IN THE SUPREME COURT
OF THE STATE OF FLORIDA

PEOPLE AGAINST TAX REVENUE MISMANAGEMENT, INC., DANNY MCDANIEL, JOEL DALAFAVE, and CHARLES SMITH,

Appellants,

vs.

COUNTY OF LEON, FLORIDA,

Appellee.

CASE NO. 77,572

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

OTHER AUTHORITY

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

PEOPLE AGAINST TAX REVENUE MISMANAGEMENT, INC., DANNY MCDANIEL, JOEL DALAFAVE, and CHARLES SMITH, Appellants, vs. COUNTY OF LEON, FLORIDA, Appellee.	CASE NO. 77,572

PRELIMINARY STATEMENT

PEOPLE AGAINST TAX REVENUE MISMANAGEMENT, INC., DANNY McDANIEL, JOEL DALAFAVE, and CHARLES SMITH, were the defendants below and are the appellants here. They will be referred to in this brief as PATRM or as the appellants. The COUNTY OF LEON, which was the plaintiff below, will be referred to as Leon County.

References to the appendix to this brief are by tab (Tab B). Transcript references (Tr. I 76) are to Leon County's Appendix by volume and page. References to the appellants' appendix are to (App.Tab C).

STATEMENT OF THE CASE AND FACTS

Leon County claims that the appellants' statement of the case and facts "fails to inform the Court fully of the underlying controversy and the manner in which it has already been litigated" (Ans. Brief, p. 1). The criticism is valid but cannot fairly be made against the appellants.

The appellants sought consolidation of the sales tax election challenge with the bond validation (App. H). Leon County opposed the motion and it was denied. (Tr.34).

This court should be informed of the underlying controversy and the manner in which it has been litigated. The appellants' motion for ancillary relief attempts to do that and points the way toward a comprehensive resolution of the controversy.

Leon County's statement implies that PATRM and the individual appellants first appeared in opposition to the sales tax after the election. Actually, as Leon County is aware from discovery with the appellants, PATRM was founded and registered as a PAC in opposition to the sales tax. The appellants actively and publicly opposed the sales tax before the election. (Tr. II 242).

REPLY TO LEON COUNTY'S PREAMBLE ARGUMENT

Leon County and the appellants are in agreement as to the treatment which most bond validation complaints can and should receive: swift resolution at a hearing on limited legal isssues. But when a major public controversy infects a bond validation with wide-ranging legal and factual disputes, Florida's bond validation statutes and case decisions do not and cannot constitutionally mandate a summary and preclusive hearing such as was had in this case.

The statute relied on by Leon County, Sec. 75.07, Fla. Stat. (1989), provides that the court is to "make such orders as will enable it to properly try and determine the action and render a final judgement with the least possible delay." Sec 75.07, Fla. Stat. (1989) (e.s.). That statute is not a license for running roughshod over politically disfavored claims and parties.

Leon County's quote from Kinzel v. City of North Miami, 212 So. 327, 328 (Fla. 3d DCA 1968) omitted the sentence describing what promptness and finality in election contests is predicated upon:

> The general proposition that when a statutory action is availed of the provisions for its exercise must be strictly followed is especially applicable here, as we are dealing in this instance with a statutory action for an election contest.

The purpose of bond validations and election contests is not swiftness and finality but is instead to fairly and fully test the legality of their subjects.

The particular mechanisms which the law establishes for that purpose should be adhered to; and a proper trial or hearing always includes the due process which is necessary to accommodate the controversy. Why have PATRM and the individual appellants been denied access to Florida's election contest remedy? On what basis of law does Leon County defend that outcome? Why do they even desire it?

Leon County unfairly disparages the appellants' diligence in this controversy. Shortly after filing their election challenge, PATRM and the three individual defendants initiated and pursued public records requests--which were resisted by Leon County. (Tr.II 242-46; testimony of Danny McDaniel). Interrogatory answers by Leon County and the City of Tallahassee in the election challenge case (Tab A) refute the slur that PATRM and the individual appellants "failed to pursue any formal discovery" (Ans. Br. 7). The incompleteness of the answers further demonstrates Leon County's obstructive tactics in this controversy.

Leon County denounces the claims of the appellants as "all demonstrably meritless." (Ans. Brief p. 7). Why did they name a small civic organization and three private citizens with supposedly meritless arguments as defendants in the bond validation now before the court?

