

**SUPREME COURT OF FLORIDA**

**CYNTHIA McCAULEY,**

**Appellant/Plaintiff,**

**Case No.: SC00-2462**

**vs.**

**DCA Case No.: 1D00-4825**

**Lower Case No.: 00-2802**

**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 and as the FLORIDA ELECTIONS  
CANVASSING COMMISSION; AL GORE;  
JOSEPH LIBERMAN; GEORGE W. BUSH;  
and DICK CHENEY,**

**Appellees/Defendants.**

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**APPELLEE'S/DEFENDANT'S,  
BAY COUNTY CANVASSING BOARD,  
ANSWER BRIEF**

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**TABLE OF CONTENTS**

<b>TABLE OF CITATIONS.....</b>	<b>ii</b>
<b>STATEMENT OF THE CASE AND FACTS .....</b>	<b>1</b>
<b>SUMMARY OF ARGUMENT .....</b>	<b>1</b>
<b>STANDARD OF REVIEW .....</b>	<b>1</b>
<b>THE IRREGULARITIES COMPLAINED OF BY McCAULEY DO NOT AFFECT THE SANCTITY OF THE BALLOT AND THE INTEGRITY OF THE ELECTION .....</b>	<b>2</b>
<b>McCAULEY’S APPEALS IN MOOT .....</b>	<b>6</b>
<b>CONCLUSION .....</b>	<b>7</b>

**TABLE OF CITATIONS**

<u>Case Names:</u>	<u>Page Number</u>
<u>Abruzzo v. Haller,</u> 603 So.2d 1338 (Fla. 1 <sup>st</sup> DCA 1992).....	2
<u>Beckstrom v. Volusia County Canvassing Board,</u> 707 so. 2d 720 (Fla. 1998).....	5
<u>Boardman v. Esteva,</u> 323 So.2d 259 (Fla. 1975).....	2,3
<u>Bush v. Gore, No. 00-949;</u> 2000 WL 1811418 (U.S. Dec. 12, 2000).....	1,6
<u>Jacobs v. Seminole County Canvassing Board,</u> No. SC00-2447; 2000 WL 1810330 (Fla. Dec. 12, 2000).....	5,6
<u>McLean v. Bellamy,</u> 437 So. 2d 737 (Fla. 1 <sup>st</sup> DCA 1983).....	2,3,5
<u>Other authorities:</u>	
§ 101.62, Florida Statutes.....	3
§ 101.64, Florida Statutes.....	4
§ 101.647, Florida Statutes.....	4
§ 101.68, Florida Statutes.....	5,6
Padovano, <u>Florida Appellate Practice, Second Edition</u> § 9.4 (1997).....	2



## **STATEMENT OF THE CASE AND FACTS**

Appellees, Marc Nolen, Richard Stewart, The Honorable Thomas Welch, in their official capacities as members of the Bay County Canvassing Board (hereinafter referred to as “Bay County”) generally agree with Appellant’s, Cynthia McCauley’s (hereinafter referred to as “McCauley”) Statement of the Case and Statement of the Facts, but notes the following exceptions. Bay County’s Answer to the Amended Complaint was filed via facsimile with the Trial Court on December 4, 2000, pursuant to the Trial Court’s Order Granting Plaintiff’s Motion to Shorten Response Time. Bay County’s Answer was filed after the 2:00 p.m. EST deadline established by the Trial Court due to a long distance telephone line malfunction in the Panama City, Florida, local area.

On December 5, 2000, Bay County filed a Motion to Dismiss which joined in the Motion to Dismiss Plaintiff’s Complaint with a Supporting Memorandum of Law filed by counsel for Harris and the Elections Canvassing Commission.

Bay County has adopted portions of the arguments raised by counsel for Katherine Harris and the Elections Canvassing Commission.

## **SUMMARY OF ARGUMENT**

The Trial Court properly dismissed McCauley’s Amended Complaint for failure to state a cause of action. McCauley failed to make any allegations that the sanctity of the ballots themselves were disturbed. Assuming all of the allegations in the Amended Complaint are true, the violations complained of will not invalidate the votes of innocent electors. Finally, due to the United States Supreme Court decision in Bush v. Gore, No. 00-949; 2000 WL 1811418 (U.S. Dec. 12, 2000) McCauley’s action is moot.

