

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

RONALD TAYLOR and JOHN and
JANE DOES I-NNN,

Plaintiffs,

vs.

CASE NO: 00-2850

THE MARTIN COUNTY CANVASSING
BOARD, PEGGY S. ROBBINS, THE
HONORABLE STEWART HERSHEY,
MARSHALL WILCOX, THE FLORIDA
REPUBLICAN PARTY, TOM HAUCK,
GEORGE W. BUSH, RICHARD CHENEY,
THE STATE OF FLORIDA ELECTION
CANVASSING COMMISSION and
KATHERINE HARRIS,

Defendants,

vs.

JOHN THRASHER, RICHARD J. KOSMOSKI;
ROSE CARMEL KOSMOSKI; ANN F. FORD;
HORACE S. FORD, JR.; WILLIAM F. ZIER;
KATHARIN P. ZIER; VIRGINIA WHITE;
JOANNE D. PAYSON and DIANE JOFFE,

Defendant-Intervenors.

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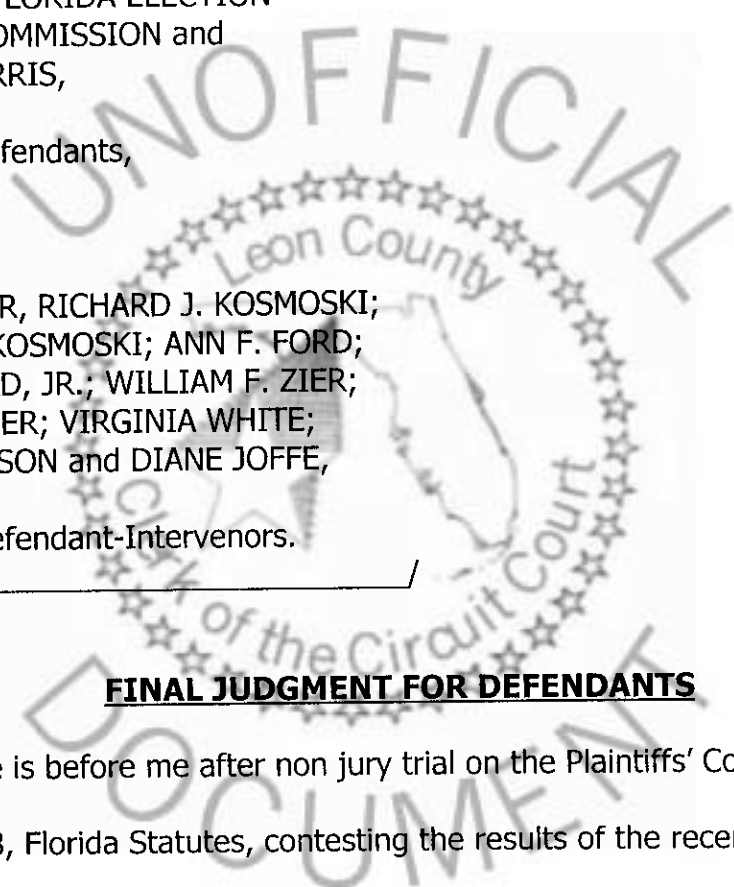


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DAVE LANG
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

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FINAL JUDGMENT FOR DEFENDANTS

This case is before me after non jury trial on the Plaintiffs' Complaint pursuant to Section 102.168, Florida Statutes, contesting the results of the recent election determining the electoral votes for president and vice-president of the United States.

