SUPREME COURT OF FLORIDA

PHYLLIS T. GARVIN,
Petitioner/Appellant,
hereinafter "Appellant",

vs. **S.Ct. CASE NO.: 94,751**

JOANNE JEROME, Chairman of the Phyllis T. Garvin Recall Committee of Daytona Beach Shores; and DEANIE LOWE, Supervisor of Elections, County of Volusia,
Appellees.
_____/

INITIAL BRIEF ON THE MERITS OF APPELLANT

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL,
COUNTY OF VOLUSIA, STATE OF FLORIDA

Respectfully submitted,

_____
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PRELIMINARY STATEMENT

Appellant was the Plaintiff and Appellees the Defendants in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida. Appellant was the Appellant in the Fifth District Court of Appeal. In this Brief, the parties will be referred to as they appear before this Honorable Supreme Court of Florida.

In this Brief, the references to the transcripts of hearing will be by use of the abbreviation "T" followed by the appropriate page and/or line reference. References to the record on appeal will be by use of the abbreviation "R" followed by the appropriate page reference. References to the Appendix shall be referred to as

"(A:)".

This Brief has been adapted, updated, and edited from my Initial Brief filed in the Fifth District Court of Appeal, which was prepared by C. Michael Barnette, my appellate counsel below. Points II, III, and IV in the Appellate Brief have been omitted

from this Brief in order to focus on the question of conflict from which this court has taken jurisdiction. The recitation facts from the omitted facts have been retained so that the court can get a full perspective of the proceedings.

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STATEMENT OF THE CASE

Appellant, Phyllis T. Garvin, filed a Verified Complaint for Declaratory Relief and Injunctive Relief in Case Number 98-31977-CICI (R:1-11) in which Joanne Jerome, Chairman of Phyllis T. Garvin Recall Committee, Nancy Farr, Acting City Manager of Daytona Beach Shores, Cathy Benson, Deputy City Clerk of Daytona Beach Shores; and Deanie Lowe, Supervisor/Director, Department of Elections, Volusia County, were named as Defendants. Together with said Verified Complaint, Appellant filed an Emergency Ex Parte Motion for Temporary Injunction and Amended Motion for Temporary Injunction (R:29-30). The Complaint and Emergency Motion were assigned to the Honorable David Monaco. A hearing was set on Appellant's Emergency Motion for Temporary Injunction before Judge Monaco on September 10, 1998. On September 9, 1998, an Order of Reassignment was entered by Judge Richard Orfinger, Chief Judge, Seventh Judicial Circuit, reassigning the case to himself and scheduling hearing for September 11, 1998 (R:13).

On September 11, 1998, Appellant amended her Ex Parte Emergency Motion for Temporary Injunction (R:29-30). On September 14, 1998, Appellant filed an Amended Verified Complaint for Declaratory Relief and Injunctive Relief (R:37-44). The amendments to the Emergency Motion for Temporary Injunction and to the

Verified Complaint for Declaratory Relief and Injunctive Relief were based on the actions of the acting City Manager/Clerk, Deputy City Clerk and Supervisor/Director, Department of Elections pertaining to the recall action prior to the Emergency Hearing sought by Appellant. The nature of the relief sought was amended in light of said actions. The Verified Complaint for Declaratory Relief and Injunctive Relief filed by Appellant was amended pursuant to Stipulation of the parties and Order Granting Leave to Amend entered by the Honorable Richard Orfinger, Circuit Judge, on or about September 14, 1998 (R:45-46). Appellee, Joanne Jerome, filed an answer to the Amended Verified Complaint for Declaratory Relief and Injunctive Relief on or about September 14, 1998 (R:47-51).

On or about September 16, 1998, Appellee, Joanne Jerome, Chairman of the Municipal Recall Committee of Daytona Beach Shores, filed a Petition to Set Recall Election (R:52-59) in Case Number 98-32056-CICI. On or about September 17, 1998, Appellant entered a Stipulation for Dismissal of Nancy Farr, Acting City Manager of Daytona Beach Shores and Cathy Benson, Deputy City Clerk of Daytona Beach Shores, as Defendants in Case Number 98-31977-CICI (R:60).

The Recall proceeding came on for trial before Judge Orfinger on September 18, 1998 (T:1-283). On or about September 22, 1998, the Honorable Richard B. Orfinger, Circuit Judge, sua sponte,

entered an Order Consolidating Case Numbers 98-31977-CICI with Case Number 98-32056-CICI (R:453). On September 23, 1998, Judge Richard B. Orfinger, the Chief Circuit Judge entered his Findings of Fact, Conclusions of Law, and Order Scheduling Recall Election (R:469-484). Appellant, Phyllis T. Garvin, filed a Motion for Rehearing (R:486-496), on October 5, 1998, seeking a rehearing of Judge Orfinger's Order. The Motion for Rehearing was timely filed on Monday, October 5, 1998. The lower court entered an Order Denying Rehearing on October 9, 1998 (R:504). Appellant filed a timely

Notice of Appeal from the lower court order on October 30, 1998 (R:505).

On November 3, 1998, Appellant filed an Emergency Motion to Prevent Tallying of Election Results (R:514-515) in the lower court after learning that the County Attorney, Daniel Eckert, had advised Appellee, Deanie Lowe, Supervisor/Director, Department of Elections, Volusia County, to proceed with the recall election despite Appellant's position and notification that a Notice of Appeal had been filed which, Appellant contended, acted as an automatic stay of the lower court order. Although this point is omitted on appeal, in this Brief, Appellant feels it is significant in that the Supervisor/Director of Elections disobeyed the law. On November 3, 1998, the lower court heard the Emergency Motion to

Prevent Tallying of Election Results, thereafter entering an Order Granting Temporary Stay on November 3, 1998 (R:564-577). The Order Granting Temporary Stay provided that the stay would remain in effect until Friday, November 6, 1998, at noon subject to further action by the Honorable Fifth District Court of Appeal.

Appellant then filed an Emergency Motion for Order Confirming Automatic Stay or Extension of Trial Court's Temporary Stay on or about November 4, 1998. This Fifth District Court of Appeal entered its Order on November 5, 1998, providing that the November 3, 1998, Temporary Stay Order of the lower court shall remain in effect until further order of this Court. Appellant then filed an Amended Notice of Appeal on November 9, 1998 (R:561-563) amending the orders appealed from to include the November 3, 1998, order of the lower court pertaining to the automatic stay provisions of Fla.R.App.P.9.130(b)(2) and granting a temporary stay (R:516-517).

