OA 10-7-99

BEFORE THE SUPREME COURT
OF THE STATE OF FLORIDA

SUPREME COURT CASE NO. 94,751
District Court Case No. 98-2975
Lower Tribunal Case No. 98-31977-CICI

PHYLLIS T. GARVIN

Appellant,

v.

JOANNE JEROME, Chairman of the Municipal Recall Committee of Daytona Beach Shores; and **DEANIE LOWE**, Supervisor of Elections, County of Volusia,

Appelless.

APPELLEE JEROME'S ANSWER BRIEF

Petition for review of the Fifth District Court of Appeals
Order of December 18, 1998

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This is to certify that the font used for this brief is Courier New (12 point).

LESLIE T. HINZMAN
Legal Assistant to
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Date: 7/27/99

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Although lengthy, the statement of the case provided by the Appellant is substantially accurate, except that the statement on page 3 of the initial brief that Appellant feels it is significant that the Supervisor of Elections "disobeyed the law" is without basis in fact. Far from violating the law concerning automatic stays, the Supervisor at all times proceeded in accord with the order of the trial court granting a temporary, not automatic, stay. The statements concerning the Appellant's motion for attorney's fees on page 4 of the Initial Brief are immaterial to the grounds of this review as there is no existing order concerning such fees. Finally, Appellee notes some confusion on page 4 concerning the filing of a Notice of Appeal on June 28, 1999 by the Appellant.

The Appellant's Statement of the Facts is more troublesome because it is so voluminous. All of the testimony cited in pages 9-18 of the Initial Brief goes to whether the format and circulation procedures of the Recall Petition provided the Appellant with due process. These matters are not on appeal with this Court. However, the summaries of the testimony are accurate and show that the witnesses were not asked about their subjective reasons for signing the Petition or whether they were influenced to

sign by the presence of the invalid grounds for removal. Thus, Appellee Jerome does not seek to strike the assertions contained on those pages, but does suggest that their value is limited due to the failure of Appellant and her trial counsel to put any evidence whatsoever on the record that would support the statement made on page 23 of the Initial Brief that "It is undisputed on the record before this court that the electors endorsed the petitions on the basis of all the charges contained therein."

In Footnote 1 of the Initial Brief, Appellant cites to a Wall Street Journal article which is not part of the record before this Court. Also in this note, the position of the Garvin Recall Committee is misstated. Throughout this proceeding, the Committee has taken the stand that this recall was for legal cause.

In her Footnote 2, Appellant asserts her defenses to the truth of the ground upon which she was removed from office. As the truth or falsity of the charges is not ever before a court, these statements are immaterial and mere surplusage.

As additional relevant facts, Appellee Jerome notes that the Appellant filed her defenses to the first Recall Petition on or about August 24, 1998 but waited to file her suit challenging the legal sufficiency and procedural

actions of the Recall Committee until September 4, 1998. (Trial Court Record.) Finally, Appellant was represented by counsel in both the circuit and appeals court proceedings. (R 23)

SUMMARY OF ARGUMENT

In this case, the recall election has been held, tallied and certified under the supervision of the courts. More is at stake here than is found in the recall cases decided before an attempted recall election was held. Reversal by this Court on the grounds asserted would do more harm to the integrity of the electoral process than merely creating a delay and inconvenience to the Garvin Recall Committee (GRC). The Appellant has asked this Court to overturn longstanding views about the correct burden of proof and scope of review of recall petitions. Because these long-held principles have a sound basis in the Constitutional guarantee of free elections for Florida citizens, this Court should be very cautious indeed about accepting her invitation.

The inferior courts were correct in determining the Recall Petition was legally sufficient, in that it adequately stated a positive violation of an express Charter provision, and provided facts identifying the circumstances of the violation that were sufficient to inform the signer about what he was being asked to sign and the officeholder of the substance of the charges she needed to defend against.

Because it requires the courts to delve into the subjective reasons a citizen might have to sign a recall petition and because it engrafts judicial amendments to Section 100.361, F.S., Davis v. Friend should be disapproved. Although the courts are empowered to determine questions of the legal sufficiency of recall grounds, they are not authorized to determine whether a petition signer had correct, incorrect or no particular reasons at all for signing. The statute places no requirement on the Petition signers other than that they be qualified electors. The statute does not even require that the grounds for recall be placed on the ballot for the voters' edification. By determining legal sufficiency on the basis of what the signers might or might not have been influenced by in signing, the Davis decision brings the courts into the realm of speculation and subjectivity. Wolfson presents a much more fair, reasonable and statutorily justifiable approach to the question of whether one sound recall charge among several unsound ones is legally sufficient under the statute.