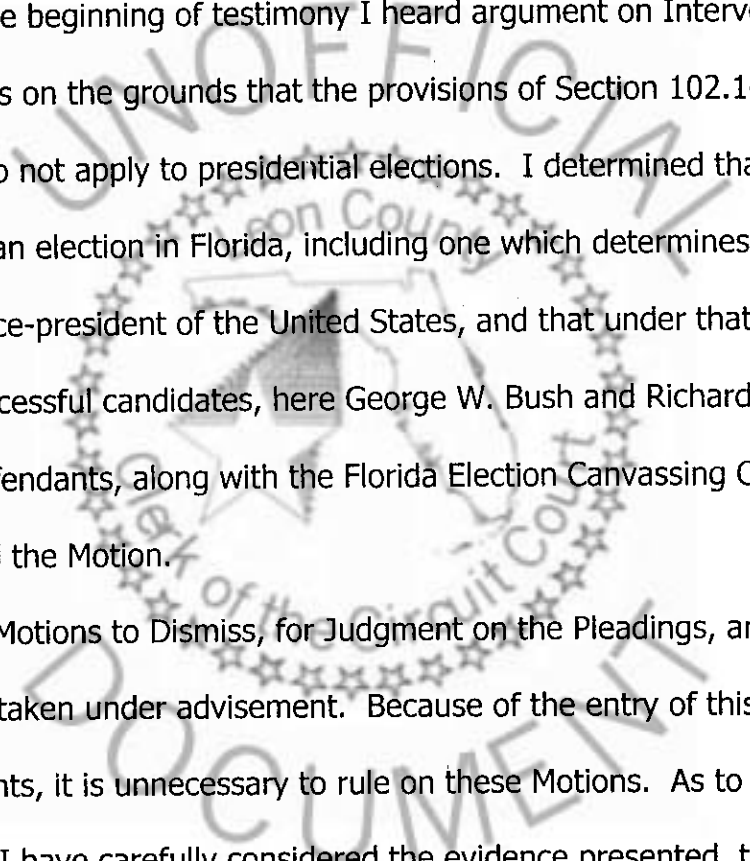
Specifically, Plaintiffs seek a Judgment invalidating all, or at least a portion of, the absentee ballots cast in Martin County.

At the beginning of the trial, I granted the Motions of John Thrasher and of Richard J. Kosmoski, et al, to intervene as Party Defendants. I also granted the Motion of the Martin County Canvassing Board, Peggy S. Robbins, the Honorable Stewart Hershey, and Marshall Wilcox, for a dismissal as to these individual Defendants on the grounds that no affirmative relief could be attained against them based upon the nature of the proceedings. For similar reasons, I now likewise dismiss as Party Defendants in this case the Florida Republican Party, Tom Hauck, and Katherine Harris.

Prior to the beginning of testimony I heard argument on Intervenor Thrasher's Motion to Dismiss on the grounds that the provisions of Section 102.168 for the contest of an election, do not apply to presidential elections. I determined that a voter may, indeed, contest an election in Florida, including one which determines the electors for president and vice-president of the United States, and that under that statutory scheme, the successful candidates, here George W. Bush and Richard Chaney, are the proper Party Defendants, along with the Florida Election Canvassing Commission. I therefore denied the Motion.

All other Motions to Dismiss, for Judgment on the Pleadings, and for Summary Judgment were taken under advisement. Because of the entry of this Final Judgment for the Defendants, it is unnecessary to rule on these Motions. As to the merits of the Plaintiffs' claim, I have carefully considered the evidence presented, the arguments of

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counsel, and the applicable law. For the reasons set forth below, I determined that the Plaintiffs are not entitled to the relief sought.

The essential facts are as follows: Both the Florida Republican Party and the Florida Democratic Party disseminated pre-printed absentee ballot request forms to registered voters in Martin County prior to the election. The Supervisor of Elections received a number of Republican request forms which had missing or incorrect voter identification numbers on them. There was no similar problem with the Democratic request forms received.

