

DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

00-4686

GEORGE W. BUSH AND
RICHARD CHENEY

Petitioners,

DCA Case No.:
Lower Court Case No. 00-2816

v.

HARRY N. JACOBS AND
JOHN AND JANE DOES 1-NNN,

Respondents.

FILED
NOV 29 11 51 AM '00

EMERGENCY PETITION FOR WRIT OF CERTIORARI

Petitioners, George W. Bush and Richard Cheney, petition for writ of certiorari to review and reverse Judge Nikki Clark's denial of the motion to transfer and consolidate lower court Case Number 00-2816 with the earlier filed case, Case Number 00-2808, presently pending before Judge N. Sanders Sauls. Judge Clark denied Petitioner's motion by order of November 28, 2000, "based upon this Court's finding that there was not sufficient allegations of common facts, parties or issues of law."¹ At the same time, the court set the *Jacobs* case (Case Number 00-2816) on an expedited schedule for trial beginning December 6, 2000. Both the trial schedule and the relief requested present a severe risk of conflict with the earlier filed case.²

¹ Order on Emergency Motion for Status Conference (App. D).

² On November 28, 2000, Judge Sauls set Case Number 00-2808 for expedited trial to commence on December 2, 2000.

By virtue of Judge Clark's denial of consolidation, the Second Judicial Circuit now has pending two election contests – both filed pursuant to section 102.168, Florida Statutes, and both contesting the certification that George W. Bush and Richard Cheney received more votes in the State of Florida than Al Gore and Joe Lieberman. By their very nature, these contests contain common issues of law and fact and common defendants.³ Left unconsolidated, a manifest danger exists that the cases will yield inconsistent results. Judge Clark's failure to consolidate Case Number 00-2816 with the earlier filed Case Number 00-2808 represents a plain departure from the essential requirements of law and is an abuse of discretion. *Holiday Inns, Inc. v. Spevak*, 639 So. 2d 1110 (Fla. 1st DCA 1994) (App. G); *U-Haul Co. of Northern Florida v. White*, 503 So. 2d 332 (Fla. 1st DCA 1986) (App. H).

BASIS FOR COURT'S JURISDICTION

This Court has jurisdiction pursuant to Article V, Section 5, Florida Constitution, and Florida Rule of Appellate Procedure 9.030(b)(2). Where a court's failure to consolidate leads to the possibility of inconsistent results, that decision constitutes a departure from the essential requirements of law, which "is inherently an abuse of discretion." *Maharaj v. Grossman*, 619 So. 2d 399, 401 (Fla. 4th DCA 1993). Accord, *Holiday Inns, Inc. v. Spevak*, 639 So.2d 1110 (Fla. 1st DCA 1994); *U-Haul Co. of Northern Florida v. White*, 503 So. 2d 332 (Fla. 1st

³ Both suits name as defendants George W. Bush, Richard Cheney, and Florida Secretary of State Katherine Harris.

DCA 1986). Further, Judge Clark's denial of consolidation cannot be remedied on plenary appeal. As the entire nation now knows, the presidential electors from the State of Florida must be determined by December 12, 2000. There is substantial risk that the two courts may enter contradictory orders concerning the winner of the statewide vote, based on the Seminole County vote in Case Number 00-2816 before Judge Clark and the Dade, Nassau, and Palm Beach County vote before Judge Sauls, and how those votes are considered in light of the votes in Florida's sixty-three other counties.

FACTS ON WHICH PETITIONERS RELY

On Monday, November 27, 2000, Plaintiffs Albert Gore and Joseph Lieberman filed Case Number 00-2808 in the Second Judicial Circuit Court for Leon County. The complaint alleges an election contest under section 102.168, Florida Statutes. The first paragraph alleges as follows:

This is an action to contest the certification that George W. Bush and Richard Cheney received more votes in the Presidential Election in the State of Florida than Al Gore and Joe Lieberman. The vote totals reported in the Election Canvassing Commissions' certification of November 26, 2000 are wrong. They include illegal votes and do not include legal votes that were improperly rejected. The number of such votes is more than sufficient to place in doubt, indeed to change, the result of the election.

(App. A).

The complaint in Case Number 00-2808 focuses on conduct in Dade, Palm Beach and Nassau Counties in the context of the statewide vote, and requests the following relief:

An order that the Election Canvassing Commission amend its November 26, 2000 certification of the votes received by electors of Al Gore and Joseph Lieberman and George Bush and Richard Cheney to report the true and accurate results of the election as determined in this proceedings.

