IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION

CASE NO. 13-21112 CA 25

KEVIN BURNS,

Plaintiff,

vs.

LUCIE TONDREAU, PENELOPE TOWNSLEY, As Miami-Dade County Supervisor of Elections; MICHAEL A. ETIENNE, a City Clerk, and CITY OF NORTH MIAMI CANVASSING BOARD,

Defendants,

SMITH JOSEPH,

as Intervenor.
_____/

SMITH JOSEPH'S MOTION TO INTERVENE

INTERVENOR SMITH JOSEPH ("JOSEPH"), by and through the undersigned counsel, pursuant to Fla.R.Civ. 1.230, moves this Court for an Order permitting him to intervene as a party in this action, and states the following:

1. This case concerns entitlement to an elected office, specifically, the office of Mayor of North Miami.

2. Intervenor SMITH JOSEPH ("Joseph"), along with Plaintiff KEVIN BURNS ("Burns") and Defendant LUCIE TONDREAU ("Tondreau"), were candidates for Mayor in the regular North Miami Mayoral Election held on May 14, 2013. There were a total of seven (7) candidates in said election.

3. Burns finished first, with 33.15% of the vote, Tondreau finished second with 27.56% of the vote, and Joseph finished third with 23.00% of the vote. The remainder of the vote was divided among the other four (4) candidates, with none having as much as 10% of the vote.

4. As a result thereof, since no candidate received a majority of the votes cast, a Run-off Election was scheduled between Burns and Tondreau, for June 4, 2013, and was held as scheduled.

5. The results of the election, as certified by the canvassing Board on June 7, 2013, were that Tondreau received 55.71% of the vote, and was declared elected, and subsequently sworn into office.

6. Thereafter, on June 17, 2013, Burns filed a complaint to challenge the election results, and on June 19, 2013, he filed an Amended complaint, seeking Declaratory Relief and a Judgment of Ouster. Specifically, Burns challenges Tondreau's qualifications for office based on her residency.

7. Burns, in his Amended Complaint, at Paragraphs 24, 28, and 29, among others, claims that if Tondreau is disqualified, as he seeks, then he should be sworn into office as Mayor.

8. Burns, at Paragraph 25, also claims that he has named all parties needed to resolve the dispute in his Amended Complaint.

9. Burns seeks, in his prayer for relief, that he be declared elected and sworn in as Mayor.

10. Burns claims, at Paragraph 24, that if Tondreau is disqualified, her votes should be discounted, and he should therefore be declared to have received a majority of the votes cast.

11. Intervenor Joseph takes no position on the merits of the underlying election challenge or on the issue of Tondreau's residency.

12. However, Plaintiff is incorrect in the remedy he is seeking. Pursuant to Article XVI, Section 165, of the City of North Miami Charter, a candidate must receive a majority "of the votes cast" in order to be elected.

13. Notwithstanding any issue of the qualifications of any of the candidates, votes on behalf of a candidate found to have been ineligible cannot simply be discarded and ignored. They are votes cast, by qualified electors, and their legitimacy is unchallenged. No candidate can be declared elected who received only 45% of the votes cast in an election for Mayor of North Miami.

14. In accordance with established judicial precedent, if Defendant Tondreau is declared unqualified based on her residence (as to which Intervenor takes no position), then the approved remedy would be to schedule a Special Run-Off election between the two highest qualified candidates, Burns and Joseph. See Pepper v. Cobo, 785 So.2d 718 (Fla. 3rd DCA 2001), Exhibit "A" hereto; Merrill v. Dade County Canvassing Board, 300 So.2d 28 (Fla. 3rd DCA 1974), Exhibit "B" hereto. See also Order on Request for Injunctive Relief and Complaint (2010), and Final Judgment (2012), in Case No 10-48338 CA 01 (22), in the Circuit Court of the 11th Judicial Circuit, in and for Miami-Dade County, Tavernier v. Robinson, et. al., attached hereto as Composite "C".

