

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

CONGRESSMAN ROBERT WEXLER,

Plaintiff/Appellant,

vs.

CASE NO. 4D04-918

L.T. No. 02004CA000491XXXXMB

THERESA LePORE, etc., et al.,

Defendants/Appellees.

**BRIEF OF *AMICUS CURIAE*, AMERICAN CIVIL LIBERTIES UNION OF
FLORIDA, INC., IN PARTIAL SUPPORT OF PLAINTIFF/APPELLANT,
FILED BY LEAVE OF COURT**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....2

TABLE OF CITATIONS.....3

IDENTITY OF *AMICUS CURIAE* AND ITS INTEREST IN THE CASE.....4

ISSUE FOR REVIEW: DID THE TRIAL COURT COMMIT PREJUDICIAL
ERROR IN DISMISSING, WITH PREJUDICE, THE COMPLAINT FOR
FAILURE TO STATE A CAUSE OF ACTION?.....5

SUMMARY OF ARGUMENT.....5

ARGUMENT6

 I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN
DISMISSING, WITH PREJUDICE, THE COMPLAINT FOR FAILURE
TO STATE A CAUSE OF ACTION.....6

 A. The Trial Court Misapplied the Rule of
Construction on a Motion to Dismiss for Failure
To State a Cause of Action and Did Not Address
Material Allegations in the Complaint.....7

 B. Florida Statutes Mandate Manual Recounts in
Certain Circumstances, Yet the Trial Court Did
Not Address the Pertinent Statutory Provisions...11

 C. Compliance with Statutory Requirements for
Manual Recounts is Impossible with the Electronic
Touch Screen Machines Currently in Use, and Will
Remain Impossible Unless the Touch Screen
Machines are Modified to Include Printers
Generating a Voter-Verified Paper Trail.....12

 D. The Right to Vote is Essential and Preeminent.
Having Sufficiently Alleged a Voting Rights Case,
Appellant is Entitled to Present his Evidence.....16

CONCLUSION.....18

CERTIFICATE OF SERVICE.....18

CERTIFICATE OF COMPLIANCE.....19

TABLE OF CITATIONS

CASES:

City of DeLand v. Fearington, 146 So. 573 (Fla. 1933).....10

Hialeah Race Course v. Gulfstream Park Rac. Ass'n, 210 So.2d 750 (Fla. 4th DCA 1968).....10

McGregor v. Burnett, 141 So. 599 (Fla. 1932).....10

Orlando Sports Stadium, Inc. v. State, 262 So.2d 881 (Fla. 1972).....7

Palm Beach County Canvassing Bd. V. Harris, 772 So.2d 1220 (Fla.), vacated on other grounds, 531 U.S. 70 (2000), on remand, 772 So.2d 1273 (Fla. 2000).....16

Reynolds v. Sims, 377 U.S. 533 (1964).....16

Wausau Ins. Co. v. Haynes, 683 So.2d 1123 (Fla. 4th DCA 1996).....9

STATUTES:

Sec. 86.101, *Fla. Stat.*.....9

Sec. 102.141(6)(b), *Fla. Stat.*.....12,13

Section 102.141(6)(c), *Fla. Stat.*.....11

Section 102.166, *Fla. Stat.*.....6,11

Section 102.166(1), *Fla. Stat.*.....11

Section 102.166(4), *Fla. Stat.*.....11

Section 102.166(6), *Fla. Stat.*11

OTHER AUTHORITIES:

Webster's New International Dictionary (Second Edition).....13

IDENTITY OF AMICUS CURIAE AND ITS INTEREST IN THE CASE

Amicus curiae, AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, INC. (hereinafter "ACLU"), is the Florida affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles of liberty and equality embodied in the United States Constitution and the nation's Civil Rights laws. Consistent with this mission, ACLU seeks in the instant case to defend and protect the right to vote, and to ensure, insofar as possible, that every person's vote actually counts.

The instant case raises issues fundamental to the legitimacy of the voting process in Palm Beach County, Florida, since the electronic touch screen voting machines currently utilized here produce electoral results that are incapable of manual recounts, open to the public, when required by Florida Statutes, or of reliable verification by voters.

In light of these issues, ACLU challenges the trial court's dismissal of the Complaint on the ground that Appellant failed to state a cause of action. The trial court did not address the statutory provisions that require manual recounts or the allegations regarding those

provisions. The trial court simply elided the question of how statutorily required manual recounts can be accomplished when the electronic touch screen voting machines produce nothing that can be recounted manually. Given the present state of technology, manual recounts and voter verifiability demand the addition of printers that generate a voter-verified paper trail. ACLU believes that no matter how technology develops, there will always be a need for a voter-verified audit trail. While some day that may permit the elimination of paper, at this point in time, an audit trail is necessarily a paper trail. Thus, ACLU's reference herein is to a "paper trail."

