IN THE

Supreme Court of Florida

Case No. 2448

RONALD TAYLOR and JOHN and JANE DOES 1-NNN,

Plaintiffs/Appellants,

v.

THE MARTIN COUNTY CANVASSING BOARD, PEGGY S. ROBBINS, THE HONORABLE STEWART HERSHEY, MARSHALL WILCOX, THE FLORIDA REPUBLICAN PARTY, TOM HAUCK, GEORGE W. BUSH, RICHARD CHENEY, THE STATE OF FLORIDA ELECTION CANVASSING COMMISSION and KATHERINE HARRIS,

Defendants/Appellees.

1st DCA Case No. 1000-4829

FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA
CASE NO: CV-00-2850

PETITIONERS' SUPPLEMENTAL BRIEF

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I. The Trial Court Applied an Incorrect Legal Standard in Denying Relief

Of course, this election contest raises issue regarding the handling of absentee ballot request forms and whether actions taken by the Martin County Canvassing Board and/or Republican Party officials in Martin County violate Section 104.047, *Fla. Stat*. (1999). That statute was enacted in 1998 and amended in 1999, and came about largely due to an increase in the number of irregularities or fraudulent activity found in the context of absentee ballots and absentee ballot applications. *See, e.g., In Re: The Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami,* 707 So. 2d 1170 (Fla. 3d DCA 1998). Thus, all cases decided before 1998 were decided without the benefit of newly created absentee voter legislation found in Chapter 104, *Fla. Stat*., particularly Section 104.047, *Fla. Stat.* (1999), and its new, extremely strict regulations regarding the requirements and validity of absentee ballots and applications therefore. The statute provides for punishments ranging from misdemeanors to third degree felonies for various violations associated with absentee ballot request forms or the absentee ballots themselves. Thus, the rules of the game vary dramatically when an election contest arises after 1998 and involves absentee ballots, as distinguished from other types of election law irregularities or violations.

In this regard, the Florida Supreme Court's decision in *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1976), must be distinguished. Before discussing the narrow focus of the opinion, the Court must recall the nature of the violations at issue in *Boardman*. The dispute involved minor violations of absentee ballot statutes (which have since been amended) dealing with things like the reason for voting absentee not being specified on either the application or the envelope;

omission of the address of the attesting witness (but not the signature of the witness); post office cancellation stamp not being affixed; vague identification of witnesses; the failure of deputies to record oaths; and "other discrepancies [ ] not of vital consequence and [ ] attributed to human misunderstanding of minute technicalities than to lack of diligence to comply with essential requirements." *Boardman*, 323 So. 2d at 261-62. The Court went on to specifically point out that "Fraud, corruption or gross negligence [or intentional misconduct] are completely absent." *Id.* However, the Court did rule that 88 absentee votes were found to be illegal and therefore discarded and not counted because of various illegalities relating to "essential elements" like where the voter did not sign the application, the return envelope was not signed, the official title of the attesting witness was not listed, and finally and most closely on point, those where the "names of the electors were not on record." *Boardman*, 323 So. 2d at 261. It is obvious that the applications which were discounted had defects which related to the signature and identity or qualification of the applicant to vote in the election.

Thus, the resounding principle of *Boardman,* and one the trial court and Respondents completely ignored, is that this Court relaxed the strict compliance standard applicable to absentee voting laws, but **only** where the absentee voting provisions are not essential to the integrity of the absentee ballot, or where despite the illegality or irregularity the absentee application is **sufficient to ascertain the qualifications of the applicant to vote.** *Boardman*, 323 So. 2d at 264-65. Specifically, the Court held that violation of absentee voting laws would be grounds for voiding of absentee ballots where the violation or irregularities are such that the application is NOT "sufficient to determine the qualifications of the applicant to vote absentee..." *Id.* at 265. For example, certain diversion from statutory language may be permissible with

regard to the oath of the affiant, but not as to the qualification of the voter or the requirement that the absentee ballot be sealed in a separate envelope. *Id.* In other words, strict compliance is still the rule when it comes to issues concerning the validity of an absentee application or ballot **which relate to the identity or qualifications of the voter.** Since the illegalities upon which this case is based relate to the very identity of the voter (and, therefore, the qualification of the voter), information necessary to ensure that a voter does not vote twice or that his or her ballot is not sent to someone other than the requesting voter, these statutes must be strictly construed and absolute compliance is mandatory to make certain that past abuses are not repeated.[1]

Thus, even under *Boardman,* the absentee ballot applications which are the subject of this litigation must be reviewed under the strict compliance standard, and substantial compliance is insufficient. Therefore, review of pre-*Boardman* decisions is necessary. The strict compliance standard was initially applied in recognition of the fact that absentee ballots or absentee voting was not something recognized by the founders of our country or at common law. Because absentee voting laws are in derogation of the common law, they must be strictly construed. *State ex rel Whitley v. Rhinehart*, 192 So. 818 (Fla. 1939); and *Spradley v. Bailey*, 292 So. 2d 27 (Fla. 1st DCA 1974). It has long been the law that the failure to adhere to the statutory requirements for exercising the privilege to vote absentee does not constitute a mere technical