15. Joseph is a necessary and indispensable party to the litigation, for the reasons set forth above. Failure to allow Intervenor Joseph to intervene as a party would render the Amended Complaint subject to dismissal under Rule 1.140(b)(7), Florida Rules of Civil Procedure. Intervenor Joseph has a material interest in the outcome of the litigation, and his absence from the litigation would prevent a complete resolution of the controversy

16. Based on the foregoing, Intervenor Joseph is a real party in interest in this proceeding, and should be permitted to intervene, and be declared a candidate in a Special Run-

Off Election for Mayor, in the event Plaintiff is successful in disqualifying Defendant Tondreau based on residence.

WHEREFORE, Intervenor Joseph seeks leave to intervene, and to assert rights in accordance with the foregoing, and to be declared a candidate in a Special Run-Off Election for Mayor, in the event Plaintiff is successful in disqualifying Defendant Tondreau based on residence.

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By: /s Joseph S. Geller
JOSEPH S. GELLER
Florida Bar No. 292771

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via Electronic Mail to: *jklock@rascoklock.com,* Joseph P. Klock, Jr., Esq.; gnieto@rascoklock.com, Gabriel E. Nieto, Esq; hnapoleon@rascoklock.com, Hilton Napoleon, II, Esq., *(Attorneys for Plaintiff Kevin Burns)*; Benedict Kuehne, ben.kuehne@kuehnelaw.com *(Attorney for Defendants Lucie Tondreau, Michael Etienne and City of North Miami Canvassing Board)*; orosent@miamidade.gov, Oren Rosenthal, Esq. (*Counsel for Penelope Townsley*); and Regine M. Monestime, rmonestime@northmiamifl.gov, City of North Miami, on the 12th day of July, 2013.

By: /s/Joseph S. Geller
JOSEPH S. GELLER, ESQ.

Jacqueline V. PEPPER, Appellant,

v.

Frank COBO; Lawrence King, Myriam Lehr, and David C. Leahy as members of the Miami-Dade County Canvassing Board; and David C. Leahy as Miami-Dade County Supervisor of Elections, Appellees.

No. 3D01-1186.

District Court of Appeal of Florida, Third District.

May 23, 2001.

Rehearing Denied June 4, 2001.

In action seeking declaration that election candidate was not qualified, due to his failure to establish residence within school district, the Circuit Court, Miami-Dade County, Robert P. Kaye, J., ordered that candidate's name be removed from ballot. Candidate brought emergency appeal, and the District Court of Appeal, 770 So.2d 176, reversed. On remand, the Circuit Court, Barbara S. Levenson, J., found that candidate was not qualified. Candidate appealed, and the District Court of Appeal, 770 So.2d 284, affirmed. On remand, the Circuit Court, Thomas S. Wilson, Jr., J., declared invalid a run-off election between candidate and competitor. Competitor appealed. The District Court of Appeal held that run-off election was invalid since candidate was not qualified.

Affirmed.

Cope, J., filed a dissenting opinion.

Elections ⇐227(1)

Run-off election for office of school board member was invalid, where one of two listed candidates on run-off election ballot was not a qualified candidate, and thus voters were not given a choice of the two highest qualified candidates. West's F.S.A. § 105.051(1)(b).

Daniels, Kashtan, Downs & Oramas, Coral Gables; Lawrence & Daniels and Adam H. Lawrence, Miami, for appellant.

Geller, Geller, Shienvold, Fisher & Garfinkel and Joseph Geller and Peggy Fisher, Hollywood; Wampler, Buchanan & Breen and Andrew K. Fishman, Miami; Robert A. Ginsburg, County Attorney and William Candela, Assistant County Attorney, for appellees.

Before COPE, GERSTEN and SHEVIN, JJ.

PER CURIAM.

Jacqueline Pepper appeals a final judgment declaring invalid a run-off election for the office of School Board Member, District 7, in Miami-Dade County. We affirm.

As explained in the trial court's well-reasoned final judgment:

1. On September 5, 2000, the primary election for School Board Member, District 7, was held. No candidate won a majority of the votes cast. DAVID LEAHY prepared the ballot for the District 7 runoff election naming the two highest vote getters, Demetrio Perez and JACQUELINE PEPPER, as the candidates for the run-off election to be held at the time of the November 7, 2000, general election.

2. In *Perez v. Marti*, 770 So.2d 284 (Fla. 3rd DCA[], *review denied*, 773 So.2d 56 (Fla.] 2000), the Third District Court of Appeal affirmed the Trial Court's finding that Demetrio Perez was not a qualified candidate for election for School Board Member, District 7, *ab initio*. As such, he was not qualified to

"A"

run either in the September 5, 2000, primary election or the November 7, 2000, general election for School Board Member, District 7.