ISSUE FOR REVIEW: DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN DISMISSING, WITH PREJUDICE, THE COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION?

SUMMARY OF ARGUMENT

The trial court misapplied the rule of construction applicable to a motion to dismiss for failure to state a cause of action. The Complaint should have been construed as a whole. Instead, the trial court failed to address the material allegations concerning the manual recount required by law and Appellees' failure to fulfill their duties concerning same.

In addition to failing to address material allegations in the Complaint, the trial court failed to address Section 102.166, *Fla. Stat.*, which mandates manual recounts in certain extremely close elections. Indeed, the term "manual" cannot be found anywhere in the trial court's reasoning. Thus, the trial court managed to avoid the entire issue of statutorily required manual recounts.

The electronic touch screen voting machines currently utilized in Palm Beach County, Florida do not allow for the possibility of manual recounts. They produce nothing to recount manually, and will produce nothing to recount manually, unless, as Appellant demands, the machines are modified to include printers that generate a voter-verified paper trail. Such a paper trail would make statutorily mandated manual recounts possible, and would, by enabling voters to see the contents of a paper printout and also to see that printout deposited in a secured ballot box, enhance voters' ability to verify that their votes have in fact been recorded as cast.

The Final Order of Dismissal With Prejudice should be reversed.

ARGUMENT

- I. The Trial Committed Prejudicial Error in Dismissing, With Prejudice, the Complaint For Failure to State a Cause of Action.**

A. The Trial Court Misapplied the Rule of Construction on a Motion to Dismiss for Failure to State a Cause of Action and Did Not Address Material Allegations in the Complaint.

The trial court misapplied the rule of construction that, on a motion to dismiss for failure to state a cause of action, the allegations of the Complaint are assumed to be true and all reasonable inferences are allowed in favor of the plaintiff. *Orlando Sports Stadium, Inc. v. State*, 262 So.2d 881, 883 (Fla. 1972).

This misapplication is evident from what the trial court chose to say and from what it chose not to say.

The trial court said in its February 11, 2004 order that Appellant requested the court to "take control over the election process in Palm Beach County." It would be more perspicuous to say that Appellant requested the trial court to fulfill its responsibility to interpret, and ensure the faithful implementation of, Florida election laws as they pertain to Appellees' alleged violations of those laws, and to issue appropriate declaratory and injunctive relief to remedy those violations.

The Complaint cites the voting rights provisions of Florida Constitution and provisions of Florida Statutes concerning voting rights and election recounts, and alleges

that Appellees violated their statutory duties concerning same.

The Complaint specifically alleges that in the recent special election for Florida Legislature District 91:

“20. The margin of victory was 12 votes, further, 134 ballots were invalidated as ‘undervotes’. Pursuant to Fla. Stats. [Sec.] 102.141 and [Sec.] 102.166 a manual recount was mandated.

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.”

While such allegations may not exemplify model pleading, they do not deserve to be ignored.

Yet the trial court said absolutely nothing about these allegations when analyzing the Complaint. The trial court, in other words, did not construe the Complaint as a whole. The trial court chose to cite paragraphs 15, 16, 27, and Exhibit “A” of the Complaint, but for some reason chose not to cite paragraphs 20, 21, and 22 of the Complaint - the paragraphs that address the crucial issue of Defendants’ inability to comply with the statutorily required manual recount. By focusing on certain allegations to the exclusion of others, the trial court

erroneously concluded that the Complaint failed to state a cause of action.

The test on a motion to dismiss for failure to state a cause of action

"is whether the pleader could prove any set of facts whatever in support of the claim. *Hillman Const. Corp. v. Wainer*, 636 So.2d 576 (Fla. 4th DCA 1994)."

Wausau Ins. Co. v. Haynes, 683 So.2d 1123, 1124 (Fla. 4th DCA 1996). It cannot be validly asserted at this early pleading stage that Appellant could offer no evidence to support his claims. See *id.* at 1125. Therefore, the test for dismissal of the Complaint is not satisfied.

Count I is an action for declaratory relief. The Declaratory Judgments Act expressly provides that it is "substantive and remedial", is intended "to afford relief from insecurity and uncertainty with respect to rights", and "is to be liberally administered and construed." Sec. 86.101, *Fla. Stat.* In a declaratory judgment proceeding, the test for sufficiency of a complaint

"...is not whether the complaint shows that the plaintiff will succeed in getting a declaration of rights in accordance with his theory and contention, but whether he is entitled to a declaration of rights at all Thus, sustaining the adequacy of the complaint only lays the foundation for the case to be heard upon its merits and does not connote a determination as to who should prevail."

