

**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

CYNTHIA McCAULEY,

Appellant

v.

CASE NO. SC00-2462

MARC NOLEN, Et. Al.

DCA CASE NO. 1D00-4825

CIRCUIT COURT CASE NO. CV00-2802

Appellees.

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**ANSWER BRIEF OF APPELLEES KATHERINE HARRIS AND  
FLORIDA ELECTIONS CANVASSING COMMISSION**

Deborah K. Kearney  
Kerey Carpenter  
Florida Department of State  
PL-02 The Capitol  
Tallahassee, Florida  
32399-0250  
(850) 414-5536

Victoria L. Weber  
Jonathan Sjostrom  
Donna E. Blanton  
STEEL HECTOR & DAVIS LLP  
215 South Monroe, Suite 601  
Tallahassee, Florida 32301-1408  
(850) 222-2300

Counsel for Appellees Katherine Harris as Secretary of State, State of Florida  
and the Florida Elections Canvassing Commission

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**CERTIFICATE OF FONT SIZE**

This Brief is typed using a Times New Roman 14-point font.

**I. STATEMENT OF THE CASE AND FACTS**

Appellees, Secretary of State Katherine Harris and the Florida Elections Canvassing Commission (“Harris” and “Commission” ) do not dispute the Statement of Case filed by Appellant, other than to note that the Amended Complaint seeks declaratory relief pursuant to section 86.011, Florida Statutes.

For purposes of reviewing the Circuit Court’s Order of Dismissal with Prejudice, the facts are assumed to be those alleged in the Appellant’s Amended Complaint.

**II. SUMMARY OF THE ARGUMENT**

The trial court properly dismissed the Appellant’s Amended Complaint for failure to state a cause of action. Election contests are not to be regarded as mere fishing licenses for contestors to determine the legitimacy of the claims. Here the conclusory allegations in the Amended Complaint are based upon erroneous interpretations of the Florida Election Code.

Florida law permits and facilitates mass mailing of absentee ballot request forms to voters. Under the applicable law, a voter was entitled to vote absentee in the 2000 presidential election if such voter was “unable to attend the polls on election day,” regardless of the reason for the voter’s inability to do so. The alleged improper return of absentee ballots by third parties does not, in and of itself, constitute a basis for invalidating all of the absentee ballots cast in Bay County. The trial court’s order should be affirmed.

### **III. ARGUMENT**

#### **A. THE STANDARD OF REVIEW IN A DECLARATORY JUDGMENT ACTION IS WHETHER THERE HAS BEEN AN ABUSE OF DISCRETION**

Appellant’s Amended Complaint seeks declaratory relief under section 86.011, Florida Statutes, and relief under the election contest provision in section 102.68, Florida Statutes. 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).

Nonetheless, the trial court’s final order should be sustained, regardless of whether this Court reviews the order *de novo*, as suggested by the Appellant, or under a more limited abuse of discretion standard.



**B. APPELLANT’S AMENDED COMPLAINT IS  
PREDICATED ON AN ERRONEOUS READING  
OF THE FLORIDA ELECTION CODE**

The Appellant’s Amended Complaint is based upon the erroneous assumption that the following alleged irregularities require invalidating all of the absentee ballots cast in Bay County:

1. The mass mailing by political parties of absentee *ballot request forms*;
2. The voting by absentee ballot of properly registered electors who have certified that they were unable to attend the polls on election day; and
3. The return to the Supervisor of Elections of more than two absentee ballots by a person other than the elector, the elector’s immediate family or another person designated in writing to do so by the elector.

The alleged irregularities about which Appellant complains are set forth in paragraph 12 of the Amended Complaint. Specifically, Appellant alleges that one political party engaged in a mass mailing of absentee ballot request forms soliciting the voters in Bay County. (Amended Complaint at ¶ 12b.). Appellant further alleges that absentee voters who certified that they were “unable to attend the polls on election day” were in fact able to do so. (Amended Complaint at ¶s 12c and 13). Additionally, Appellant complains that “[i]n this election, individuals personally delivered more than two absentee ballots, other than their own or ballots

of immediate family members and/or other delivered absentee ballots without having been designated in writing as the person authorized to return the ballot and/or the Supervisor of Elections did not verify the identity of the person delivering the ballots.” (Amended Complaint at ¶ 12a.)