In its November 5, 1998, Order, the Fifth District Court of Appeal expedited the time periods for preparation of the Record on Appeal and briefing schedule herein. On December 18, 1998, the Appellate Court, affirmed the trial court's order in a ten-page decision. (A:1-10) This appellate decision struck the Fifth ground in the Petition leaving only one valid ground. (A:11-26) On January 19, 1999, the Petitioner filed a Notice of Discretionary

Appeal. (A:55)

Meanwhile, on January 29, 1999, the Appellate Court granted Councilmember Garvin's Motion for Attorneys' Fees. (A:56-58) On April 2, 1999, that Order was vacated so that the issue could be litigated in the trial court. (A:59-61) On June 22, 1999, this Court granted jurisdiction and set a timetable. (A:62) On June 28, 1999, Appellant filed a Notice of Appeal on June 30, 1999, this Court entered an Order expediting the appeal. (A:63) This appeal ensues.

STATEMENT OF THE FACTS

A committee was formed in the City of Daytona Beach Shores in August 1998 to consider the possibility of recall of Phyllis T. Garvin, a Councilmember and Vice Mayor of the City of Daytona Beach Shores, Florida. The committee prepared and circulated an initial

Petition for Recall (hereinafter referred to as the "10% Petition" or "First Petition") and thereafter a Petition for Recall and Defense (hereinafter referred to as the "15% Petition" or "Second Petition"). Appellant, Phyllis T. Garvin, challenged the sufficiency of the allegations for recall and process by which the petitions were prepared, issued and circulated as violative of her minimal statutory due process rights. The following facts were developed at trial on September 18, 1998.

Joanne Jerome, Chairperson of the Phyllis T. Garvin Recall Committee, testified in Appellant's case below that the recall committee came into existence on or about August 16, 1998. She related initial discussions relating to the possibility of recall with Clyde Brennaman and Don Large (T:27-28). Appellee, Joanne Jerome, testified that she was familiar with Exhibit 2, the 10% Petition for Recall. She testified that the wording of the petition initially was done by her attorney, Mary Hanson, but that she redid the petition in her computer (T:31-32). She testified that the affidavits attached thereto were given to her by her attorney, Mary Hanson (T:34). The affidavits were circulated with and made a part of the Recall Petition (T:34). Additional materials including instructions to circulators and a press release on the recall were included in the packet of materials with the Recall Petition (T:34-35) although not attached to the petition

itself. The petition and affidavits were attached although all other materials were included within the recall packet given to circulators (T:38). The 10% Petition was copied by Don Large (T:39) and someone added "Joanne Jerome, Chairperson" to the petition during the copying process but before circulation (T:39). Appellee, Joanne Jerome, testified that approximately 40-50 complete sets of Exhibit 2 were made by others, although she had earlier testified to copying of 25-30 sets (T:40-41). Appellee, Joanne Jerome, testified that she did not believe any other documents were provided to the circulators other than the recall Petition with attached affidavits, instruction sheet, and press release (T:41-42).

Jerome testified that Don Large obtained circulators for the 10% Petition (T:45) but that she did not get personally involved in the process of soliciting people to act as circulators (T:45). Jerome testified that she may have circulated some of the original petitions herself and conceded that she had signed some of the original petitions as a circulator (T:46). The circulated petitions were received back from the circulators by Don Large and presented to Appellee (T:47). Appellee, her husband, Don Large and Clyde Brennaman took the first petitions to City Hall (T:47-48). At City Hall, the petitions were given to Joyce Holmquist, the City Manager at the time (T:48). Subsequently, Jerome received a copy

of Exhibit 18 from Joyce Holmquist in which Ms. Holmquist notified Appellee, Deanie Lowe, Supervisor/Director, Department of Elections, Volusia County, that Holmquist had found the 10% Petition to be facially valid and containing 432 signatures (T:49-51).

Thereafter, Appellee, Joanne Jerome, and the recall committee began composing the paperwork for the Second or 15% Petition (T:52-53). She was assisted by her husband, Brennaman and Large. Appellee identified Exhibit 7, the Recall Petition and Defense Packets for the 15% Petition (T:55) an Exhibit 21, a blank of said Recall Petition and Defense (T:56). Exhibit 21 was prepared by Don Large (T:56). Jerome testified that the signature page was placed first and did not specifically refer to Appellant, Phyllis T. Garvin (T:56-57). Jerome conceded that the committee submitted a signature page with everything but signatures already on it to Cathy Benson, City Clerk of Daytona Beach Shores (T:59). The majority of the petitions had only a space for signatures and did not include a space for residence or precinct number (T:59-60). The preprinted signature pages did include an address from the voters' list and a precinct number on the top of each page (T:59-60). No space was left on the signature page for the date of signing by the elector (T:60) although there was a place for the date with the circulators oath on the signature page (T:60).

Appellee, Joanne Jerome, testified that the committee elected to make the Recall Petition and Defense (15% Petition) on three pages, rather than one, as requested by Appellant, as she was concerned with the size of the type on a one-page document (T:61) and whether it would be readable. Exhibit 22, sample Recall Petition and Defenses on one page from other Florida cities' recall elections, was displayed to Appellee, Joanne Jerome, who conceded that the form was one that the committee could have used (T:62). Jerome indicated that some changes had been made to what she referred to as page 2 of the Recall Petition, the 15% Petition, Exhibit 7 (T:64) and that she did not know who made the change (T:64). The committee submitted two pages while Appellant, Phyllis T. Garvin, submitted her defense, to Cathy Benson who copied the three (3) separate pages (T:66-68). Appellee Jerome was unaware of how many copies were made by Cathy Benson but admitted that when she received the copies from Benson that they were not stapled together (T:69). The copies were then collated and secured by Don Large, James Jerome and Appellee Jerome (T:69). The committee members assembled the copies by placing the signature page entitled "Petition for Recall and Defense" on top of the second page, Petition for Recall, which stated the charges for recall and the third page, "Defense Statement" submitted by Appellant (T:69-70), which was placed on the bottom by the Appellee. The committee then

provided the 15% Petition to circulators as a package (T:70-71). Appellee Jerome indicated that she did not believe that any affidavits or newspaper articles were submitted with the packets for circulators (T:71-72).

