supervisors did not have standing. On the same day that Sancho v. Smith, *supra*, was decided, the First District Court of Appeal issued Florida Association of Realtors v. Smith, 825 So.2d 532 (Fla. 1st DCA Sept. 18 2002).

Florida Association of Realtors v. Smith, *supra*, was also an action by voters themselves against the State seeking declaratory and injunctive relief asking for 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.

Second, there should be no doubt that Plaintiff Wexler's claim also meets the special injury exception to the asserted "Rickman Rule". Plaintiff 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 is enough to constitute standing. 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. (R 1-12)

If the outcome of Congressman Wexler's election fits within the statutory scheme to mandate a manual recount and there are undervotes and/or overvotes that must be manually recounted, Congressman Wexler should not be put in the same position as those candidates in the City Council election in Wellington in 2002 and in the District 91 special election who could not receive a mandatory manual recount.

Third, amendment of the Complaint would not be futile. The Trial Court cited the case of Weber v. Shelley, 347 F.3d 1101, (9th Cir. 2003) for the proposition that allowing Plaintiff to amend the Complaint to allege a violation of his constitutional rights would be futile. Weber is distinguishable and respectfully, the Trial Court missed the intent of Plaintiff's complaint.

Certainly Plaintiff agrees with the one statement the Trial Court made about Weber: "[h]owever, the Ninth Circuit ruled that it was up to the legislature to

weigh the pros and cons of any balloting system and that as long as the legislature's choice was reasonable and neutral; it was free from judicial second guessing.” (R 58)

In Weber, the Plaintiff was concerned about the potential for fraud and ballot manipulation and filed suit in California asking the Federal Court to declare that the use of the paperless touch screen voting system is unconstitutional, and to order the State and County to withdraw the system.

The Weber opinion made no mention of any California statutes dealing with legislative requirements for: (a) counting votes, (b) verifying and identifying undervotes, or (c) manually recounting undervotes. Weber made no mention of alleged violations of California statutes by the Voting official defendants.

Instead, the 9th Circuit Court of Appeals characterized Weber's suit as “at most a hypothetical concern about the ability to audit and verify election results” (Id. at 1103), and “Weber makes a number of interrelated arguments which boil down to distrust of a system that records a vote without a paper trail” (Id. at 1104) and “[h]owever, there is no indication that the AVC Edge System is inherently less verifiable than other systems” (Id. at 1105).

In comparing Weber to this case, Plaintiff's Complaint specifically cited to the Florida Statutes that require what voting systems must be capable of, the Statutes that require verification and identification of undervotes, and the Statutes

that set out the requirements for manual recounts. Moreover, Plaintiff's concerns are neither hypothetical nor full of interrelated arguments for the Court to boil down to mistrust of voting systems. (R 3-4)

Plaintiff specifically alleged, in the Complaint, that in the very month that the lawsuit was filed there had been an actual election where a recount was statutorily mandated but not accomplished because it was impossible. (R 5) The Trial Court overlooked that in Plaintiff's Memorandum in Opposition to the Motion. (Supp. R) Plaintiff also brought to the Court's attention an earlier concrete example of an actual statutory recount violation in Wellington in 2002. (Supp. R)

Further, Plaintiff is not asking the Court to second-guess the Florida Legislature. Plaintiff alleged that the Legislature has enacted clear and unequivocal statutory requirements and that the Defendants have not fulfilled those requirements causing actual problems in past elections, and that unless these Defendants are required to follow the statutory requirements, Plaintiffs rights will be violated. There is simply nothing speculative about that, and the Trial Court's finding that Plaintiff has only alleged a speculative injury is simply erroneous.

Although not cited in Plaintiff's Memorandum of Law below, Plaintiff provided the Trial Judge with the recent case of Green v. Mortham, 989 F. Supp. 1451 (M.D. Fla. 1998). (R 84-85) Green was a case brought by a former and prospective candidate for office challenging Florida requirements for qualifying to

be on the ballot. In discussing the standing requirements, the Court said at 1453-54:

A. Mootness and Standing

[1][2][3] The Plaintiff has standing to advance the claims asserted in the Amended Complaint. In her memorandum of law, the Defendant has not argued that Green's attack on Florida's 1996 primary ballot access laws was mooted by his participation in the relevant primary or by the amendment of section 99.092(1), Florida Statutes, nor has Defendant asserted that Plaintiff lacks standing to bring a pre-enforcement challenge to the ballot access laws currently in place and applicable to the 1998 primaries. Although, substantively speaking, ballot access jurisprudence is widely inconsistent, it is a well-settled principle that given the brief duration of the election season ballot access cases are capable of repetition yet susceptible to evading review. Therefore, the fact that the election at issue has come and gone does not moot a plaintiff's claims. *Norman v. Reed*, 502 (Cite as: 989 F.Supp. 1451, *1453) U.S. 279, 287, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992); *Brown v. Chote*, 411 U.S. 452, 457 n. 4, 93 S.Ct. 1732, 36 L.Ed.2d 420 (1973). *1454(Cite as: 989 F.Supp. 1451, *1454)