The Appellant asserts no claim that any absentee ballot cast in Bay County was cast by any person other than the duly registered voter. The Appellant makes no claim that the absentee ballots at issue lacked proper signatures of electors or witnesses. The Appellant asserts no claim that any absentee ballot in Bay County was cast by a deceased or otherwise ineligible person. The Appellant makes no claim that any absentee ballot in Bay County was not timely cast. The Appellant asserts no claim that any person influenced, in any way, any voter’s choice on any absentee ballot in Bay County.

Under the circumstances, there was little time to plead, discover, try and appeal an election contest case. Thus, Appellant’s failure to plead the alleged irregularities with any degree of specificity is particularly troubling as it undermines due process. As this Court has stated, “the election contest statutes are not to be regarded as mere fishing licenses for contestors to ascertain the correctness or incorrectness of their statements of contest.” *Burke v. Beasley*, 75 So. 2d 7, 10 (Fla. 1954), *quoting Gray v. Huntley*, 238 P. 53 (Colo. 1925).

**1. Florida Law Permits and Facilitates Mass Mailing of Unsolicited Absentee Ballot Request Forms to Voters**

In 1990, the Division of Elections was asked to opine on the following question: “Can a candidate legally mass mail unsolicited absentee ballot applications to the voters?” The Division answered unequivocally: “A candidate may legally mass mail unsolicited absentee ballot applications to the voters.” Division of Elections Opinion DE 90-31.<sup>1</sup> Appellant’s Appendix 9, Exhibit 1. Thus, for at least ten years, it has been the explicit law of this state, well known to both political parties, that mass mailing of unsolicited absentee ballot applications is permissible.

Additionally, the statutes themselves provide the political parties the means to prepare such mass mailings. All necessary, voter specific information required for request forms is available to both political parties from the Division of Elections in the form of the Central Voter File pursuant to section 98.097, Florida Statutes. Both political parties can routinely obtain the most current information from the local Supervisors of Election pursuant to sections 98.095(1)(b) & (2)(d), Florida Statutes.

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<sup>1</sup>Division of Elections Opinions are published on the Division’s official web site at <http://election.dos.state.fl.us/index.html>.

The Legislature revised the absentee ballot laws in 1998 and preserved the parties' participation in the request form process. *See* Chapter 98-129, 1998 Laws of Florida. Following enactment of this legislation, the Division was once again asked to opine concerning mass mailing of request forms. It issued its opinion DE 98-14 addressing the effect of the 1998 legislation. Appellant's Appendix 9, Exhibit 2. The Division extensively analyzed the statutory changes and concluded that "[c]andidates, political parties, or other persons may provide absentee ballot request forms to electors in order that the elector can complete the form and return it to the supervisor of elections by mail, in person, or by delivery to a third party for transmittal to the supervisor." *Id.* at 6.

Thus, nothing prohibits a political party from mass mailing absentee ballot request forms to electors. To the contrary, such mass mailings have been specifically permitted by the Division for ten years, and such mailings are specifically permitted by the Division under the statutory scheme in effect today. The practice has the effect of giving both political parties the incentive and means to effect maximum voter participation. For example, in this most recent election, both of the major political parties' absentee ballot request programs generated many thousands of requests statewide for absentee ballots. *See* Democratic

Absentee Ballot Request and Republican Absentee Ballot Request Forms, Appellant's Appendix 9, Exhibit 3.

Nor is it unusual or at all improper that the two major, institutional political parties should have substantial responsibility for implementing voter turnout efforts, including with respect to absentee ballots. For example, the Legislature has specifically permitted political parties to appoint "Absentee Ballot Coordinators" for the purpose of assisting in the execution and witnessing of absentee ballots. § 101.685, Fla. Stat. (2000). Far from creating some nefarious scheme, our election laws contemplate and encourage participation by the political parties that are integral to our democratic process.