ISSUE I

(AS STATED BY APPELLANTS)

WHETHER SUBSTANTIAL UNRESOLVED ISSUES OF FACT AS TO THE VALIDITY OF THE SEPTEMBER 1989 LEON COUNTY LOCAL OPTION SALES TAX REFERENDUM SHOULD HAVE BEEN DISPOSED OF THROUGH SUMMARY BOND VALIDATION PROCEDURES OR THROUGH THE ELECTION CONTEST MECHANISM WITH THE PARTICIPATION OF THE LEON COUNTY CANVASSING BOARD AS THE PROPER PARTY DEFENDANT.

(AS STATED BY LEON COUNTY)

THE FORM AND CONDUCT OF THE BOND VALIDATION PROCEEDING WERE PROPER.

Why did Leon County, with what it represents as an impregnable legal and factual position, stoop to sue the appellants?

Here is how Mr. Hume Coleman, counsel for Leon County explained this unusual tactic to the trial court:

> The private defendants were adjoined in this suit because in Florida we have the one dismissal rule, that is the party is entitled to take a dismissal of its case one time free. So these private defendants were entitled to refile their lawsuit a second time.
>
> They did not do that and so the County elected to join these private defendants in this bond validation action so that we can once and for all get this question of whether the expenditures by the County for the referendum were illegal, as the private defendants claim, or were they proper. (Tr. I 36).

As Mr. Coleman admitted to the trial court at least, Leon County recognizes that there are outstanding questions over the integrity and validity of the sales tax election--so they sued

PATRM and three citizens. Leon County should not complain that they appeared and opposed the bond issue. Having told the Leon County Circuit Court that it recognized lingering questions over the sales tax, Leon County should not tell the Florida Supreme Court that the claims advanced by PATRM and the individual appellants which it wished to be judicially settled are completely without merit.

The trial court should have joined the canvassing board as the proper and indispensible party defendant as requested by the appellants and as required by Sec. 102.168, Fla. Stat.(1989). In that way, at long last, PATRM, the individual appellants, and the people of Leon County could have had a lawful airing and resolution of the issues against the sales tax election.

The trial court not only failed to join the canvassing board as the indispensable statutory proper party defendant, but also accepted Leon County's view of a bond validation: the trial judge sits and listens to it all, then at the end of the hearing immediately validates the bonds by signing a conclusory, canned judgement which does not even discuss the testimony at hearing or the arguments and authority of the opposition.

That procedure was swift and summary but it did not afford due process to the appellants. Due process "extends, of course, into every type of legal proceeding. In observing due process of law, the opportunity to be heard must be heard full and fair, not merely

colorable or illusive." Tomayko v. Thomas, 143 So. 2d 227 at 230 (Fla. 3d DCA 1962).

These criticisms against the hearing below are even supported by a case law authority quoted by Leon County, Rianhard v. Port of Palm Beach District, 186 So.2d 503 (Fla. 1966). Leon County's quotation stopped short of revealing what lay behind the Rianhard court's conclusion that "the [trial] court offered respondents opportunity to present their evidence." Id, at 504. Beginning where Leon County left off:

> The circuit judge said at the hearing that he would rule on questions of law, adding "* * * and if there is in the opinion of the court the need for taking testimony, I will fix a time." (Transcript, p. 23). Thus the judge indicated he would study the questions of law presented and determine therefrom whether any testimony was needed in order to aid him in making his final determination.

Rianhard, 504-5.

In Special Tax School District No. 1 of Duval County v. State, 123 So.2d 316 (Fla. 1960), this court approved the overthrow of a bond election in which:

> The learned circuit judge declined to validate the bonds and dismissed the petition because of his conclusion that the proceedings leading up to and including the election were so infected with gross and substantial irregularities and failures to comply with mandatory provisions of the law that the reregistration of voters and the election were invalid and void.

Id, at 318.

The election law violations in Special Tax School District were as to the notice of the election and period for which the registration books were opened before the election. The bonds were

denied validation even though the vote approving them was a lop-sided 18,723 in favor to 8,741 against.

The trial judge's order is reported as Special Tax School District No.1 v. State of Florida, 16 Fla.Supp. 110 (Cir. Ct. Duval Co. 1960)(Tab B). The order contains detailed findings which reflect the evidence at hearing. The trial judge described the schedule and form of the proceedings:

> On April 9 and 18, 1960, evidence was received in open court; oral arguments were heard April 21, and the parties were allowed through May 4 to file memoranda. The ultimate question to be decided is--Did a majority of the qualified freeholder electors participate in the bond election as mandatorily required by the constitution?

Id., at 111.

The opinion section of the court's order refers to the statutory requirement that the proceedings be heard and determined "with the least possible delay." Id., at 114.

The treatment of the parties and the election issues in the Special Tax School District bond validation case was far more thorough and fair than was the hearing afforded the appellants and their issues in this case. Even in bond validations, deliberation and due process are not synonyms for delay nor are they the enemies of priority on the judicial calendar.

