IN THE
SUPREME COURT OF FLORIDA

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

CASE NO.74,280

SARA 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 REPLY BRIEF ON THE MERITS

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INTRODUCTION

This is the Reply 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 are made herein to the Appendix to Respondent's Answer Brief by the letters "RA" and the page number.

A.

Though Respondent argues that the "plain meaning" of the statute is that the statute does not apply to cities which do not have recall provisions, the fact is that the statute has no such "plain meaning." §100.361(9), Fla. Stat.(1987), is ambiguous and it is the resolution of that ambiguity which has been certified to this Court by the District Court of Appeal as a question of great public importance.

B.

Respondent argues that the rule on deference to administrative opinions applies only if the administrative interpretation conforms with legislative intent and that the administrative interpretations cited by Petitioner cannot serve as a guide to the intent of the Legislature in the instant case because the administrative interpretations do not conform to the intent of the Legislature. Clearly, Respondent is advancing a circular argument which will not be of assistance in resolving the ambiguity inherent in the wording of subsection (9) inasmuch as Respondent's argument is predicated on the assumption that there is no ambiguity. As noted above, if subsection (9) were not ambiguous, this case would not be before this Court.

Respondent argues that subsection (8) provides for uniform recall procedures without the necessity for the language in subsection (9) and that subsection (9) is a "restatement" of subsection (8). Respondent is wrong. Subsection (8) states that it is the intent of the Legislature that the recall procedures be uniform

statewide and that the recall act will overrule any contrary municipal charter and special law provisions. If the statute stopped there, it would be entirely unclear as to what effect, if any, is to be given to contrary municipal and county recall ordinances. For municipal and county recall ordinances are not included within the category of municipal charter and special law provisions which is addressed by subsection (8). Thus, subsection (9) must be seen as expanding the scope of subsection (8) by providing that 5100.361 will also prevail over any conflicting municipal and county ordinances.

Respondent argues that "no specific statement is made as to the availability of the [recall] remedy itself" in the statute. Respondent is wrong. §100.361(1), Fla. Stat.(1987), states that:

> Any member of the governing body of a municipality...may be removed from office by the electors of the municipality.. .Members may be removed from office by the following procedure.. .

The very first sentence of the first paragraph of the statute provides that any member of the governing body of a city or county is subject to recall, and the statute then proceeds to describe with great particularity the procedure by which the recall is to be implemented. While subsection (9) is ambiguous, subsection (1) is not ambiguous. Subsection (1) clearly and explicitly provides that "any member of the governing body of a municipality ...may be removed from office. .." Thus, subsection (1) clearly states that the recall remedy is available statewide.

C.

Respondent argues that April 25, 1989, is not a proper date to hold the recall election in the instant case. Whereas it appears with certainty that the election will not be held on April 25, 1989, Petitioner submits that the issue raised by Respondent is moot.

In any event, the Chief Judge of the Seventeenth Judicial Circuit fixed March 14, 1989, as the date for holding the recall election (RA-3,57). Respondent appealed the Order setting this election (RA-4) and by virtue of the provisions of Rule 9.310(b)(2), Fla.R.App.P., the election did not take place on March 14, 1989. Thus, Respondent, having first delayed the election by moving to stay and appealling the Order which scheduled the election, now argues that there should be no election because the one which was scheduled for March 14, 1989, did not take place. If Respondent did not want to delay the March 14, 1989, election, the Respondent should not have appealed the Order scheduling that election. Under the circumstances, any error with regard to the scheduling of the election is invited error and, as such, may not be advanced as a grounds for reversal by Respondent. Roe v. Henderson, 139 Fla. 386, 190 So. 618 (Fla. 1939).

D.

Pursuant to §100.361(2), Fla. Stat.(1987), the activity of the chief judge in the recall process is limited to the fixing of an election date. The statute does not provide that the chief judge of the circuit will preside over any lawsuit arising from the

recall process after the election date is selected.

Petitioner does not deny that Respondent retains any and all rights to test the legal sufficiency of the recall petition or any other aspect of the recall process in the court of competent jurisdiction. Respondent invoked this right and filed suit in the Circuit Court of Broward County (Case No. **88-34487** CO). Thereafter, Respondent voluntarily dismissed this action **(RA-55).** If Respondent truly wanted to test the legal sufficiency of the recall petition, as opposed to merely delaying the recall process, the Respondent should not have dismissed the suit which he filed.

Respondent cannot claim error because the Chief Judge would not entertain a counterclaim or other such pleading in response to the petition filed below. The Chief Judge was eminently correct when she opined that the recall act merely required the Chief Judge to perform a ministerial function by way of fixing an election date.

E.

The operative act to be performed by the chief judge of the relevant circuit, pursuant to the recall statute, is the fixing of a date to hold the recall election. §100.361(2), Fla. Stat. (1987). The Statute does not require, nor even contemplate, the filing of a "Petition for Chief Judge to Set Recall Election" **(RA-1)** as was filed in the instant case. The Chief Judge was not required to enter the "Order Setting Election Date" **(RA-3,57).** It would have been consistent with the statute if the Chief Judge had merely written a letter to the Supervisor of Elections, which letter fixed

the date for the Recall Election. The Recall Petition used the proper nomenclature, that is, it called for the recall of the Respondent from the governing body of Pembroke Park. Respondent cannot claim surprise or any other sort of prejudice. The issue which Respondent attempts to raise in Section E of its brief is much ado about nothing. If there was any error, it was surely harmless error. Respondent cannot claim to have been prejudiced by the improper choice of words in an order which was neither required nor necessary. The record herein, when viewed in pari materia with the recall statute, indicates that the Chief Judge could clarify that she meant to fix a date for the recall election of Respondent from the governing body of the Town of Pembroke Park, as per the Recall Petition, as opposed to a date for the recall election of Respondent as the Mayor of Pembroke Park. When the Chief Judge made the correction to the order in question (RA-3,57), she fulfilled the court's responsibility to fix an election date pursuant to §100.361(2).

CONCLUSION

Based on the foregoing argument, the question certified to this Court by the District Court of Appeal should be answered in the affirmative and the opinion presented for review should be reversed, the stay entered by the District Court should be dissolved, and this matter should be remanded to the Circuit Court with instructions to the Chief Judge to forthwith fix a date for the recall election of Respondent from the governing body of The Town of Pembroke Park.

Dated this 21st day of August, 1989.

RESPECTFULLY SUBMITTED.

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BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief on the Merits was mailed this 21st day of August, 1989, to: SAMUEL S. GOREN, ESQUIRE, Josias & Goren, P.A., Attorney for Jane Carroll, 3099 East Commercial Blvd., Suite 200, Fort Lauderdale, FL 33308; CATHERINE RAFFERTY, ESQUIRE, Miller, Squire & Rafferty, Chartered, co-counsel for Respondent Barney Koretsky, 500 N.E. 3rd Avenue, Fort Lauderdale, FL 33301; JOSEPH W. WEIL, ESQUIRE, co-counsel for Respondent Barney Koretsky, 500 S.W. 109th Avenue, Sweetwater, FL 33174; and HARRY HIPLER, ESQUIRE, City Attorney for Pembroke Park, Post Office Box 216, Danie, FL 33004.

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