OA 12-2-87

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

SAMUEL C. WADHAMS, WILLIAM HADLEY,
ROBERT G. SIFF, RAMON J. SWEEZY,
HONOR H. SANBORN, MAXINE B. HOLM,
ROBERT G. McGREGOR, KAZIMIR ZIELONKA,
JANET S. WILSON, CHARLES P. LEACH, SR.
WALTER R. PIERSON and BESS KNOWLES,

Appellants,

v. Case No. 70,078

THE BOARD OF COUNTY COMMISSIONERS
OF SARASOTA COUNTY, FLORIDA,

Appellee.

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ON APPEAL FROM THE
DISTRICT COURT OF APPEAL
STATE OF FLORIDA
SECOND DISTRICT

MAIN BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF CITATIONS

MAIN BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

The Plaintiffs below and the APPELLANTS here, SAMUEL C. WADHAMS, WILLIAM HADLEY, ROBERT G. SIFF, RAMON J. SWEEZY, HONOR H. SANBORN, MAXINE B. HOLM, ROBERT G. McGREGOR, KAZIMIR ZIELONKA, JANET S. WILSON, CHARLES P. LEACH, SR., WALTER R. PIERSON and BESS C. KNOWLES, will be referred to as APPELLANTS. The Defendant below and the Appellee here, SARASOTA COUNTY, will be referred to as THE BOARD. References to the APPELLANTS' Exhibits will by (Px. #_____, R ___) and references to the BOARD'S Exhibits will be (Dx. #_____, R _____). Reference to the transcript will be (Tr. ___).

STATEMENT OF THE CASE

This is an appeal from a two to one decision of the Second District Court of Appeal rendered January 21, 1987 from an appeal from a Final Judgment rendered November 27, 1985 from the Circuit Court of the late Honorable Richard H. Bailey, Judge. (R, 528-531). The case was commenced by the APPELLANTS upon a complaint challenging an amendment to §2.11 of the Sarasota County Charter, which was submitted by the BOARD to the voters at a special election held concurrently with the general election in November, 1984. (R, 193-210, 208-216) The APPELLANTS alleged that the referendum placed on the special election ballot by the BOARD failed to comply with the essential requirements of the general law of the State of Florida which mandates that the substance of any public measure, which includes proposed amendments to the Sarasota County Charter, be summarized in an explanatory statement not exceeding 75 words in length stating the purpose or substance of the proposal. The APPELLANTS further alleged that the official ballot was misleading and confusing; and that it failed to extend to the voters an opportunity to know and to be on notice as to the precise purpose of the proposition on which the voters were to cast their ballots. The APPELLANTS finally alleged that the official ballot did not fairly, concisely or clearly advise the voters sufficiently to enable the voters to cast intelligently his or her ballot.

The BOARD answered on April 15, 1985, charging that the APPELLANTS' claim was barred by the statute of limitations, by

application of the doctrine of estoppel, by application of the doctrine of laches, and that the APPELLANTS had otherwise waived whatever complaint they were making as a result of their failure to assert their rights at an earlier date. (R, 220-221) The case was filed on January 9, 1985. (R, 193-201)

The case was tried to the Court during the week of August 19, 1985. On November 27, 1985 Judge Bailey rendered his Final Judgment setting out what he saw as the issues, his findings of fact, his conclusions of law, and his Final Order holding that the APPELLANTS were not entitled to a declaratory judgment, upholding the ballot and the election results. (R, 528-531) The Trial Court articulated four issues:

1. Is §101.161(1) Florida Statutes (1984) directory or mandatory?

2. If mandatory, was §101.161(1) substantially complied with so that the APPELLANTS may not be heard to complain?

3. If §101.161(1) is mandatory and the BOARD did not substantially comply with it, are the APPELLANTS precluded from obtaining the remedies sought because the APPELLANTS waited until after the election to formally seek the remedy because the election "cured" the defects?

4. Did the ballot give the voters fair notice of the decision which must be made by the voters?

Judge Bailey saw the issues as a combination of legal and factual issues which he answered variously. First, he concluded that §101.161(1) **F.S.** (1984) is mandatory and not directory. The Statute provides in principal part:

> Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measures shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and

> shall be styled in such a manner that a ''yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the joint resolution, constitutional revision commission proposal, constitutional convention proposal, or enabling resolution or ordinance. The substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length by which the measure is commonly referred to or spoken of. [emphasis added]

The Trial Court concluded that the BOARD failed to comply with the requirements of the foregoing statute. (id.)

The Trial Court then went on to observe that the APPELLANTS failed to bring a legal action to prevent the election in question and that they did not seek to preclude the elector from considering that portion of the special election ballot. The Trial Judge concluded that the APPELLANTS had sufficient advance notice of the proposed ballot to bring the appropriate legal action; that the electorate voted in favor of the amendment by a substantial majority; that the ballot in question was not misleading; that the APPELLANTS failed to carry the burden of establishing that a substantial number of voters were misled. The Trial Court concluded that the election result "cured" the defects about which the APPELLANTS complained.