3. The conduct of a nonpartisan election is governed by Florida Statutes § 105.051(1)(b) (1999). In pertinent part, it reads:

> (b) If two or more candidates, neither of whom is a write-in candidate, qualify for such an office, the names of those candidates shall be placed on the ballot at the first primary election. If any candidate for such office receives a majority of the votes cast for such office in the first primary election, the name of the candidate who receives such majority shall not appear on any other ballot unless a write-in candidate has qualified for such office. An unopposed candidate shall be deemed to have voted for himself or herself at the general election. *If no candidate for such office receives a majority of the votes cast for such office in the first primary election, the names of the two candidates receiving the highest number of votes for such office shall be placed on the general election ballot.* If more than two candidates receive an equal and highest number of votes, the name of each candidate receiving an equal and highest number of votes shall be placed on the general election ballot. In any contest in which there is a tie for second place and the candidate placing first did not receive a majority of the votes cast for such office, the name of the candidate placing first and the name of each candidate tying for second shall be placed on the general election ballot. emphasis supplied.

4. Since Demetrio Perez was not a qualified candidate for that office, the voters were not given a choice between the two highest **qualified** candidates as required by Fla. Stat. § 105.051(1)(b), and, in fact, were given no choice at all. Therefore, the November 7, 2000, election for School Board Member, District 7 was invalid.

We entirely agree. Mr. Perez has *never* been qualified from the date of filing to the present. Any other result would allow a person who has not been duly elected to serve in the position. Therefore, the trial court correctly invalidated the November 7, 2000, election for School Board Member, District 7. A new election for that position will be held on June 26, 2001, between Ms. Pepper and Mr. Cobo. Accordingly, the trial court's final judgment is hereby affirmed.[1]

GERSTEN and SHEVIN, JJ., concur.

COPE, J. (dissenting).

I would reverse the judgment because it is barred by res judicata.

In *Perez v. Marti*, 770 So.2d 284 (Fla. 3d DCA), *review denied*, 773 So.2d 56 (Fla. 2000), this court approved the disqualification of Demetrio Perez as a runoff candidate in the November 7, 2000 election for Miami Dade County School Board District 7.

On remand the trial court reiterated an earlier ruling that votes for Perez would not be counted. The trial court denied the request of appellee Frank Cobo (who had been eliminated in the first primary) for a new election. As a result the other runoff candidate, appellant Jacqueline Pepper, was declared the winner in School Board District 7.

1. This opinion shall become effective immediately notwithstanding the filing of a motion for rehearing.

Cobo promptly sought appellate review of the trial court's refusal to order a new election. He filed a motion in this court to enforce this court's mandate. In substance Cobo asked this court to tell the trial court it should order a new election, either (a) between the top two finishers (which, because of Perez' elimination, would be a new runoff between Pepper and Cobo), or (b) between all of the District 7 candidates (excluding Perez).**

Pepper filed a response in this court, which opposed Cobo's motion. Pepper asked that the general election results not be disturbed.

This court denied Cobo's motion to enforce mandate. The conclusion is inescapable that this court by its ruling has already denied Cobo's request for a special election. Cobo's later-filed election challenge is barred by the doctrine of res judicata.

1

Ricky RYLAND, Appellant,

v.

STATE of Florida, Appellee.

No. 1D00-3413.

District Court of Appeal of Florida, First District.

May 24, 2001.

An appeal from an order of the Circuit Court for Leon County. J. Lewis Hall, Jr., Senior Judge.

James C. Banks, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General, and James W. Rogers, Senior Assistant Attorney General, Tallahassee, for appellee.

PER CURIAM.

AFFIRMED. *Robinson v. State*, 373 So.2d 898 (Fla.1979); *Leonard v. State*, 760 So.2d 114 (Fla.2000).

ALLEN, VAN NORTWICK and POLSTON, JJ., concur.

2

SUGARMILL WOODS CIVIC ASSOCIATION, INC., f/k/a Cypress and Oaks Villages Association, Appellant,

v.