More specifically, the Supreme Court has held that a plaintiff who pays a filing fee and participates in an intervening election does not moot his legal challenge to the constitutionality of the paid fee where there is no indication that the defendant will cease collecting it in the future. *Morse v. Republican Party of Virginia*, 517 U.S. 186, 116 S.Ct. 1186, 1213 n. 48, 134 L.Ed.2d 347 (1996); see also, *American Civil Liberties Union v. The Florida Bar*, 999 F.2d 1486, 1496 (11th Cir.1993) (holding that an intervening judicial election did not moot the plaintiff's First Amendment challenge to a Florida Bar disciplinary rule prohibiting judicial candidates from publicly criticizing their opponents). This is particularly true where, as here, the Plaintiff intends to participate in a subsequent election, thereby

subjecting himself to the same process or requirements at a later date. *Chandler v. Miller*, 520 U.S. 305, ---- n. 2, 117 S.Ct. 1295, 1300 n. 2, 137 L.Ed.2d 513 (1997).

[4] Relatedly, the fact that the state legislature amended the Florida Statutes during the pendency of this action, reducing the filing fee at issue by 1.5%, does not moot the Plaintiff's claims. "The well settled rule [is] that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice...." *Northeastern Florida Chapter of the Associated General (Cite as: 989 F.Supp. 1451, *1454) Contractors of America v. City of Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 2301, 124 L.Ed.2d 586 (1993); see also, *The Florida Bar*, 999 F.2d at 1495 (holding that a case or controversy remains after a defendant voluntarily ceases the allegedly improper conduct but remains free to resume it at any time). Finally, Green is not prohibited from challenging Florida's current primary ballot access requirements though not yet subject to them. Plaintiff has testified by affidavit that he intends to seek the Democratic nomination for the Tenth District's house seat in 1998, which will subject him to the current ballot access requirements. Green, therefore, has standing to challenge the law as currently written. *The Florida Bar*, 999 F.2d at 1493; *Minnesota Citizens Concerned for Life v. Federal Election Commission*, 113 F.3d 129, 131 (8th Cir.1997); *Vannatta v. Keisling*, 899 F.Supp. 488, 493 (D.Or.1995).

Plaintiff's Complaint, in the Third Paragraph, alleged a violation of his constitutional right and quoted the Florida Constitution, Article VI Section 1. (R 1-12) Moreover, at the Hearing, Plaintiff's Counsel reminded the Trial Court of the other allegations of Constitutional Rights violations alleged in Plaintiff's Complaint:

“Paragraph three of the complaint we quote word for word the Florida constitution. Paragraphs --when we get into the counts themselves for declaratory relief, count number 23, plaintiff, Congressman Robert Wexler, contends defendants and each of them pursuant to the above noted statutory requirements have respective and shared mandatory responsibility to ensure that each citizen of Palm Beach County who exercises his or her right to vote guaranteed by the Florida constitution. We go on. Paragraph 26, Congressman Wexler, as we talked about, is in doubt as to his rights under his Florida constitution. Paragraph 27(c) where we talk about the relief we want; require the defendants and each of them immediately to take whatever steps are necessary to correct the constitutional and statutory violations.

The next count, count two, it continues in the same line. Paragraph 30, shared constitutional and statutory duties. Under the relief portions of the second count, paragraph 33(b) -- I'm sorry, 33(c) require the defendants and each of them to immediately take whatever steps are necessary to correct such constitutional and statutory violations.” (R 104)

Lastly, the Trial Court failed to consider 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 to dismiss.

C. Plaintiff's Complaint States A Cause of Action for Injunctive Relief.

After improperly finding that Plaintiff did not have standing to bring suit, as discussed above, the Trial Court went on to hold that Plaintiff failed to state a cause of action. Again the Trial Court erred in its construction and interpretation of the statutes as well as the allegations of Plaintiff's Complaint. (R 58)

The Trial Court selectively cited several statutes in its Order and overlooked other pertinent statutory requirements that Plaintiff cited in his Complaint and Memorandum of Law. For instance, while the Trial Court cited Fla. Stat. 102.141(6)(b), it did not consider Fla. Stat. 102.166(1);(2);(3)(a)&(c).

It is a basic principal of statutory construction that the Legislature is deemed to know the provisions of the various statutes when it passes a statute and further such legislation is to be construed based on the premise that the statute in question is to be applied relevant to other statutes affecting the same subject matter. M.W. v. Davis, 756 So.2d 90 (Fla. 2000); Holmes County School Board v. Duffell, 651 So.2d 1176, 1179 (Fla. 1995); Preston v. Healthcare and Retirement Corporation of America, 26 FLW D919 (Fla. 4th DCA 2001); Schwartz v. GEICO General Insurance Company, 712 So.2d 773 (Fla. 4th DCA 1998); see also Comptech International, Inc. v. Milam Commerce Park, Ltd., 753 So.2d 1219 (Fla. 1999).