ISSUE II

(AS STATED BY APPELLANTS)

WHETHER LEON COUNTY HAS STANDING TO AFFIRMATIVELY ESTABLISH THE VALIDITY OF A DISPUTED ELECTION.

(AS STATED BY LEON COUNTY)

LEON COUNTY HAS STANDING TO LITIGATE ALL MATTERS WITHIN THE SCOPE OF THE BOND VALIDATION, INCLUDING PATRM'S ELECTION CHALLENGE.

Leon County's answer to PATRM's standing argument misses the point: Leon County's legal authority is limited. They may not lawfully interfere in the election process by taking sides on the issues and candidates on the ballot, nor may they enter the fray of an election contest.

Being the plaintiff in a bond validation action does not mean that Leon County has standing as to all issues. Watson v. Claughton, 34 So.2d 243 (Fla. 1948); and State v. Kerwin, 279 So.2d 836 (Fla. 1973).

The implications of Palm Beach County v. Hudspeth, 540 So.2d 147 (Fla. 4th DCA), as to standing cannot be disregarded by characterizing it as a pre-election suit for injunctive relief against a county government. The principle is still the same. Hudspeth was about enjoining a county government against corrupting an election through a government advocacy campaign; this case is

about an election corrupted by such a campaign. Since Hudspeth arose pre-election, the county canvassing board was not involved.

Leon County officials may have personal opinions about how they want an election or election contest to be decided, but Leon County itself has no lawful interest in the outcome and cannot acquire any. Manipulating an election contest into a bond validation proceeding cannot deprive the canvassing board of their proper and essential role in an election contest and allow Leon County to supplant it. It is not a matter of PATRM and the appellants choosing their adversaries. It is a matter of obeying the law.

Leon County seems baffled at the notion that only the voters are the real parties in elections and election contests. But the concept flows from the first sentence of our state constitution, that "All political power is inherent in the people". Art. I, Sec. 1, Fla. Const. See Palm Beach County v. Hudspeth, supra. The political voice and vote of a single citizen is of surpassing constitutional authority over the political desires and machinations of government.

Under what circumstances will a court overturn an election? Special Tax School District No.1 v. State of Florida, supra, is not the only example.

This court has established the rule of decision in Florida election contests as being that an election will be declared invalid if any irregularities have impaired the integrity of the

election or the sanctity of the ballot. See Boardman v. Esteva, 323 So.2d 259 (Fla. 1975). In 1984, in Bolden v. Potter, 452 So.2d 564 (Fla. 1984), the Boardman rationale was applied to overturn a local election due to extensive absentee ballot vote-buying--even though the number of votes shown to have been bought was not enough to have changed the outcome.

Former Justice Adkins, the author of the Boardman opinion, described it as one of the most important cases of his career because until then Florida election law had been so confused that it "could be twisted to reach any result" and that rulings could be made "depending on whom the justices wanted to see in office." J.Adkins, L.Samuels, P.Crockett, "Eighteen Years in the Judicial Catbird Seat", 11 Nova Law Review 1 (Fall 1986).

Contrary to Leon County's representations, when an election is overturned, it does not necessarily mean that the voters have been disenfranchised. Overturning a corrupted election is the essential remedy for restoring the integrity of the election process and the sanctity of the ballot. Overturning a corrupted election vindicates the franchise. Why does Leon County refuse that principle?

ISSUE III

(AS STATED BY APPELLANTS)

WHETHER THE PUBLISHED NOTICE TO THE PUBLIC OF LEON COUNTY WAS CONSTITUTIONALLY ADEQUATE NOTWITHSTANDING THE LACK OF ANY PUBLISHED NOTICE OF THE UNRESOLVED ELECTION ISSUES.

(AS STATED BY LEON COUNTY)

PUBLICATION OF NOTICE WAS ADEQUATE IN ALL RESPECTS.

The notice required for any proceeding which may produce a final result is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed 865 (1950); Hart v. Hart, 458 So.2d 815, 816 (Fla.4th DCA 1984). "The right to be informed has little value if one is not informed that a matter is pending." Phillips v. Guin & Hunt, 344 So.2d 568, 572 (Fla. 1977).

Why did Leon County not tell the public against whom they acquired a final judgment in a bond validation that they were using it as a vehicle to, as Mr. Coleman put it, "once and for all get this question of whether the expenditures by the County for the referendum were illegal, as the private defendants contend, or were proper" (Tr. I 36). The cost of that information as part of the published notice of the validation would have been negligible.