FLORIDA WATER SERVICES CORPORATION f/k/a Southern States Utilities, Inc., et al., Appellees.

No. 1D98-727.

District Court of Appeal of Florida, First District.

May 24, 2001.

County and villages association appealed Public Service Commission's (PSC)

** Cobo requested that

> this Court provide guidance to the trial court as to the extent of her authority to order a special election in which either the top two vote-getters from the September primary or the entire field from the September primary (excluding the unqualified candidate, Perez) are on the ballot and to instruct the trial court that this Court's opinion required the trial court to fashion a remedy different from the one which was cross-appealed by Appellee [Cobo], which remedy was not affirmed by this Court.

300 So.2d 28
District Court of Appeal of Florida, Third District.

Clark MERRILL, Petitioner,
v.

DADE COUNTY CANVASSING BOARD et al., Respondent.

No. 74-1310.Sept. 19, 1974.

Candidate for state office who finished second in primary election brought action for declaratory and injunctive relief seeking run-off election on basis of votes which were cast in primary for unqualified third candidate. The Circuit Court for Dade County, James H. Barnest, J., held that there were only two candidates in the race receiving legal votes, and candidate appealed. The District Court of Appeal held that votes for disqualified third candidate could not be thrown out in absence of showing that those who voted for disqualified third candidate knew she was disqualified but went ahead and cast their vote merely as a negative expression.

Circuit court order reversed and order entered accordingly.

West Headnotes (1)

1 **Elections**⇨Count of Votes, Returns, and Canvass

Votes cast for disqualified third candidate in primary election were improperly excluded by trial court in determining whether to certify election results for a run-off election between first and second place finishers in the absence of a showing that those who voted for such disqualified candidate knew that she had withdrawn from the race but went ahead and cast their vote anyway merely as a negative expression. West's F.S.A. §§ 99.012, 101.253.

0 Cases that cite this headnote

Attorneys and Law Firms

Melvin D. Bratton, Miami, for petitioner.
Stuart Simon, County Atty., and Alan Kan, Asst. County Atty., George C. Persandi, Coral Gables, for respondent.

Before HENDRY, HAVERFIELD and NATHAN, JJ.

Opinion

PER CURIAM.

The petitioner has filed a motion for an emergency hearing without notice and for entry of an emergency injunction. For reasons to follow and pursuant to Florida Appellate Rule 4.5(g), we have considered this case on the merits as a full appeal.

The petitioner, Clark Merrill, defendant below, was a qualified candidate for the Florida House of Representatives in District 115, in the Democratic primary election held on September 10, 1974. He received 7,948 votes in the election.

His opponent, James F. Eckhart, also a qualified candidate in the same race, who appeared through counsel and argued in opposition to the petitioner's contentions, received the highest number of votes, 10,510.

Originally, a third candidate, Mrs. Clara Oesterle, qualified as a candidate for the District 115 race, but she withdrew to run for a seat on the Dade County Commission.

However, by mistake on certain voting machines in the district, the name of Clara Oesterle also appeared on the ballot, and she received 3,805 votes in the election.

Under the provisions of Fla.Stat. s 99.012, F.S.A., it is evident that Mrs. Oesterle was not a qualified candidate for the 115th District Legislative race, since her name appeared on the same ballot as a duly qualified candidate for another office, to-wit: the county commission.

There is no dispute also that Mrs. Oesterle withdrew from the campaign in the legislative district in accordance with Fla.Stat. s 101.253, F.S.A. The statute provides that a candidate's name shall be removed from the ballot when he or she notifies the board of county commissioners in writing, and under oath, at least 30 days before the election, that he or she will not accept the office for which he or she qualified.

Following the election, the plaintiff in this case filed a complaint for a declaratory decree and injunctive relief in Circuit Court, stating that it is assigned the statutory duty to certify the election results to the Secretary of State's office, and since the petitioner, Merrill, and Eckhart were disputing the validity of the votes cast for Mrs. Oesterle, it

"B"

was in doubt as to its legal rights and obligations.

The Circuit Court, after ordering the plaintiff to determine the exact number of votes received by Mrs. Oesterle, entered the order now appealed. The court found that Eckhart and Merrill were the only two candidates in the District 115 race, that Eckhart received the majority of votes cast, and that Eckhart therefore was the winner.