**2. The Statutes Applicable to the 2000 General Election Authorize Absentee Voting By Any Elector Who Certifies That He or She Is "Unable to Attend the Polls on Election Day," Without Regard to the Reason for Such Inability to Attend the Polls**

Section 97.021, Florida Statutes, defines "absent elector," and section 101.64, Florida Statutes, contains the wording of the affirmation that must be executed by the voter. Section 101.68(2)(c), Florida Statutes, provides for canvassing of absentee ballots. However, it is necessary to look beyond the wording in the 2000 Florida Statutes to understand the Florida law applicable to absentee voting. This is because five Florida counties are subject to pre-clearance

of election laws by the U.S. Department of Justice. 42 U.S.C. §1973c; 28 C.F.R. Pt. 51. Appellant's Appendix 10, Exhibits A and B.<sup>2</sup> The 1998 Legislature's amendments to sections 101.64 and 101.68(2)(c), Florida Statutes, (the most recent change) have *not* been pre-cleared at this time. *See* Division of Elections Opinion DE 98-13, August 19, 1998, and Correspondence between the Florida Attorney General and the U.S. Department of Justice. Appellant's Appendix 10, Exhibits C and D, respectively. Because the Florida Division of Elections has properly ruled that it would be inappropriate to apply different election laws to different counties within the State of Florida, the 1998 amendments to sections 101.64 and 101.68(2)(c), Florida Statutes, were inapplicable during the 2000 general election. DE 98-13, Appellant's Appendix 9, Exhibit 2. Thus, it is necessary to review the law as it existed prior to the 1998 legislation and the legislative history of the 1998 legislation to understand the standard for voting by absentee ballot both before and after the 1998 change.

Appellant argues that “[i]f the word unable is viewed as including convenience, the desire not to stand in line on election day or imagined excuses, then the exception of absentee voting swallows the rule of Florida’s polling place

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<sup>2</sup> For a more detailed explanation of the pre-clearance requirements and the application of same to the 1998 legislative changes, see Appellee's Supplemental Memorandum of Law at Appellant's Appendix 10.

electoral scheme.” Appellant’s Brief at 28. In her memorandum of law filed in the trial court, the Appellant argued that being unable to attend the polls did not include “excuses or reasons that do not derive from a person’s absence from their county or physical disability.” Plaintiff’s Memorandum of Law at 5.

However, a review of the legislative history for sections 97.021(1) and 101.64, Florida Statutes, shows that Appellant is reading the phrase “unable to attend the polls on election day” far more narrowly than the Legislature itself has read it.

The law existing in 1995 enumerated six specific reasons that entitled an individual to vote absentee:

97.021 Definitions. -- For the purposes of this code, except where the context clearly indicates otherwise, the term:

(1) “Absent elector” means any registered and qualified voter who:

(a) Is unable without another’s assistance to attend the polls.

(b) Is an inspector, a poll worker, a deputy voting machine custodian, a deputy sheriff, a supervisor of elections, or a deputy supervisor who is assigned to a different precinct than that in which he or she is registered to vote.

(c) On account of the tenets of his or her religion, cannot attend the polls on the day of a general, special, or primary election.

(d) Has changed residency to another county in this state within the time period during which the registration books are closed for the election for which the ballot is requested.

(e) *Will* not be in the precinct of his or her residence during the hours the polls are open for voting on the day of an election.

(f) Has changed residency to another state and is ineligible under the laws of that state to vote in the general election; however, this shall pertain only to presidential ballots.

(Emphasis added.) Section 101.64, Florida Statutes (1995), required the elector to swear in a certificate on the back side of absentee ballot envelope that he or she was entitled to vote absentee for one of the reasons enumerated in section 97.021(1).

In 1996, the Florida Legislature enacted Chapter 96-57, 1996 Laws of Florida. Section one of this legislation modified section 97.021(1) to read as follows:

**97.021 Definitions.** -- For purposes of this code, except where the context clearly indicates otherwise, the term:

(1) “Absent elector” means any registered and qualified voter who is unable to attend the polls on election day.