Appellant argues strenuously for a prudential requirement that recall grounds be drafted with the same formality and presumptions as are criminal charges, and that a heavy burden of showing signers were not influenced

by invalid charges be placed on the recall committee. This issue was not raised or argued on appeal to the Fifth District Court of Appeals.

The citizens involved in a recall committee undertake a daunting task of gathering numerous signatures not once, but twice. The second time requires 50% more signatures than the first, and the signers of the second petition have not just the grounds but also the officeholder's defenses available before signing. The statutory safeguards against an unfounded basis for recall are solid and sufficient when coupled with the availability of judicial review for legal sufficiency and due process. Citizens like those in Daytona Beach Shores must not be foreclosed from properly removing an intolerable public official.

ARGUMENT

Issue 1: Whether the courts below correctly rejected Davis v. Friend on the issue of the legal sufficiency of the Garvin recall petition.

In reviewing the legal sufficiency of a recall petition, the burden is on the challenging officeholder to show that the recall proceedings are not in substantial compliance with Section 100.361, F.S. Dubose v. Kelly, 181 So.11 (Fla. 1938); Platt v. Ross, 150 So.716 (Fla. 1933); Hines v. Dozer, 134 So.2d 548 (Fla. 3d DCA 1961). As a general rule, election laws are to be liberally construed in favor of the right to vote, although a recall election is treated as an extraordinary proceeding because the right of the officeholder to her term and emoluments of office may not be illegally infringed or unlawfully taken away. State ex rel. Landis v. Tedder, 143 So. 148, 149 (Fla. 1932). A free election in a democracy is a matter to be determined by the voters, not the courts. Metropolitan Dade County v. Shiver, 365 so.2d 210, 212 (Fla. 3d DCA 1978), *aff'd* 394 So.2d 981 (Fla. 1981). In proper cases, the courts have been willing to enjoin recall elections, because the only harm done is the delay caused by requiring the recall committee to get it right. Where the recall

election has been held and the officeholder has been removed, that rationale does not apply. See Landis, 149. To reinstate the Appellant at this time has consequences far beyond those of the usual recall case. Not only are the interests of the Daytona Beach Shores electorate at stake, but the replacement councilmember has duly qualified, taken the oath of office and has participated in City business, often on close 3-2 votes. The disruption that could be caused means this Court should only order reinstatement on the firmest of grounds. Those grounds are not presented in this case.

Recall statutes are in derogation of common law, and so must be strictly construed. However, strict construction does not necessarily mean strict compliance. The intention of the legislature as gleaned from a review of the entire statute prevails over literal meaning. Boardman v. Esteva, 323 So.2d 259, 265 (Fla. 1975). The test for legal sufficiency is objective, and asks whether sufficiently specific facts are stated in the recall grounds which relate to unlawful conduct by the officeholder and which sufficiently inform the signer and the officeholder of the bases asserted for recall. Tolar v. Johns, 147 So.2d 196 (Fla. 2d DCA 1962).

On the authority of Davis v. Friend, 507 So.2d 796 (Fla. 4th DCA 1987), Appellant claims that where only one among several charges are found to be legally sufficient, a recall election must be enjoined as a matter of law. However, the law we are concerned with is a statute intended to create an orderly and uniform process for accomplishing the recall of offending officials. Section 100.361, F.S. All the statute requires is that "a" proper basis for recall undergo the petition and defense procedure established therein. Unless the statute expressly directs that one or more invalid recall bases invalidate the entire petition, the courts have no reason or authority to impose such a mandatory requirement.

This Court has had prior occasion to refer to Wolfson v. Work, 326 So.2d 90 (Fla. 2d DCA 1976). In Bent v. Ballantyne, 368 So.2d 351 (Fla. 1979), the circuit court found that only one of four grounds for removal, if true, was sufficient to sustain the recall petition. This Court found that the remaining ground did not state a positively unlawful act related to conduct in office, so no valid grounds existed. Although not necessary to the decision, this Court commented that Section 100.361 F.S. requires the allegation of conduct which would constitute one of the several statutory grounds. This Court distinguished Bent

from Wolfson because in the latter case, the petition alleged a violation of an express Charter prohibition against councilmembers giving orders to employees. Bent, 353.

