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IN THE
SUPREME COURT OF FLORIDA

IN RE: The Recall of
BARNEY KORETSKY, as Mayor of
Pembroke Park, Florida.

CASE NO. 74,280

SARAH PHELPS, Chairwoman of the
RECALL COMMITTEE, THE TOWN OF
PEMBROKE PARK,

Petitioner/Appellee,

v.

BARNEY KORETSKY,

Respondent/Appellant.



ON DISCRETIONARY REVIEW FROM THE FOURTH
DISTRICT COURT OF APPEAL - CASE NO. 89-0488

# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## INTRODUCTION

This is the Initial Brief of Petitioner, SARAH PHELPS, as Chairwoman of the RECALL COMMITTEE, THE TOWN OF PEMBROKE PARK, who was Petitioner in the Circuit Court and Appellee in the District Court. She will be referred to throughout this Brief as "Petitioner". BARNEY KORETSKY was Respondent in the Circuit Court and Appellant in the District Court. He will be referred to throughout this Brief as "Respondent".

References to the appendix will be by the letter "A" and the page number.

## STATEMENT OF THE CASE AND FACTS

This appeal arises from an order of the Fourth District Court of Appeal granting an application for a constitutional stay writ, thereby staying a recall election scheduled by the Circuit Court pursuant to S100.361, Florida Statutes (1987), and reversing the order setting that election. (A. 3,4). In granting the constitutional stay writ and reversing the order on appeal, the Fourth District Court certified the following question as being of great public importance, having answered it in the negative:

> DO THE PROVISIONS OF SECTION 100.361 APPLY TO A MUNICIPALITY WHICH HAS ADOPTED NO PROVISIONS FOR RECALL ELECTIONS?

Petitioner initiated recall proceedings pursuant to §100.361, Fla. Stat. (1987) to recall BARNEY KORETSKY from the governing body of the Town of Pembroke Park. Thereafter, on March 17th the Chief Judge of the 17th Judicial Circuit entered an order which provided that a recall election would be held in the Town of Pembroke Park on April 25, 1989. (A. 1) On March 20, 1989, Respondent timely filed an Amended Notice of Appeal appealing the Circuit Court order of March 17th.

On April 13th Respondent filed an Application for Constitutional Stay Writ and for Enforcement of Automatic Stay, praying that the District Court enforce the automatic stay provided by Florida Rule of Appellate Procedure 9.310(b)(2) and enjoin the holding of the April 25, 1989 recall election. (A. 2)

On April 24, 1989, the District Court of Appeal entered

its order granting the Respondent's Application for Constitutional Writ and directing that the recall election scheduled for April 25, 1989 be cancelled. (A 3). On April 26, 1989, the Fourth District filed its opinion which found that it was undisputed that the City of Pembroke Park had not adopted any recall provisions. (A. 4) The Fourth District determined that §100.361(9), Fla. Stat. (1987) limited the application of the recall act to those cities and counties having their own recall provisions. In reversing the order on appeal, the Fourth District certified the question set forth above as being of great public importance, having answered it in the negative. This Petition ensued.

## ISSUE ON APPEAL

DO THE PROVISIONS OF §100.361, FLA. STAT. (1987) APPLY TO A MUNICIPALITY WHICH HAS ADOPTED NO PROVISIONS FOR RECALL ELECTIONS?

## SUMMARY OF ARGUMENT

IN ORDER TO RESOLVE THE AMBIGUITY OF SUBSECTION (9) OF §100.361, FLA. STAT. (1987), THIS COURT MUST DETERMINE THE LEGISLATIVE INTENT. ANY UNCERTAINTY AS TO THE LEGISLATURE'S INTENT MUST BE RESOLVED BY AN INTERPRETATION THAT BEST SERVES THE PUBLIC INTEREST AND COMPORTS WITH REASON. INASMUCH AS THE LEGISLATURE HAS ACQUIESCED FOR OVER TEN YEARS IN THE INTERPRETATION GIVEN THE STATUTE BY THE ATTORNEY GENERAL AND THE DIVISION OF ELECTIONS, IT MUST BE PRESUMED THAT THE LEGISLATURE APPROVES OF THIS INTERPRETATION. SUBSECTIONS ONE AND EIGHT OF THE STATUTE CLEARLY INTEND THAT THE RECALL PROVISIONS APPLY STATEWIDE.