On January 21, 1987 the Second District addressed the APPELLANTS' appeal. (See Appendix hereto) Judge Scheb, writing for a split court, said:

> We think the Trial Court correctly articulated the issues and properly applied

the law to those issues and that the Court's factual findings are supported by substantial, competent evidence.

Judge Scheb continued by observing that Appellant, Wadhams, was aware of the problem of the ballot wording before the election. Judge Scheb observed that he and the other APPELLANTS waited some two months after the election before filing suit to invalidate the election result. The Appellate Court however implicitly agreed with the APPELLANTS' argument that the ballot was confusing. It answered that point by noting that the purpose of the amendment was shown to have been widely disseminated by public hearing, advance publication and media publicity. The Court stated that "the fact that a ballot may be confusing to some does not mandate a Court to invalidate the results of an otherwise properly conducted election." [emphasis added] [sic]

Judge Grimes dissented. He observed that both the majority in the Second District Court of Appeal and the Trial Court framed the issue as "whether there was substantial compliance with the applicable statutory requirement." He noted that the Trial Court answered the question in the negative and the majority in the Appellate Court did not disagree. He concluded:

> The majority seems to be saying that even though there was no explanatory statement [required by §101.161(1)], it doesn't make any difference because the amendment received substantial publicity and passed by a comfortable margin. To apply this rational thwarts the whole intent of section 101.161(1). How can it be said with reasonable certainty that the voters would have reacted the same way if the ballot had contained an explanation of the purpose of the amendment? Since there was no

substantial compliance with the statute, the ordinance should have been stricken.

STATEMENT OF THE FACTS

The Charter Review BOARD (CRB) exists by virtue of a provision in the Sarasota County Charter for the purpose of reviewing the operation of County government, including the BOARD. (Px. 1, R, 454-455) Up until November, 1984, the CRB was free to meet when its members wished. (id.) In 1984 a political dispute arose between the members of the CRB and the BOARD. (Tr., 21-22, 32) The BOARD gave some "directions" to the CRB which were not followed, including a proposal pressed by the BOARD on the CRB to recommend the elimination of the County's popularly elected Sheriff. (Tr., 21-22) The CRB refused to recommend the amendment, leaving the task to the BOARD itself, which is authorized to place recommended changes in the Charter on the ballot for voter approval. (Tr., 22) The CRB did recommend a certain tax increase limitation amendment and a restriction on the BOARD's power to authorize bonded indebtedness without the approval of the voters. (Tr., 15; Px, 3, R, 460) The BOARD opposed both recommendations. (Tr., 15) Both passed by large majorities. (Dx., 11; R, 411-450)

In the wake of this dispute, the BOARD voted, 3-2, to recommend an amendment to the Sarasota County Charter which would prevent the CRB from meeting other than during every fourth year. (Px., 2; R, 456-459) The first time after the 1984 election the

CRB would be authorized to meet under the terms of that amendment would be in 1988. (Tr., 143; Px, 3; R, 460) The BOARD by ordinance directed the matter to be submitted to a vote of the Sarasota County electorate. (Px., 2; R, 456-459)

The BOARD ordered that the 1984 ballot, insofar as it relates to this question, appear as follows:

> Shall Article 11, Sections 2.11.A and 2.11.B of the Sarasota County Charter be amended as proposed by Sarasota County Ordinance No. 84-72 to read:
>
> "Section 2.11.A Composition, Election, and Terms of Members. There shall be a Charter Review Board which shall be 1984 be composed of Ten (10) members who shall serve without compensation and who shall be elected in the following manner: Five (5) members, one residing in each of the five County Commission Districts, shall be elected by the voters of Sarasota County at the general election to be held in 1982 and every four (4) years thereafter; five (5) members, one residing in each of the five County Commission Districts shall be elected by the voters of Sarasota County at the general election to be held in 1984 and every four (4) years thereafter. Members shall take office on the second Tuesday following the general election.
>
> "Section 2.11.B Purpose, Jurisdiction, and Meetings of the Review Board. The Charter Review Board shall hold meetings to organize, elect officers, and conduct business only during the year, and prior to that time, in which a general election is held in 1988, and each four (4) years thereafter. The Review BOARD shall review the operation of the County Government, on behalf of the citizens and recommend changes for improvement of the Charter. Such recommendations shall be subject to referendum in accordance with the provisions of section 6 herein. An affirmative vote of two-thirds (2/3) of the members elected or appointed to the Review BOARD shall be required to recommend amendments for referendum. The BOARD of County

Commissioners shall pay reasonable expenses of the Charter Review BOARD.