In construing a statute, the courts should always construe statutes in pari materia, that is, to construe related statutes together so that they illuminate each

other and are harmonized, even if the Legislature did not direct such a reading within the language of the statutes themselves. McGhee v. Volusia County, 679 So.2d 729 (Fla. 1996); Holmes County School Board v. Duffell, supra; Miami Dolphins Ltd. v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981); and Cannella v. Auto Owners Insurance Company, 25 FLW S559 (Fla. 2000).

Here, the Trial Court went on to cite the case of Joughin v. Parks, 143 So.145 (Fla. 1932) for the proposition that the Plaintiff has no recourse in the courts, instead he must seek relief in the Legislative or Executive Branches of Government. (R 59) Again, the Trial Court misread and misconstrued the Joughin case.

Joughin was a suit for writ of prohibition absolute filed four days prior to a run-off primary election to enjoin the sheriff and his deputies from violating laws regulating the holding of the run-off election. The Florida Supreme Court phrased the issue as follows:

“Petitioner states the involved as follows: Is a primary election a political right over which courts of equity as administered in this state have any jurisdiction? No other question is presented.”

The Supreme Court of Florida went on to explain:

“This rule recognizes degrees in political rights and applies only where rights purely political are involved. **One’s right may not be purely political when it has coalesced with a civil or personal right, or has been**

clothed by the Constitution or statute with a quality superior and beyond the mere exercise of a political or party function. In such cases the question of whether or not a political right has been or is about to be exercised in compliance with law is a judicial question for determination by the courts.

The right to vote, for example, is not inherent. It is secured by law. So long as the security extends only to the naked right to vote it is purely political, but when the law takes it over and throws around it safeguards in the interest of the voter and requires it to be exercised under rules and regulations to safeguard the ballot and the body political it becomes more than a naked political right and will be protected in like manner as a civil right. **A court of equity will in other words not attempt to supervise or control the management of a political party or a political function, but when the law prescribes rules and regulations for the party to conduct an election any interested elector may invoke the aid of a court of appropriate remedies to enforce such rules and regulations.**”

Plaintiff, unlike Joughin, is not asking this Court for an injunction during the progress of an election. Here, the Plaintiff's suit was filed long before the next election because the Defendants are not complying with the statutes.

The Trial Court's ruling, in essence, is that even though Plaintiff complains that the Defendants are not complying with the statutes that they are required to follow, Plaintiff's only recourse is to ask those officials themselves to stop violating the statutes, and if that doesn't work, ask the Legislature to change the statutes and hopefully that will make the officials follow the statutes. Separation of Powers does not require such an absurd result.

The Court's recitation of what it would be required to do if it granted the injunction does not comport with the relief requested, shows a basic misunderstanding of the Court's injunctive powers, and were the Court to grant the relief, Plaintiff's requests that would not violate the separation of powers clause. (R 60) For instance, where, in Plaintiff's complaint, is there any request that the Trial Court "locate a source of funding for purchasing such a system"? (R 58)

As compared to the situation in Department of Children and Family Services v. I.C., 742 So.2d 401(Fla. 4th DCA 1999), Plaintiff is simply asking for equitable relief by holding that the Defendants are indeed violating the Florida Constitution and Statutes, by requiring Defendants to fix the problem that they created, by requiring them to report their progress to the Court and requiring them to communicate to the voters. Such request does not require the trial to exercise general jurisdiction over Defendants and "micro-manage" their activities.

D. Upon Remand Venue Is Proper In Palm Beach County.

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.

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

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.

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."

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 1088.

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.

In the present case, the Complaint specifically alleges that the actions of the Defendant Secretary of State Glenda E. Hood will deny the Plaintiff his constitutional and statutory right to a fair and proper election process in Palm Beach County within the geographical jurisdiction of this Court. (R 1-12) The failures of the Defendant Hood are inextricably intertwined with the alleged failures sought to be addressed in this proceeding of the Defendants LePore and the Palm Beach County Board of Commissioners.

CONCLUSION

Accordingly, Plaintiff respectfully submits that the final judgment dismissing the Complaint must be reversed and this action remanded for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this April 19, 2004 to: PAUL HUCK, ESQ., Office of Attorney General, 110 Southeast 6th Street, Fort Lauderdale, FL 33301, Attorney for Defendant, Glenda E. Hood; RONALD A. LABASKY, ESQ., Landers & Parsons, P.A., 310 West College Avenue, Tallahassee, FL 32301, and GEORGE L. WAAS, ESQ., Office of the Attorney General, PL-01 The Capitol, Tallahassee, FL 32399-1050, Attorneys for Defendants, Theresa LePore and Kay Clem.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210(a)(2), Fla. R. App. P., the undersigned attests that this Initial Brief is being submitted in Times New Roman 14 point font.

Dated: April 19, 2004.