Additionally, Section 101.64, Florida Statutes (1996 Supp.), required the elector to swear in a certificate on the back of the absentee ballot envelope that he or she was unable to attend the polls on election day.



The legislative history for Chapter 96-57 provides:

The bill revises the reasons for voting absentee to allow any voter to vote an absentee ballot if he is unable to attend the polls on election day.

Final Bill Analysis & Economic Impact Statement, House of Representatives Committee on Ethics and Elections, HB 233, May 6, 1996, at page 1. Appellant's Appendix 9, Exhibit 5.

Section 97.021, F.S., redefines an "absent elector" by removing the reasons a person may vote absentee. So long as a person is unable to attend the polls on election day, *regardless of the reason*, he or she may vote by absentee ballot.

Senate Staff Analysis and Economic Impact Statement, SB 2252 (companion bill to HB 233), March 14, 1996, at page 3. Appellant's Appendix 9, Exhibit 6. (Emphasis added.)

In 1998, the Florida Legislature enacted Chapter 98-129, 1998 Laws of Florida. Section three of that act revised section 97.021(1) to again provide six enumerated reasons for voting absentee:

**97.021 Definitions.** -- For the purposes of this code, except where the context clearly indicates otherwise, the term:

(1) "Absent elector" means any registered and qualified voter who:

(a) Is unable without another's assistance to attend the polls.

(b) Is an inspector, a poll worker, a deputy voting machine custodian, a deputy sheriff, a supervisor of elections, or a

deputy supervisor who is assigned to a different precinct than that in which he or she is registered to vote.

(c) On account of the tenets of his or her religion, cannot attend the polls on the day of the general, special, or primary election.

(d) *May* not be in the precinct of his or her residence during the hours the polls are open for voting on the day of the election.

(e) Has changed his or her residency to another county in this state within the time period during which the registration books are closed for the election for which the ballot is requested.

(f) Has changed his or her residency to another state and is ineligible under the laws of that state to vote in the general election; however, this pertains only to presidential ballots.

(Emphasis added.) Furthermore, Section 101.64, Florida Statutes (1998 Supp.), requires the elector to certify on the back of the absentee ballot envelope that he or she is entitled to vote absentee for one of the reasons enumerated in section 97.021(1).

In making the 1998 revisions, the Florida Legislature explained:

CS/HBs 3743, 3941 [Passed as CS/SB 1402 (2d Engrossed)] is an omnibus election bill targeted at reforming Florida's voter registration and absentee voting system by:

...

Modifying the Absentee Ballot Voting Process: *narrows* the qualifications and procedures for requesting, mailing, witnessing, **voting** and returning absentee ballots.

Final Bill Research & Economic Impact Statement, House of Representatives Committee on Election Reform, CS/HB 3743, 3941 (Passed as CS/SB 1402), May 12, 1998, at 1. (Emphasis added.) Appellant's Appendix 9, Exhibit 7.

The 1998 law permitted an elector to vote by absentee ballot if that person “*may* not be in the precinct of residence during polling hours;” the 1996 law permitted an elector to vote by absentee ballot if that person certified that he or she was “unable to attend the polls on election day.” As is evident from the legislative history, the 1998 law was intended to *narrow* the circumstances in which an elector could vote absentee. Indeed, the U.S. Department of Justice has said that its concerns about the 1998 restrictions on absentee voting are in part the reason they have not yet pre-cleared these changes. Appellant's Appendix 10, Exhibit D. Thus, it would be illogical to read the pre-1998 law, as the Appellant does, to require that the elector be absent from the county on election day as a precondition of voting absentee. Such a reading would render the 1998 legislation a *broadening -- not a narrowing* -- of the law.

Under the applicable law, it is sufficient for the elector to certify that he or she is “unable to attend the polls on election day,” regardless of the reason that

such elector believes himself or herself to be unable to attend the polls. An elector who cannot attend the polls on election day because he or she lacks transportation, or because he or she cannot get adequate time off from work to travel to the appropriate precinct and back, is a voter who is entitled to vote absentee. Yet such a person may not be physically infirm or out of the county on election day -- the test suggested by Appellant. Thus, the trial court was correct in dismissing the allegations in the Amended Complaint that suggested that absentee votes cast by individuals who were in the county on election day were illegal votes.