On the lower right-hand corner of page 11 of the voters' ballot booklet, the words ''yes" and "no" appear next to punch-outs for use by the voter. (Px., 3; R, 460) The ballot was published for the first time in the Sarasota Herald Tribune on the Sunday preceding election day. (Tr., 11) Much of that which appeared on the ballot was not in any way to be amended.[1] (Tr., 141-142)

The BOARD left it to Wallace Storey, County Attorney, to determine what should appear on the ballot. (Tr., 144) As a result, Ordinance No. 84-72 was drawn. (Px., 2; R, 456-459) Storey drafted the Ordinance so as to have the entire section 2.11 appear on the ballot, without regard to whether the provision was going to be changed or not. (Tr., 163) The BOARD failed to summarize the purpose or substance of the proposed change. (Px., 3; R, 460) A voter without a reasonably detailed understanding or description of 2.11 as it was prior to the adoption of the BOARD's recommended change, could not tell from the ballot what was being proposed or changed. (Tr., 75)

The BOARD and its Counsel made a conscience decision not to comply with §101.161 **F.S.**, instead taking the position that

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[1] The section prior to the amendment included one additional sentence in subsection 1 and one less sentence in subsection 2. Deleted from subsection 1 was the provision "meetings may be called at the discretion of the Chairman of the Charter Review BOARD or three (3) other Review BOARD members." Added to subsection 2 is the first sentence after the subtitle.

compliance with it was discretionary. (Tr., 160) In fact, after the Sarasota County Supervisor of Elections received the BOARD's directive, she brought the failure to summarize the amendment to the County Attorney's attention. (Tr., 81) The County responded with a memorandum justifying the refusal to summarize the proposed change. (Px., 5; R, 466-468; Tr,, 82)

As stated, the BOARD's purpose in proposing the change to sections 2.11.A and 2.11.B of the County Charter was to prevent the CRB from meeting until 1988 and then every four years thereafter. To accomplish this end, the BOARD included in the proposed section 2.11.B the following:

> The Charter Review BOARD shall hold meetings to organize, elect officers, and conduct business only during the year, and prior to the time, in which a general election is held in 1988 and each four (4) years thereafter. [emphasis added] (Px., 2; R, 456-459)

Voters were misled by the language utilized by the BOARD. (Tr., 52-74) Two voters appeared and testified that when they entered the ballot box, they intended to vote to permit the CRB to meet as it wished. (Tr., 54; Tr,, 67) The voters were misled by the inclusion of language which suggested the establishment of the CRB clause and the apparent authorization of a meeting one week after the election; and in the first sentence of the second section, inclusion of the phrase "and prior to the time" which was construed by these voters as authorizing the CRB to meet in 1988 as well as prior to that time. (Tr., 59; Tr,, 71)

Without specific knowledge as to the existing language of the sections which the BOARD proposed to amend, a voter could not

determine from the ballot what was to be changed. (Tr., 75) Sarasota Attorney William Namack, an adjunct Professor at the Stetson University College of Law and an author of the "Florida Lawyers Guide" published by Callaghan, lives and votes in Manatee County. He was unfamiliar with the particulars of page 11 of the 1984 Sarasota County ballot. (Tr., 37) For the first time he read the ballot item during the final hearing on August 19, 1985. He was asked to identify that which was to be changed or amended. His answer was completely wrong. (Tr., 47; Tr,, 75-77) Namack, a person schooled in legal language construction, could not ascertain the amendment's purpose from the official ballot. (Tr., 76-77) The BOARD's witness, Gertrude Block, a trained linguist, who writes for the Florida Bar News, agreed by acknowledging that she understood what was being changed only by having familiarized herself with the "former" language. (Tr., 178) She admitted that from the ballot language standing alone, she could not know what was being changed. (Tr., 179)

Appellant, Sam Wadhams, for the first time saw the ballot approximately a week before the election. (Tr., 11) He and other members of the CRB attended a public hearing conducted by the BOARD into whether the Charter should be amended. That public hearing dealt with the substance of the change. Wadhams' testimony about when he first saw the ballot and the form of the ballot was undisputed at trial, although both Counsel for the BOARD and the Second District Court seem to be under the impression that Wadhams was aware of the form of the ballot as early as

mid-September, 1984. The record does not contain any evidence to support such a conclusion.

The referendum passed by a significant majority. (Px., 11; R, 281-286) In January, 1985 the APPELLANTS commenced litigation, challenging the BOARD's failure to comply with §101.161(1) Florida Statutes.

POINT ON APPEAL

I.

THE LOWER COURTS ERRED WHEN THEY UPHELD THE ELECTION RESULT EVEN THOUGH THEY FOUND THAT THE BOARD OF COUNTY COMMISSIONERS FAILED TO COMPLY WITH THE ESSENTIAL REQUIREMENTS OF LAW BY WHICH REFERENDA ARE TO BE SUBMITTED TO THE VOTERS.

A.

THE FAILURE BY THE BOARD OF COUNTY COMMISSIONERS TO COMPLY WITH THE NOTICE AND INFORMATION REQUIREMENTS OF SECTION 101.161(1) FLORIDA STATUTES (1984) DEPRIVED THE VOTERS TO WHOM THE REFERENDA WAS SUBMITTED OF AN ESSENTIAL RIGHT TO BE ADVISED OF THE PURPOSE OF THE PROPOSED PUBLIC MEASURE.