## **STANDARD OF REVIEW**

McCauley's Amended Complaint alleges that it is an action for declaratory and injunctive relief contesting the election for President and Vice President of the United States. A motion to dismiss assumes for purposes of the motion that all of the allegations in the complaint are true. A trial court's decision to dismiss a complaint seeking declaratory relief is accorded great deference and is reviewed only for abuse of discretion. Abruzzo v. Haller, 603 So.2d 1338 (Fla. 1<sup>st</sup> DCA 1992). Assuming that the Amended Complaint is not based on an action for declaratory relief, then the standard of review is de novo. See Padovano, Florida Appellate Practice, Second Edition § 9.4 (1997). Under either standard of review, the Amended Complaint fails to state a cause of action for which relief may be granted.

### **THE IRREGULARITIES COMPLAINED OF BY McCAULEY DO NOT AFFECT THE SANCTITY OF THE BALLOT AND THE INTEGRITY OF THE ELECTION**

In McLean v. Bellamy, 437 So. 2d 737 (Fla. 1<sup>st</sup> DCA 1983), the First District was asked by an unsuccessful candidate to void 293 absentee ballots based upon the violation of various statutory requirements governing absentee voting. In evaluating the case, the court first reviewed the legal principles established in Boardman v. Esteva, 323 So.2d 259 (Fla. 1975). The First District noted this Court's statement:

Unless the absentee voting laws which have been violated in the casting of the vote expressly declare that the particular act is essential to the validity of the ballot, or that its omission will cause the ballot not to be counted, the statute should be treated as directory, not mandatory, provided such irregularity is not calculated to affect the integrity of the ballot or election.

. . .

[W]e hold that the primary consideration in an election contest is whether the will of the people has been effected. In determining the effect of irregularities on the validity of

absentee ballots case, the following factors shall be considered:

- (a) The presence or absence of fraud, gross negligence, or intentional wrongdoing;
- (b) whether there has been substantial compliance with the essential requirements of the absentee voting law; and
- (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the ballot and the integrity of the election.

The underlying concern of the election officials in making the initial determination as to the validity of the absentee ballots is whether they were cast by qualified, registered voters, who were entitled to vote absentee and who did so in a proper manner.

Id. at 742 (quoting Boardman 323 So.2d at 269.)

The First District applied these legal principles and determined that the following acts in violation of the Florida absentee voting law did not constitute irregularities sufficient to void the absentee ballots that were cast by qualified, registered voters:

- (1) the mailing of unrequested ballots to voters where the City Auditor-Clerk mailed such ballots to individuals who voted absentee in a primary election but did not expressly request an absentee ballot for a runoff election;
- (2) improperly witnessed ballots where one of two required witnesses signed the ballot at the time the voter marked the ballot, but the second required witness signed the ballot without witnessing the voter's action;
- (3) failure of the voter to check on the ballot application the "appropriate reason" for which the voter was entitled to vote absentee; and
- (4) distribution of the absentee ballot forms to third persons without written authorization from the elector.

In evaluating these technical statutory violations, the First District explained: "We are unable to glean from the provisions of [section 101.62] a legislative intent that the failure to follow the letter of its provisions should result in the invalidation of absentee ballots cast by qualified electors who are also qualified to vote absentee." McLean 437 So. 2d at 743-44. The Court noted that the 1977 Legislature

“relaxed some of the former rigidities of Section 101.62 regarding requests for absentee ballots,” and explained that “we find no declaration in Section 101.62, implied or explicit, that strict compliance with its provisions is essential to the validity of the ballot or that the failure to strictly follow any of its provisions will cause the ballot not to be counted.” Id.

In rejecting the unsuccessful candidate’s request to invalidate the absentee ballots, the First District repeatedly considered whether such rejection was necessary to ensure a full, fair and free expression of the will of the people. The First District held that rejection was not appropriate despite the irregularities. In concluding that it would be inappropriate to disenfranchise absentee voters for errors on the part of elections officials, the First District explained:

It is obvious that the subject election was managed by the election officials in a manner other than in strict conformance with the applicable voting laws. It may well be that such irregularities were the result of negligence on the part of the election officials. However, any such negligence avails the appellant nothing because such negligence did not descend to the kind of gross negligence which the Supreme Court in Boardman equated with fraud or intentional wrongdoing.

Id. at 750 (emphasis added).

Paragraph 12 of McCauley’s Amended Complaint alleges that “Substantial irregularities occurred in the processing of the absentee ballot requests and in the receipt of the ballots themselves. These specific irregularities include:....” The Amended Complaint then makes three allegations of irregularities the substance of which are: (i) the Supervisor of Elections, in violation of § 101.647 Fla. Stat., accepted absentee ballots from people who delivered more than two absentee ballots to the Supervisor of Elections and who did not return the absentee ballots with the appropriate written authorization; (ii) a Republican Party mailing misled voters into believing that the State of Florida permitted and encouraged absentee voting as a matter of convenience and the mailing included a removable pre-addressed absentee ballot

request form; and (iii) contrary to the misleading letter sent by the Republican Party, § 101.64, Fla. Stat., requires absentee voters to swear of affirm that he or she is “unable to attend the polls on election day.”

