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.
_____/

REPLY BRIEF ON THE MERITS OF APPELLANT

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

Respectfully submitted,

PHYLLIS T. GARVIN, Pro se, Appellant
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(904) 761-7029

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STATEMENT IDENTIFYING SIZE AND STYLE OF TYPE USED IN THE REPLY 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

I HEREBY CERTIFY, that a true and accurate copy of the foregoing, has been furnished by U.S. EXPRESS MAIL August 6, 1999

to: **SUPREME COURT OF FLORIDA**, 500 SOUTH DUVAL STREET, TALLAHASSEE, FLORIDA 32399-1927; and regular U.S. Mail August 6, 1999, to **Daniel Eckert**, **County Attorney**, 123 West Indiana Avenue, DeLand, Florida 32720-4613; and, HAND-DELIVERED August 9, 1999 to the following: **Mary D. Hansen**, **Esq.**, 420 South Nova Road, Daytona Beach, Florida 32114; ; **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 6th day of August, 1999.

Respectfully submitted,

_____

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SUMMARY OF THE ARGUMENT

The Appellant clearly met her burden of proof that the recall petition was not in substantial compliance with Section 100.361,

Florida Statutes. The recall statute requires that all charges in the petition be limited to seven specified grounds. Since 4 of 5 charges were outside the specified charges, the petition does not substantially comply with the recall statute. There is no statutory or case law basis for Appellee's assertion that a valid charge coupled with other invalid charges is permitted by the recall statute.

Appellant's arguments in the Initial Brief are consistent with existing precedent in Florida, and add no new standards or burdens of proof. Since Appellant met her burden of proof, by proving 4 invalid charges in the Petition, there is no need to inquire into the motives of the signers. That task would be left to the Recall Committee to overcome Plaintiff's prima facie case, a task that may be well-nigh impossible to accomplish.

The Appellee Recall Committee confuses inapplicable election cases with the requirements of a recall petition, an analogy that the seminal case of State Ex Rel Landis v. Tedder, 143 So.2d 148 (Fla. 1932) refuse to recognize. Also, most of the remainder of Appellee's cases that pertain to recall proceedings were overturned. Appellee had misrepresented these decisions throughout her Brief.

The final charge left standing after the litigation to this point is also invalid. Appellee admits the lone charge is

ambiguous. Since one side of the ambiguity allows for an interpretation of innocent conduct protected by the First Amendment, the charge cannot stand. The charges drafted by counsel for the Appellee neglected to track the proscribed language in the Charter. The word "instruct" does not have the same meaning as the word "order" in most instances. The difference of meaning is the difference between legal and illegal conduct. This ambiguity could confuse the signers of the Petition. While the signers would have the final say as to whether the Petitioner gave an order, if that were specifically charged, the signers did not have the latitude to interprete the charge and decide whether the word instruct meant advice or conveying information, or whether it meant an order. The courts have the responsibility to decide the legal deficiency of the charge as drafted.

ARGUMENT

POINT I

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

The Appellee, Recall Committee, is incorrect that the recall statute, Section 100.361, does not prohibit invalid grounds from being placed in a recall petition. Section 100.361(1)(a) requires a petition to be "limited solely to the grounds specified in paragraph (1)(b)".

Paragraph (1)(b) provides:

> The grounds for removal of elected municipal officials shall, for purposes of this act be limited to the following and must be contained in the petition:
>
> 1. Malfeasance (Limited to direct violations of the City Charter or other laws.)
> 2. Misfeasance
> 3. Neglect of Duty
> 4. Drunkenness
> 5. Incompetence
> 6. Permanent inability to perform official duties
> 7. Conviction of a felony involving moral turpitude

(emphasis supplied)

Paragraphs (a) and (b) are cross-referenced and are obvious candidates to read in pari materia, Goldstein v. Acme Concrete Corp., 103 So.2d 202 (Fla. 1958).