B.

THE LOWER COURTS ERRED IN HOLDING THAT THE APPELLANTS' FAILURE TO CHALLENGE THE BALLOT BEFORE THE ELECTION WAS MORE LEGALLY SIGNIFICANT THAN THE BOARD'S INTENTIONAL FAILURE TO COMPLY WITH THE REQUIREMENTS OF §101.161(1) F.S.

C.

THE LOWER COURTS ERRED WHEN THEY HELD THAT THE ELECTION BALLOT DEFECT WAS CURED BECAUSE THE APPELLANTS WAITED UNTIL AFTER THE ELECTION TO SEEK A REMEDY.

ARGUMENT

POINT ON APPEAL

THE LOWER COURTS ERRED WHEN THEY UPHELD THE ELECTION RESULT EVEN THOUGH THE LOWER COURTS FOUND THAT THE BOARD HAD FAILED TO COMPLY WITH THE ESSENTIAL REQUIREMENTS OF LAW BY WHICH REFERENDA ARE TO BE SUBMITTED TO THE VOTERS.

A.

THE FAILURE BY THE BOARD OF COUNTY COMMISSIONERS TO COMPLY WITH THE NOTICE AND INFORMATION REQUIREMENTS OF SECTION 101.161(1) FLORIDA STATUTES (1984) DEPRIVED THE VOTERS TO WHOM THE REFERENDA WAS SUBMITTED OF AN ESSENTIAL RIGHT TO BE ADVISED OF THE PURPOSE OF THE PROPOSED PUBLIC MEASURE.

The failure by the BOARD to comply with the notice and information requirements of §101.161.(1) Florida Statutes (1984) deprived the voters to whom the referenda was submitted of an essential right to be advised of the purpose of the proposed public measure on the ballot in a short summary.

The BOARD failed to comply with §101.161(1) F.S. The Trial Court explicitly acknowledged that; the Second District Court of Appeal determined that the findings of fact and conclusions of law reached by the Trial Court were correct. *So* also did both Courts conclude that the requirements imposed by the Florida Legislature on those who would submit referenda to the voters are mandatory. Notwithstanding that finding of fact and conclusion of law, the Trial Court determined that either the failure was

insufficient to warrant setting aside the vote or the defect was "waived" as a result of the **APPELLANTS** failure to seek an injunction to prevent the election from being held.

An analysis of the section of the Statute readily discloses the legislature's intent. Whether referenda as a means of making political decisions are favored or not is not the issue; they have become a fundamentally important aspect of the political decision making process. Referenda are a fact of life. **To** insure that the electorate are fully and fairly notified of the purpose and effect of a proposed change, the legislature mandated that those submitting referenda avoid long complicated statements. The legislature directed that the referenda issue be expressed in a short, plain statement of the chief purpose of the proposed change, If the result of the referenda is to reflect accurately the attitudes or the decision of the body politic, the drafters of §101.161(1) knew that the issue to be decided had to be expressed so as to permit the voter, in the pressurized circumstances of the voting booth, to make a straight forward policy decision. When a referendum ballot departs from these requirements, the voter cannot possibly be expected to make decisions which reflect accurately his or her disposition on that issue.

Failure to comply with the requirement, necessarily raises questions about the results obtained. The question would linger forever, did the vote result accurately reflect the will of the electorate? The legislature, by adopting §101.161(1), solved the

problem by making sure that a voter could simply answer yes or no to the change sought to be made.

The statutory requirement embodies the legislature's commitment to protect the integrity of the referendum and to maximize the likelihood that neither errors of commission nor omission will occur.

If anything, this case is more about preserving and protecting the integrity of the system of participatory democracy as reflected by the means of referenda, than it is about whether or not Sarasota County CRB can meet any time during the four years between general presidential elections. The APPELLANTS respectfully suggest that the terms of §101.161(1) represent the bulwark to maximizing the certainty of the result and the fairness of the referenda system. The Florida Legislature in adopting this section was self-evidently concerned about referenda which are drawn with language more common to legal documents that to everyday communication. The requirement that the substance of the amendment or other public measure be expressed in a short statement explaining the chief purpose of the measure reflects an important commitment to insuring that the policy decision placed before the electorate for a decision will be understandable to the average voter.

The principle involved is not simply academic. What the Legislature was trying to guarantee is precisely what the BOARD was trying to avoid. The BOARD addressed the questions of $101.161 prior to the time of the special election. County election supervisor, Koester, brought the issue to the County

Attorney's attention. He responded that the BOARD could choose whether it wished to comply with S101.161. When it came time to place the CRB issue on the ballot, the BOARD decided it would not summarize the proposal, although the drafting of a summary would have been simple.

What was the result of the failure? The ballot was unnecessarily long, did not in any way identify the proposed change, included language which a reasonable person could have, and did, misinterpret. While the Trial Court concluded that the APPELLANTS failed to prove that the election result was distorted as a result of the BOARD's misconduct, two voters testified to the contrary. They were the only persons to testify on the point.