None of the allegations contained in Paragraph 12 of the Amended Complaint allege that individual voters committed any acts, except the act of being misled or their absentee ballots mishandled by third parties, which effect the sanctity of the ballots themselves. In sum, the allegations of Paragraph 12 of the Amended Complaint allege possible criminal violations on the part of third parties. However, those violations, even when taken as true, do not require the invalidation of approximately 12,000 absentee ballots.

In footnote 3 of Jacobs v. Seminole County Canvassing Board, No. SC00-2447; 2000 WL 1810330 (Fla. Dec. 12, 2000), this Court states “We note that chapter 104 of the Florida Election Code provides certain penalties for election official and others who violate the Code. However, violations of the Code will not necessarily invalidate the votes of innocent electors.” See also, Beckstrom v. Volusia County Canvassing Board, 707 so. 2d 720 (Fla. 1998) (elections officials failure to substantially comply with the Florida Election Code did not result in doubt as to whether the results of the election reflected the will of the voters). Just as in McLean and Jacobs, the violations complained of are violations of directory, not mandatory, statutes. The failure to strictly follow those statutes does not affect the sanctity of the ballot and the integrity of the election<sup>1</sup>.

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<sup>1</sup> Paragraphs 9 and 10 of the Amended Complaint allege that in Bay County George W. Bush received 38,637 votes of which 8,969 were absentee and that Al Gore received 18,850 votes of which 3,327 were absentee. Thus, the total polling place votes in Bay County for Bush are 29,668 and Gore 15,523. In both the polling place tabulation and the absentee tabulation, Bush defeated Gore by a margin of approximately 2:1 in Bay County, Florida. The will of the voters in Bay County is that Bush should be elected President.

Paragraph 13 of the Amended Complaint makes the conclusion of law that “Absentee votes cast by individuals who were in fact able to attend the polls on election day are illegal.” However, § 101.68(2)(c)1. Fla. Stat. (2000) declares an absentee ballot shall be considered illegal if it does not include the signature and last four digits of the social security number of the elector as shown by the registration records, and it is either notarized or signed by a witness. No where in the Amended Complaint does McCauley allege that any of the absentee ballots counted by Bay County are illegal pursuant to § 101.68(2)(c)1. Fla. Stat. (2000).

In footnote 2 of Jacobs, this Court stated:

“While there may be questions regarding the application forms in this case, there is no question that the ballots themselves conformed to the requirements of section 101.68, Florida Statutes (2000) which requires the signature and last four digits of the social security number of the elector, and either subscription of a notary or identifying information from an attesting witness.” (Emphasis added.)

Similar to the allegations in Jacobs, in this case the ballots themselves have not been questioned.

### **McCAULEY’S APPEAL IS MOOT**

On the evening of December 12, 2000, the United States Supreme Court issued its ruling in Bush, et al. v. Gore, et al., Case No. 00-949; 2000 WL 1811418 (U.S. Dec. 12, 2000) and stated as follows:

“The Supreme Court of Florida has said that the legislature intended the State’s electors to ‘participate fully in the federal electoral process,’ as provided in 3 U.S.C. § 5. – So.2d, at – (slip op. at 27); see also Palm

Beach Canvassing Bd. v. Harris, 2000 WL 1725434, \*13 (Fla. 2000). That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed." Bush v. Gore, 2000 WL 1811418, \*7. [Emphasis added].

In Gill v. City of North Miami Beach, 156 So.2d 182 (Fla. 3<sup>rd</sup> DCA 1963), the Third Circuit held that where an election sought to be enjoined had already been held, issues presented by appeal had become moot and the appeal was dismissed.

The Bay County contends that the issues presented in this appeal are moot based upon the United States Supreme Court's ruling. Specifically, the Bay County avers that the Appellant's contest was solely designed to lead to an amended certification of Bay County's voting results. Since this contest was not completed by the December 12, 2000 deadline, this appeal is moot.

### **CONCLUSION**

McCauley's amended complaint failed to make any allegations that the irregularities complained of affected the sanctity of the ballots themselves. Hyper-technical violations of the Election Code by election official should not be permitted to disenfranchise voters. The Trial Court's Order granting dismissal should be affirmed for the reasons stated herein. In the alternative, Appellees respectfully request that this Honorable Court deem the issues raised in this appeal to be moot and dismiss this action.

BURKE & BLUE, P.A.

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CANVASSING BOARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief has been furnished by facsimile transmission this 13<sup>th</sup> day of December, 2000, to the following:

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