(App. A, p. 21.⁴)

Later, three residents and voters from Seminole County, Florida filed an election contest, again pursuant to section 102.168, in the Second Judicial Circuit, Case Number 00-2816. (App. B). This second contest, assigned to Judge Nikki Clark, points to alleged misconduct by election officials in Seminole County and alleges that such misconduct “changed the outcome of the Presidential Election.” (App. B, p. 2).

In paragraphs 33 – 34, the complaint in Case Number 00-2816 alleges that while the Florida Secretary of State certified Governor Bush as having received a greater number of votes than Al Gore, supposed misconduct of election officials “tainted the November 7, 2000 Presidential Election” and was “sufficient to change the outcome of that election.” (App. B, p. 7). In paragraph 54, plaintiffs also allege that “one or more voting precincts in Seminole County, Florida had returns that indicate the likelihood of significant irregularities, distorting the results

of the Presidential Election in Seminole County to favor George W. Bush.” (App. B, p. 11).

As relief for this alleged misconduct, plaintiffs request that the court “invalidat[e] all absentee ballots cast in Seminole County in the November 7, 2000 election.” (App. B, p. 12). On the face of plaintiffs’ complaint, that invalidation purports to change the result of the Presidential Election in Florida, substituting Al Gore and Joe Lieberman as the candidates who allegedly received the most votes.

Case Number 00-2808 was assigned to Judge N. Sanders Sauls. The later case, Case Number 00-2816, was assigned to Judge Nikki Clark. By the time Plaintiffs filed their complaint shortly before the close of business on November 27, 2000, Judge Sauls had already conducted a hearing and entered *ore tenus* discovery deadlines for the presidential election contest. Pursuant to rulings at the November 27 hearing, discovery has commenced in Case Number 00-2808.⁵

On the next day, November 28, 2000, Petitioners filed in Case Number 00-2816 a motion to transfer and consolidate that later filed case with the earlier filed case before Judge Sauls. (App. C). Judge Clark denied that motion on the afternoon of November 28th, stating that she was unpersuaded that the contests were sufficiently similar to merit consolidation. (App. D).

⁴ See pleadings in Case Number 00-2808 attached to the corrected motion to transfer and consolidate. (App. E).

⁵ See the witness and trial exhibit list provided by plaintiffs in Case Number 00-2808 to defendants prior to Judge Clark’s order denying the motion to transfer and consolidate. (App. F).

NATURE OF RELIEF SOUGHT

Pursuant to Florida Rule of Appellate Procedure 9.100(h), Petitioners respectfully request expedited entry of an order to show cause, followed promptly by an order granting certiorari, reversing Judge Clark's order denying consolidation, and an order requiring consolidation of Case Number 00-2816 with the earlier Case Number 00-2808.

ARGUMENT IN SUPPORT OF PETITION

Judge Clark's order is a clear abuse of discretion. Judge Clark erred in refusing to consolidate two contests of the same election, both brought pursuant to section 102.168, both involving the validity of the certification of presidential elections results, and both seeking the same relief – an order declaring that Al Gore and Joe Lieberman received more votes in Florida's presidential election than petitioners, George Bush and Richard Cheney.

This Court's decisions in *Holiday Inns, Inc. v. Spevak*, 639 So. 2d 1110 (Fla. 1st DCA 1994) (App. G), and *U-Haul Co. of Northern Florida v. White*, 503 So. 2d 332 (Fla. 1st DCA 1986) (App. H), could not be more plain – it is an abuse of discretion to deny consolidation of cases which present the obvious possibility of inconsistent results, even if the cases are not factually identical.

Holiday Inns v. Spevak is dispositive. There, one of the cases involved a claim that a lessee failed to pay rent and taxes due on real property in Duval County. The second case, in contrast, sought damages against persons who entered

into indemnity agreements obligating them to assume the defaulted obligations of the lessees. The trial court denied consolidation of the two cases. This Court granted certiorari and quashed the order denying consolidation. Acknowledging that the facts in the two cases were not identical, this Court felt “compelled to overturn the lower court’s order and to require consolidation to avoid the possibility of inconsistent results.” 639 So. 2d at 1111.

In requiring consolidation, this Court adhered to the First District decision in *U-Haul Co. of Northern Florida v. White*, 503 So. 2d 332 (Fla. 1st DCA 1986), and the Fourth District decision in *Tommie v. LaChance* 412 So. 2d 439 (Fla. 4th DCA 1982) (App. I). Both decisions confirm that consolidation should be granted in any instance where there is a possibility of “inconsistent outcomes and needless litigation.” Accord *Maharaj v. Grossman*, 619 So. 2d 399 (Fla. 4th DCA 1993) (App. J).