Appellee Jerome testified that she collected signatures on a primary election day at a table on which the Recall Petition and Defense were displayed on a clipboard (T:73). The Second Petition was collected from circulators although Appellee could not recall if the signature page, Petition for Recall and Defense were all attached when the sets were returned (T:77). The collected 15% Petitions were then delivered to Cathy Benson (T:78). Jerome recalled Bill Lazarus taking off some pages when they were counting the signatures (T:78-79) at City Hall.

On cross examination, appellee Jerome again confirmed that the affidavits were attached to the first or 10% Petition (T:82). The press releases and/or newspaper articles previously referred to by Appellee Jerome were not physically attached to the original 10% Petition (T:83). Jerome testified that she believed attaching the defense statement before the signature page would have been misleading or confusing to electors in light of the language "Do Not Sign Below" contained at the end of the defense statement (T:85-86). Jerome testified that the signatures obtained on the first and Second Petitions were all obtained within the statutory

time periods (T:88).

Russell V. Brown testified that he had signed a Petition for Recall (T:91). He identified his signature on Exhibit 7 (T:92) and noted that he was in the shower at the time he signed the form (T:92) and was not in the presence of the circulator Hammersly (T:93). Mr. Brown requested his signature be removed from the Petition for Recall (T:93). Mr. Brown's testimony was corroborated by his wife, Mildred Brown, who testified that she was present when her husband signed Exhibit 7 and that he was in the shower outside of the presence of circulator Hammersly (T:99). She also indicated that she signed Exhibit 7 but that she did so at the parking lot near the polling area (T:98-99) and that there was nothing attached to the signature page when she signed it (T:99). On cross-examination, she indicated that she had signed Exhibit 21, the blank form, at the parking lot (T:100) although she subsequently identified Exhibit 17, the withdrawal form, as the form she signed in the parking lot (T:103) on election day. Brian Hammersly testified that he circulated signature forms without the attached charges and defense (T:104). Thirty-two voter signatures were obtained on materials circulated by Hammersly for the Second (or 15%) Petition (T:106). Hammersly conceded that he did not see Mr. Brown (T:108) at the time Mr. Brown provided the signature in question.

Merle Kappleman testified that she was at the polling area in Daytona Beach Shores on election day for the primary election (T:110). She indicated that she saw people at a table collecting signatures for the recall petition and saw a document like Exhibit 21 on the table (T:110). The document was clipped in a clipboard at both the top and side in such a way that people could not readily or easily look underneath (T:111).

Rita Zito testified that she signed a petition which had papers attached (T:113-114) but did not know any of the specific reasons for recall other than how she felt and what she read in the paper (T:115). Further, Zito knew nothing of the defense other than what was in the paper (T:116).

James W. Armstrong testified that he observed the recall committee soliciting signatures (T:117). Armstrong confirmed that the Recall Petition and Defense was clipped in a clipboard with the signature page displayed (T:118). The clipboard had two clips and the form was secured at the top and side. He observed no one examined what documents were underneath the signature page (T:118).

Harriet Johnson was a circulator of both the First and Second Recall Petitions. She recalled receiving a packet of materials with the Second Petition , which included a press release and affidavits (T:120). She testified that she did not show the

individuals who signed for her anything other than the signature page unless they asked for it (T:122). The Petition for Recall and the separate defense of Appellant were included in her packet but were not stapled to the signature pages (T:24), although Mrs. Johnson had them available for electors if they wanted to see them (T:125).

Harry Limauro testified that he was asked by Don Large to get involved in the recall campaign (T:27). He was involved in the First (10%) Petition and attended an instructional meeting about the recall (T:127-128). Limauro examined Exhibit 2, Petition for Recall, and indicated that he had received the petition but that there were loose items relating to it which were in his kit (T:129). He could not remember specifically what was attached to the petition but recalled that he made extra copies (T:129-130).

Mr. Limauro further testified that he received a packet of materials pertaining to the Second (15%) Petition. He received preprinted signature pages requiring only a signature (T:132). Limauro made three sets of the materials in the packet. Limauro separated the signature pages from what he characterized as the "working kit" while leaving the other two sets of documents intact (T:135). He displayed the materials on the bridge table in his condominium outside the mail room (T:134-135). After collecting signatures, he returned only the signature pages, which were not

attached to anything, to the recall committee. Eleven pages of signatures reflected Limauro's name as circulator (T:133).

Joyce Holmquist, testified that she was the City Manager/City Clerk at Daytona Beach Shores from early October 1997, until she was terminated, with sixty-days notice, on July 8, 1998, and removed from her employment on August 20, 1998. Previously, she was a Deputy City Clerk (T:145-146). She indicated that during the first or second week of August, Brennaman, Don Large, and Joanne Jerome came to her wanting information on recall of Appellant. She was asked if she knew of charges against Appellant for which she could be recalled. She informed the recall committee representatives that whatever charges had been previously forwarded to the State Attorney's Office. She indicated that she did not have affidavits to provide to them (T:147-148). Eventually, Holmquist did provide affidavits during the second week of August (T:148). Holmquist testified that she did not prepare the Petition for Recall but did prepare some of the affidavits which were appended to the Recall Petition (T:148-149). She received the Petition for Recall in her capacity as City Clerk on about August 14, 1998, from Appellee Joanne Jerome (T:149). The signatures obtained by the committee were submitted to Holmquist who then sent them to the Supervisor of Elections (T:149). Holmquist indicated that she served Appellant with a copy of what she received back

from the Supervisor of Elections Office (T:150). Holmquist identified Exhibit 18 and noted that she certified having received and examined the Petition for Recall wit 432 signatures which she found to be prima facially valid (T:153). After receiving the certification back from the Supervisor of Elections (Exhibit 18), she caused a copy of the Recall Petition to be served on Appellant (T:154) by a police officer. She identified Exhibit 4 as the certification from Deanie Lowe certifying 405 of the 450 signatures (T:155). Holmquist believes that she provided notice to Appellant on August 19, 1998, as her last day was August 20, 1998 (T:158). Holmquist intended Exhibit 18 to be a transmittal document to Deanie Lowe whereby Holmquist certified that the Petition for Recall was prima facially the same as the petition presented to her on August 14, 1998 (T:164).