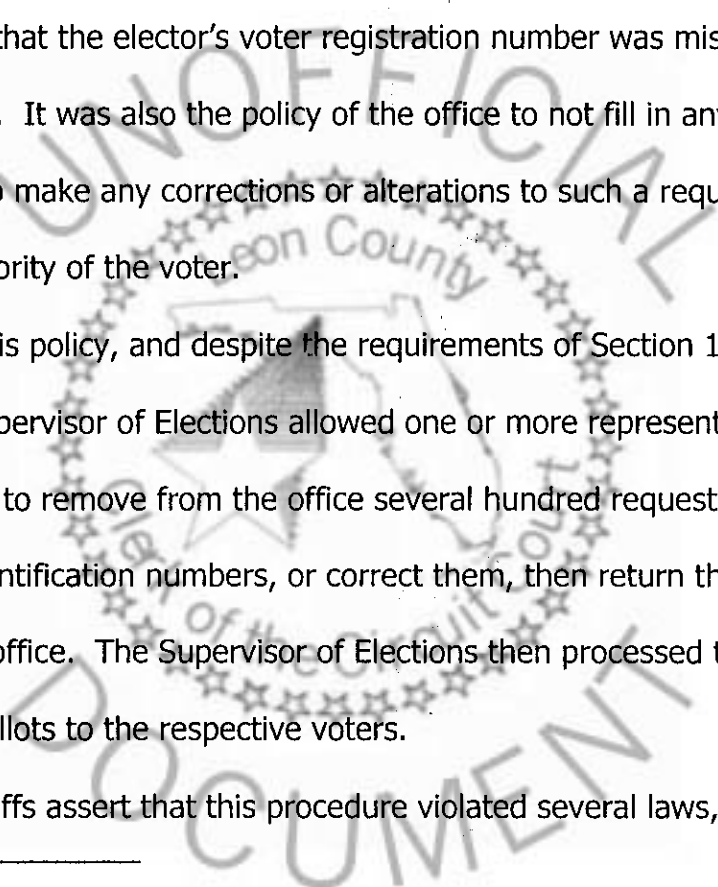
It was the policy of the Supervisor's office not to issue an absentee ballot if it was determined that the elector's voter registration number was missing or incorrect on the request form. It was also the policy of the office to not fill in any missing information, or to make any corrections or alterations to such a request form without the express authority of the voter.

Despite this policy, and despite the requirements of Section 101.62, Florida Statutes¹, the Supervisor of Elections allowed one or more representatives of the Florida Republican Party to remove from the office several hundred request forms, fill in the missing voter identification numbers, or correct them, then return the forms, as changed, to the office. The Supervisor of Elections then processed these requests, and sent absentee ballots to the respective voters.

The Plaintiffs assert that this procedure violated several laws, created an

¹The law requires that a person requesting an absentee ballot must provide certain information, including his or her voter registration number.

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opportunity for fraud, tainted the integrity and the fairness of the election, and casts doubt on the validity of the results. I agree that the procedure utilized was contrary to Section 101.162, Florida Statutes, and the Public Records Act, and that it offered an opportunity for fraud and created the appearance of partisan favoritism on the part of the Supervisor of Elections. I also find, however, from the evidence that there was, in fact, no fraud nor other intentional misconduct, and that the noncompliance with applicable statutory procedures did not compromise the integrity of the election or the sanctity of the ballot. Under the applicable case law, the Defendants are entitled to judgment.

The Florida Supreme Court very recently, in Palm Beach County Canvassing Board v. Harris, Case Nos. SC00-2346, SC00-2348 & SC00-2349, 30 (Nov. 21, 2000) remanded on other grounds, declared that the right to vote is the pre-imminent right contained in the Declaration of Rights of the Florida State Constitution and that all election laws must be liberally construed to protect this right. The Court stated at the beginning of the Opinion:

"Twenty-five years ago, this Court commented that the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases: The real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. ... The right to vote is the right to participate; it is also the right to speak, but more importantly, the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

P. 8, quoting Boardman v. Esteva, 323 So.2d 259, 263 (Fla. 1975).

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The Opinion of the Florida Supreme Court in Boardman, is probably the most important case in the area of the law related to absentee ballots. In that case, a candidate contested an election on the grounds that there were multiple irregularities or errors in absentee ballots. In considering the issue, the Court noted that notwithstanding the alleged defects, a majority of the voters had apparently preferred the other candidate. This, the Court said, must not be overlooked.

"If we are to countenance a different result, one contrary to the apparent will of the people, then we must do so on the basis that the sanctity of the ballot and the integrity of the election were not maintained, and not merely on the theory that the absentee ballots cast were in technical violation of the law."

323 So.2d @ 263.

The Court specifically receded from its prior holding that the absentee voting laws should be strictly construed. The fundamental inquiry, the Court said, should be whether or not the irregularity complained of prevented a full, fair and free expression of the public will. Unless the applicable law expressly declared a particular act or omission would cause a ballot not to be counted, then the law should be treated a directory, not mandatory.