In Joyner v. Shuman, 116 So.2d 472 (Fla. 2d DCA 1959), the court quoted extensively from authorities on recall. Those authorities clearly state that it is not necessary that each statement in a recall petition express a proper ground of misconduct, as long as the petition as a whole presents facts that constitute one or more valid grounds. Id, 477. The Second Circuit also reviewed those authorities in Tolar at 199. Joyner, Tolar and Bent were not considered by the Davis court when it held that one valid ground would not support a recall election where several other grounds were found invalid.

The circumstances revealed in the Davis opinion are unusual and not calculated to present authoritative precedent to accomplish the statutory goal of an orderly and uniform process. First, there was no appearance by appellees, so the Fourth District did not have the benefit of research or argument opposing the officeholders' view. Second, the opinion fails to detail the substance of the charges found invalid and valid or to discuss what it was in the record that made it "undisputed" that a substantial

number of signers did so predicated on all four charges.[1] The Davis court agreed with the uncontroverted point made by the appellants that "it is impossible to determine whether those voters would have endorsed the recall petition" in the absence of the three invalid charges. Id, 797. Of course, it is similarly impossible to determine whether the voters would have signed anyway.

With due respect to the Fourth District, it should never have addressed the question of the bases or lack thereof that the signers had in endorsing the recall petition. As a matter of freedom of expression, the courts should rarely and only with express statutory authority inquire into the subjective influences on the signer of a petition for any purpose, including recall. The statute gives no such authorization - the only requirement for the signer of a recall petition is that he be duly qualified, which can be objectively determined without the necessity of putting each signer under oath for examination and cross-examination of his motives and reasons for signing.

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[1] Appellee has combed the record here in vain for any evidence at all that signers of the Garvin petition did so under the influence of both the invalid and valid charges. Thus, Appellant's statement on page 23 of her Initial Brief that the record here reflects such influence is untrue. The obligation to create the record is on the Appellant, so her statement at pages 23-24 of her Brief that "it is impossible to determine from the record whether the voters would have endorsed the recall petition in the absence of the invalid charges" confirms she failed to meet that obligation. Appellee also notes that it is equally possible to state that the record does not show the signers were influenced by the valid charges, either. Without facts on the record, this Court would engage in pure speculation if it upheld the Appellant's assertion in this regard.

A mandatory judicial inquiry into the reasons a petition is signed or a particular ballot is cast would be inimical to the right of the electorate to do as it sees fit without prying by an arm of government. For this reason alone, Davis should be disapproved.

The approach taken by the Wolfson and Garvin courts is preferable in several respects. First, it avoids a judicial amendment to Section 100.361 which would require invalidating a multiple ground petition if some "substantial number" of the charges are found to be invalid. As the Second District noted, "there is no legal requirement that all grounds in a recall petition be legally sufficient." Wolfson, 91. The Fifth District commented that appellate courts do not have sufficient guidance in the law to determine whether struck charges are more serious than any found valid, as the Davis court did nonetheless. It also noted, as did Wolfson, that the struck charges would surface during the recall campaign, irrespective of their invalidity. (R 30)

Indeed, political expression in a campaign is sacrosanct, and the Davis holding violates that constitutional right. Art. 1, Sections 1 and 4, Fla.

Constitution (1968).[2] There being no statutory basis for requiring all or most recall grounds to be valid, the courts may not create one.

Second, the Wolfson and Garvin opinions properly applied the legal sufficiency test in an objective fashion, avoiding judicial inquiry into the signers' motives and subjective influences. It has been held that a subjective application of an objective standard is reversible error. Pinkerton-Hays Lumber Co. v. Pope, 127 So.2d 441, 442 (Fla. 1961). To rule otherwise would be to require an elector to forego signing a petition containing invalid grounds, even if one valid charge supports the Petition. If he signed it anyway, he would then be subjected to judicial inquiry as to whether and how the invalid charges influenced his decision to sign. Section 100.361 does not require a recall petition signer to undergo such a process any more than it requires more than one ground to support a recall election. The truth or falsity of valid charges is not at issue during the Petition stage of the process, but arises on the day of the recall election. "…[T]he statement of the ground for recall, nothing extraneous, must direct the decision of the court. So we are therefore concerned with

[2] In her first footnote, Appellant complains of the supposed vicious acts and demagoguery of the GRC, although no such acts are found in this record. Politics is a rough and tumble process, both

the adequacy of the substance of the charge and not its truth or falsity." Joyner, 480. What might or might not have influenced a signer is simply not a proper inquiry by a court. Here, the statute permits one valid ground alone to require an officeholder to face a recall election, even if among invalid grounds. This is the proper test.

Issue 2: Whether the Garvin recall ground upheld below is in fact legally sufficient.