It is obvious that the court's ruling necessarily threw out Mrs. Oesterle's votes, treating her vote as null and void. Had the court included her vote, Eckhart would not have received a majority of 50% Of the vote, plus one, enabling him to avoid a run-off election.

Merrill petitions to this court, contending that the court's order effectively disenfranchised those who voted for Mrs. Oesterle and deprived him of the right to face Eckhart in a run-off scheduled for October 1, 1974.

In our view, the circuit court incorrectly excluded Mrs. Oesterle's vote, and another election between Merrill and Eckhart is mandated.

It is urged in opposition to the petitioner's contentions that an election should not be set aside by the courts simply because some official has not complied with the law governing elections. Carn v. Moore, 1917, 74 Fla. 77, 76 So. 337. Where the voter has done all that is necessary to honestly and intelligently cast his vote, unless fraud, corruption or coercion has been exercised, an election should be upheld. Ibid.

We agree with these principles of law. However, we do not perceive that the relief sought in this case constitutes the abrogation or setting aside of the September 10 election in District 115. To the contrary, the precise question presented is whether or not All votes cast in the election must be counted in order to correctly ascertain if a run-off election on October 1 is required.

The holding of the Florida Supreme Court in McQuagge v. Conrad, Fla.1953, 65 So.2d 851, also has been cited as authority for discarding Mrs. Oesterle's vote in this case.

In that case, D. G. McQuagge, the longtime tax assessor of Bay County, died [illegible] shortly before the election. His name was the only name on the ballot, but there was space for write-in candidates. McQuagge came in third in the election behind two write-in candidates.

The Supreme Court held his vote to be a nullity because McQuagge's name was a 'by-word' in the county, his death was widely publicized, and the court assumed all the voters of the county knew of the death.

The decision in McQuagge is in line with the so-called 'English rule' pertaining to votes cast for a deceased, disqualified or ineligible candidate. See Tellez v. Superior Court In and For County of Pima, 104 Ariz. 169, 450 P.2d 106 (1969); State ex rel. Jackson v. County Court of McDowell Co., 152 W.Va. 795, 166 S.E.2d 554 (1969); Annot., 133 A.L.R. 319; 26 Am.Jur.2d Elections s 294. The English rule is the minority rule.

The majority rule, the 'American rule', treats the knowledge of the voters in casting their ballots for a deceased or disqualified as immaterial. In determining the results of an election as regards the other candidates who are qualified, the American rule does not treat the votes received by a deceased or disqualified candidate as void or thrown away, but as counted, even if the voters knew of the death or disqualification.

The minority rule has been criticized because it requires the court to examine the knowledge of the voters of a candidate's death or disqualification, which from a practical standpoint may be very difficult. And, by throwing out certain votes, the English rule creates certain perils that either an incompetent or undeserving candidate may be elected.

We think there is some merit to this criticism. Nevertheless, even if we were to adopt the minority view, we do not think that there is a sufficient indication that the voters in this case knew Mrs. Oesterle was either disqualified or ineligible to be elected to the 115th District seat.

At this point, it should be apparent that the recent election in Dade County produced an abundance of candidates. It is possible that the most informed voters experienced some difficulty learning of the names of all candidates, the exact race in which they were involved, and the issues in each campaign. Indeed, we take note that even the Dade County election officials experienced some problems in this regard. The ballot is vital to our democratic process and the voters rely on the correctness of the names of the candidates listed thereon.

We think that after a due consideration of the size of Dade County and the problems of disseminating information to the voters during the course of a campaign, it cannot adequately be shown that those who voted for Mrs. Oesterle knew she was disqualified, but went ahead and cast their vote for her anyway merely as a negative expression. See, State ex rel. Wolff v. Geurkind, 111 Mont. 417, 109 P.2d 1094, 133 A.L.R. 304 (1941).

Therefore, for the reasons stated and upon the authorities cited and discussed, the order appealed is reversed, and the plaintiff, the Dade County Canvassing Board, is directed to include the names of Clark Merrill and James F. Eckhart as run-off candidates on the October 1 ballot. Due to the unusual circumstances of this case, there will

be no rehearing granted.

It is so ordered.