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[1] For example, what if two John Smiths live in Martin County, yet one is a convicted felon, or for some other reason is ineligible to vote. Elections officials need identifying information, in the form of the voter's identification number, in order to verify that the John Smith who submitted the request (or had one submitted on his behalf by the Republican Party) is the eligible John Smith so that a ballot is not send to the unqualified or ineligible John Smith. Viewed in this light, and in light of the rampant eligibility/qualification fraud which occurred in Miami-Dade County just a few years ago, there can be no good faith dispute that the required identifying information goes to the qualification to vote such that the new statutory language under Section 104.047, *Fla. Stat.* (1999) is mandatory and not directory.

violation. *Spradley*, 292 So. 2d at 29. Moreover, given the new laws for absentee voting and the fact that the illegalities here relate to verification of a voter's identity and qualification to vote, contrary to the Respondents' arguments a voter's compliance with statutory requirements for exercising the privilege to vote absentee in an election are mandatory, and not directory. *Id.*; *Wood v. Diefenbach*, 87 So. 2d 777 (Fla. 1955). Since absentee voting is not designed to ensure a vote but rather to permit a vote, statutory requirements associated with the qualification to vote absentee must be specifically followed and strictly construed. *Id.*; *See also*, *McDonald v. Miller*, 90 So. 2d 124 (Fla. 1956); *Parra v. Harvey*, 89 So. 2d 870 (Fla. 1956); and *Frink v. State*, 35 So. 2d 10 (Fla. 1948).

The Court also made clear in *Boardman*, and again in opinions issued in the past weeks, that the intention of the legislature would be a primary consideration. The Court held that "the intention of the legislature...would prevail over" literal application of provision which did not pertain to qualification of the voter or integrity of the ballot. *Boardman*, 323 So. 2d at 266. Here, the Florida Legislature has evinced an intention to buttress and make more strict the requirements for absentee voting, as codified in Section 104.047, *Fla. Stat.* The 1998 amendments or new statutes certainly reflect a series of more rigid laws pertaining to absentee voting, thereby showing the legislature intended to require strict compliance with voting laws in order to ensure that the rampant fraud uncovered in Miami-Dade County would not be repeated.

Legislative intent can also be found elsewhere. The Florida legislature amended Section 104.0515, *Fla. Stat.*, in 1998. The statute provides:

> (2) No person acting under color of law shall:
>
> (b) Deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any

> application, registration, or other act requisite to voting, **if** such error or omission is **not material** in determining whether such individual **is qualified** under law to vote in such election. This paragraph shall apply to absentee ballots only if there is a pattern or history of discrimination on the basis of race, color, or previous condition of servitude in regard to absentee ballots.

This statute confirms without question that it is the intention of the legislature, made even clearer after the Miami-Dade absentee ballot fiasco in 1997, that absentee ballots were not to be given the same protection as other voting rights, and that strict standards designed to verify qualifications and to preserve the integrity of absentee voting must be rigidly followed. This expression of legislative intent compels the conclusion that it was the legislature's desire to invalidate absentee ballots that did not scrupulously adhere to the letter of the law regarding the "application, registration, or other act requisite to voting." Thus, if an absentee ballot was not applied for and used in strict compliance with the law, then it must be stricken, regardless of whether the court considers the deviation from law to be "material."

To the extent that any court may apply the 25 year old *Boardman* decision to the provisions of this 1998 statute, the express language of the statute must control. Indeed, requesting and unlawfully modifying an absentee ballot application under the circumstances established in this case now, under the new statute, constitutes a third degree felony (See, Section 104.047 (2), *Fla. Stat.*). This is just one example of the way that the legislature toughened the standards for applying for an absentee ballot and in which the legislature evinced its intent to require strict compliance with absentee voter laws - especially those which relate to the identity or qualification of the voter to vote. At the time *Boardman* was decided, these new, strict provisions did not exist. Therefore, even under *Boardman*, these violations related to the

identity and qualifications of those applying for absentee ballots must be considered mandatory and not directory.

CONCLUSION

Given the strict standard by which the absentee voting laws in this case must be construed, given the fact that voting absentee is a privilege rather than a right, and given the recently enacted Florida legislation which tightened absentee voting requirements (including making it a third degree felony to commit various illegal acts with absentee ballots and absentee ballot applications), much of the authority relied upon by the Respondents must be distinguished or the comments contained therein taken in the context in which they were made. For example, since this Court has held that failure to adhere to voting requirements dealing with fundamental issues like identity and qualifications of an absentee voters is not a mere technical violation, Respondents' arguments that the statutory violations at issue constitute "hyper-technical violations" is not well taken, as technical violations relating to the identity or qualifications of the voter, like the statutes at issue here, are enough to invalidate absentee votes. *Spradley*, *supra.* For all the reasons asserted herein and in the Initial Brief submitted by Petitioners, this Court must reverse the decision below.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was furnished by fax and mail delivery this _____ day of December, 2000.

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