"There is no magic in the statutory requirements. If they are complied with to the extent that the duly responsible election officials can ascertain that the electors whose votes are being canvassed are qualified and registered to vote and that they do so in a proper manner, then who can be heard to complain that the statute has not been literally and absolutely complied with? Strict compliance is not some sacred formula nothing short of which can guarantee the purity of the ballot."

323 So.2d @ 267.

The Court then set out the test for determining the validity of absentee ballots:

"[W]e hold that the primary consideration in an election contest is

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whether the will of the people has been effected. In determining the effect of irregularities on the validity of absentee ballots cast, the following factors shall be considered:

- (a) the presence of or absence of fraud, gross negligence, or intentional wrongdoing;
- (b) whether there has been substantial noncompliance with the essential requirements of the absentee voting law; and
- (c) whether the irregularities complained of adversely effect the sanctity of the ballot and the integrity of the election."

323 So.2d @ 269.

The Supreme Court considered and applied these factors in the 1998 case of Beckstrom v. Volusia County Canvassing Board, 707 So.2d 720 (Fla. 1998). In that case, there were allegations of fraud in the counting of absentee ballots by the staff of the Supervisor of Elections. Specifically, it was argued that absentee ballots had been tampered with and modified in violation of Section 101.5614(5), Florida Statutes, in that at least 6500 absentee ballots contained votes which were marked over with a black felt-tipped marker, and an additional 1000 absentee ballots were similarly marked, but it was impossible to determine whether they were marked over or newly marked.

The trial court in Beckstrom, found that this procedure was not in substantial compliance with the above cited Statute, and that it constituted gross negligence, creating an opportunity for fraud. The trial court found, however, that although there was an opportunity for fraud, no fraud was proven. Finding that there had been a "full and fair expression of the will of the people", the trial court refused to grant the Plaintiffs' requested relief. The Supreme Court upheld this ruling making a distinction between fraud and "gross negligence" which the Court defined as "negligence that is so

pervasive that it thwarts the will of the people." 707 So.2d @ 725.

The Court was quick to note that its Opinion should not be seen as condoning anything less than strict adherence by election officials to statutory mandated election procedures. It is for the Legislature, however, the Court said, to determine what sanctions should apply to election officials who do not follow the law, and that the sanction should not be one that would frustrate the will of the voters if the violation of the law is unintentional wrongdoing.

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Similarly, in McLean v. Bellamy, 437 So.2d 737 (Fla. 1st DCA 1983), the Court addressed several categories of alleged irregularities relative to absentee ballots. One of those irregularities complained of was, as in the present case, a violation of Section 101.62 regarding the request for absentee ballots. In McLean, there were a number of absentee ballots that were sent to voters without them ever having been requested pursuant to the Statute. In considering this argument, the Court held that:

"[T]he failure to conform to the requirements of Section 101.62 are not the kind of irregularities as should result in the Court's invalidation of the subject absentee ballots.

Central to the resolution of this issue is the determination of whether the Section 101.62 statutory criteria for issuance of absentee ballots are directory or mandatory. Our examination of Section 101.62 leads us to conclude that its provisions are directory. We are unable to glean from the provisions of that Section a legislative intent that the failure to follow the letter of its provisions should result in the invalidation of absentee ballots cast by qualified electors who are also qualified to vote absentee....

[W]e find no declaration in Section 101.62, implied or explicit, that strict compliance with its provisions is essential to the validity of the ballot or that the failure to strictly to follow any of its provisions will cause the ballot not to be counted."

437 So.2d @ 743, 744.

There are two cases in which the invalidation of all absentee ballots as a result of the contest of the election was approved. Those are Bolden v. Potter, 452 So.2d 564 (Fla. 1984) and In Re The Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami, Florida, 707 So.2d 1170 (Fla. 3rd DCA 1998). In both of these cases there were findings of extensive fraud and corruption. In Bolden, for example, the trial court found that there had been an organized vote buying operation, and a number of electors admitted that their vote had been bought. Some ballots were witnessed by individuals who had no contact with the respective voter and no independent knowledge of the voters or the nature of their signatures. The trial court expressly found that "the fraud and illegal activities... were so conspicuously corrupt and pervasive that it has tainted the entire absentee voting procedure in this election". 425 So.2d @ 566.