Clearly, the plain meaning of both paragraphs when read separately or together is that a petition containing allegations not limited to those specified in paragraph (b) violates the recall statute. The word "grounds" is mentioned in the plural, meaning all grounds, must originate from the enumerated grounds in paragraph (1)(b).

Furthermore, the statute does not state as the Recall Committee incorrectly argues that a recall petition can be based on "a" valid charge*. Section 100.361(1)(a), Florida Statutes only uses a singular article ("a") to modify the word "statement", which can contain a number of grounds and other instructions about the recall process. The Recall Committee has completely misrepresented the statute.

If the statute is strictly construed on its face, the petition would automatically have to be thrown out**. It is the judicial construction originated in state of substantial compliance, originated in State Ex Rel Landis v. Tedder, supra, which is found nowhere in the text of the statute, that allows a petition to stand with minor violations of the statute, not major flaws of the kind

that exist here. The American Heritage Dictionary defines "substantial" as "considerable in importance, value, degree, amount or extension"; on the other hand, Blacks Law Dictionary defines the phrase substantial compliance as "compliance with the essential requirements of a statute". Here, the Legislature has made it imperative that it is essential that the charges be limited to

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*The Recall Committee confuses the notion that one valid charge by itself can constitute a valid basis for recall. Appellant agrees with that statement however, one allegedly valid charge mixed with 4 invalid ones cannot! The Committee had the option of removing the bad charges and amending the first charge to allege that an order was given by starting over, but failed to do so. Cf. Advisory Opinion to the Attorney General Re: Tax Limitation, 673 So.2d 864 (1996).

**The Recall Committee incorrectly states that other procedural aspects of the election were proper. This is untrue. For example, Appellant's defenses were not properly presented to the voters. The Committee is going beyond the issues.

those specified in the statute. The Petition having 1 out of 5 charges is not in compliance with the essential requirements of the statute. The charges are the heart of a recall petition.

However, as in **Davis v. Friend**, 507 So.2d 796 (Fla. 4th DCA 1987), which had 3 out of 4 bad charges, the Recall Committee had 4 out of 5 bad charges verses good charges. This does not constitute substantial compliance with the recall statute. A recall committee could not have substantial compliance unless at least a majority of the charges were valid. Such was the case in

Hines v. Dozier, 134 So.2d 548 (Fla. 3rd DCA 1991) where 5 out of 6 of the charges were found to be valid. The invalid charge was viewed as general and vague in comparison to five strong, valid charges.

In Wolfson v. Work, 326 So.2d 90 (Fla. 2nd DCA 1976), the court did not even evaluate the validity of the other 4 charges; therefore, it is difficult to gauge whether the substantial compliance rule was employed. However, the Wolfson* court had no way of knowing whether the other charges would have surfaced in the election, other than pure speculation, or more importantly, what impact those charges would have had on potential citizens signing the petition, which is a necessary predicate before an election and a campaign in support thereof can be held.

The instant case presents a scenario where the four invalid charges were more derogatory and sensational than the one much weaker, remaining charge, that really isn't valid itself. There is

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*As was stated in the Initial Brief, Wolfson is yellow-flagged as questionable authority.

no basis for contending that the presence of four invalid charges in the Petition constituted harmless error. The charges were obviously put in the petition by the Recall Committee to attempt to magnify the allegations against the Appellant and to attract potential signers of the Petition.

Appellant has met its burden of proof of lack of substantial compliance by showing that at least 4 out of the 5 charges in the Recall Petition were invalid. The signers of a recall petition do not have to be interviewed once this determination has been made as part of the Appellee's burden. Davis should be interpreted that the case ends as a matter of law, and the Recall Committee would have no opportunity to rebut anything.

