IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE STATE OF FLORIDA,
On The Relation Of
JAMES B. CLAYTON, Relator,

vs. CASE NO. 83,053

BOARD OF REGENTS, a State Agency,
Respondent.
_____/

RELATOR'S RESPONSE TO BOARD OF REGENTS' RESPONSE

COMES NOW JAMES B. CLAYTON (hereinafter referred to as Petitioner) and responds to the Board of Regents' Response to Petition for Writ of Mandamus. The Relator responds in this reply to the various separate subheadings contained in the Board's Response as follows:

I JURISDICTION OF SUPREME COURT

The parties to this action agree that this Court has jurisdiction to issue Writs of Mandamus and that the Board of Regents (hereinafter referred to as "Board") is a state agency as contemplated by Art. V, Section 3(b)(8), Florida Constitution.

II STATEMENT OF FACTS

The parties to this action agree "that the material facts are not in dispute". Although the Board included the foregoing quoted phrase

in its Response on page 1, on page 2, it denied "the remainder of Clayton's allegations (Petition, paragraphs 21-26)". The Petitioner was careful in his preparation of the Petition for Writ of Mandamus to state only facts which could not be controverted. Paragraph 21 refers to Petitioner's Exhibit 4, which was the advertisement circulated for employment of the President of the University of South Florida and is attached hereto as Petitioner's Exhibit 1. Paragraph 22 sets forth the procedure adopted by the Board as its Rule 6C-4.002, which is attached hereto as Petitioners's Exhibit 2. This rule was allowed pursuant to Florida Statutes 240.209(3)(B). Paragraphs 23, 24 and 25 of the Writ of Mandamus set forth exactly what physically occurred at the December 10, 1993 meeting as is evidenced by the electronic recording of the meeting, a transcription of which is attached hereto as Petitioner's Exhibit 3. Paragraph 26 of the Petition For Writ of Mandamus merely sets forth the requirement of Florida Statutes 240.209(3)(B). For the Board to deny paragraphs 21 through 26 of the Petition would be to deny their own rules, records and requirements of the Florida Statutes covering the Board of Regents hiring of university presidents.

After pleading that "the material facts are not in dispute", the Board on Page 2 of its Response refers back to Paragraph 15 of the

Petition wherein it is alleged that Castor "voted the approval" of a majority of Board members during her tenure as Commissioner of Education saying that it is "vague and conclusory". Public records are kept of the actions of the Cabinet and the Petitioner has attached hereto as Petitioner's Exhibit 4 those parts of the Cabinet's actions as proof of that allegation in Paragraph 15 of Petition. Betty Castor, as a member of the Cabinet, did, in fact, approve a majority of the make-up of the Board of Regents at the time of her appointment to the presidency of the University of South Florida.

The Board of Regents is aware that Ms. Castor was present at the meeting on December 10, 1993 within the clear meaning of the word "present" which means "being within reach, sight or call". She was called and appeared at the meeting to make her acceptance speech as shown by the transcript of that part of the meeting which is attached hereto as Petitioner's Exhibit 3.

III STANDING/CHOICE OF FORUM

The Board talks out of both sides of its mouth when it says the Petitioner does not have standing. In North Palm Beach v. Cochran, 112 So. 2d 1 (Fla. 1959), a case previously cited by the Petitioner, the Court said on page 5, regarding the Petitioner's standing, that:

> It is enough that he is interested as a citizen in having the laws executed.

Also in that case, the Court referred to an 1893 Florida case as being the "correct rule". In that case the Court said:

> Where the object is the enforcement of a public right, the people are regarded as the real party and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed and the duty in question enforced. Florida Cont. & P.R. Co. v. State, 13 So. 103 (Fla. 1893).

The Board cites no case indicating that Petitioner does not have standing as a citizen, voter and taxpayer.

The other argument put forth by the Board in its Section IIIA. is without merit, namely because the Petitioner has not claimed title to the office himself. That is not at issue.

The Board says under "Clayton's rationale, any Florida citizen would have standing to bring the instant petition". That is exactly what the Court has said concerning mandamus in this kind of case. The fact that the Petitioner is also a taxpayer strengthens that position.

In the last sentence on page 5 of the Board's Response, the Board states "a taxpayer citizen has no interest in the appointment of an otherwise qualified Board member to the presidency of a university". The

Board refuses to even address the issue of the fact that the Board's appointment of Betty Castor was void.

Concerning the Petitioner's choice of forum, the Board correctly states the Petitioner's Petition could have been brought in the First District Court of Appeal or the Circuit Court of the Second Judicial Circuit in and for Leon County. Both of these courts have jurisdiction over the Board and have the same jurisdiction as the Supreme Court to issue extraordinary writs. The Board argues that the Circuit Court is better able to act as a fact finder and the Petitioner agrees; however, the Petition contains no facts that may be controverted by the Board of Regents, hence no requirement for discovery or testimony. The Petitioner chose the Supreme Court because the Florida Constitution at Article V, Sec. 3(b)(8) states that "the Supreme Court may issue writs of mandamus . . . to state agencies". The parties agree that the Board of Regents is a state agency and that the Court has this power.

