SUPREME COURT OF FLORIDA

PHYLLIS T. GARVIN,
Appellant,
vs.

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

CASE NO.: 98-2975
L.CT.: 98-31977-CICI

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL STATE OF FLORIDA

AMENDED JURISDICTIONAL BRIEF

Respectfully submitted,

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STATEMENT OF THE CASE AND THE FACTS

This is a petition to invoke the discretionary jurisdiction of this court pursuant to Fla.R.App.Pr. 9.030(a)(2)(A)(iv). The basis of this jurisdiction is express and direct conflict between two district courts of appeal concerning the application of the recall statutes, Section 100.361, Florida Statutes.

The Fifth District Court of Appeal rendered a ten-page written opinion affirming the trial court's order denying Phyllis T. Garvin's Recall Challenge of her Council seat sitting as Vice-Mayor of the City of Daytona Beach Shores, Florida, dated September 23, 1998. (A: 1-10) Garvin was later recalled.

The Petition for Recall of Vice-Mayor Garvin recited the following grounds:

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

1. Giving direct work instructions to city employees William Lazarus, Cathy Benson, and Joe Blankenship, without first going through the city manager.

2. Without Council discussion or approval, taking unlawful unilateral action to advertise for a part-time, interim city manager.

B) Malfeasance, as without lawful grounds, she makes every effort to deprive applicants of their rights of due process of law.

C) Violation of her oath of office (Sec. 2.08) by subverting the city manager form of government.

D) Misfeasance, in that she continually intimidates and harasses city employees to effectuate her personal desires.

E) Malfeasance of office in that she urged Councilmember Marion Kyser not to attend a council meeting so that a quorum would not be available.

(A: 1-10)

The Fifth District also invalidated Count V and affirmed the trial court's earlier ruling which invalidated Counts II, III, and IV, leaving only one count on the petition that had not been invalidated. (A:5) The Court rejected Petitioner's argument that count one was also invalid. (A: 1-3)

The court below, in choosing between two conflicting decisions from sister appellate courts opted for the rule that the recall election could proceed if one charge remained pending. (A:5)

On January 19, 1999, Petitioner timely filed a Notice to Invoke Discretionary Jurisdiction from which this brief issues. (A: 11)

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction pursuant to Fla.R.App.Pr. 9.030(3)(a)(2)(A)(iv). The decision below establishes express and direct conflict with another decision in another court, which were both faced with the issue of whether a recall election should be enjoined when the election is to proceed where all but one of the charges have been invalidated. A third decision from the Second District Court Appeal also directly agrees with the case at bar.

All three decisions are squarely on point with each other. This Court should rule on this issue to preserve uniformity of the law on an important issue. This decision will impact voters and elected officials in over 400 cities in this State.

ARGUMENT

I. THE OPINION FROM THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DAVIS V. FRIEND, 507 SO.2d 796 (FLA. 4TH DCA 1987).

This Court has discretionary, conflict jurisdiction pursuant to Fla.R.App.Pr. 9.030(2)(iv) as the decision below, from the Fifth District Court of Appeal expressly and directly conflicts with Davis v. Friend, 507 So.2d 796 (Fla. 4th DCA 1987).

At page 5 of its opinion, the Fifth District Court of Appeal squarely framed the conflicting question, "Assuming four grounds set forth in the recall petition were insufficient, and one was legally sufficient, does that invalidate the recall process? There are two cases from our sister courts, which adopt this question, and reach opposing views." (emphasis supplied). The two cases referred to in the decision below are Wolfson v. Work, 326 So.2d 90 (Fla. 2nd DCA 1976)[1] and Davis, supra:

In Wolfson, the Second District Court of Appeal ruled that one out of four of the charges in a recall petition was legally sufficient. The trial court refused to enjoin the election based on the alleged invalidity[2] of the other four charges. 326 So.2d at 91. The Wolfson court found no error stating, "It is not required that all the grounds in the petition be legally

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[1] F. McQuillan, 4 Municipal Corporations, §12, 251, 15 (3rd ed), which adopts the position in Wolfson, cites to Davis with the signal contra.