The Lower Courts concluded that the ballot as submitted was not misleading, although the Second District implicitly acknowledged that the ballot was confusing. The determination that the ballot was not misleading is neither supported by the Record or close analysis. Two voters cast their ballot on election day who, when they entered the voting booth, intended to vote "for" the CRB. Both concluded, after a review of the ballot, that the "yes" vote was a manifestation of that position. Neither was familiar with the ballot before they voted. However, they knew how they wanted to vote.

To state that the ballot did not assist them to that end is an understatement. To the contrary, by including provisions on the ballot which were to remain unchanged and by including the phrase "prior to the time" the BOARD confused these two voters and by inference just about any voter not intimately familiar

with the section 2.11 as it was then written. At a very minimum, the result is suspect, owing to this failure on the part of the BOARD.

The first sentence of that which appeared on the ballot other than the introduction recites that there will be a CRB; that it will be composed of ten members, five of whom will be elected at each general election. The second sentence which appeared in the ballot says that the members shall take office on the second Tuesday following the general election. Anyone wanting to vote "for" the CRB at the November special election would at this point be inclined to believe that the a "yes" would carry out that intent. The second sentence virtually requires such a conclusion. If the members of the CRB are to take office on the second Tuesday following the general election, that necessarily implies meeting, swearing in, and conducting business from one week following the general election.[2]

But, those who put the item on the ballot did not intend for that language or the inferences from that language to be controlling. Had the BOARD complied with the Statute, the ballot would have necessarily informed the voters what the BOARD wanted to do; the voters would have been better able to make a precise decision. What that decision would have been is speculative given the BOARD's noncompliance.

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[2]Ironically, some of the persons elected in 1984 who were to serve two year terms never did get sworn in and never were able to attend a meeting, because at the same election that these

(Footnote Continued)

The BOARD in the "new" section added a sentence to sub-paragraph B of section 2.11. That sentence provides:

> The Charter Review BOARD shall hold meetings to organize, elect officers, and conduct business only during the year, and prior to the time, in which a general election is held in 1988 and each four (4) years thereafter.

The Trial Court concluded that this was not misleading. The APPELLANTS do not and have never simply argued that a lawyer reasonably well versed in legal construction of charter, statutory or ordinance provisions or even a linguist could not have determined what the phrase "prior to the time" means and what the drafter intended. That point is however, arguable. For two voters who testified, both stated that they concluded that the inclusion of that phrase "prior to the time" meant that the CRB could hold meetings during a general election year and prior to that time. Under the circumstances, their conclusions were not unreasonable. They certainly were average voters; the only ones to testify.

The record does not include any other evidence on this point. The BOARD did not bring forward anyone comparable. Whether the language utilized is misleading to a lawyer or not, the resulting confusion for the voters who testified emphasizes the importance of compliance with section 101.161. The Legislature specifically mandated that the voters should not be

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(Footnote Continued)
people were being elected to their CRB office, the BOARD's amendment was prohibiting it from meeting and conducting any business.

put into such a position where the voter would have to guess what policy issue he or she was being called upon to decide. It requires that a voter not be put into the untenable position of having to construe and interpret legal language.

Had the BOARD summarized the proposed amendment as the statute requires, the summary of the chief purpose of the proposal would have read something like this:

> Shall the Sarasota County Charter be amended to prohibit the Sarasota County Charter Review Board from meeting, other than during the year 1988 and during each fourth (4th) year thereafter?

The BOARD, by proceeding in the fashion it did, failed completely to explain itself or its chief purpose. As a result, only those persons with a knowledge of the Charter section as it was and those familiar with the one sentence deletion in subparagraph A and the one sentence addition in subparagraph B could reasonably discern what precisely the BOARD intended to accomplish. This point was made graphically clear when Sarasota Attorney William Namack testified. Namack, an adjunct professor at Stetson College of Law, lives and votes in Manatee County, first read the special referendum ballot during the Court proceeding. He was asked what he understood was to be changed. While he answered the question, his answer was completely wrong. In other words, a practicing lawyer, who teaches law, who writes law books, was unable to respond accurately to the very question which the Legislature mandates the ballot clearly answer. If such a person as William Namack is unable to accurately assess the chief purpose for which the referenda item is included on the ballot,

then it stands to reason, or at a very minimum a reasonable inference therefrom is that voters could not reasonably be expected to do better. Namack's testimony illustrates the importance of §101.161(1) and the dangers associated with non-compliance.