Hialeah Race Course v. Gulfstream Park Rac. Ass'n, 210 So.2d 750, 752 (Fla. 4th DCA 1968)(citation omitted).

Count I, properly construed, alleges in substance that Appellant has a justiciable, cognizable, bona fide and direct interest in the result sought by his action, and that his rights under the constitutional and statutory provisions he cites are in doubt. See *id.* at 753. Therefore, Count I is sufficient to state a declaratory judgment action.

Count II is an action for injunctive relief.

"[I]n cases where fraud or other palpable violation of the registration or election laws is charged prior to an election, any elector is entitled to his relief by injunction or such other appropriate remedy as is available to him under the law ..."

McGregor v. Burnett, 141 So. 599 (Fla. 1932). See also *City of DeLand v. Fearington*, 146 So. 573 (Fla. 1933)(election held in violation of law or contrary to well-established legal requirements, or when it would result in substantial injury to suitor or public generally, may on proper showing be enjoined where there is no other legal remedy).

Count II, properly construed, alleges that, absent appropriate injunctive relief, the November 2004 general election will take place in Palm Beach County by means of a voting system in palpable violation of laws mandating

manual recounts in certain circumstances. The palpable violation stems from the inherent inability of the touch screen voting machines to produce electoral results that are capable of being recounted manually. Therefore, Count II is sufficient to allege an action for an injunction.

B. Florida Statutes Mandate Manual Recounts in Certain Circumstances, Yet the Trial Court Did Not Address the Pertinent Statutory Provisions.

An entire section of Florida Statutes, Sec. 102.166, *Fla. Stat.*, is devoted to manual recounts of election results.

Section 102.166(1), *Fla. Stat.*, provides that, in certain extremely close elections, the board responsible for certifying the vote "shall order a manual recount of the overvotes and undervotes cast ..." (Emphasis added.)

Section 102.166(4), *Fla. Stat.*, provides: "Any manual recount shall be open to the public." (Emphasis added.)

Section 102.166(6), *Fla. Stat.*, provides procedures "for a manual recount ..." (Emphasis added.)

Section 102.141(6)(c), *Fla. Stat.*, provides that the county canvassing board "shall complete the recount prescribed in this subsection, along with any manual recount prescribed in s. 102.166 ..." (Emphasis added.)

Although it cited Sec. 102.141(6)(b), *Fla. Stat.*, on the recount question, the trial court failed utterly to address the issue of manual recounts.

Indeed, the term "manual" is completely missing from the section of the trial court's February 11, 2004 order entitled, "Plaintiff Fails to State a Cause of Action For Injunctive Relief." That order is relied upon in the February 26, 2004 Final Order of Dismissal With Prejudice.

In sum, the trial court not only failed to address the allegations concerning manual recounts, it also failed to address the statutes mandating manual recounts, thereby eliding the entire issue of manual recounts, even though that issue is at the heart of Appellant's Complaint.

C. Compliance with Statutory Requirements for Manual Recounts is Impossible with the Electronic Touch Screen Machines Currently in Use, and Will Remain Impossible Unless the Touch Screen Machines are Modified to Include Printers Generating a Voter-Verified Paper Trail.

These glaring omissions in the trial court's reasoning are perhaps explained by the fact that compliance with the statutory requirement of a manual recount is impossible with the paperless touch screen voting machines currently in use. The Complaint's allegations to this effect are demonstrably correct.

According to Webster's New International Dictionary
(Second Edition), "manual" is defined as follows:

"1. Of or pert. to the hand or hands; done, made, or operated, by, or used with, the hand or hands; as, *manual labor.*"

(Italics in original.)

It is, and will remain, physically impossible to conduct a manual recount of votes in Palm Beach County, unless the electronic touch screen voting machines are modified to include printers that generate a paper trail. Under the present system, there is literally nothing to recount by hand.

A so-called recount of touch screen electoral ballots is not a recount in any meaningful sense. Rather, it is an electronic regurgitation of tabulations previously produced electronically. See Sec. 102.141(6)(b), *Fla. Stat.* Trust but do not verify.

The absence of verification is antithetical to the logic of the statutory requirement of a manual recount. An electronic replay of prior electronic output is obviously not the same thing as an examination, by hand, of the votes cast, or not cast, by individual voters as reflected on a paper printout. The deliberate process of manually examining the votes cast, or not cast, by individual voters is the essence of verification. That is

what a statutorily required recount by hand is intended to accomplish.