The Board misinterprets the cited case of State ex rel Sentinel Star Co. v. Lambeth. That case refers to writs of mandamus issued against inferior tribunals. Petitioner does not seek a writ against an inferior tribunal. It seeks a writ against a state agency, namely the Board of

Regents. The Petitioner is not seeking review of any lower court's or administrative body's rulings.

The other cases cited by the Board in Section III B. are not on point. Original jurisdiction of the Supreme Court is invoked to enforce a public right as opposed to a private right. Fla.R.App.P. 9.100(b).

IV. REQUISITES FOR WRIT OF MANDAMUS

The Board attempts in Paragraph IV A. to establish the remedy of declaratory relief in the Circuit Court for the Petitioner instead of a Petition for Writ of Mandamus in the Supreme Court. There is no disputed fact in the subject Petition For Writ of Mandamus. The Board wants to change the name of the common law Writ of Mandamus to the statutory relief known as declaratory judgment.

Again the cases cited by the Board in its section IV A. are not applicable to this Petition. There is nothing to be determined by a declaratory decree, since the Board pleads, in the Response at Page 9, "Since Clayton argues matters of law only and the facts material to that argument are not disputed," certainly nothing could be determined or asked for in a petition for declaratory decree.

In that same numbered IV A. the Board states that the Petition fails to allege that the Petitioner made express and distinct demand to the

Board to rescind Castor's appointment. The cases cited by the Board (Florida Pharmacy Association v. Strong) is distinguishable in that it involves an attempt to enforce a private right rather than a public right.

The Board of Regents by its nature has authority only when it is in session. By its adopted Rule 6C-1.007, Appearances before the Board, (1) "The Board will afford each individual and representatives of groups a reasonable opportunity to be heard on any agenda item being considered by the Board." (See Petitioner's Exhibit 5) On December 9, 1993 the Petitioner had an attorney contact Carolyn King Roberts, Chairman of the Board of Regents, seeking permission to address the Board at its meeting in Tampa on December 10, 1993. The attorney for the Board called the Petitioner's attorney and said the Petitioner would not be allowed to speak.

Notwithstanding the Petitioner drove to Tampa, spent the night and appeared at the public meeting of the Board of Regents on December 10, 1993 and gave a written request to the Chairman for permission to address the Board. The sole purpose of the Petitioner's desire to address the Board was to advise the Board that what they were about to do was to commit a void act by appointing one of its members as president of a state university.

The Petitioner, on December 10, 1993 at the meeting in Tampa, attempted on two occasions to address the Board and in each instance was ruled out of order. One of these instances is borne out by the Board's Exhibit A at the end of the first paragraph on Page 2. The Petitioner's request to address the Board was read into the record by the Petitioner, to the Chairman, in session, and a copy of it was made a part of the record. Said request is attached hereto as Petitioner's Exhibit 6.

The Petitioner attempted to make demand upon the Board at their December 10, 1993 meeting. The Board refused to allow him to speak. Even if demand were not made, the Petitioner is entitled to a Writ of Mandamus to enforce a public right as opposed to a private right.

B. Although the vote of Betty Castor is not required in order to rescind the void appointment, the Board states that Ms. Castor did not participate in the vote on her appointment and contends that she was not shown as present. In excerpts from the Minutes, attached hereto as Petitioner's Exhibit 3, it is clearly shown that Ms. Castor was present within the meaning of the definition of "present" which includes "being within reach, sight or call". (See Fl. Att. Gen. Op. 74-289 at Page 469)

The Board argues that the Petitioner cannot establish any constitutional or statutory provision expressly prohibiting the Board from

appointing one of its members. The Petitioner is relying totally on the fact that the Board's action was in violation of the common law, against public policy and morals and is void and of no effect as established by the law cited in the original Petition filed herein. A board with appointing power may not appoint one of its own members, Betty Castor, to the office of the President of the University of South Florida. See cases cited in paragraph 33 of the Petition for Writ of Mandamus filed herein.

In its argument in IV B., the Board would make light of the fact that the foreign jurisdiction cases have not been cited as law in this state. Perhaps after this decision, a Florida case will be cited in the future. The Board, through its attorney, the Attorney General of Florida, seeks to diminish the former research done by the Attorney General of Florida, which research indicates that the law of Florida should be what the common law is in the jurisdictions as cited by the Petitioner. Although correct, the Board diminishes the Attorney General's opinion by saying "While entitled to great weight in construing state law, the official opinions of the Attorney General of the State of Florida are not legally binding upon the courts of this state". However, this Court must recognize that in Attorney General Opinion 070-46 (May 11, 1970) the

Attorney General of Florida (the same office now representing the Board) entirely agreed with the position of the Petition.