Judge Clark’s denial of consolidation is flatly inconsistent with *Spevak* and *U-Haul*. Case Number 00-2808 and Case Number 00-2816 seek precisely the same result – a judicial declaration that Al Gore and Joe Lieberman received more votes in Florida than George Bush and Richard Cheney. Both are brought pursuant to section 102.168. Both cases involve the same principal defendants.

Left unconsolidated, these cases present a real possibility of inconsistent results. Judge Sauls could well decide the contest in Case Number 00-2808 in favor of Defendants, declaring Bush and Cheney the winners of the statewide total

of presidential votes cast in Florida's sixty-seven counties. In Case Number 00-2816, if Judge Clark ruled in favor of plaintiffs, plaintiffs would urge Judge Clark to declare that Al Gore and Joe Lieberman received the most votes, or otherwise enter an order inconsistent with Judge Sauls' finding and order that Bush and Cheney received the most votes statewide. The existence of two election contests in the same circuit, presenting the real possibility of contradictory results, is improper. If the two contest actions reach inconsistent results, they will resolve nothing.

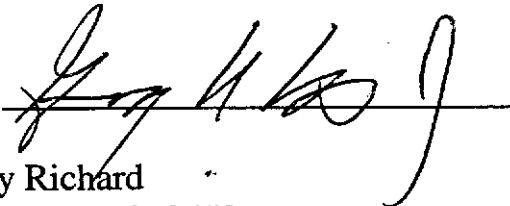
The ultimate issue in both suits is whether George Bush and Richard Cheney, or Al Gore and Joe Lieberman, received the most votes in Florida. This is a statewide election, not one pertaining solely to Seminole County or to Palm Beach County. Therefore, to determine who received the most votes in Florida, all votes in all counties must be considered. In both cases, the court will have to resolve the question whether there was misconduct on the part of local and state election officials which caused some votes to be counted which should not have been, or which caused other votes not to be counted when they should have been counted. Because those issues are statewide, not isolated to particular counties, they pervade the findings and relief requested in both suits. In addition, many of the Petitioners' affirmative defenses in this case will be the same defenses they will assert in Case Number 00-2808. If those issues are separately decided by two different courts, there is a very real possibility of inconsistent results.

Judge Clark's order denying consolidation has created a manifest injustice directly contrary to this Court's decisions in *Spevak* and *U-Haul Co.* Petitioners respectfully request an expedited order to show cause, followed by an order quashing Judge Clark's order of denial of consolidation, and a further order requiring consolidation of Case Number 00-2816 with the earlier filed case, Case Number 00-2808.

REQUEST FOR ORAL ARGUMENT

In view of the extraordinary nature and national importance of this case, Petitioners respectfully request expedited oral argument.

Respectfully submitted,

By: 

Fred H. Bartlit, Jr.
Philip Beck
BARTLIT BECK HERMAN
PALENCHAR & SCOTT
1899 Wynkoop Street, 8th Floor
Denver, CO 80202
Telephone: (303) 592-3100
Facsimile: (303) 592-3140

Barry Richard
Fla. Bar No. 010553
GREENBERG TRAUERIG, P.A.
101 East College Avenue
Tallahassee, FL 32301
Telephone: (850) 222-6891
Facsimile: (850) 681-0207

George N. Meros, Jr.
Florida Bar No. 263321
Jason L. Unger
Florida Bar No. 991562
GRAY, HARRIS & ROBINSON
301 South Bronough Street, Ste. 600
Tallahassee, FL 32301
Telephone: (850) 577-9090
Facsimile: (850) 577-3311

Daryl B. Bristow
Irvin G. Terrell
BAKER BOTTS, L.L.P.
One Shell Plaza
910 Louisiana
Houston, Texas 77002-4995
Telephone: (713) 229-1234
Facsimile: (713) 229-1522

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November 2000, a true and correct copy of the foregoing was served by hand delivery or facsimile to:

John D.C. Newton, II
Berger Davis and Singerman
215 S. Monroe Street, Suite 705
Tallahassee, FL 32301
For Albert Gore, Jr. and Joseph I. Lieberman

Joseph E. Sandler
Sandler & Reiff, P.C.
6 E Street, S.E.
Washington, D.C. 20003
For Albert Gore, Jr. and Joseph I. Lieberman