Alternatively, Davis, could be interpreted as creating a rebuttable presumption from the establishment of a prima facie case of 4 out of 5 invalid charges shifting the burden of proof or going forward with the evidence to the Recall Committee to show that the voters would have signed the petition, based solely on the one valid charge. In this instance, it would be the Recall Committee's option to call voters to testify. The signers could waive or invoke any doubious First Amendment privilege, if any, at their option. The Recall Committee has not presented any law that there is such a privilege. Again, as was stated in the Initial Brief, the Fifth District Court did not apply the standard of review in elections cases. It is the Appellant's opinion that the Appellee wasted words debating whether the electors knew all of the grounds when they signed the Petition. It is common sense that they were influenced. Not only were the 5 "charges" on the front of the first Petition, they were also given by Appellee Jerome, in a Press

Release, (A: 1-12; 13-14), to the news media (newspaper, radio and TV). Furthermore, they were frequently repeated by them. Appellant contends the electors were misled to believe that Garvin was "completely out of control".

The Appellee Recall Committee, in its Answer Brief, continually confuses election cases with the instant case, which is not an election case. At issue here is the sufficiency of a recall petition, a charging document. The issue is not whether the election was later properly conducted or whether the votes were properly counted. The only thing wrong with the election was that it should not have been held in the first place, because of the invalid Petition and the bar of the automatic stay. The election cases cited by the Appellee are not applicable. We are not talking about the secrecy of a ballot or the will of the voters as in the Boardman v. Esteva, 323 So.2d 259, 265 (Fla. 1975). A recall petition is a public document that is used publicly.

The Recall Committee apparently faults Appellant for not asking her witnesses at trial as to their motives for signing the petition. Appellee then inconsistently states that such an inquiry would be improper. However, Davis does not require the office holder to make this showing*. It violates no First Amendment

*The record shows all five of the charges were on the Petition that were signed by the citizens. The signers of a document are presumed to know and rely on the entire contents of a document. John Deese Industrial Equipment Co. v. Roberts, 362 So.2d 65 (Fla. 1st DCA 1978).

Rights for the Recall Committee to ask the signers about their motives in signing the petition.

The Recall Committee's approach that the ends (the election result) justifies the means (the invalid petition) is evil and hopefully will have no impact on this court. There is no stricter test Appellant must meet simply because there has been an election after the fact. If the Petition falls, the election falls as fruit of the poisonous tree. Appellees' statement of the Case and Facts argues that "the Supervisor of Election "disobeyed the law" is without basis in fact". Appellant does not agree that it is without basis in fact. Appellant timely challenged the Recall Petition and process, and the Recall Election should not have been held. Appellant's Notice of Appeal to the Order Denying her an Injunction to the Recall Process served as an automatic stay of the recall election, but was ignored by the Volusia County Elections office. Unfortunately, it took a court order to stay an election that was already in progress, necessitating the sealing of ballots. Appellant's replacement, Paul DeMange, was not "elected" in the true sense of the word. DeMange, a member of the Recall Committee

(A: 15), qualified over a six (6) day qualification period from December 23rd through 28th, 1998, including Christmas Day and a weekend, where City Hall was not open for business. In actuality, there were three business days to qualify, in the heart of the Christmas/New Year holiday season.

The Appellee mentions the 3-2 votes by the new City Council of Daytona Beach Shores, and this fact is interesting. In this regard, Appellant's recall also resulted in the change of government voting by placing the former minority faction into voting majority. Appellant's removal was more than wrongful recall; it was, in a greater sense, a non-violent coup d'ètat. Neither Appellant, nor the former, properly elected government, should be punished for the passage of time necessitated by the appellate process, which was expedited below. Thanks is given to this court for also expediting this matter. The length of time Appellant has been wrongfully ejected from office merely increases the harm suffered by Appellant that needs to be remedied by this appeal.

Prior to oral argument, since the replacement of the Appellant, the only major ordinance, resolution, or motion passed by Daytona Beach Shores City Council will be the budget, which could be amended afterwards, if reinstated Appellant reduces some of the expenditures, increasing the reserves (the tax rate in

accordance with the law will remain the same). Any other votes won or lost by a margin of one vote could be reagendaed and either ratified, amended or declared null and void in accordance with parliamentary procedure. Appellant does not feel this would have any material effect on the government or the citizens of the city.

