

SC00-2462

FILED  
THOMAS D. HALL

DEC 12 2000

CLERK, SUPREME COURT  
BY \_\_\_\_\_

DISTRICT COURT OF APPEAL, FIRST DISTRICT  
Tallahassee, Florida 32309-1850  
Telephone No. (850) 488-6151

December 12, 2000

CASE NO.: 1000-4825

L.T. No. : 00-2802

Cynthia Mccauley

v.

Marc Nolen, Richard  
Stewart, Et Al.

Appellant / Petitioner(s),

Appellee / Respondent(s).

**BY ORDER OF THE COURT:**

On the court's own motion, it is hereby certified in accordance with Florida Rule of Appellate Procedure 9.125 that this appeal requires immediate resolution by the Supreme Court of Florida because the order on appeal presents issues which are of great public importance.

ERVIN, KAHN, and BENTON, JJ., CONCUR.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Alvin L. Peters

Barry Richard

Hon. L. Ralph Smith, Judge

Deborah K. Kearney

John Little

Hon. Thomas D. Hall, Clerk

Craig Meyer

Michael S. Burke

Hon. Dave Lang

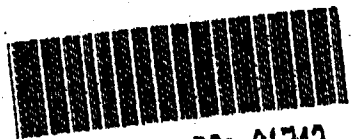
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JON S. WHEELER, CLERK



SC00-246290-4825

CIRCUIT COURT OF SECOND JUDICIAL CIRCUIT  
IN AND FOR LEON COUNTY, STATE OF FLORIDA  
THOMAS D. HALL



BK: R2441 PG: 01742

CYNTHIA McCAULEY

DEC 12 2000

Plaintiff,

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BY \_\_\_\_\_

CASE NO 00-2802

v.

R20000087376  
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BOOK: R2441 PAGE: 01742  
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MARC NOLEN, RICHARD STEWART,  
THE HONORABLE THOMAS WELCH,  
in their official capacities as members  
of the BAY COUNTY CANVASSING  
BOARD; Secretary of State KATHERINE  
HARRIS, Secretary of Agriculture BOB  
CRAWFORD, and Director of the Division  
of Election L. CLAYTON ROBERTS  
in their official capacities and as the  
FLORIDA ELECTIONS CANVASSING  
COMMISSION; GEORGE W. BUSH;  
and DICK CHENEY,



Defendants.

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DAVE LANG  
CLERK, CIRCUIT COURT  
LEON COUNTY, FLORIDA  
FILED  
00 DEC -8 PM 12:55  
JON S. WHEELER  
CLERK, DISTRICT COURT OF APPEALS  
FIRST DISTRICT

NOTICE OF APPEAL

NOTICE IS GIVEN that CYNTHIA McCAULEY, appellant, through her undersigned attorneys, appeals to the First District Court of Appeal, the order of this court rendered on December 7, 2000 (conformed copy attached). The nature of the order is a final order which dismissed with prejudice plaintiff's complaint for declaratory and injunctive relief contesting the election for President and Vice President of the United States of America.



BK: R2441 PG: 01744

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served upon the following on  
this 8<sup>th</sup> day of December 2000 by fax and by first class, regular mail.

R20000087376  
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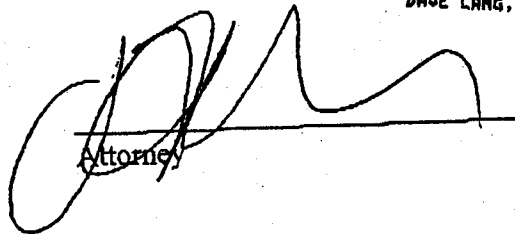
Attorney for Secretary of State  
Katherine Harris and the Elections  
Canvassing Committee

Craig Meyer, Esq.  
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BK: R2441 PG: 01745

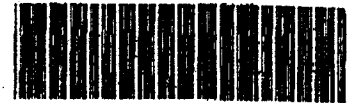
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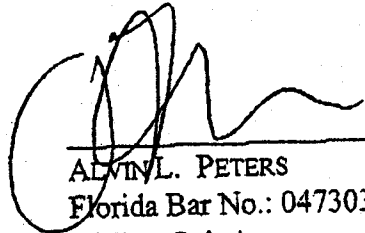
Attorney

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a horizontal line. Below the line, the word "Attorney" is printed in a small, sans-serif font.