In Bussey v. Legislative Auditing Committee, 298 So.2d 219 (Fla. 1st DCA 1974), the court noted with approval the principle as stated by Am.Jur.2d.:

> A judgment against one who was not given notice in the manner required by law of the action or proceeding in which such judgment was rendered lacks all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is fairly administered.

That language conveys well the nature of the judgment issued in this case against the uninformed public of Leon County.

ISSUE IV

(AS STATED BY APPELLANTS)

WHETHER THE APPELLANTS SHOWED SUFFICIENT CAUSE TO BAR THE PROPOSED BOND ISSUE OR TO REQUIRE FURTHER PROCEEDINGS INQUIRING INTO THE VALIDITY OF THE UNDERLYING SALES TAX ELECTION.

(AS STATED BY LEON COUNTY)

PATRM FAILED TO MAKE A SHOWING SUFFICIENT TO INVALIDATE THE BONDS.

The record which any proceeding develops is inseparable from the procedures used. The time constraints and the summary, preclusive hearing below gave inadequate scope for development of a full record against the validity of the sales tax election.

Leon County's answer brief on this issue is loaded with misleading references and facts stripped out of context, all to the end of minimizing the sales tax campaign. Let us focus here on the heading of the ballot by the sales tax campaign slogan.

As Leon County's witnesses told it at the hearing, the slogan was innocuous. However, when experts in public relations and political campaigns are not under oath, they have a different view:

> The most important element in politics and political advertising is to appeal to the voters' perception of reality and important issues because perception becomes reality.
>
> Professional public relations and advertising companies know this fact about public perception and they appeal to it through the use of imprecise language which

> has multiple interpretation possibilities, "secret words" which evoke subconscious emotions or seduce the voter subliminally, or tacit inferences which appeal to voters' cultural or social heritage and biases. Deliberately using imprecise words and phrases and appealing to the voters' psyche, the advertisement allows people to hear what they want to hear and to get out of the ad what they feel most comfortable with.

Woo, Lillian C., THE CAMPAIGN ORGANIZER'S MANUAL, (1980), at 89-90.

> Much like a campaign speech or a news report, advertsing provides a mode of communicating with the public. An advertisement is a message that must be articulated in a way that appeals to both the conscious and subconscious feelings of the voter. The surface of the ad, at first glance, does not always reveal the substance of the message.

Seib, Philip, WHO'S IN CHARGE?, (1987), 160.

> The individual printed ballot is in itself a piece of propaganda. It influences votes. . . .
>
> In ballot propositions it can be a matter of semantics.

Baus, Herbert M., and William B. Ross, POLITICS BATTLE PLAN, (1968), at 343

It takes a strained effort to believe that Leon County's sales tax campaign slogan and its placement on the ballot was anything other than an expression of well-honed strategies of public persuasion.

ISSUE V

(AS STATED BY APPELLANTS)

WHETHER JUDGE SAULS OR ANY JUDGE OF THE SECOND CIRCUIT IS QUALIFIED TO PRESIDE IN THIS CASE.

(AS STATED BY LEON COUNTY)

THE TRIAL JUDGE PROPERLY DENIED THE MOTION FOR DISQUALIFICATION.

As with other key aspects of this controversy, the judicial disqualification issues are bound up with decisions by the First DCA and are addressed in the motion for ancillary relief. Leon County is mistaken in asserting that the "new ground" of disqualification was not raised in the court below. It was, in the form of an extensive letter to Judge Sauls from counsel for the appellants (App. Tab R). The newness of the ground is as it appears before this court.

In Hill v. Feder, 564 So.2d 609 (Fla. 3d DCA 1990), for example, a trial judge's comments that the allegations of a motion for disqualification were "in fact, totally false" required his disqualification as he had by those remarks created an adversarial relationship with the litigant.

The principle applies much more forcefully when the facts which were raised as to disqualification were drawn directly from the public record and the judge's own financial disclosure statement. The statute involved (Sec. 38.02, Fla. Stat. (1989)) does not give the judge license to voice his view that the motion for disqualification is false. An abundance of case law from this court and others over the years has refined the practice and standards for judicial disqualification beyond what the legislature has commanded.

CERTIFICATE OF SERVICE

I certify that a copy of the initial version of the reply brief was furnished by hand delivery to Herb Thiele, attorney for the appellee, Leon County Courthouse, Tallahassee, Florida, 32301, and Hume F. Coleman, attorney for the appellee, P. O. Drawer 810, Tallahassee, Florida, 32302, and Elaine Ashley, Assistant State Attorney, Leon County Courthouse, Tallahassee, Florida, 32301, on the 26th day of April, 1991. Copies of the final version of the reply brief were served by hand on the same persons on this 29th day of April, 1991.

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