Page 6 of the Recall Committee's Brief states, in predictable, vigilante fashion, "citizens must not be foreclosed from properly removing an ***intolerable*** ***public*** *official*". With this proclamation, it is no longer necessary for the court to read the Wall Street Journal Article. Whether the Petitioner is "intolerable" to some politically-motivated people or unpopular, is not the test. Bent v. Ballantyne, 368 So.2d 351 (Fla. 1974)*; Tolar v. Johns, 147 So.2d 196 (Fla. 2nd DCA 1962). The test is whether she violated the law. She didn't.

The only decision that arguably supports the Committee is Wolfson v. Work, supra**. Again, Wolfson, is very questionable authority. However, Wolfson provides the key to victory for Appellant.

In Wolfson, the Recall Committee tracked the Charter language exactly in drafting the malfeasance charge for giving orders. In contrast here, the Recall Committee strayed from the formula and used different language in the charge that refers to the City

Charter. There is no excuse for not doing so as the Recall Committee was represented by counsel, Mary Hansen. The record indicates Hansen drafted the charges, (A: 4-12) notwithstanding her misleading remarks at page 15 of the Appellee's Brief suggesting that the (lay members) "ordinary citizens" of the Committee drafted the charges. Instead of properly quoting the Charter, the word "instruct" was charged.

"Instruct" has a primary meaning of advising, suggesting, educating or conveying information as opposed to ordering. The Charter of Daytona Beach Shores gives Councilmembers the authority to talk to city employees for purposes of better serving their constituents

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*The Recall Committee misrepresented Bent as implying that one valid charge might sustain the Petition. The Bent court did not rule on this issue and made no such inference.

**The "limited to" language was added to Section 100.361 a year after Wolfson was decided, 1977 Fla. Law's Ch. 77-175. Clearly this amendment overrules Wolfson.

(A: 18). If a Councilmember is allowed to talk to an employee, then it is more than a matter of shade of meaning as to how the Councilmember can talk to him or her. Rather, it is the difference between legal and illegal conduct. A Councilmember cannot be recalled for legal conduct. Joyner v. Shuman, 116 So.2d 472 (Fla. 2nd DCA 1959).

Most importantly, the Councilmember has a First Amendment Right to express her views. Precision is imperative to avoid the chilling effect of an elected official exercising First Amendment Rights, not to mention Garvin's property rights in her office, which are protected by due process, and the protection from the stigma caused by quasi criminal prosecution. Lester v. Department of Professional and Occupational Regulations, 348 So.2d 923 (Fla. 1st DCA 1979).

The issue as to the sufficiency of the charge has been preserved through this litigation. Moreover, this issue is fundamental error as involving due process, the First Amendment and a question of great public importance. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970); State v. Johnson, 616 So.2d 1 (Fla. 1993). "Standards of permissible statutory vagueness are strict in the area of free expression since freedoms guaranteed under the [First Amendment] need breathing space to survive, and government may only regulate in this area with narrow specificity." Keyshian v. Board of Regents of University State of N.Y., 385 U.S. 589, 89 S.Ct. 65, 17 L.Ed. 2d 627 (1967).

Bent v. Ballantyne,* supra, states that the charges in Section

100.361 (A: 16-17) are accusations. The First Amendment would even allow an elected official to order an employee, if that act was not specifically proscribed by the Charter. However, the Charter does not proscribe instructing an employee. The charges are not tightly drawn to satisfy First Amendment purposes. This is why the Wolfson Committee tracked the statute, because the charges had to be that precise.

The fact is that a less preferred and lower rank definition for the word "instruct" can also ambiguously mean an authoritative command or order. That meaning is still within the connotation of speech that occurs in a teaching or academic sense rather than in the administrative or political arena.