MCCAULEY & PETERS



BK: R2441 PG: 01743



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Attorney for Appellant,  
Cynthia McCauley

00-4825

SC00-2462



IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT  
IN AND FOR LEON COUNTY, FLORIDA

Case No. CV 00-2802

CYNTHIA McCAULEY,

Plaintiff,

vs.

MARC NOLEN, RICHARD STEWART,  
THE HONORABLE THOMAS WELCH,  
in their official capacities as members of the  
BAY COUNTY CANVASSING BOARD;  
Secretary of State KATHERINE HARRIS;  
Secretary of Agriculture BOB CRAWFORD,  
and the Director of the Division of Election  
L. CLAYTON ROBERTS, in their official  
capacities as the FLORIDA ELECTIONS  
CANVASSING COMMISSION; AL GORE;  
JOSEPH LIEBERMAN; GEORGE W. BUSH;  
and DICK CHENEY,

Defendants.

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DISTRICT COURT OF APPEAL  
FIRST DISTRICT  
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DEC 08 2000

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CLERK CIRCUIT COURT  
LEON COUNTY, FLORIDA

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ORDER OF DISMISSAL WITH PREJUDICE

THIS CAUSE came on for hearing on the Motion of Defendants Katherine Harris and the Florida Elections Canvassing Commission to dismiss the Amended Complaint of the plaintiff, and the Court having considered such motion and plaintiff's response, memoranda and supplemental memoranda filed by the parties, argument of counsel, and being otherwise fully advised in the premises, it is, therefore

ORDERED AND ADJUDGED as follows:

The amended complaint filed by the plaintiff alleges that substantial irregularities occurred in the "processing of absentee ballot requests and in the receipt of the ballots themselves." Plaintiff alleges that such irregularities are significant and material, constitute a substantial non-compliance with statutory election procedures and that reasonable doubt exists as to whether the certified



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election results express the will of the voters through a fair and impartial election. Plaintiff alleges that irregularities in the receipt of the ballots "compromised the sanctity of the ballot and the integrity of the election", that the ballots so received were tainted and were so numerous as to place in doubt the result of the election.

Nowhere in the amended complaint does plaintiff allege that any absentee ballot received, canvassed, and counted in the 2000 presidential election was cast by a person who was not duly registered in the county where such ballot was received, nor that any absentee elector was not duly qualified to vote. There is no allegation that any absentee elector violated any laws in attempting to cast his or her ballot in this election. Plaintiff only complains that third parties violated the election laws and that such violations should result in this court invalidating all absentee ballots. The law of this state does not support plaintiff's claim. These allegations do not state a cause of action under the law of this state. *See Boardman v. Esteva*, 323 So.2d 259 (Fla. 1975).

Plaintiff alleges that the republican party caused a mass mailing to be made to registered republicans using a photograph of the governor and the seal of the State of Florida enclosing a pre-addressed card to the Supervisor of Elections, requesting a mail-in absentee ballot. Plaintiff alleges that such mailing violated Florida law, misleading the recipient into believing that the State of Florida affirmatively permitted and encouraged absentee voting as a matter of convenience. Plaintiff alleges that such statement is contrary to Florida law which requires that an absentee voter be "unable to attend the polls on election day". If the Republican Party, or the person signing the letter for the Republican Party, violated any Florida law by using the photograph of the governor, or the seal of the State of Florida, that violation can be prosecuted by the proper public officials of this state. And if there was any violation of the law for misstating the Florida law regarding absentee voting, that violation can also be prosecuted by public officials. But there is no private cause of

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BK: R2441 PG: 01748

action for any such alleged violation, and there is no right to seek or obtain the invalidation of all absentee ballots cast by all absentee voters because of such alleged violation.

The major thrust of plaintiff's complaint is predicated on an erroneous assertion of Florida law applicable to absentee elector voting. Plaintiff claims that the mass mailing to the registered Republican electors misled such electors into believing that they did not have to be "unable to attend the polls on election day"; and, that because the Supervisor of Elections accepted such absentee ballots without confirming the voter's inability to attend the polls on election day, and permitted unauthorized persons to deliver many of such ballots, that all absentee ballots should be invalidated by this court.

