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.

_____/

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

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER

REPLY TO THE BOARD'S STATEMENT OF THE FACTS

The major objection made by the BOARD to the APPELLANTS' Statement of the Facts involves what Wadhams knew and when he knew it. Wadhams testified at the trial that he first saw the ballot approximately one week before the election. (Tr.; p. 23, R. 10-18) That testimony went unchallenged and therefore unrefuted. The BOARD seeks to offuscate the issue by confusing the matters of ballot form and proposed substance. The August 22 published notice informs the reader only as to the issue set for public hearing on September 11 (DX-2, R-402). The public hearing attended by APPELLANTS Wadhams, Sweezy, McGregor and Holm concerned itself with the substance of the proposal, not the ballot. Commissioner Anderson admitted that the BOARD did not consider the ballot form at that or any other public hearing. (Tr., 144) One attending the hearing would not have been alerted to what the BOARD did until the ballot was seen.

Moreover, the BOARD flagrantly distorts the record when it contends that Wadhams testified [at the trial] as to his familiarity with the form as early as September. (DX 12) What the BOARD did was to extract out of context a statement Wadhams made at a discovery deposition which was contradicted at a minimum or clarified at the trial when he was asked whether he had seen the form of the ballot prior to one week before the election. (Tr. 117) The text of the deposition on which the BOARD would have this Court rely is that the Charter Review Board and various members who are APPELLANTS here, met in September and considered the form of the ballot, when the fact is they met to

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consider the substance of the proposal. What is most unfortunate about this is that the BOARD intentionally created an ambiguity by its chosen trial tactics by choosing not to ask Wadhams about this at trial.

Wadhams testified that he first saw the form of the ballot one week prior to the election. (Tr,; p. 23, R. 10-18) The County did not cross examine him on the point or confront him with the deposition statement wherein Wadhams uses the word "form." Moreover, the deposition portion was anything but clear, and when taken in light of the unqualified statement at trial, only one conclusion can be drawn: that Wadhams did not see the form of the ballot until one week prior to the election.

The BOARD's claim that the APPELLANTS seek to disregard the evidence before the Trial Court is unwarranted. The APPELLANTS contend and the evidence shows that the ballot as it would appear was published for the first time in the Sarasota Herald Tribune on the Sunday preceding election day. (PX 3, R, 460; Tr. 11) The issue involves when the APPELLANTS first saw it. What the BOARD relies upon to contradict the APPELLANTS is (DX-6; R, 409), which includes a published notice of the special election. The BOARD seeks to contradict the APPELLANTS' assertion as to the ballot, relying upon a notice of special election which is not the same as the ballot.

While it is unclear exactly why the BOARD seeks to make the point, it claims that the undersigned, as attorney for the CRB, acquiesced in the ballot form. The BOARD relies upon Wallace Storey's use of the word "acquiesce" to support its claim. The

unrebutted facts show otherwise. The CRB voted to submit two proposals to the voters. The BOARD must place them on the ballot by ordinance. Mr. Storey drafted the ordinances which the BOARD were to adopt to put the items on the ballot. After the ordinances were drawn, the Supervisor of Elections noted the non-compliance with S101.161. The ordinances were re-done at my insistence, which Mr. Storey acknowledged in Court. (Tr. 161). Once the requirement was brought to Mr. Storey's attention and the changes made on two of the pending proposals, one should be able to assume that the change would be made for all refenenda. Why did the BOARD leave the proposed referendum the way it was, without a summary? Because the BOARD, at least in the person of its staff attorney, decided the question should go to the voters without the essential summary. The only reasonable inference from those facts is that the BOARD wanted it that way.