**3. ABSENTEE BALLOTS, LIKE ALL BALLOTS, MAY NOT BE INVALIDATED BECAUSE OF HYPER-TECHNICAL ERRORS BY THIRD-PARTIES**

Absentee ballots are not presumed to be fraudulent or otherwise disfavored under Florida law. Absentee voting advances the fundamental value of our democracy that every person who wishes to vote may do so; invalidation of legal absentee votes because of a third party's alleged error in returning the ballot to the Supervisor of Elections does not.

Section 101.647, Florida Statutes, provides that absentee ballots must be returned to the Supervisor of Elections by the elector, either in person or by mail, unless returned by a member of the elector's immediate family or by a person

designated in writing by the elector. A designated person is not permitted to return, however, more than two absentee ballots. Section 104.47(5), Florida Statutes, imposes criminal penalties upon any person who returns more than two ballots in violation of section 101.647, Florida Statutes.

Both of these provisions were enacted by the Florida Legislature in 1998 as a result of concerns about absentee voter fraud in the Miami mayoral election of 1997. *See* Appellant's Appendix 9, Exhibit 7 (Final Bill Research & Economic Impact Statement). In that race, the specific allegations included: voting on behalf of others; purchasing and selling of absentee ballots; voting by nonresidents; alteration of ballots; false information provided with respect to voter registration; use of city addresses to permit voting by nonresidents; voting on behalf of dead people; and voting by non-U.S. citizens. *Id.*

If the Appellant has reason to believe that individuals in Bay County were involved in similar activities, or that they intentionally and knowingly violated section 101.647, these violations should be reported to the State Attorney for investigation. However, the broad and cursory assertions of "gross misconduct" and acts that "compromised the sanctity of the ballot and the integrity of the election," without more specific allegations of ultimate facts supporting these conclusions, do not provide a legal basis to invalidate the absentee ballots of all of

the electors who voted absentee in Bay County, and thus they fail to state a cause of action.

Florida law does not permit the disenfranchisement of a voter who made an unequivocal choice for a candidate within the appropriate time on an official ballot. *See Jacobs v. Seminole County Canvassing Bd.*, 2000 WL 1810330 (Fla. December 12, 2000). *Taylor v. Martin County Canvassing Bd.*, 2000 WL 1810269 (Fla. December 12, 2000) *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1975). All three cases involved absentee ballots that were timely cast by qualified electors. The absentee ballots at issue in *Boardman* were contested because of errors on the part of elections officials. This Court considered and rejected the attempt to invalidate absentee ballots of innocent voters. The Court's words are plain:

Assuming that the absentee ballots counted in the election were cast by qualified, registered electors, who were otherwise entitled to vote absentee, notwithstanding the alleged defects, a majority of the voters in the Second District preferred Mr. Boardman over Mr. Esteva in October, 1973. This must not be overlooked. If we are to countenance a different result, one contrary to the apparent will of the people, then we must do so on the basis that the sanctity of the ballot and the integrity of the election were not maintained, and not merely on the theory that the absentee ballots cast were in technical violation of the law.

*Boardman*, 323 So. 2d at 263.

The law of Florida, beginning with *Boardman*, compels the conclusion that invalidation of the ballots of innocent voters is not permissible here. Violation of a statute related to absentee ballots will not alone invalidate any ballot. Violation of the statutory procedures related to absentee ballots will only invalidate a ballot if a statute says that the remedy for the specific violation is the exclusion of an otherwise valid ballot, or if the ballot itself does not reveal the true choice of an eligible, registered voter. Even if the actions of persons other than duly registered, eligible voters involved in the requests were subject to criminal penalties, that would be no justification to disenfranchise the absentee voters in Bay County.