The BOARD brought to the Court a talented, articulate witness in the person of Gertrude Block, who is associated with the University of Florida Law School as a linguist, and who writes a column for the Florida Bar News on language. The BOARD-intended effect of her testimony cannot be disputed: Mrs. Block testified that she did not have any trouble determining what the language which appeared on the ballot meant. The testimony however, somewhat begs the question. During cross-examination, Mrs. Block was asked whether, as part of her preparation for giving testimony, she familiarized herself with the section before it was "amended." She initially responded in the negative. When asked how she knew what was to be changed, she then realized that the only way she could answer that question is by comparing the "before" with the "after." She acknoweldged that she familiarized herself with the section as originally written. The point which necessarily must be drawn from the testimony of Professors Namack and Block is that without having the two texts to compare, you cannot reasonably know what was being changed. That the Legislature in (s101.161 mandated just the opposite, is as instructive as it is self-evident.

This Court has held that the failure to comply with the requirements of (s101.161 constitutes a fatal defect. This Court

has minimumly required that those that conduct elections comply substantially with the State election laws. The Second District concluded that the BOARD in submitting the Charter proposal to the voters failed to comply. In so doing, it affirmed the Trial Court. But also in so doing, those two lower courts ignored this Court's ruling in Askew v. Firestone, 421 So2d 151 (Fla., 1982) that §101.161 must be followed and that the failure to do so constitutes a fatal defect. See also, Save Our County Coalition v. Wittenstein, 351 So2d 1112 (Fla., 4 DCA 1977)

B.

THE LOWER COURTS ERRED IN HOLDING THAT APPELLANTS' FAILURE TO CHALLENGE THE BALLOT BEFORE THE ELECTION WAS MORE LEGALLY SIGNIFICANT THAT THE BOARD'S INTENTIONAL FAILURE TO COMPLY WITH THE REQUIREMENTS OF §101.161(1) F.S.

In spite of the fact that both lower courts concluded that the BOARD failed to comply with (5101.161, each upheld the election, finding instead that the APPELLANTS omission to challenge the election ballot prior to the election was more legally significant than the BOARD's error of commission. It is exceedingly difficult to understand either the Trial Court's or the District Court's prioritization of the two "errors." Insofar as rules and regulations governing referenda are concerned, there is no more important a requirement than that which is set out in §101.161(1). What appears on the ballot is the primary means by

which the voting public is notified of that which is to be decided. Until now, the Courts have held that newspaper publicity cannot and should not be considered. The reason for that is clear, each voter is entitled to sufficient notice, which comes on the face of the ballot. Not all people read the newspaper. Moreover, not all newspapers are completely accurate, impartial, or even fair in publicizing material about issues in upcoming elections. Newspapers, like most others, frequently have points to prove which effect or color, at least to some degree, their reportage.

The failure to notify the electorate properly or adequately via the ballot constitutes an omission of a fundamental nature. The decision made by the voters when acting upon a misleading notice, or a garbled notice, cannot be reasonably endorsed without simply disregarding the potential consequences of a failure to notify the voters properly. By the Legislature's standards, the notice was misleading and garbled. To the extent that the notice is defective, as it clearly was here, then the result is necessarily suspect.

Notice is fundamental to both procedural and substitive due process. The importance of the BOARD's error of commission should not be minimized or rewarded. That they knew of the requirement is admitted; that they chose to view the requirement as discretionary implies their purpose: to avoid summarizing. Why? That the BOARD's motivation to limit the CRB arose out of a political dispute simply aggravates an otherwise aggravating circumstance. The ballot format became an instrument of a

political dispute, which trivilializes the fundamental importance of ballot integrity. The Legislature mandated the essential requirements for a fair ballot when it ordered that any public measure being submitted to the voters shall be explained in a short statement. How can one reasonably defend the integrity of the voters collective judgment when the single most important requirement is disregarded?

What the Trial and Appellate Courts did was to arrive at a legal conclusion which is and remains internally inconsistent. On the one hand, each determine that the BOARD failed to properly notify the electorate as to the chief purpose of the measure, while on the other hand, finding that the result cured the defects.

The Lower Courts reached this conclusion only by concluding that the APPELLANTS' failure to attack the ballot in court prior to the election deserved more weight and consideration than the BOARD's disregard of the Legislature's mandate. The Trial Court correctly found that the APPELLANTS' failed to make a legal challenge to the ballot with an object to preclude the electorate from considering the referendum ballot on November 6. The Trial Court unreasonably concluded that the APPELLANTS had sufficient advance notice of the proposed ballot to bring an appropriate legal challenge, which challenge would not have had any chance of realistically affecting the vote.