In regard to this issue, Appellee notes that Appellant has had one full appellate review of the substantive question she presents. Both the circuit court and the Fifth District were unimpressed with her argument that the ground found valid failed to state a violation of an express Charter prohibition related to the duties of her office because the petition did not "tract" (sic) the language of Section 3.06 of the City Charter.

She bases her assertion on the use of the word "instructions" in the Petition, instead of the word "orders" as given in the Charter. Her argument presumes that words are reviewed in isolation by the courts, instead of in their context so the meaning may be clarified. Her

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before and after election. It is critically important to maintain that fractiousness because it insures that elections truly are free and open.

argument forgets that the courts must interpret writings so as to do substantial justice to all involved, not just the threatened officeholder. A slight variation in language is not fatal. Shiver, 213.

In this case, the wording of the first charge is clearly intended to relate to the prohibition in Section 3.06 that expressly makes it malfeasance to deal with City staff without going through the city manager or to give "orders" to employees either publicly or privately, because the charge specifically mentions that Section. Furthermore, since ordinary citizens are empowered to use the recall process, the plain and ordinary meaning of the word "instructions" should be employed in determining legal sufficiency. It is doubtful that the electors comprising a recall committee who are called upon to draft a legally sufficient petition will think to ask whether there is more than one meaning. It is equally doubtful that a petition signer would think to distinguish between the words. Given their plain and ordinary meaning, "orders" and "instructions" are synonymous.

All the law requires is that the Petition sufficiently set forth a violation of some duty to the electorate which is sufficiently identifiable for the electorate to determine the truth or falsity of the charges. Gilbert v.

Morrow, 277 So.2d 812, 814 (Fla. 1st DCA 1973). Here, the offended Charter section was identified and the specific employees were named and had given affidavits supporting the charge. Both the signers and the Appellant thus had fair notice of the substance of the charges.

To adopt the hyper-legalistic definition urged by the Appellant would set a trap for the unwary. There is no evidence that the Legislature intended to create such a snare, as the courts below correctly determined.

Issue 3: Whether this Court should preserve its longstanding and useful substantial compliance test or adopt heightened "pleading" requirements and shift the burden of showing substantial compliance to a recall committee as urged by Appellant.

Because she did not raise this issue below, Appellant is foreclosed from raising it in this Court. Because she did not appeal the circuit court's express allocation of the burden of proving the legal insufficiency of the Petition or its use of the "legal sufficiency" test for the adequacy of the charges, she has waived any privilege she may have had to raise it now.

Appellant equates a recall proceeding with a criminal proceeding, ignoring the fact that Section 100.361 does not

authorize the State to initiate a recall proceeding, nor does it result in a potential for imprisonment or a fine. Nor is a recall proceeding in any sense like litigation, where formal rules and pleadings requirements hold sway.

By setting up the recall safeguards as it did, the Legislature implies that only those safeguards are necessary to protect the limited property interest an officeholder holds in the office. The courts have acknowledged that prerogative of the Legislature by devising the legal sufficiency standard, which adequately protects both the rights of a recall committee and of the officeholder by determining that there is a real basis to subject the official to the removal election. The drastic shift proposed by Appellant would skew this balance in a manner not intended by the Legislature, to the unwarranted disadvantage of recall committees. Keeping in mind that an office is held in trust and the right of an officeholder is a property right only in the broad sense (e.g., sufficient to provide standing to challenge a recall petition), Appellant simply has shown no justification for such a radical move. Landis, 150.

CONCLUSION

Because Section 100.361, F.S. does not expressly forbid the signing of recall petitions comprised of some invalid and one valid ground, the Petition as a whole was in substantial compliance with its terms. Because one valid ground is statutorily sufficient for recall, there is no occasion to hold as the Davis court did. Because the valid ground did not mislead the signers or the Appellant, sounded in an expressly prohibited act and met all other articulated precedents for legal sufficiency, it substantially complied with the statutory requirement. On these issues, the courts below were correct and should be upheld.

Davis should be found to be questionable as precedent because it was decided solely on the arguments of the officeholder. It should be disapproved in its entirety because it unnecessarily indulges in an inquiry about the subjective thoughts of the signers to resolve the question of whether a petition may stand where only one of several

grounds is legally sufficient. That question is properly resolved by an inquiry into what the statute requires or does not require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail the 27th day of July, 1999 to Phyllis Garvin, pro se, 2555 South Atlantic Avenue, #406, Daytona Beach Shores, FL 32118; and to Frank B. Gummey, III, Esquire, Assistant County Attorney, County of Volusia, 123 West Indiana Avenue, DeLand, Florida 32720.

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