Nancy Farr testified that she was the Finance Director for the City of Daytona Beach Shores prior to August 20, 1998, but thereafter assumed the position as Acting City Manager/Acting City Clerk (T:170-171). She had no involvement in the process pertaining to the First (10%) Petition for Recall but was involved with the Second (15%) Petition (T:171-172). Ms. Farr testified that Cathy Benson made copies of the Recall Petition and defense statement which was brought into the City Clerk's Office by Appellee Joanne Jerome (T:172). Ms. Farr was aware that Appellant,

Phyllis T. Garvin, wanted the document to be all on one page (T:173). She indicated that no one on the recall committee asked her advice or opinion as to whether the form or content of the documents submitted were correct (T:173). Farr consulted with Appellee Deanie Lowe, and reviewed the recall statute. She than concluded that the form did not need to be contained on one page (T:173). Farr recalled making contact with an attorney with the Elections Commission who agreed that the statute did not require the form to be presented on one page (T:173-174). Farr indicated that she was informed by Appellee Lowe that there were 3,070 electors at the time of the last election in 1997 (T:174) but that she did not make any specific efforts to determine whether there had been additions or deletions to the number of qualified electors as of August of 1998 (T:174). Farr recalled that there were three pages per packet and that the contents of the packet were stapled before copying. She could not recall whether the typed in information on part of Exhibit 7 was there or if it only contained blank lines (T:176).

When Farr received the forms back from the committee, she and Benson reviewed to see if the signature pages had the signature of the circulator and date (T:178) before sending them on to Appellee Lowe (T:179). Farr recalled that Appellee Lowe certified back to her that the petitions contained at least fifteen percent of the

qualified electors as of the date of the last election, which was September 20, 1997 (T:179-180). Farr was never provided documentation from Appellee Lowe as to what the actual percentage was of the total of qualified voters as of September 10, 1998 (T:181).

Farr notified Appellant and provided her with a copy of Exhibits 10 and 11 which she had received back from Appellee Lowe on or about September 10, 1998 (T:180-181). Farr hand-delivered a copy of Exhibit 13 to Appellant at City Hall but did not provide Appellant with a certificate as to the percentage of qualified electors who signed the Recall Petition (T:181). Farr recalls that she did deliver such a certificate to the City Council (T:181). Farr identified Exhibit 16 as the notice provided to the City Council (T:182) which was based on the figures provided to her by Appellee Lowe (T:182). Farr testified that the Second Recall Petitions were returned to her within sixty (60) days after they were sent out (T:184).

Catherine Benson testified that she had been a Deputy City Clerk a the City of Daytona Beach Shores since April of 1998 (T:189). Her first involvement in the case was when the 10% Petition was presented to the City Manager. She assisted Joyce Holmquist with the counting of signatures for the First (10%) Petition (T:190). She was present when Holmquist certified the 10%

Petition to Lowe (T:191). Her next involvement was when Appellant brought in the defense statement. Benson notified Appellee Jerome that the defense statement had been turned in and provided Jerome with a copy (T:192). Benson testified that the recall committee prepared the actual Recall Petition and Defense but that she put appellant's defense with the other portions (T:192-193). The recall committee selected the format while Benson made the copies and provided them to the committee (T:193). Benson recalled receiving two versions of the signature page. She indicated that she began copying the version with preprinted names but was stopped and the preprinted form was returned to Don Large at his request (T:193-194). Benson recalled that Garvin's name did not appear on the signature page, which did not have a line for the precinct and date of signing of each person signing (T:195). She indicated that she made 100 copies of each form and did not make any additional copies thereafter (T:195). Benson further testified that she did not authorize anyone to make any copies of the materials for her (T:196). Benson was unaware of and had no knowledge of how the majority of the signature pages, which were ultimately turned in, ended up being the preprinted version which she returned to Don Large (T:196). Benson testified that the recall committee told her to put the signature page on top when she initially attempted to put the signature page on the bottom of the three pages (T:197).

Benson conceded that Appellant had requested a different format which was not used (T:197). The recall committee selected the actual format and order of the pages (T:193-197). Benson did not attach more than one signature page to any of the documents but acknowledged that Exhibit 7 had multiple signature pages attached when returned to her (T:199-200). She noted that the sets did have Appellant's defense when returned but the sets were not returned in the same fashion as when they left her office (T:201-202, 204).

On cross-examination, Benson acknowledged that the statutes, to her knowledge, did not provide that only one signature page could be attached to the petitions (T:205). Further, she conceded that there were no differences between the blank signature pages and the preprinted signature pages other than that the names and addressed had been typed in (T:205-206).

Appellant, Phyllis Garvin, testified in her case that she was elected a council member and had been elected Vice Mayor by the City Counsel on October 8, 1997 (T:207). She acknowledged that she was the subject of the recall petition being considered by the court (T:208) and that she had filed an Amended Verified Complaint for Declaratory Relief and Injunctive relief. She testified that she asked, in her petition, that the grounds for recall be declared legally insufficient (T:208). She testified that she believed that she and the city residents would be irreparably harmed if the

relief requested was not granted (T:209). Appellant confirmed that the signature page was all that was visible on primary day as the charges and her defense were obscured by a clipboard as previously testified to by other witnesses (T:212-214). After Appellant's testimony, Appellant rested her case below (T:220).

In the defense case, James Jerome testified that he was involved with the recall committee (T:222). He indicated that he helped prepare the packages for the circulators of Exhibit 7 (T:24-225) and that all pages were attached when the circulators were given their materials at the committee meeting (T:228). Jerome testified that most of the sets had two signature pages attached and some were blank and others were preprinted (T:229). Jerome did not know who prepared or copied the preprinted forms which were attached to some of the sets (T:229-230). Mr. Jerome was involved in the assembly of the sets of the Second (15%) Petition (T:236). He indicated that he made sets of the Second Petition. A set consisted of the signature page, recall petition charges and defense statement in that order (T:237). Although Mr. Jerome did not know where they came from he indicated that preprinted signature pages were used and that sometimes multiple signature pages were attached to the sets (T:237-238). He indicated that they had extra copies of all of the forms (T:239). Some packets also included loose affidavits (T:240) and that the instructions to

circulators stated that affidavits were enclosed (T:242).