Plaintiff maintains that the statutory provisions of the official 2000 Florida Statutes do not apply to this election. That version of the Florida Statutes has existed since 1998, without amendment by the Florida legislature, and has not been invalidated in whole or in part, by any court of competent jurisdiction. Plaintiff maintains that the 1997 Florida Statutes apply to this election and this case even though the Florida Legislature clearly and explicitly amended the law as it existed in 1997, to add additional reasons to vote absentee, other than being "unable to attend the polls on election day", as was provided in 1997. Plaintiff contends that the statute enacted by the 1998 Florida Legislature is not yet enforceable because the Division of Elections of the Florida Department of State has issued an opinion, DE 98-13, dated August 19, 1998, opining that such laws are not enforceable. The defendants agree with this contention and advance an equally bizarre argument, *i.e.*, that the 1998 legislation, which provides seven reasons to permit a person to vote absentee, including the reason that the voter is "unable to attend the polls on election day", is more restrictive and more narrow than the statute which existed in 1997, which only allowed one reason to vote absentee, and that reason was because the voter is "unable to attend the polls on election

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day". The defendants' support for this incredible argument is a report issued by a committee of the Florida Legislature which states that certain proposed bills reforming Florida election laws "narrow the qualifications and procedures for requesting, mailing, witnessing, voting and returning absentee ballots." The committee's analysis does not change the obvious. And the opinion of the Division of Elections certainly cannot over-ride an act of the Florida Legislature. This court will not accept the parties stipulation as to the applicability of the 1997 statutes and the inapplicability of the 2000 Florida Statutes, as adopted first in 1998, even though plaintiff's complaint does not state a cause of action under either statute. The basis for the dismissal, which is hereby ordered, is more obvious, however, by the application of the last enactment of the Florida Legislature. Neither the Division of Elections nor the Secretary of State can over-ride the legislature, and there is no federal law which invalidates the acts of the 1998 Florida Legislature,

The Division of Elections and the Secretary of State maintain that the Department of Justice must pre-clear the 1998 amendments to the absentee voting laws and that pre-clearance has not been obtained. It is true that pre-clearance has not been obtained, but that is irrelevant because no pre-clearance is required in order for the 1998 legislative act to become effective. 42 USC § 1973 c merely provides that if an act of the legislature changes a voting practice or procedure and the state has, by virtue of past violations, become subject to the provisions of 1973 (c) (such as Florida) then that state may seek a declaratory judgment from the District Court of the District of Columbia that such voting practice or procedure which has been changed "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in § 1973 b (f)(2)" of Title 42 or the state may obtain an affirmation from the Attorney General, indicating that it has no objection to such a declaratory judgment. Failing to obtain such a declaratory judgment, or the Attorney General's affirmation of

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no objection thereto, the entire act of the legislature is not rendered unenforceable by any federal law. The only consequence is as provided in 1973 (c), which is that "no person shall be denied the right to vote for failure to comply with such . . . practice or procedures . . ." which was enacted in 1998. Clearly, changing the requirements for absentee voting, giving more people the right to vote absentee, has no bearing upon race or color, and will not render such statute ineffective, merely because no declaratory judgment has been obtained or agreed to by the Attorney General. And the Secretary of State and Division of Elections actions do not render such amendment made in 1998 unenforceable.

Regardless of which statutes applies, the Amended Complaint at issue here does not allege that the voter has done anything which should invalidate his or her vote, nor has the Supervisor of Elections violated any statutory duty, which justifies the invalidation of any absentee votes. The irregularities alleged are not the type of noncompliance supporting the relief sought by plaintiff. *Boardman v. Esteva, supra*. Plaintiff has alleged no ultimate facts to support her conclusory allegations that any violations of any statute thwarted the will of the voters or compromised the sanctity of the ballot. *Beckstrom v. Volusia County Canvassing Board, 707 So.2d 720, (Fla. 1998)*.

It is therefore ORDERED AND ADJUDGED that Plaintiff's Amended Complaint is hereby DISMISSED WITH PREJUDICE.

DONE AND ORDERED at Tallahassee, Leon County, Florida, this 7<sup>th</sup> day of December, 2000.

L. RALPH SMITH, JR  
Circuit Judge

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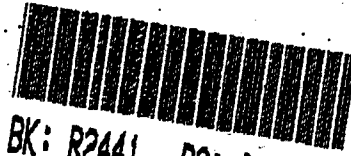
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