In the City of Miami case, there was evidence of false voter addresses, ballots that were falsely witnessed, ballots procured or witnessed by "ballot brokers", who invoked their privilege against self incrimination at trial. The result was such that the uncontradicted statistical evidence showed that the results of the absentee ballots was such an aberrant case, so unlikely, that it was "literally off the charts" of probability tables. 707 So.2d @ 1170.

In the present case the persons who signed the request forms in question were duly qualified and registered voters in Martin County. There is no evidence of fraud or other irregularities in the actual casting of the ballots, or the counting of the ballots.



The procedure may have provided an opportunity for fraud, but none has been shown.

The failure to comply with the statutory procedure was not intentional wrongdoing, but rather was the result of an erroneous understanding of the statutory requirements.

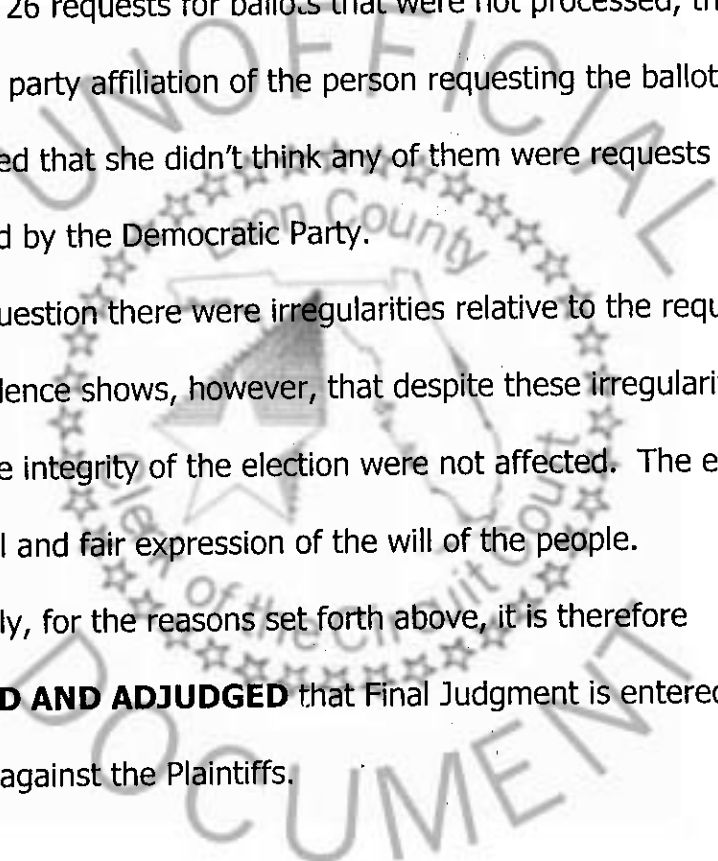
There is also no basis in the evidence to conclude that the irregularities affected the vote. The Democratic Party, like the Republican Party also disseminated pre-printed absentee ballot request forms to registered Democrats. The difference is, their printed forms did not have the errors that the Republicans did. Of the total request forms received, there were 108 that were deemed deficient and were not processed. Of those 108 requests, 82 of them were on the pre-printed form used by the Republican Party. Of the remaining 26 requests for ballots that were not processed, there is no evidence as to the political party affiliation of the person requesting the ballot, although the Supervisor testified that she didn't think any of them were requests made on the pre-printed form used by the Democratic Party.

Without question there were irregularities relative to the requests for absentee ballots. The evidence shows, however, that despite these irregularities, the sanctity of the ballot and the integrity of the election were not affected. The election in Martin County was a full and fair expression of the will of the people.

Accordingly, for the reasons set forth above, it is therefore


ORDERED AND ADJUDGED that Final Judgment is entered in favor of the Defendants and against the Plaintiffs.

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DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this

8th day of December, 2000.


TERRY P. LEWIS, Circuit Judge

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