Jerome testified that he did not work on putting the 10% Petition together (T:234) and, although he did not separate the signed 10% Petition from the affidavits that had been attached (T:235), he knew that they were separated in the office at City Hall (T:235). Despite that testimony, Jerome later contradicted himself by testifying that the affidavits were not attached to the First (10%) Petition when circulated (T:242).

Don Large testified that he started the recall committee and met with Clyde Brennaman and Joanne Jerome (T:245-246). Large testified that he did not have anything to do with the drafting, content or format of the First (10%) Petition (T:247) but that he was a circulator of that petition (T:248). He initially testified that the affidavits were attached to the First Petition but then indicated that they were loose (T:248) in the circulator's packets. Large testified that he created the Second (15%) Petition form (T:249) and prepared Exhibit 21 (T:249-250). Large also prepared a separate preprinted signature form with names and addresses contained thereon (T:250) from a list of voters of Daytona Beach Shores (T:250-251). The list was not up to date (T:251). Large prepared the preprinted forms from the list of voters and organized them according to address (T:251). He then printed the lists out

of his computer and gave them to circulators (T:252). Multiple signature pages were included with the preprinted sets (T:255). At the conclusion of Don Large, the defense rested.

SUMMARY OF ARGUMENT

Appellant contends that the trial court erred in failing to find that the Petitions for Recall were legally insufficient. Appellant contends that the court's rulings as to grounds 1(a) and (b) were in error as the allegations failed to allege conduct which was positively unlawful. Grounds 1(a) and (b) were legally insufficient to allege a basis for recall for malfeasance. No specific violations of law or charges were identified or applied to the facts of the instant case. Finally, even if the lower courts were correct in finding ground 1 legally sufficient, Appellant contends that the determination below that grounds 2, 3, 4 and 5 were legally insufficient dictated that the mixed petition was insufficient as a matter of law on the authority of Davis v. Friend, 507 So.2d 796, (Fla. 4th DCA 1987) as the Petition was substantially based on invalid grounds. appellant would ask this Court to retain jurisdiction, adopt Davis and overrule.

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S AMENDED VERIFIED COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF WHERE THE ALLEGATIONS OF THE PETITIONS FOR RECALL WERE LEGALLY INSUFFICIENT.

A. **PROLOGUE**:

Appellant filed her Amended Verified Complaint for declaratory Relief and Injunctive Relief (R:37-44) and her earlier Verified Complaint for Declaratory Relief and Injunctive Relief (R:1-11) seeking a declaratory judgment that the Petition for Recall contained legally insufficient grounds to support the issuance of a recall petition, for immediate decertification of the recall petition and an injunction prohibiting a recall election. The lower court order on appeal (R:469-484) determined that grounds one and five of the allegations raised in the recall petition were

legally sufficient while holding that grounds two, three and four were legally insufficient (R:474-475). The lower court denied Appellant's requested relief for a declaratory judgment and injunction (R:480). The Appellate Court held that ground 5 was legally insufficient but affirmed on the basis that ground 1 was still valid and alone could support the sufficiency of the recall petition.

The allegations contained in the First (10%) Petition for Recall were:

1. Malfeasance due to persistent repeated violations of City Manager form of government and Section 3.06 of the Charter by:

   a. Giving direct work instructions to City employees William Lazarus, Cathy Benson and Joe Blankenship, without first going through City Manager.

   b. Without Council discussion or approval, taking unlawful unilateral action to advertise for a part-time interim City Manager.

2. Malfeasance, as without lawful grounds [sic] she makes every effort to deprive applicants of their rights of due process of law.

3. Violation of her oath of office (Sec. 2.08) by subverting the City Manager form of government.

4. Misfeasance, in that she continually intimidates and harasses City employees to effectuate her personal desires.

5. Malfeasance of office in that she urged council member Marion Kyser not to attend a council meeting so that a quorum would not be available (R:470).

B. CONTAMINATED PETITION:

1. Appellant contends that the trial and appellate courts erred in denying declaratory and injunctive relief even if the court's findings as to the legal sufficiency of ground 1 are deemed by this court to be correct. Appellant contends that the Recall Petition was legally insufficient once the appellate court made a determination that four of five grounds contained therein were insufficient for recall. Davis v. Friend, supra. Instead, both courts relied on Wolfson, for their determination that only the complete failure of all of the charges in a Recall Petition to meet the statutory requirements will justify enjoining an election. However, Wolfson may be distinguished from the facts presented in the instant case. The trial court in Wolfson refused to rule on the validity of several other charges after determining that the first ground was

sufficient to sustain recall proceedings. Accordingly, there were no invalid grounds found to be contained within the Wolfson petition for recall. (Wolfson is listed as questionable authority in Shephards.)

The lower court, Fifth District Court of Appeal, herein has determined that four of the five grounds for recall were legally insufficient.

Appellant would note that the grounds 2, 3, 4 and 5 of the Recall Petition were more ominous sounding and offensive in nature than the grounds found by the court to be legally sufficient. The recall committee accused Appellant of denying others due process of law, a violation of her oath of office, subverting the City Manager form of government and intimidation and harassment of city employees to effectuate her personal desires (R:470). The recall committee did everything but accuse Appellant of treason, sedition, and communist party membership. The inflammatory nature of these allegations, which were found to be legally insufficient as contrasted to the weakness of the charge in Count 1, cannot be overlooked with respect to their impact on the decision of those who decided to sign the Petition in addressing whether the petition as a whole should have been stricken.