The Board states that the case of State ex rel Bove v. McDaniel, 157 Atl 2d 463 (Delaware 1960), involves a statutory provision prohibiting the governmental body from appointing one of its own members and should be ignored by this Court. The Court did cite statutory authority but went on to rule on both the common law and the statute. The statute merely tracked the common law. In that case the court said:

> Plaintiff contends that under this section of the statute, and under the common law as well, it is contrary to public policy to permit a member of a Board having the power to appoint to an office to exercise that power by appointing thereto one or more of their own body. Plaintiff further contends that this principle of law is not affected by the resignation of the appointee as a member of the appointing body.
>
> Both the common law and the statute demand that the power of appointment be exercised fairly and impartially. In order to attain this purpose it is important that the deliberations of the appointing body not only be free from wrongdoing but free from suspicion of wrong as well.
>
> It is contrary to public policy to permit a Board to exercise its power of appointment by designating someone from its own body.

Further, in response to IV B., the Petitioner agrees with the Board that there is no existing Florida legislative act specifically prohibiting the Board from appointing Castor as President of the University of South

Florida. The Petitioner has not contended that in any part of his Petition. He simply contends that the appointment is in violation of the common law, public policy and morals, and that that is the law of Florida.

The Board has also attempted to cause the use of Florida Statutes 112, Part III. This has no application for the case in point. Petitioner is seeking an order directing the Board of Regents to rescind its void appointment. Petitioner is not seeking redress against any individual.

The case of Brown vs. Firestone, 382 So. 2d 654, (Fla. 1980), a case cited by the Board, shows that any person that is a citizen or taxpayer may bring suit and have stricken a gubernatorial veto of the qualification or restriction of the general appropriation bill. The court went on to say that in this context the mandamus action should be limited to narrow issues of law which do not require extensive fact finding. In the case sub judice no fact finding is needed.

The Board wants this Court to determine that the Petitioner must seek a declaratory judgment before applying to this Honorable Court for a writ of mandamus. The Board wants the Petitioner to file a suit for "mandamus" in the circuit court but call it a suit for "declaratory judgment". In McNevin vs. Baker, 170 So. 2d 66 (Fla. 1964) this Court said at page 68:

> to sustain an action for declaratory relief, the complaining party must demonstrate that he has a judicially cognizable bona fide and direct interest in the result sought by the action.

Clearly, to be entitled to have standing to bring a declaratory judgment action, the Petitioner must show a "direct interest in the relief sought". The Petitioner claims no direct interest in this matter. The Petitioner has no standing to bring a declaratory judgment action. The Petitioner, however, asserts standing to bring this mandamus action under the Cochran case, supra, in that "he is interested as a citizen in having the laws executed".

V. CONCLUSION

The common law governs the Castor appointment. In Westin v. Rigdon, 110 So. 2d 470 (Fla. 1959) the Court said on page 472:

> The common law of England is in effect in Florida except insofar as it is modified or superseded by statute.

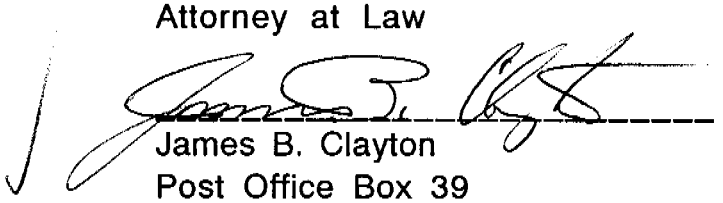
Nothing in Florida Statutes indicates an intention on the part of the legislature to change the common law in regard to university president appointments by the Board. In City of St. Petersburg v. Earle, 109 So. 2d 388 (Fla. 1959), the Court said on page 393:

> It is, to us, evident, and we think, common sense, to hold that an act, in order to change the common law, must clearly express that intention.

For the purpose of the prayer, the Petitioner affirms the Petition, and states again that the Court must instruct the Board of Regents to rescind the void appointment of Betty Castor as President of University of South Florida based upon the common law cited therein.

WHEREFORE, the Relator (Petitioner) again requests the Court take jurisdiction and issue an Alternative Writ of Mandamus directing the Respondent, Board of Regents, to rescind, as void, its action taken December 10, 1993 appointing Board member Betty Castor to the Office of President of the University of South Florida, or to show cause why the Court should not make the Alternative Writ a final and absolute order, and asks for oral argument if the Court deems advisable.

Respectfully submitted,
JAMES B. CLAYTON
Attorney at Law



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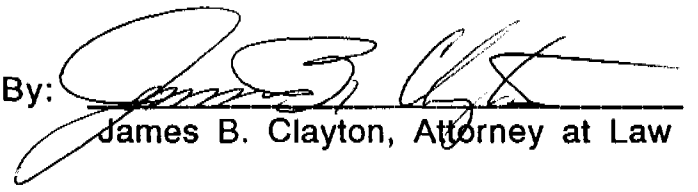
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished by U.S. Mail to: Robert A. Butterworth, Attorney General, c/o Charlie McCoy, Assistant Attorney General, Office

of the Attorney General, The Capitol - PL01, Tallahassee, Florida 32399-1050 this 25th day of February, 1994.

By: 
James B. Clayton, Attorney at Law