## I

The guiding beacon in this case must be the legislative intent. Indeed, fulfilling the intent of the legislature is the end to which the various rules of statutory construction are merely the means. Abood v. City of Jacksonville, 80 So.2d 443 (Fla. 1955). The intent of the drafters of the Recall Statute is to be found in the title to Ch. 74-130, Laws of Florida, wherein the purpose of the recall act is set forth as "authorizing and providing procedures for the recall of any member of the governing body of a municipality...by the municipal...electors..." (emphasis supplied) This Court has, in the past, looked to the title of an act to determine legislative intent when there was doubt as to the meaning of an act. Armstrong v. City of Edgewater, 157 So.2d 422, 426 (Fla. 1963). Any uncertainty as to the intent of the legislature should be resolved by an interpretation that best serves the public interest. In re: Ruff's

Estate, 32 So.2d 840 (Fla. 1947).

It cannot be disputed but that the intention of the legislature in drafting the recall statute was to allow the electors of a city or county to be able to remove an elected official who is guilty of any of the acts listed in subsection (1)(b) of the act. If the statute is to be construed as if subsection (9) thereof included the word "only" between the words "shall" and "apply" then it is conceivable that the electors of a municipality which had not adopted its own recall provision could be faced with a corrupt city council which would not allow for the passage of a recall ordinance. In this situation, the people of the municipality would be powerless to recall the corrupt city officials.

The District Court's construction of the statute would give to those very people who would be subject to recall the ability to frustrate the entire process. Surely the legislature would not have given to an elected municipal official who fears an oncoming recall the opportunity to repeal the municipal recall ordinance, thereby insulating himself from recall. Elected officials could thus make a mockery of the entire recall statute and the people would have no immediate recourse. As this Court has often stated, it is a basic tenet of statutory construction that in a case of an ambiguity, a statute will not be interpreted so as to yield an absurd result. Williams v. State, 492 So.2d 1051, 1054 (Fla. 1986).

It would truly serve the best interests of the people

and be conducive to the general welfare if subsection (9) of the recall statute is read consistent with the language in subsection (8) which provides that the recall statute is to be "uniform statewide." To allow electors to remove a public official who is guilty of some crime, act of neglect or other impropriety is a special implementation of the democratic process which provides the electors with a more powerful political voice. To limit the availability of the recall procedure does not serve any public purpose. Petitioner submits that by making recall available to all the people this Court will have better served the people. Participation by the people in their government is to be encouraged, not curtailed. As this Court stated in State Ex Rel. Ayres v. Gray, 69 So.2d 187, 193 (Fla. 1953):

> The basic principle of our constitutional system is that 'All political power is inherent in the people.'...The tendency has been, and still is, to extend further the privilege of the people to participate in their government and to elect offices originally appointed, rather than to curtail such participation by the people.

II

The question of whether S100.361, Fla. Stat. (1987) authorizes the recall of members of governing bodies of municipalities and charter counties which have no charter or ordinance provisions respecting the recall of such members has been addressed twice by the Attorney General of the State of Florida. 1975 Op. Att'y Gen. Fla. 075-242 (August 28, 1975); 1979 Op.

Att'y Gen. Fla. 079-38 (April 18, 1979). In both instances the Attorney General opined that the provisions of 5100.361 authorized the recall of members of the governing body of all municipalities and charter counties in the State of Florida, regardless of whether these municipalities and counties have adopted their own recall provisions.

In 1978 the Division of Elections issued an Opinion in which it construed the recall provisions of §100.361, Fla. Stat., as applying to all municipalities and charter counties whether or not those governmental units had adopted their own recall provisions. See 1978 Op. Div. Elec. Fla. 78-48 (Nov. 6, 1978), reversing 1977 Op. Div. Elec. Fla. 077-9 (March 8, 1977) which had held to the contrary. The legislature has amended the provisions of §100.361, Fla. Stat. five times since the publication of the first of the aforementioned Attorney General's Opinions and on two occasions since the publication of the Division of Elections' Opinion in 1978. See Ch. 77-174, Ch. 77-175, Ch. 77-279, Ch. 81-312, Ch. 83-217, Laws of Florida.

This Court has previously noted that administrative interpretations of state statutes, while not binding on this court, are entitled to great weight and, accordingly, will not be departed from by the court unless clearly erroneous or unauthorized. State v. Massachusetts Company, 95 So.2d 902 (Fla. 1956). In Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987 (Fla. 1985), this Court determined that a reviewing court must defer to an agency's

interpretation of a statute as long as that interpretation is consistent with legislative intent and is supported by substantial, competent evidence. In State v. Stein, 198 So.82 (Fla. 1940), this Court noted that it:

> ...has frequently held that the practical construction placed upon a statute by an administrative department of the State government, while it is not binding upon the courts, yet, when not in conflict with the Constitution or the plain intent of the act, such departmental construction is of great persuasive force, and efficacy, especially when established by long usage.