Appellant contends that the trial court erred in failing to apply the holding in Davis v. Friend, supra. Therein, the trial court had determined that three out of the four grounds for recall were legally insufficient. Nonetheless, the trial court in Davis, held that the recall proceedings under the petition should continue. The District Court of Appeal, Fourth District, reversed the lower court order denying Appellant's request to enjoin a recall election. As here, the lower court had relied on Wolfson. The District Court of Appeal, Fourth District, held:

> Wolfson is distinguishable in that the trial and appellate courts refused to rule on the validity of several charges after determining that the first ground was sufficient to sustain recall proceedings. The appellate court noted that the additional allegations "would likely surface during a campaign anyway." Id, at 92. The recall statute requires the approval of a petition by a substantial number of voters before a recall election may be scheduled to that petition. Section 100.361 Florida Statute (1985). Here, three (3) distinct charges have actually been ruled invalid, and it is undisputed on this record that a substantial number of voters endorsed the petition on the basis of all four (4) charges. We agree with Appellants that it is impossible to determine whether those voters would have endorsed the recall petition in the absence of three (3) charges, all of which we note superficially appear to be more serious than the remaining charge. We disagree with Wolfson to the extent it holds that recall proceedings may not be enjoined even though they are predicated on a petition substantially based on invalid grounds.

Davis, at 797.

It is undisputed on the record before this court that the electors endorsed the petitions on the basis of all of the charges

contained therein. Just as in Davis, the three charges found to be invalid in this case superficially appeared to be more serious than lone charge found to be valid. Further, it is also impossible from reviewing the record to determine whether the voters would have endorsed the Recall Petition in the absence of the invalid charges.

The absence of evidence on this point should be determinative against the Recall Committee. A four corners evaluation of the Petition should be construed against the drafter committee. It was the drafter that had the option of leaving out the invalid charges, but decided to get the maximum bang for its "buck". When a can of food is discovered to be contaminated, the bottom of the can is not eaten from. And everything that flowed from the Recall petition was fruit of the poisonous tree and cannot serve as an after-the-fact rationalization of a wrongful result.

At best, a very strong presumption of invalidity should be created when invalid allegations are intermingled with "other" charges. The burden of proof should shift and indeed a very stringent burden of proof should be placed on the contaminator to prove the entire process was not contaminated. The record starkly reflects that the recall committee did not meet this burden.

Ironically, the court below followed the Wolfson rule instead of Davis because it "further distanced the court from the political process". To the contrary, Wolfson requires a court to look into

a political ball and speculate that the invalid charges would have caused no harm. The Davis rule would create either an absolute rule of exclusion, as a matter of law, or implement a rebuttable presumption, both of which are typical constructs of the courts. If in other areas of the law the courts can adopt exclusionary rules clearly the Court should do so here, and keep the recall process pure.

While Davis did not specifically rule on the percentage of invalid grounds necessary to create a threshold before a petition to be determined to be “invalid grounds” such petitions must be scrutinized to ensure and protect the office holder’s property rights and a right to due process of law. Clearly, when 4 of 5 charges were declared invalid, a whopping 80%, the petition was "substantially based on invalid grounds". Fundamental fairness requires a determination that the recall petition so contaminated with the invalid charges, that sandwiched one very weak and questionable charge, should not be allowed to constitute a basis for recall election. Davis should be followed and Wolfson rejected. The Appellant should be reinstated.

C. CUTTING THE FINAL THREAD/THE FINAL SWEEP

Ground 1 should have been invalidated or a bare minimum should have been regarded as so weak that it could not have been the

prevailing influence for the people to sign the Petition when the signers were inflamed by the other 4 grounds in the petition.

1. STANDARD OF REVIEW

First, it is necessary to understand the archaic standard of review unique to the recall petition that impacts on the malfeasance charge. It is well established that a City Clerk has no authority to determine the legal sufficiency of allegations contained in a municipal recall petition before transmitting to the Supervisor of Elections. Section 100.361, Florida Statutes (1997). The authority to make a determination of the legal sufficiency of allegations is reserved solely to the court upon application of an interested party. State ex rel Landis v. Tedder, 106 Fla. 140, 143 So. 148 (1932); Jividen v. McDonald, 541 So.2d 1276 (Fla. 2nd DCA 1989). Once the legal sufficiency of the allegations of a recall petition have been properly raised by an interested party the reviewing court cannot rule on the truth or falsity of charges against the official and may only rule on whether the facts alleged in the recall petition are sufficient to establish grounds for recall, Bent V. Ballantyne, 368 So.2d 351 (Fla. 1979); Moultrie v. Davis, 498 So.2d 993 (Fla. 4th DCA 1986).

In other words, a well pled lie can serve as the basis for a recall petition, and ultimately allow the electorate to turn a recall election into a popularity contest.

Appellant herein sought such a determination with the Verified complaint for Declaratory relief and Injunctive Relief and Amended Verified Complaint for Declaratory Relief and Injunctive Relief (R:1-11, 37-44).

While the truth or falsity of allegations alleged in a municipal recall petition is ultimately for the electorate and not subject to judicial inquiry, a mere recital of one of the specifically enumerated grounds for recall without an allegation of conduct constituting that ground, is insufficient. Bent, supra. Allegations, even if true, cannot constitute malfeasance where the conduct alleged is not prohibited under the laws of this state or the City Charter.

Malfeasance has been defined as:

> Evil doing: ill conduct. The commission of some act which is positively unlawful; the doing of an act which is wholly wrongful and unlawful; the doing of an act which a person ought not to do at all or the unjust performance of some act which the party had no right or which he had contracted not to do Comprehensive term including any wrongful conduct that affects, interrupts, or interferes with the performance of official duties. State ex rel Knabb v. Frater, 198 Wash. 675, 89 P.2d 1046, 1048. Malfeasance is a wrongful act which the actor has no legal right to do, or any wrongful conduct which affects, interrupts or interferes with performance of an official duty, or an act for which there is no authority or warrant of law or which a person ought not to do at all, or the unjust performance of some act, which party performing it has no right, or has contracted not, to do. Daugherty v. Ellis, 142 W. Va. 340, 97 S.E.2d 33, 42.

Black's Law Dictionary, 6th edition, (1990).