For what it is worth, the BOARD's characterization of Mrs. Fitshugh's and Mrs. Webb's testimony is misleading at best. Both came to Court to testify and did testify that each was misled by the ballot. The BOARD's claim to the contrary notwithstanding, neither witness relented from their testimony about their confusion and about them having been misled by the ballot <u>when they voted</u>. (Tr. 52-74)

In its final point, the BOARD chooses to emphasize that Professor Namack understood that the Charter Review Board portion of the County Charter was to be amended. That he was unable to ascertain the substance of the amendment appears to be of little interest to the BOARD.

POINTS 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 REFERENDUM 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 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 SECTION 101.161(1) FLORIDA STATUTES.

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.

REPLY ARGUMENT

The BOARD's argument simply disregards the single most important fact about this whole controversy. The BOARD failed to comply with the clear requirements of §101.161(1) Florida Statutes which mandates the means by which a referendum question is to be put to the voters. By its non-response, the BOARD now apparently admits non-compliance with a mandatory statute, but apparently hopes to overwhelm the matter of the admission by denigrating the APPELLANTS as being little more than self-serving advocates, merely "seeking to maintain [their] prerogatives...," ignoring the fact that more than one-half of the APPELLANTS are not members of the Charter Review Board.

Notwithstanding the self-evidence of the non-compliance, about which the two Lower Courts were clear, the BOARD, rather than simply admitting the point and limiting its arguments to the significance of the non-compliance, chooses to argue at page 17 of its Answer Brief that non-compliance is actually compliance when the entire section of the Charter which the BOARD sought to amend, including parts not to be changed, is printed on the ballot.

Non-compliance is non-compliance, which in this case brings the decisive issue into focus: of what significance is the non-compliance? The two Lower Courts which addressed the issue concluded that the non-compliance was legally insignificant,

thereby implicitly contradicting each's conclusion that the statute is mandatory in nature. The point which distinguishes the Court's opinion from Judge Grimes' dissent in the Second District is that the latter concluded that non-compliance was significant.

In the end, the BOARD faces the issue of significance by arguing that the non-compliance is insignificant. In so arguing, the BOARD never addresses itself to the role of the Florida Legislature in setting the terms and conditions, if you will, for referenda. It assumes that avoidance of mandatory standards can be insignificant. Not only is the argument not persuasive in this case, the conclusion and the reasoning to that conclusion undermines the rule of law. In effect, the BOARD asks this Court to join it in proclaiming "so what!". Not a compelling argument in light of the fact that the Florida Legislature and this Court have spoken clearly as to the nature and requirements of §101.161(1) F.S.

The BOARD seeks to further its claim of insignificance by arguing that the ballot was not misleading. First, the Legislature has already defined what is not misleading in this context. The BOARD failed to satisfy the statutory requirement which is what the Legislature determined was how "not misleading" should be defined when it comes to referenda. Therefore, in terms of Florida Statutory Law, the ballot was misleading <u>because</u> it failed to comply with the statutory requirements. Second, the BOARD argues that the ballot was not misleading, based upon the testimony. The BOARD supports this argument only through

tortuous distortion of Mrs. Fitshugh's testimony, and by selective omission and recharacterization of both Professors Namack's and Block's testimony. The BOARD states flatly at page 20 of its Answer Brief that the witness (Fitshugh) understood the ballot. Not only did Mrs. Fitshugh not admit to any such thing, the testimony to which the BOARD refers this Court clearly indicates that she did not understand the ballot when she voted. Mrs. Fitshugh testified she was confused by the ballot. Mrs. Fitshugh testified she knew what she wanted to do on the CRB issue, but after reading the ballot in the voting booth, she voted in a manner which was at odds with her original intent. Why? Because the ballot did not include a summary of the chief purpose. Only after the County Attorney escorted Mrs. Fitzhugh through a phrase by phrase explanation did she acknowledge that she now understood what the BOARD was up to. But, the County Attorney was not available to the voters in the election booth to remedy the problems created by the BOARD's non-compliance.