Mitchell W. Berger
Berger Davis & Singerman
305 E. Las Olas Blvd., Suite 1000
Ft. Lauderdale, FL 33301
For Albert Gore, Jr. and Joseph I. Lieberman

Deborah Kearney
General Counsel
Florida Department of State
400 S. Monroe Street, PL 02
Tallahassee, FL 32399
For Secretary Katherine Harris and the Elections Canvassing Committee

Tucker Ronzetti
Assistant County Attorney
111 N.W. 1st Street

David Boies
Boies, Schiller & Flexner LLP
80 Business Park Drive, Suite 110
Armonk, NY 10504
For Albert Gore, Jr. and Joseph I. Lieberman

W. Dexter Douglass
Douglass Law Firm
211 E. Call Street
Tallahassee, FL 32302
For Albert Gore, Jr. and Joseph I. Lieberman

Jeffrey D. Robinson
Baach Robinson & Lewis
One Thomas Circle, N.W.
Washington, D.C. 20005
For Albert Gore, Jr. and Joseph I. Lieberman

Donna E. Blanton
Steel Hector & Davis
215 S. Monroe Street, Suite 601
Tallahassee, FL 32301-1804
For Secretary Katherine Harris and the Elections Canvassing Committee

Harold McLean, Senior Attorney
Agriculture & Consumer Services
515 Mayo Building

Miami, FL 33130
For Miami-Dade Canvassing Board

407 S. Calhoun Street
Tallahassee, FL 32399

Gerald. F. Richman, Esq.
RICHMAN, GREER, WEIL,
BRUMBAUGH
MIRABATO & CHRISTIANSEN, P.A.
Counsel for Plaintiffs
One Clearlake Centre
250 Australian Avenue South, Suite
1504
West Palm Beach, FL 33401

Andrew McMahon
Palm Beach County Attorney Office
301 N. Olive Avenue, Suite 601
Palm Beach, Florida 33401-4705
For Palm Beach Canvassing Board

Kent Spriggs, Esq.
SPRIGGS & DAVIS, P.A.
Co-Counsel for Plaintiffs
324 W. College Avenue
Tallahassee, FL 32301

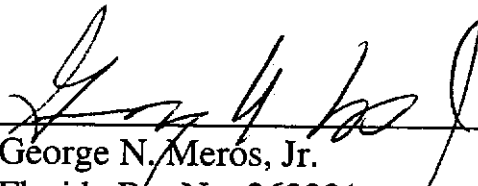
Bruce Rogow
Bruce S. Rogow, P.A.
500 East Broward Boulevard, West
Suite 1930
Ft. Lauderdale, Florida 33394
For Palm Beach Canvassing Board

Terry Young, Esq.
LOWNDES, DROSDICK, DOSTER,
KANTOR & REED, P.A.
Counsel for Defendants Seminole
County Canvassing Board and Sandra
Goard
215 S. Bola Drive
Orlando, FL 32801

Michael S. Mullin
191 Nassau Place
Yulee Florida 32097
For Nassau County Canvassing Board

Kenneth Wright, Esq.
SHUTTS & BOWEN
Counsel for Defendant Florida
Republican Party
200 S. Orange Avenue, Suite 1000
Orlando, FL 32801

COUNSEL FOR GEORGE W. BUSH AND RICHARD CHENEY



George N. Meros, Jr.

Florida Bar No. 263321

Gray, Harris & Robinson, P.A.

301 S. Bronough Street, Suite 600

Tallahassee, FL 32302-3189

Telephone: 850-577-9090

Barry S. Richard

Florida Bar No. 0105599

Greenberg Traurig, P.A.

P.O. Box 1838

Tallahassee, FL 32302

Telephone: 850-222-6891

OF COUNSEL:

Fred H. Bartlit, Jr.

Philip S. Beck

Bartlit Beck Herman Palenchar & Scott

54 W. Hubbard Street, Suite 300

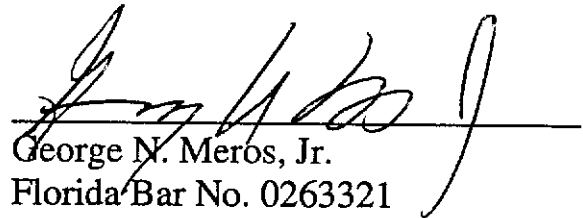
Chicago, IL 60610

Telephone: 312-494-4400

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that the font used in this petition is Times New Roman 14 point, and is in compliance with Florida Rule of Appellate Procedure 9.100(1).

Dated this November 29, 2000.


George N. Meros, Jr.
Florida Bar No. 0263321