As noted by the trial court in its order on appeal, malfeasance is defined as the commission of some act which is positively unlawful. Moultrie, supra. In considering the legal sufficiency of the allegations of the instant Petition for Recall, it is necessary to examine the specific allegations to see what specific act has been alleged which is, or could be, positively unlawful. Further, the alleged misdeeds must have some relationship to the duties of the official's office. The conduct alleged must be prohibited under either the laws of the state or the charter of the municipality. Bent, supra. Allegations consisting of nothing more than beliefs, ideas, opinions or alleging errors in judgment or unpopular acts by the official for whom recall is sought are legally insufficient no matter how unpopular they may be. See, E.G. Taines v. Galvin, 279 So.2d 9 (Fla. 1973); Richard v. Tomlinson, 49 So.2d 798 (Fla. 1951); Tolar v. Johns, 147 So.2d 196 (Fla. 2nd DCA 1962); Joyner v. Shuman, 116 So.2d 472 (Fla. 2nd DCA 1959). The court has previously determined that there should be a real foundation for such a harsh test as a recall election, that the charge against an official sought to be recalled is related to the performance of the duties of his office and that the ground of the action should be something stronger than a belief or an idea. A charge should contain a substantial basis in fact. Richard, supra; Joyner; supra.

Appellant as an elected Councilmember of the City Council of the City of Daytona Beach Shores, Florida, has a vested property right in her office. Such property rights may not be unlawfully taken away or illegally infringed upon. State ex rel. Landis, supra. In assessing the legal sufficiency of allegations for recall, the court has a duty to address only the specifics alleged by the recall committee rather than to interpret or supply missing factual allegations which would arguably render the grounds legally sufficient. Piver v. Stallman, 198 So.2d 859 (Fla. 3rd DCA 1967).

2. NOT GROUNDED

Having identified the appropriate legal standard, Appellant contends that the trial court erred in making a determination that ground 1 was legally sufficient. Appellant was accused in ground 1(a) of giving direct work instructions to city employees in violation of Section E 3.06 of the City Charger of the City of Daytona Beach Shores. Section 3.06 of the City Charter provides that:

> Except for purposes of investigation, inquiry and information, the Council and committees or individual members thereof, shall deal with the City Officers and employees of the City solely through the manager and neither the Council or its members shall give orders to such officer or employee, either publicly or privately. Any such action shall constitute malfeasance within the meaning of Article IV, Section 7(a) of the Florida Constitution. This prohibition shall in no way restrict the right of individual council members to observe personally and scrutinize closely all aspects of City government in order to obtain independent information for

> use by the council in discharging its responsibility to formulate sound policies, to hold the administration accountable to the people and to increase the efficiency and the economy of City government wherever possible.

Section 3.06 does not specifically prohibit the giving of instructions without first going through the City Manager but only the giving of orders to city employees without first going through the City Manager. Without regard to whatever may have been contained within affidavits which were either attached or loosely circulated with the Petition for Recall, the statement of grounds must be contained within the Petition for Recall, consisting of 200 words or less, and reference to other materials to interpret or explain the specific grounds is inappropriate.

Appellant is accused only of having given instructions, rather than orders as prohibited by Section 3.06 of the City Charter. An order is defined as “a mandate; precept: command or direction authoritatively given; rule or regulation.” Further, to instruct is defined as “to convey information as a client to an attorney”, or as an attorney to a counsel, or as a judge to a jury.” Black’s Law Dictionary, 6th edition, (1990). Instructions are in the nature of advice or directions conveying information as opposed to precepts or mandates. The recall committee specifically chose the language employed in the allegations of the Recall Petition and chose incorrectly. Section 3.06 of the City Charter does not prohibit a council member from having contact with city employees

or from scrutinizing their performance or actions. In fact, council members have a duty to do so. If Appellant gave instructions as alleged in the recall petition, such conduct cannot be construed to be malfeasance because it is not specifically prohibited by the City charter or any other law of this state.

The Recall Committee, in drafting the grounds in the Recall Petition, failed to appropriately identify any provision of the City Charter or state statute violated by the giving of the instructions alleged. As malfeasance is specifically defined to be the commission of some act which is positively unlawful. The Court cannot, in assessing the legal sufficiency of the allegations, supply missing factual information or language necessary to state a legally sufficient ground. The lower court erroneously made a finding that Appellant violated an express prohibition in the City Charter by interpreting or construing instructions to be the equivalent of orders.

After so doing, the Court construed the allegations in ground 1(a) as constituting malfeasance and found the ground legally sufficient on the authority of Wolfson v. Work, 326 So.2d 90 (Fla. 2nd DCA 1976). However, the decision in Wolfson is of questionable validity as good law and certainly may be distinguished on its facts. The City Charter provision considered in Wolfson had

expressed prohibitions against the giving of orders or requests to subordinates of the City Manager either publicly or privately. The specific ground in the Recall Petition considered in Wolfson tracked the language of the City Charter provision by accusing Wolfson of "giving orders to, and making a request of, city employees who were subordinates of the City Manager." Wolfson, at 90. Unlike the grounds considered in Wolfson, ground 1(a) herein alleged that Appellant had given instructions while the Charter provision considered prohibited only the giving of orders to city employees. The grounds did not tract the language of the applicable City Charter provision alleged to have been violated. See, fn. The actions attributed to Appellant were not unlawful and, therefore, cannot constitute malfeasance as a matter of law. The trial court erred in finding this ground legally sufficient.

In ground 1(b) Appellant is further accused of having taken unlawful, unilateral action to advertise for a part-time interim City Manager. No statutory or charter provision is cited by the drafters of the Recall Petition, nor was any identified in the trial below, which would prohibit the action alleged and make such action unlawful. The specific allegation did not state that an actual advertisement for the position of part-time Interim City Manager was placed by Appellant or that City funds were used by Appellant to place such an advertisement. Even if Appellant

actually did place such an advertisement, her actions would not have violated the Charter of the City of Daytona Beach Shores or any other law of the state. In that malfeasance constitutes the commission of an act which is positively unlawful, the alleged conduct cannot be construed as malfeasance.

Section 3.02 of the City Charter provides that the City Manager shall be appointed by a vote of 4/5 of the full council for an indefinite term. It should be noted that Appellant is not accused in ground 1(b) of having unilaterally appointed, or attempted to appoint, a City Manager. Even if true, the allegations in ground 1(b) constitute, at most, a solicitation for applications or expressions of interest in employment which is not

prohibited by the City Charter and state law. This allegation was legally insufficient for recall and the trial court erred in its legal conclusion to the contrary.

Obviously, since all five grounds of the recall petition were invalid, the recall election should be declared null and void.

CONCLUSION

Based on the foregoing authorities and argument contained herein, Appellant respectfully requests this Honorable Court reverse the order of the lower court and declare the recall election null and void.