In State Ex Rel. Biscayne Kennel Club v. Board of Business Regulation, 276 So.2d 823, 828 (Fla. 1973), this Court noted that administrative construction of a statute by an agency or body charged with its administration "is entitled to great weight and will not be overturned until clearly erroneous." In State Ex Rel. Szabo Food Service, Inc. of N.C. v. Dickinson, 286 So.2d 529 (Fla. 1973), this Court held that when the legislature reenacted a sales tax statute that it was presumed to know and adopt the construction placed thereon by the State Tax Administrators. See also Volunteer State Life Insurance Co. v. Larson, 2 So.2d 386 (Fla. 1941); State v. Lee, 188 So.775 (Fla. 1939); Davies v. Bossert, 449 So.2d 418 (Fla. 3d DCA 1984); and Peninsular Supply Company v. C.B. Day Realty, 423 So.2d 500, 502 (Fla. 3d DCA 1982), wherein the District Court of Appeal found that when the legislature amended the Florida Mechanic's Lien Statute in 1977 that it was presumed to know and adopt the construction previously placed thereon by courts or

administrators.

The power to definitively construe a statute resides solely in this Court. Nevertheless, the administrative constructions of the statute in the instant case are persuasive not because of any power which the executive or administrative agencies have to interpret the law, but because the legislature has in this case impliedly endorsed the administrative interpretations for over ten years.

If the aforementioned Attorney General's Opinions and the Opinion of the Division of Elections did not accurately reflect the intent of the Florida legislature, then the legislature would have certainly taken steps to clarify the provisions of §100.361 by way of amendment so that the legislative intent was manifest. The most compelling single indicia of the intent of the legislature with regard to subsection (9) of the recall statute is that the legislature has never amended the statute so as to contradict the interpretation given thereto over ten years ago by both the Attorney General and the Division of Elections. It must be presumed that the legislature approves of the interpretation given to subsection (9) by both the Office of the Attorney General and the Division of Elections.

III

Petitioner submits that the legislature included subsection (9) of the act in order to express the intent that the state law would be applicable statewide, applying even in those cities and counties which had adopted their own recall ordinan-

ces. Absent subsection (9), the statute would be unclear as to the effect of any county or city recall ordinance. Subsection (9) amplifies and expands upon that which is set forth in subsection (8) of the act.

Subsection (8) clearly and unambiguously sets forth the legislature's intent that the recall procedures provided in the act shall be "uniform statewide". Subsection (1) of the act states that:

> ***Any*** member of the governing body of the municipality or charter county.. .may be removed from office by the electors.. .(emphasis supplied)

Thus, it is clearly contrary to the express intent of the legislature as set forth in the act itself to place the word "only" between the sixth and seventh words of subsection (9) of the act. This Court should not read into the statute a word that is not there. If the legislature had wanted the statute to only apply to cities and charter counties that have adopted their own recall provisions, the legislature certainly could have done so. Petitioner prays that this Court read subsection (9) of the act exactly as it was written.

## CONCLUSION

Based on the foregoing authorities and argument, the question certified to this Court by the Fourth District Court of Appeal should be answered in the affirmative and the opinion presented for review should be reversed with directions to remand the cause to the Circuit Court for further proceedings.

Dated this 6 day of July, 1989.

Respectfully submitted,

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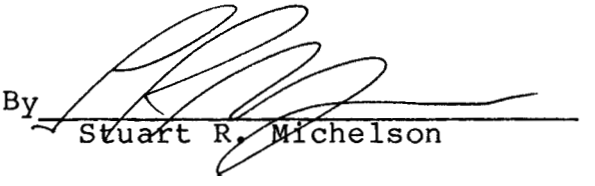
By 
Stuart R. Michelson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Petitioner's Initial Brief on the Merits was mailed this 6 day of July, 1989, to SAMUEL S. GOREN, ESQ., JOSIAS & GOREN, P.A., attorneys for JANE CARROLL, 3099 East Commercial Blvd., Suite 200, Fort Lauderdale, FL 33308; to CATHERINE RAFFERTY, ESQ., MILLER, SQUIRE & RAFFERTY, CHARTERED, co-counsel for Respondent, BARNEY KORETSKY, 500 Northeast 3rd Avenue, Fort Lauderdale, FL 33301; to JOSEPH W. WEIL, ESQ., co-counsel for Respondent, BARNEY KORETSKY, 500 S.W. 109th Avenue, Sweetwater, FL 33174; and to HARRY HIPLER, ESQ., City Attorney for Pembroke Park, P.O. Box 216, Dania, FL 33004.

HELSON, ESQ.