The ambiguities within the definition of "order" are enough to confuse both the voters and the Councilmembers of what the Councilmember is being charged with. Such confusion renders the Petition invalid. Tolar v. Johns, supra. Where a statute is susceptible to more than one meaning, the statute must be construed in favor of the accused. Gabal v. State, 678 So.2d 315 (Fla. 1996). If Garvin had been charged with giving orders to employees, it would have been the voter's right to determine the truth or validity of the charge. However, the voters

*The Petitioner did not say the recall charges are criminal. Bent v. Ballantyne, supra, states that the charges in Section 100.361 are accusatory.

are not charged with deciphering the meaning of a sloppy charge.*

The Recall Committee admits that there is more than one meaning to the remaining charge. Count I, then, is dead because of the case law cited above. The Recall Committee amazingly speculates that the signers probably were not aware of the ambiguity and vouches that they were not misled. Even if there were any way of knowing that was true, which meaning did the signers monolithically believe? Was it the less commonly used meaning?

Also, the question should be asked: was the term "instruct" consciously chosen because the Recall Committee knew its proof was insufficient to meet the definition of an order? That hypothesis seems likely when the Affidavits gathered in support of the Petition are examined. A vague term would be more efficient in getting a broader consensus of the citizens. In any event, the signers are being asked to condemn legitimate conduct, which cannot be the basis of a recall petition. Bent, supra.

The thousands of elected officials in Florida should be protected from such faulty charges in the future. All five of the recall charges are invalid. The orders of the lower court should

be reversed.

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*The charge is also vague as to questions of time, place and manner of appellant's acts. Piver v. Stallman, 198 So.2d 859 (Fla. 3rd DCA 1967).

CONCLUSION

Based on the foregoing authority, the Order Denying Declaratory Relief should be reversed. Furthermore, the Appellant prays this Court will enter a judgment whereby Petitioner shall be reinstated with back pay and benefits as well as attorneys' fees and costs plus pre-judgment interest.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and accurate copy of the foregoing, **REPLY BRIEF ON THE MERITS OF APPELLANT**, has been furnished by U.S. EXPRESS MAIL August 6, 1999 to: **SUPREME COURT OF FLORIDA**, 500 SOUTH DUVAL STREET, TALLAHASSEE, FLORIDA 32399-1927; regular U.S. Mail August 6, 1999, to **Daniel Eckert**, **County Attorney**, 123 West Indiana Avenue, DeLand, Florida 32720-4613; and, HAND-DELIVERED August 9, 1999 to the following: **Mary D. Hansen**, **Esq.**, 420 South Nova Road, Daytona Beach, Florida 32114; ; **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 6th day of August, 1999.

Respectfully submitted,

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_____/

MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES AND COSTS

The Petitioner/Appellant, Phyllis T. Garvin, files this Motion for Entitlement to Attorneys' Fees and Costs, and states:

1. Petitioner has incurred attorneys fees and costs in the scope of the recall challenge including this appeal.

2. Attorney's fees and costs should be awarded pursuant to Thornber v. City of Fort Walton Beach, 568 So.2d 914 (Fla. 1996).

3. The Appellant adopts the argument of the Fifth District Court of Appeal on January 27, 1999, (attached). The court vacated its opinion on April 2, 1999, on other grounds (also attached).

WHEREFORE, it is respectfully requested that this court award attorneys' fees and costs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and accurate copy of the foregoing, **MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES AND COSTS**, has been furnished by U.S. EXPRESS MAIL August 6, 1999 to: **SUPREME COURT OF FLORIDA**, 500 SOUTH DUVAL STREET, TALLAHASSEE, FLORIDA 32399-1927; and regular U.S. Mail August 6, 1999 to **Daniel Eckert, County Attorney**, 123 West Indiana Avenue, DeLand, Florida 32720-4613; and, HAND-DELIVERED August 9, 1999 to the following: **Mary D.**

Hansen, **Esq.**, 420 South Nova Road, Daytona Beach, Florida 32114; ; **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 6th, day of August, 1999.

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