It is further noted that from the very outset of the Recall Campaign, the Recall Committee has publicly threatened recall of two of the other five members of our City Council. They await your decision which will also impact voters and thousands of elected officials in over 400 cities in this state.

Moreover, Appellant should be reinstated and if the replacement Councilmember will not step down, issue an order allowing Appellant to get a Writ of Ouster of said Councilmember to be signed by the Governor himself.

FOOTNOTES

1. The Recall Committee is expected to waive the flag, stomp up and down and claim the will of the people have spoken and that all errors are harmless, Beckstrom v. Volusia County Canvassing Board, 707 So.2d 720 (Fla. 1998). The Court below did not buy this argument. Beckstrom applies to general elections, not recall petitions, an extraordinary proceeding where “t’s” must be crossed and “i’s” dotted. If not for the invalid petition, there would not have been a vote in the first place. Who can calculate the harm caused, not only to the Appellant, but to her beautiful little city's image, by the bandwagon effect between the time of signing of the petition and the recall election? The committee’s position when stripped of all its gloss is that the electorate should be able to recall anyone for any reason, even for unpopularity, and as quoted in the May 19, 1999, Florida Wall Street Journal, where the Appellee argued that voters have a right to vote someone out of office for simply being a "jerk". Appellant and her family have suffered for 14 months with her reputation, which was formerly that of a "do-gooder", severely damaged by the vicious acts and demagoguery of the Recall Committee. An expedited decision in this case now before this Honorable Court, might give the Appellant the benefit of more

time as a candidate for re-election as an incumbent.

2. In a Recall election a judge is concerned with the sufficiency of the pleadings, not the proof, as in reviewing a motion to dismiss. Appellant has never been able to state her innocence in a court of law. However, Appellant has learned that further analogy to the rules of civil proceedings is interesting. A complaint valid on its face can be invalidated by exhibits attached to it that give cause for dismissal. If the sworn affidavits (A:64-69) were examined carefully, it is clear that Appellant did not give orders or instructions to anyone but merely that Appellant, as Councilmember, while at City Hall, asked questions and made suggestions to city employees, actually in every case. She had the permission of the City Manager to speak to them. She was permitted to do as a City Councilmember in accordance with the City Charter. Like the attachments on a complaint, the affidavits in support of the Recall Petition, themselves, would defeat the Petition. (A:64-69) Indeed, only two of the three employees mentioned in the petition had affidavits supposedly against the Appellant. An obviously disgruntled City Manager, who was in the process of being dismissed for cause, admitted in the lower courts to writing affidavits against the Appellant for the employees. (T:146-148)

3. Query: If Appellant was denied a vested property right, should not she be able to sue for a taking in inverse condemnation for loss of her term or for violation of her civil rights? Florida courts have not spoken to this question.

4. The Appellate Court below was an excellent panel and wrote a very thoughtful ten-page opinion, which largely made this review attainable. The Appellate Court however, felt that the difference between the terms "orders" and "instructions" was too much a "splitting of hairs". Appellant would submit that the distinction is stronger than that. Nevertheless, the Appellate Court should have focused on the prospective that recall proceedings are quasi-criminal in nature and impose a stigma much like being charged with a crime. In fact, Appellant was charged with malfeasance, which also has a criminal counterpart, if the malfeasance is severe enough. A recall proceeding is also analogous to an impeachment proceeding which has a heightened standard of pleading and proof; or, a license-revocation proceeding which has been described as quasi-criminal and stigmatic. See, Anheuser Busch v. Department of Business Regulation, 393 So.2d 600 (Fla. 1st DCA 1981). The Busch case stated that the competent substantial evidence rule should be a variable that heightens

in degree of proof as the consequences of the license-revocation proceeding presents. Analogously, the Recall Committee should be held to a stricter standard of pleading once an extra-ordinary proceeding was brought against Appellant.

Further, aren't criminal charges construed strictly in favor of the accused, and isn't a prosecutor required some exactness of his or her charges? Appellant has been falsely accused, sloppily charged and politically assassinated. All because an elected official in a

representative democracy has talked to city employees about relevant city issues! The distinctions between the word used in the Petition and the correct word does make a difference.

Respectfully submitted,

PHYLLIS T. GARVIN, Pro se, Appellant
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Daytona Beach Shores, Florida 32118
(904) 761-7029

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and accurate copy of the foregoing, INITIAL BRIEF ON THE MERITS OF APPELLANT, has been furnished by U.S. EXPRESS MAIL July 7, 1999 to: **SUPREME COURT OF FLORIDA**, 500 SOUTH DUVAL STREET, TALLAHASSEE, FLORIDA 32399-1927; and, HAND-DELIVERED July 8, 1999 to the following: **Mary D. Hansen, Esq.**, 1620 S. Clyde Morris Boulevard, Suite 300, Daytona Beach, Florida 32119; **Daniel Eckert, County Attorney**, 123 West Indiana Avenue, DeLand, Florida 32720-4613; **C. Michael Barnette, Esq.**, 3925 South Nova Road, Suite 2, Port Orange, Florida 32127; **Gayle S. Graziano, Esq.**, 457 South Ridgewood Avenue, Daytona Beach, Florida 32114; and **Margaret Roberts, City Attorney**, Daytona Beach Shores, 3050 South Atlantic Avenue, Daytona Beach Shores, Florida 32118,

this 7th day of July, 1999.

Respectfully submitted,

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Daytona Beach Shores, Florida 32118
(904) 761-7029

INDEX TO APPENDIX

SUPREME COURT OF FLORIDA

PHYLLIS T. GARVIN,
Petitioner/Appellant,
hereinafter "Appellant",

vs. **S.Ct. CASE NO.: 94,751**

JOANNE JEROME, Chairman of the Phyllis T. Garvin Recall Committee of Daytona Beach Shores; and DEANIE LOWE, Supervisor of Elections, County of Volusia,
Appellees.
_____/

STATEMENT IDENTIFYING SIZE AND STYLE OF TYPE USED IN THE INITIAL BRIEF ON THE MERITS OF APPELLANT

The size and style of the type used in the body of this Motion is Courier 10cpi./12pt.

CERTIFICATE OF SERVICE

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Respectfully submitted,

_____

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