End of Document

Citing References (4)

Treatment	Title	Date	Type	Depth	Headnote(s)
Mentioned by	**Bober v. Dijols** 990 So.2d 688, 688 , Fla.App. 1 Dist. , (NO.) We deny petitioner Bernard Issac Bober's September 18, 2008 emergency petition for writ of prohibition and/or quo warranto, with prejudice. See Pepper v. Cobo, 785 So.2d 718...	Sep. 19, 2008	Case	[redacted]	—
—	**Result of election as affected by votes cast for deceased or disqualified person, 133 A.L.R. 319** , (NO.) The present annotation considers the effect, on the result of an election for public office, of votes cast for a deceased, disqualified, or ineligible person. It includes cases...	1941	ALR	—	—
—	**Am. Jur. 2d Elections s 358, Votes cast for dead or ineligible candidate** Am. Jur. 2d Elections , (NO.) Votes cast for a deceased, disqualified, or ineligible person are ineffective to elect such person to office or to nominate him or her for office in a primary election....	2010	Other Secondary Source	—	1 So.2d
—	**FL Jur. 2d Elections s 149, Votes cast for deceased, ineligible, or disqualified candidates** FL Jur. 2d Elections , (NO.) In Florida, votes cast for a disqualified candidate in a primary election may be excluded only if it is shown that those who voted for such candidate knew that he or she was...	2010	Other Secondary Source	—	1 So.2d

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI DADE COUNTY, Florida

J. PHILLIP TAVERNIER,
Candidate, Miami Gardens
Residential Area Council
Member Seat 4,

Plaintiff,

vs.

FELICIA S. ROBINSON; LESTER SOLA,
in his official capacity as Supervisor of
Elections for Miami Dade County, Florida,
and as a member of the Canvassing Board;
CANVASSING BOARD OF MIAMI-DADE
COUNTY, Consisting of SHELLEY J. KRAVITZ,
In her official capacity as County Court Judge
and Chairperson of the Canvassing Board,
NORMA S. LINDSEY, in her official capacity
As County Court Judge and substitute member
of the Canvassing Board; and RONETTA TAYLOR,
in her official capacity as City Clerk, Miami Gardens,
Florida,

Defendants.

GENERAL JURISDICTION DIVISION
CASE NO.: 10-48338 CA 01 (22)

ORDER ON REQUEST FOR INJUNCTIVE RELIEF AND COMPLAINT

THIS MATTER came to be heard on September 21, 2010. This Court, after hearing testimony, legal argument from Counsel and reviewing all admitted evidence finds:

1. Merrill v. Dade County Canvassing Board, et. al., 300 SO.2d 28 (Fla 3rd

"C"

DCA 1974) controls the following question. Were the votes for Santarvis Brown legal or illegal votes? Section 102.168 Florida Statute, Contest of Elections, does not define the terms "legal" or "illegal."

2. The City of Miami Gardens, relying on section 102.168, Florida Statutes, for rejecting the votes for Santarvis Brown, argues that the votes cast for Mr. Brown were "illegal" votes because Mr. Brown "was never eligible to have his name on the ballot in the first place." The Court rejects this argument.

3. Next, the City of Miami Gardens argues that the City of Miami Gardens followed the directive of the Florida Department of State, Division of Elections memorandum, dated June 30, 2010, issued by Maria I. Matthews, Assistant General Counsel. The subject of the memorandum is "Notice of Candidate Withdrawal/Disqualification or Removal of Issue from Ballot (corrected)." Without citing any authority to do so, the Assistant General Counsel reaches the conclusion that, "these votes are otherwise invalid and not part of the unofficial or official election results. Moreover, these votes should not be counted for purposes of determining whether a recount or a run-off is triggered." The question then becomes: does the Executive Branch of Government have the authority to overrule the decision in Merrill? The answer is clearly no.

4. The last issue for consideration is whether or not the City of Miami Gardens followed the protocol established in the memorandum discussed above for notifying voters that Mr. Brown had either withdrawn or been disqualified. There is no issue that the specified protocol was followed in each of the polling places and each voting booth. The issue, based on the stipulated facts, is whether or not the protocol was followed for absentee ballots.

5. The City of Miami Gardens asserts that absentee ballots are a non-issue because in Florida there is not a right to vote in absentia. "It is a privilege, not a right" Anderson v. Canvassing and Election Board of Gadsden, County, Florida, 399 SO.2d 1021. However, this case deals with disqualifying absentee votes when there is an issue with the signature of the voter submitting the ballot.