Furthermore, a so-called recount of touch screen electoral ballots is not, and cannot be, open to the public, despite the statutory requirement that any manual recount be "open to the public." The Sequoia source codes are proprietary and thus closed to the public.^{1/} Whatever the voting machine software does with the voters' input inside the voting machine hardware is known only to Sequoia. The public does not have, and cannot obtain, this essential information. Again, trust but do not verify.

To remedy the palpable statutory violations that directly impact constitutionally based voting rights, and given the present state of voting technology, Palm Beach County's electronic touch screen voting machines should be modified to add printers, certified in accordance with Florida law, that would generate a voter-verified paper trail: a paper printout, and a depositing of that paper printout into a secured ballot box, that voters can see at the time of voting. ACLU is not advocating a system where

^{1/} As noted in its Motion For Leave To Appear As *Amicus Curiae* in the trial court, ACLU advocates open source codes subject to rigorous security vetting. However, because that issue exceeds the scope of the instant appeal, it is not addressed herein.

each voter actually touches the paper and puts it into a ballot box, but rather the ability of the voter to see that his or her vote has been accurately recorded prior to casting the ballot. The paper itself should not, and need not, be handled by the voter.

Similarly, a voter-verified paper trail does not have to mean that sight-impaired voters will lose their ability to cast their own ballots independently. Rather, text-to-speech readers or scanners can provide verification by reading the record aloud, thereby preserving independence.

The addition of such a permanent paper record is a necessary condition, in present circumstances, to enable election officials to conduct manual recounts, open to the public, when and as required by Florida Statutes. The statutory mandates cannot be met, at present, in the absence of a paper trail. This is the essential legal point raised by Appellant, missed by the trial court, demanding attention from this appellate court.

Additionally, a paper printout generated by the touch screen machines would allow voters - not just election officials conducting recounts - to verify, at the time of voting, that their votes have been recorded as cast. Public confidence in the accuracy of vote recordation, presently lacking, would inevitably be enhanced.

**D. The Right to Vote is Essential and Preeminent.
Having Sufficiently Alleged a Voting Rights
Case, Appellant is Entitled to Present his
Evidence.**

Appellant understandably resorted to the courts to resolve this voting rights dispute, especially since the voting machines currently in use made a manual recount impossible in the District 91 special election and the next general election is only months away. Courts should not recoil from litigation intended to further the bedrock constitutional principle expressed by the United States Supreme Court 40 years ago:

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

Reynolds v. Sims, 377 U.S. 533, 555 (1964).

In a similar vein, the Supreme Court of Florida has observed that the Florida Constitution starts with a Declaration of Rights.

"The right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished. The importance of this right was acknowledged by the authors of the Constitution, who placed it first in the Declaration."

Palm Beach County Canvassing Bd. v. Harris, 772 So.2d 1220, 1236 (Fla. 2000), vacated on other grounds, 531 U.S. 70 (2000), on remand, 772 So.2d 1273 (Fla. 2000).

Appellant has alleged a bona fide voting rights case, predicated on a plausible, non-frivolous legal theory against Defendants. With voting rights at stake, the trial court should have taken care to consider all allegations in the Complaint thoroughly and comprehensively. Unfortunately, as demonstrated supra, key allegations in the Complaint were left untouched by the trial court's analysis.

Whether the view espoused by Appellant and ACLU - that a voter-verified paper trail is necessary, given the present state of technology - will ultimately prevail in the trial court remains to be seen. But Appellant surely should be given the chance to support his well-founded allegations with evidence. (Indeed, to the extent that Appellees may claim that the touch screen machines actually do create some sort of reviewable record, this would be further support for an evidentiary hearing upon remand.) By dismissing the Complaint with such an incomplete analysis, the trial court erroneously denied Appellant that chance.

Reversal is, therefore, the appropriate result.

CONCLUSION

ACLU requests this Court to reverse the Final Order of Dismissal With Prejudice and to remand this action for further proceedings consistent with such reversal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by regular mail to Jeffrey M. Liggio, Esquire, Liggio, Benrubi & Williams, P.A., 1615 Forum Place, Suite 3B, West Palm Beach, FL 33401, J. Michael Burman, Esquire, Burman, Critton et al., 515 N. Flagler Dr., Suite 400, West Palm Beach, FL 33401, George L. Waas, Esquire, Office of Florida Attorney General, PL-01, The Capitol, Tallahassee, FL 32399, Paul Huck, Esquire, Office of Florida Attorney

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is submitted in
Courier New 12-point font in compliance with the font
requirements of Fla. R. App. P. 9.210(a).

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