[2] The Wolfson court did not rule on the legal validity of the other four charges.

sufficient. Id. Only the complete failure of all the charges to meet the statutory requirements will justify enjoining an election. Id.

On the other hand, in Davis v. Friend, supra, the Fourth District Court of Appeal expressly disagreed "with Wolfson[3] 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." 507 So.2d at 797 (Fla. 4th DCA 1987). The Davis court, instead, ruled that the recall proceedings, based on four substantive charges, cannot serve as the basis for a recall election once three of the four charges had been stricken. Id.

In the instant case, four out of the five charges (80%) were ruled to be invalid (three by the trial court, and one by the appellate court). The court below rejected any means of attempting to distinguish[4] its facts from Davis, or the facts of Davis from Wolfson.

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[3] In light of the more recent and better reasoned decision in Davis, Wolfson has been "yellow-flagged" in Westlaw, forewarning questionable authority.

[4] The Court below rejected the notion that Davis could be distinguished based on whether there was an evidentiary showing that the petition was signed by the citizens based on all the charges (including the defective ones), or whether the defective charges in Davis may have been more serious than the lone, valid charge.

Instead, the Fifth District aligned itself with the legal rule in Wolfson and directly rejected the Davis holding[5]. Thus, conflict jurisdiction here cannot be defeated[6] because of a meaningful, factual distinction between the cases. Express and direct conflict with Davis is obvious and apparent from the face of the appellate decision below.

[5] The court specifically chose Wolfson over Davis because the Court believes that the former decision further distanced the court from the political process.

[6] The recall committee has no equity to complain about the conflict. The Committee created the problem by using a shotgun approach by drafting the complaint with 80% of the charges found invalid, notwithstanding the rule in Davis of which the committee had actual constructive knowledge.

II. THE COURT SHOULD EXERCISE ITS JURISDICTION

The committee notes to Fla.R.App.Pr. 9.120(d) regarding jurisdictional briefs provides, "The petitioner may wish to include a very short statement of why the Supreme Court should exercise its discretion and entertain the case on the merits if it does have discretionary jurisdiction."

Here, the court should exercise its discretion to accept jurisdiction over the case as the express conflict involves an important issue dealing with how recall proceedings should be conducted. This is an issue that potentially could affect 400 cities and thousands of elected officials in Florida. At present, two districts conflict with a third. Two other districts have not ruled and the Circuit Courts, within these districts, are without guidance. The question as to what constitutes a valid recall petition, hinges now on geography or problematic litigation, as opposed to a bright-line rule of law.

The primary purpose of conflict jurisdiction is to avoid confusion and to maintain uniformity that might derive from situations where conflicting decisions develop in the district courts of appeal. Hastings v. Osius, 104 So.2d 21 (Fla. 1958). Furthermore, the goal of uniformity converges with legislative intent expressed in the recall statute. Section 100.361(8) specifically provides:

> INTENT:
>
> It is the intent of the legislature that the recall procedures provided in this act shall be uniform statewide.

Uniformity is especially urgent here since a recall is a special, extraordinary, and unusual proceeding, Landis v. Tedder, 106 Fla. 140, 143 So.148 (1932), that is in derogation of the statutory tenure of office prescribed for the office sought to be removed. Id. This case is worthy of this Court exercising its discretion to accept jurisdiction.

CONCLUSION

In light of the foregoing argument, this court should accept discretionary jurisdiction in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and accurate copy of the foregoing has been furnished by regular U.S. Mail to: 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., 1326 South Ridgewood Avenue, #19, Daytona Beach, Florida 32114, Gayle S. Graziano, 149-P South Ridgewood Avenue #710, Daytona Beach, Florida 32114, and Scott Simpson, Interim City Attorney, Daytona Beach Shores, 3050 South Atlantic Avenue, Daytona Beach Shores, Florida 32118, this 5th day of March, 1999.

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