Appellant, Samuel Wadhams, testified during the APPELLANTS' case in chief that he first saw the ballot approximately one week prior to the election date. The ballot was first published in

local newspapers on the Sunday immediately prior to election Tuesday. The BOARD adduced no rebuttal to Wadhams' clear testimony that the first time that any one of the APPELLANTS saw the wording on the ballot was approximately seven days before the election. While Wadhams knew what the BOARD was proposing, he did not know the way the BOARD was proposing to carry out its recommendation or the manner in which the BOARD was going to submit the question to the electorate. The BOARD has, however, attempted to obfuscate this indisputable, uncontradicted fact by pointing out that Wadhams, and other APPELLANTS, appeared at a public hearing in September whereat the BOARD considered the merits and substance of their proposal. The BOARD did not consider the form of the ballot, as Commissioner Anderson acknowledged that he simply moved for the adoption of the proposal which, when passed, was thereafter referred the matter to the County Attorney who drafted the Ordinance, drafted the amendment and determined the manner in which it would appear on the ballot. The Chairman thereafter signed the ordinance. Under these facts, it is and was unreasonable for the Trial Court to impose upon the APPELLANTS the legal duty to attempt to stop an election on account of a ballot defect when that party first becomes aware of the form of the ballot approximately one week prior to the election date. The BOARD produced no evidence that any of the APPELLANTS knowingly delayed bringing the challenge. Nor did it produce any evidence that the APPELLANTS could have reasonably expected that if they had brought the legal challenge within the days preceding the election, they could have, under any

circumstances, had any significant chance of having it adjudicated within that short period. Cases simply cannot be filed and adjudicated within five or six business days. Moreover, the BOARD produced no evidence that the APPELLANTS' delay to the second week in January resulted in any prejudice to anyone.

This cannot be said of the BOARD. The BOARD was familiar with the legal requirements of summarization. The County Attorney's office drew two ordinances for consideration by the BOARD, ordering submittal of the two CRB recommended Charter Amendments. The CRB proposals appear at S12 of the special ballot. When the County Attorney's office first drafted the Ordinances, via which the BOARD ordered the two CRB recommended charter amendments to be put to the voters, it provided for printing a complete text of the proposed amendments. (Px, **4**; R, **461-468)** The Attorney for the CRB (the undersigned) challenged the appropriateness of submitting the entire text to the ballot without any attempt to comply with the requirements of §101.161(1). As a result, the BOARD modified those two proposals by substituting summaries of the CRB proposals in lieu of the complete text of the amendments. In other words, the BOARD was fully apprised of the legal requirements. County Attorney, Wallace Storey, made the changes for the two CRB proposals, but failed to make a summary for the BOARD's proposal. The reason seems obvious. The BOARD did not want to take the political chance of having such a clear-cut question submitted to the voters.

What is the point? The point is that it is unreasonable to conclude that the APPELLANTS specifically, and the voters in general, should be penalized because Wadhams did not within seven days prior to the election seek to, by Court action, prevent the election from going forward. It is ludicrous to suggest he would have had time to complete the challenge, even if he tried. Look how long this case has taken to work its way throught the Courts. Nothing of inportance is gained requiring hasty action. To suggest that Wadhams could have gotten the review completed in time is to ignore the realities of heavy court dockets and the time it takes to get before a court.

Under the circumstances, and if we assume that both the APPELLANTS and the BOARD failed to do something, the BOARD's failure was far more egregious. Confidence in the political system certainly has been higher in the past. Noncompliance with election laws such as we have here does not help. The Courts, being the least political of the three branches of a political system which intentionally devides public authority, should and must stand as a bulwark to defending the rules of the political system. To impose upon the APPELLANTS the herculean task of stopping an election within seven days defies reality. To impose upon the APPELLANTS that duty is to at once excuse the BOARD's more significant impropriety, while de facto amending the clear requirements imposed by the Legislature on those who would submit referenda to the voters.

C.

THE LOWER COURTS ERRED WHEN THEY HELD THAT THE ELECTION BALLOT DEFECT WAS CURED BECAUSE THE APPELLANTS WAITED UNTIL AFTER THE ELECTION TO SEEK A REMEDY.

The BOARD argued and the Trial Court accepted the proposition that the holding of the election "cured" the defects about which the APPELLANTS complain. While the Appellate Court did not directly address this point, it in general stated that all of the Trial Court's factual findings and legal conclusions were appropriate.

The law requires that an election ballot be fair and advise the voters sufficiently to enable that voter to intelligently cast his or her ballot. Hill v. Milander, 72 So2d 796 (Fla., 1954) The ballot must give the voter fair notice of the decision he must make. Miami Dolphins, Ltd., v. Metropolitan Dade County, 394 So2d 981 (Fla., 1981) Not only has this Court previously held that the substance of a proposed amendment must be in clear and unambiguous language in the form of a summary, the failure to comply with that requirement constitutes a fatal ballot defect. Askew, supra. This view was reaffirmed in Rowe v. Pinellas Sports Authority, 461 So2d 71 (Fla., 1984) wherein this Court upheld a summary as sufficient, stating that the statute does not require that each and every provision be included in the summary. The Supreme Court sustained the ballot in that case because it found that the summary fairly apprised the voters of the

referendum's chief purpose. The APPELLANTS have argued previously in point I(A) that this ballot did not fairly apprise the voters of the referendum's chief purpose.

The Trial Court's conclusion that the defect would be cured by the election result, disregards the essential relationship between full and fair notice which the voter did not get, and the result. The curative argument fails to attribute any significance whatsoever to the fact that the election result must be considered suspect when the BOARD's purpose was camouflaged to the degree that it was in this case.