6. In the instant case the parties agree to the following: "thirty five (35) absentee ballots mailed overseas were sent out without the proscribed disclaimer. Four of these ballots were returned. It is unknown who these votes were for." "Additionally some absentee ballots were mailed to local electors without the proscribed disclaimer. It is unknown how many of these ballots pertained to the Miami Gardens election, how many were returned and who these votes were for."

7. If the Secretary of State's position prevails, then the non-compliance is critical because more than the fifty percent (50%) of the votes that Felicia Robinson received were based on only eight (8) votes of the over two thousand five hundred sixteen (2,516) votes counted. It is unknown how many of these votes were based on ballots without the disclaimer.

8. The parties have already agreed that both Mr. Tavernier's and Ms. Robinson's names will appear on the November 2, 2010 ballot and that the vote results would be sealed pending ruling by this Court. This agreement eliminates the entry of the injunctive relief sought.

9. As to Count I, relying on Merrill v. Dade County, Canvassing Board, et. al., cited above, the Court finds all of the votes cast should have been counted. If this had been done, Ms. Robinson would not have received more than fifty percent (50%) of the vote and a run-off would be required.

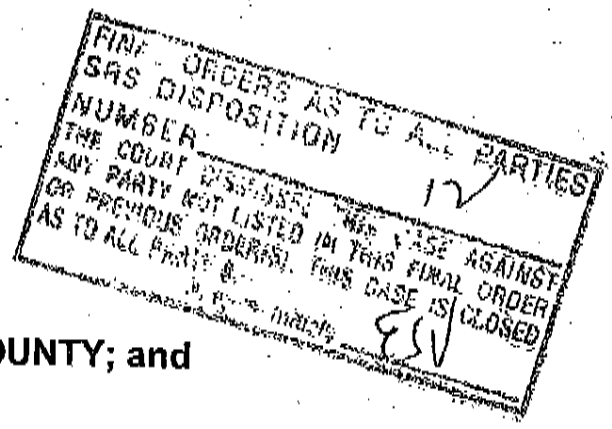
10. As to Count II, the Contest Challenge is granted in favor of the Plaintiff who is declared a run-off candidate for the November 2, 2010 election for Seat 4.

11. As to Count III, the Plaintiff is declared a run-off candidate for the November 2, 2010 election. Therefore, the votes cast on November 2, 2010 are to be counted and relied upon for determining the winner of the Seat 4 election.

DONE AND ORDERED at Miami, Miami Dade County, Florida this 4 day of October, 2010.

LAWRENCE A. SCHWARTZ
Circuit Court Judge

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MIAMI-DADE COUNTY
CIRCUIT CIVIL DIVISION
CASE NO. 10-48338-CA-01 (22)



J. PHILLIP TAVERNIER,
Plaintiff,

vs.

FELICIA S ROBINSON;
LESTER SOLA;
CANVASSING BOARD OF MIAMI-DADE COUNTY; and
RONETTA TAYLOR,
Defendants.

_____/

FINAL JUDGMENT

This action was heard on September 21, 2010, on Plaintiff's Complaint for Contest of Election and for Injunctive and Declaratory Relief to Place Name of Qualified Candidate on General Election Ballot, and Plaintiff's Motion for Emergency Injunctive and Declaratory Relief to Order Preparation of Run-Off Election Ballot for November Election Ballot. The court heard evidence and the argument of the parties, and entered its Order on Request for Injunctive Relief and Complaint on October 4, 2010. In conformance with that Order, the plaintiff's name appeared on the November 2, 2010 General Election ballot. The election was won by defendant Felicia Robinson. Accordingly, it is

ORDERED and ADJUDGED that:

1. The Order on Request for Injunctive Relief and Complaint having been implemented, the case is now moot as a result of the November 2, 2010 election.

2. Each party takes nothing by this action, and each party goes hence without day.

3. No costs or fees are assessed against any party.

DONE and ORDERED on February __, 2012.

FEB 14 2012

ELLEN SUE VENZER
Circuit Judge

ELLEN SUE VENZER
CIRCUIT COURT JUDGE

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