In 1998, this Court considered a request that it invalidate absentee ballots cast by voters in Volusia County because election officials involved in recounting those ballots utilized a “re-marking procedure that was not in substantial compliance with section 101.5614(5), Florida Statutes (1995), because the procedure provided no reasonable substitute means of verification of the results of the election.” *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 723 (Fla. 1998). This Court declined to do so because there was no showing that the noncompliance of the elections officials resulted in doubt as to whether the certified election results reflected the will of the voters.

Here, the Appellant does not allege that any absentee vote was cast by anyone other than a qualified elector who timely cast a vote. While Appellant alleges that certain voters may not have been entitled to cast their votes via an absentee ballot, that assertion is based solely upon Appellant's erroneous interpretation of the law governing who is entitled to vote absentee. As the trial court correctly noted:

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.

Appellant's Appendix 11.

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*. 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).

In clear contrast to *McLean* and this action is *In the Matter of the Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election of the City of Miami, Florida*, 707 So. 2d 1170 (Fla. 3<sup>rd</sup> DCA 1998). In that case, the court reviewed a decision in which the circuit court, evaluating events involving the 1997 Miami mayoral election, found an extensive “pattern of fraudulent, intentional and criminal conduct that resulted in such an extensive abuse of the absentee ballot laws that it can fairly be said that the intent of these laws was totally frustrated.” *Id.* at 1171. The Third District ruled that it was appropriate in that situation to void all of the absentee ballots cast in the election.

In reaching its decision, the court reviewed evidence presented to the trial court, including an expert document examiner’s conclusion that 225 illegal absentee ballots were cast; an FBI agent’s identification and confirmation of 113 false voter

addresses; evidence of 14 stolen ballots; 140 falsely witnessed ballots; and evidence that more than 480 ballots were procured or witnessed by approximately 29 ballot brokers who invoked their privilege against self-incrimination instead of testifying at trial. *Id.* at 1172. In summary, the court found “ample evidence of fraud” to support the trial court’s finding that “the integrity of the election was adversely affected.” *Id.* at 1172.<sup>3</sup>

As a direct result of absentee voter fraud problems in the 1997 Miami mayoral election, the Legislature enacted Chapter 98-129, 1998 Laws of Florida. This legislation addressed voter registration, absentee voting, and criminal penalties associated with violation of election laws.

The final staff report on the legislation, prepared by the House of Representatives Committee on Election Reform, describes the situation existing at the time of the legislation as follows:

Issues of voter fraud, with an emphasis on absentee balloting, arose in the 1997 Miami mayoral race and in a 1997 city commission race in Miami Beach. Similar allegations had arisen as early as 1993 in the Hialeah mayoral election. Specific allegations in the Miami mayor’s race included:

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<sup>3</sup> The Appellant’s reliance on *Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984) is likewise unavailing. This Court in *Bolden* noted that the facts there showed “promiscuous vote buying” and that “fraud and illegal practices were so conspicuously corrupt and pervasive that it has tainted the entire absentee voting procedure in this election.” *Id.* at 565.

Someone voting on behalf of someone else  
The purchasing or selling of absentee ballots or another's vote  
Non-City-of-Miami residents voting  
Changing the markings on ballots  
False statements or information being provided with regard to address information and changes of address on voter registrations  
Use of certain addresses within the City as the "new address" for persons not residing within the City for the sole purpose of allowing non-residents to vote in the municipal election  
Voting by absentee ballots under the name of deceased persons  
Voting by non-U.S. citizens

Final Bill Research & Economic Impact Statement, House of Representatives Committee on Election Reform, CS/HBs 3743, 3941 (Passed as CS/SB 1402), May 12, 1998. Appellant's Appendix 9, Exhibit 7.

The legislative report notes that an "absentee ballot is considered illegal if it does not include the signature of the elector, as shown by the registration records, and the signature and address of an attesting witness." *Id.* at 8. The report further explains that "[a]lthough the statutes emphasize the importance of all the instructions, only the voter's signature and the signature of the *attesting* witness are mandatory; all other provisions are directory in nature." *Id.* (citing *Boardman v. Esteva*). The Legislature quoted *Boardman*'s admonition that "[u]nless 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 the statute should be treated as directory, not mandatory, provided such irregularity is not

calculated to affect the integrity of the ballot.” *Id.* (quoting *Boardman*, 323 So. 2d at 265). The legislature did not specify that a third party’s return of the ballot contrary to the requirements of section 101.647, Florida Statutes, would invalidate a ballot.