Third, the BOARD argues the ballot was not misleading because the ballot indicates that some change was going to be made and that indication should be sufficient to inform voters on whether they wish to retain the status quo or change things. This is probably the BOARD's best argument, but ignores the offsetting inclusion of portions on the ballot which were not to be changed. No one could reasonably and confidently conclude that he or she knew what was being done. The first sentence on the ballot suggests the establishment of the CRB which could have been easily construed as continuing the CRB. The BOARD's

argument also disregards the nature of the voting booth and the conditions under which a ballot decision is made and a vote cast. These factors merely emphasize the importance of the use of a summary to explain the chief purpose.

The APPELLANTS would respectfully suggest that the matter of whether or not the ballot was misleading is a mixed question of law and fact. It is impractical to the point of absurdity that the challengers should be required to bring forth a statistically significant voting sample to "prove" the misleading nature of the ballot, when the BOARD submitting the referendum to the voters does not comply with §101.161(1) F.S.. The question cannot reasonably be settled by a head count. The witnesses brought forth by the BOARD were intended to be illustrative only. What was illustrated is that some confusion reigned both in the ballot box and in the courtroom when a voter, one of whom teaches law, encountered the ballot form for the first time. The APPELLANTS would respectfully suggest that the Court must determine whether the ballot was misleading in light of its reading of the ballot, the facts available and the applicable legal standards.

The point being, given the BOARD's departure from compliance with §101.161(1) F.S. plus the voter confusion, plus a textural analysis of that which appeared on the ballot, the APPELLANTS believe that all things considered the conclusion must be that the ballot was misleading. Interestingly, the BOARD dropped its previous claim that a reading of the ballot leads one inextricably to a clear cut understanding of what was being done in terms of the change to be made. Even a rather deliberative

analysis leaves one pondering just what "and prior to that time'' is supposed to mean. We know at least two voters construed that as a crucial phrase which operated to give the CRB the right to meet prior to 1988.

In light of all the facts and circumstances, the non-compliance with §101.161(1) F.S. must be considered legally significant. The rationale for the statute emphasizes its importance to protecting the integrity of the referenda system and its result. The Legislature's objective was to insure that those placing policy questions on the ballot do so in such a manner as to maximize the reliability of the result and the individual voter's right to have the issue which he is called upon to decide stated forthrightly.

The BOARD also fails to address in any way this Court's previous decision in Askew v. Firestone, 421 So2d 151 (Fla., 1982) to the effect that §101.161(1) must be followed and that failure to do so constitutes a fatal defect. The BOARD would have this Court excuse their failure to comply with the substantive requirements of the statute because the APPELLANTS failed to challenge the ballot prior to the election. It is ad hominem to argue that a fatal defect is no longer a fatal defect because someone else failed to do something. The points made by this Court in that opinion are as important now as they were then. In addition, there is something perverse with the argument that a governmental body's failure to follow the law can and should be excused because laymen failed to act more quickly to

attack the error. A fatal defect is a fatal defect and should be regarded as such.

The BOARD meets this argument indirectly by claiming that this Court should go back to a time preceding the adoption of the Statute at issue to conclude that the election cures defects, even fatal defects. Even if one assumes that the curative argument still represents sound, valid and existing law, the cases to which the BOARD refers this Court can be distinguished. None involves a departure from the law as significant as not coming close to meeting the important requirements set out by the Legislature for submitting a referendum to the voters. Moreover, the curative argument has been rejected, at least inferentially, by a line of cases wherein this Court rejects the curative argument. Special Tax School District #1 of Duval County v. State, 123 So2d 361 (Fla., 1960)

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 the kind of notice and information 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 involved fundamental matters. To disregard the BOARD's failure to comply with these requirements unreasonably and unnecessarily rewards the BOARD for its intentional avoidance of the legal requirements. The election result

should be set aside. The 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 County 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.

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 34236 and RICHARD L. SMITH, ESQUIRE, 2070 Ringling Blvd, Sarasota, Florida 34236 this 21st day of September, 1987.

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