The Courts in Florida have rejected the proposition that the holding of the election will, ipso facto, cure notice defects. This Court affirmed the invalidation of a bond election in Special Tax School District No. 1 of Duval County v. State, 123 So2d 361 (1960) when the County's election authorities failed to publish notice requiring the re-registration of voters once each week for four consecutive weeks. The election result was voided when the Court concluded that the authorities had failed to comply substantially with the statutory notice requirement for voter re-registration. In another case, the First District Court of Appeal set aside an election result when the authorities had failed to comply with the requirement that notice be published once a week for four consecutive weeks prior to the election. State ex rel Pope v. Shields, 140 So2d 144 (Fla., 1 DCA 1962) In Shields, the notice had been published three of the four required times. It is not significant that Shields is no longer of precedential value for the proposition that the failure to

publish one of four notices constitutes a fatal defect. See, State v. Sarasota County, 155 So2d 543 (Fla., 1963) The Supreme Court now holds that publishing notice three out of four times constitutes substantial compliance with the applicable notice requirements. That is not the point. Shields, and the Special Tax School District No. 1 of Duval County, illustrate that the Courts, while being reluctant to invalidate elections after the fact, will do so when the Courts find that the election authorities have failed to substantially comply with the requirements of the State Election Laws.

This Court also addressed an appeal in Frink v. State ex rel Turk, 35 So2d 10 (Fla., 1948) From a Final Judgment wherein 698 absentee ballots cast in a municipal election were held void, because the prerequisite affidavit was not made according to the statute. The affidavit that was provided to the would-be absentee voters was, the Court concluded, clearly defective in that the elector swore that he expected to be absent from the City, whereas the statute required that he state his expectation to be absent from the County. The Court, finding that the language of the statute was clear and mandatory, determined that the failure to comply with it rendered the 698 ballots of no effect. The voiding of the absentee ballots changed the result of the election.

In each of the foregoing three cases, the error committed was less significant that the failure of the BOARD to explain the chief purpose of its proposal to the voters. In this case, the omission goes to the very integrity of the ballot. In the cases

cited, the defect was technical, although sufficient at the time to warrant a setting aside of the election result.

In 1974, five unsuccessful candidates in Pinellas County brought an action against an election supervisor seeking to invalidate the results in five contested races. The Circuit Court voided the election and the Second District Court reversed. The Appellate Court held that the paramount purpose of an election is to provide the people with the means and opportunity to express a full, free and open choice over the contested matters which constitute the subject of the election. The "confusion" caused by the fact that all candidates for a particular office in a primary election were not located on the same line of the voting machine did not amount to an impediment to the voters free choice, where all but one of the voters who testified were able within a reasonable time and with a reasonable effort to locate the candidate of their choice. Nelson v. Robinson, 301 So2d 508 (Fla., 2 DCA 1974) Importantly, the Second District Court in that decision did not hold that the holding of the election cured the defect. Nor did it hold that the failure of the voters to prevent the holding of the election cured the defect. It held only that the defect was not sufficient as to constitute an impediment to the voter's free choice.

The case sub judice differs significantly from the facts present in Nelson. There, the Court concluded that the ballot was not confusing, relying upon the evidentiary record to support its conclusion. Here, the facts indicate just the opposite. All

who testified about the ballot agreed that the ballot was either misleading or failed to inform them what changes were being contemplated. This includes the one witness, Mrs. Block, that the BOARD brought forward to testify as to the clarity of the language utilized. The failure on the part of the BOARD to comply with the notice requirement of the Florida Statutes, the inclusion extraneous language on the ballot, and the inclusion of the phrase "and prior to the time" constitutes the kind of extraordinary circumstances which necessarily operated to deprive the Sarasota County voter of a full and efficacious notice. As a result, no confidence can be placed in the ballot. No one can confidently state that the result accurately reflects the will of the people. As such, it cannot be reasonably asserted that the result cures the defect, when the result itself is suspect.

CONCLUSION

The failure to comply with §101.161(1) Florida Statutes (1984) renders the notice given by the BOARD to the voters inadequate. Not having had the kind of notice the Florida Legislature mandated, neither the Trial Court nor the Appellate Court could reasonably conclude that the election result was anything other than suspect. The notice provided the voters and the ballot form involve fundamental matters. To disregard the BOARD's failure to comply with these fundamental requirements unreasonably and unnecessarily rewards the BOARD for its intentional violation of the law. The election result should be set aside. This Court should reverse the Appellate Court's holding,

remanding the matter with instructions that the amendment should be declared null and void, and that the sections of the Sarasota Charter are as they were prior to November 6, 1984 and will continue to be effective sections, until such time as an election is held with a ballot which adequately and lawfully apprises the voter of the proposal that the BOARD recommends if the proposal passes.

Respectfully submitted,

Daniel Joy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by mail, to RICHARD E. NELSON, ESQUIRE, 2070 Ringling Blvd., Sarasota, Florida 33577 this 3rd day of August, 1987.

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APPENDIX