Section 101.647, Florida Statutes (return of absentee ballots) and sections 101.64 and 101.65, Florida Statutes (delivery of absentee ballots and instructions to absent electors), take differing approaches. In section 101.647, the law imposes limitations on who can return an absentee ballot to the Supervisor of Elections. However, nothing in that provision states that failure to follow these instructions will invalidate the ballot. In comparison, both sections 101.64 and 101.65 contain clear instructions to the voter that failure to sign the voter’s certificate on the ballot, or to have the signature properly witnessed, will invalidate the ballot. Nothing in the statutes, or in the attendant legislative history, suggests an intent to turn otherwise directory provision in the absentee ballot law into mandatory provisions that will invalidate an absentee ballot.

The 1998 legislation also created or increased criminal penalties imposed for violations of election laws, and these penalty provisions are referenced in Appellants’ complaint. Section 104.047 was created to provide new penalties for the following absentee voting violations: vote brokering; requesting an absentee

ballot on behalf of another without permission; witnessing more than five ballots in an election; marking the ballot of another; and returning more than two voted absentee ballots to supervisors. None of these penalty provisions contains the barest hint of an intent to disenfranchise all absentee voters based on the means by which some voters obtained their absentee ballots. Again, should the Appellant have reason to believe that one or more persons knowingly violated the provisions of section 101.647, Florida Statutes, by improperly returning absentee ballots, such a violation of the law would be subject to criminal prosecution by the state attorney pursuant to section 104.047, Florida Statutes.

**C. THE TRIAL COURT PROPERLY DETERMINED THAT THE AMENDED COMPLAINT FAILED TO STATE A CAUSE OF ACTION, REGARDLESS OF WHETHER THE PRE-1998 LAW OR THE POST-1998 LAW APPLIED**

Appellant contends that “regardless of the statutory edition or formula considered applicable [for purposes of determining who is entitled to vote by absentee ballot], the complaint still states a cause of action. Appellant’s Brief at 25.

To the contrary, the trial court correctly ruled that the complaint failed to state a cause of action regardless of whether the applicable absentee ballot rules were those in effect before or after the 1998 legislative revisions. *See* Appellant’s Exhibit 11 at 5, which states:

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).

Even if this Court disagrees with the reasoning of the trial court in reaching its decision, the Order should be affirmed. *See Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d. 638, 644 (Fla. 1999) (“[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record.”)

#### **IV. CONCLUSION**

For the foregoing reasons, this Court should affirm the final order entered below.

STEEL HECTOR & DAVIS LLP



Counsel for Defendant Katherine Harris as  
Secretary of State, State of Florida  
Florida Elections Canvassing Commission  
215 South Monroe Street, Suite 601  
Tallahassee, FL 32301  
(850) 222-2300

BY \_\_\_\_\_

Victoria L. Weber  
Florida Bar No. 0266426

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the undersigned by U.S. Mail, Hand Delivery, or Fax this \_\_\_\_ of December, 2000 to the following:

Alvin L. Peters,  
Attorney for Plaintiff  
36 East Oak Avenue  
Panama City, FL 32401  
Fax and Mail

Barry Richard  
Attorney for Governor George Bush and Dick Cheney  
Greenberg Traurig  
101 East College Avenue  
Tallahassee, FL 32301  
Hand Delivery

Ben R. Patterson

315 Beard Street  
P. O. Box 4289  
Tallahassee, FL 32315

Craig Meyer  
Agriculture & Consumer Services  
The Capital Plaza, Level 10  
Tallahassee, FL 32399-0800  
Hand Delivery

Michael S. Burke  
Burke & Blue, P.A.  
221 McKenzie Avenue  
Panama City, FL 32401  
U.S. Mail and Fax

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\_Victoria L. Weber

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