

1 IN THE CIRCUIT COURT OF THE  
2 ELEVENTH JUDICIAL CIRCUIT, IN AND  
3 FOR MIAMI-DADE COUNTY, FLORIDA

4 CASE No.: 14-029339-CA-01 (08)

5 LEWIS J. THALER,  
6 Candidate, Office of Mayor,  
7 City of Sunny Isles Beach, Florida,

8 Plaintiff,  
9 vs.

10 MAYOR GEORGE "BUD" SCHOLL, City of  
11 Sunny Isles Beach, Florida;  
12 PENELOPE TOWNSLEY, in her official  
13 capacity as Supervisor of Elections for  
14 Miami-Dade County, Florida, and as a  
15 member of the Canvassing Board;  
16 CANVASSING BOARD OF MIAMI-DADE COUNTY,  
17 FLORIDA, consisting of SHELLEY J. KRAVITZ,  
18 in her official capacity as County Judge  
19 and Chairperson of the Canvassing Board;  
20 ANDREW S. HAGUE, in his official capacity  
21 as County Judge and a substitute member  
22 of the Canvassing Board; and JANE A. HINES,  
23 in her official capacity as City Clerk,  
24 City of Sunny Isles Beach, Florida,

25 Defendants.

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17 Transcript of Hearing  
18 Before the Honorable Judith Kreeger,  
19 Circuit Court Judge

20 DATE TAKEN: Thursday, February 25, 2016

21 TIME: 2:54 p.m. - 3:41 p.m.

22 LOCATION: Miami-Dade County Courthouse  
23 73 West Flagler Street  
24 Miami, Florida 33130

25 REPORTED BY: Lesly Montes, FPM,  
Court Reporter and Notary Public

TRANSCRIBED BY: Natalie Hartsfield, FPR, CER, CET,  
Court Reporter and Notary Public

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On behalf of Defendant City of Sunny Isles Beach,  
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On behalf of Defendant Supervisor of Elections and  
Canvassing Board.

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2                                   PROCEEDINGS

3               THE COURT:   Would you all care to announce  
4 your appearances for the court reporter?

5               MR. LOWY:   Certainly, Your Honor.  Ron Lowy  
6 of Lowy and Cook on behalf of Lewis Thaler, who's  
7 sitting to my right, along with my associate  
8 Jonathan Smulevich.

9               THE REPORTER:  Thank you.

10              MR. SHUBIN:  Good afternoon, Your Honor.  
11 John Shubin of Shubin & Bass with Liana Kozlowski,  
12 along with Mayor George "Bud" Scholl.

13              MR. DE GRANDY:  Good afternoon, Your Honor.  
14 My name is Miguel De Grandy.  I represent the City  
15 of Sunny Isles.  With me is my associate  
16 Daniel Hanlon and the City Attorney Hans Ottinot.

17              THE COURT:  Okay.

18              MR. VALDES:  Good afternoon, Your Honor.  
19 Michael Valdes representing the Supervisor of  
20 Elections, and Oren Rosenthal, also from the Miami  
21 County Attorney's Office.

22              THE COURT:  Did we get everybody?

23              MR. LOWY:  Yes, Your Honor.

24              THE COURT:  Okay.  Good.

25              All right.  You're here this afternoon for

1 competing motions for summary judgment; and I've  
2 read most of what you have filed with the Court,  
3 including the various cases. And I really  
4 appreciate your having thoroughly briefed the  
5 issues that you're presenting to the Court. So  
6 having said that, I'll be glad to hear arguments.

7 I don't recall whose motion for summary  
8 judgment was filed first. That's the one --  
9 Mr. Lowy, I think the finger is being pointed at  
10 you.

11 MR. LOWY: Yes, Your Honor.

12 THE COURT: Okay. First, can I correctly  
13 assume from all of the filings, including the  
14 stipulation of facts that was filed some time ago,  
15 that everybody here agrees that this case is  
16 properly decided on a summary judgment basis?

17 MR. VALDES: Yes, Your Honor.

18 MR. LOWY: Yes, Your Honor.

19 MS. KOZLOWSKI: Yes, Your Honor.

20 MR. DE GRANDY: Yes, Your Honor.

21 THE COURT: Okay. Thank you.

22 MR. LOWY: May it please Your Honor?

23 THE COURT: Yes, sir.

24 MR. LOWY: This is a very simple case, in all  
25 actuality, Your Honor. There was an election in

1 Sunny Isles in which three candidates qualified to  
2 run for office. And one of the candidates,  
3 Alex Amselem, decided to withdraw in a lawful  
4 manner prior to the election, but after the  
5 absentee ballots had been sent out.

6 THE COURT: And less than 30 days before the  
7 election.

8 MR. LOWY: That's correct, Your Honor.

9 THE COURT: He withdrew on October the 13th,  
10 if I read my writing correctly?

11 MR. LOWY: Yes, Your Honor. And, therefore,  
12 his name still appeared on the ballot; and the  
13 Department of Elections and the City attempted to  
14 correct the problem by taking two actions: one,  
15 publishing ads in the Miami Herald; and, secondly,  
16 posting some notices at the different polling  
17 places advising that Mr. Amselem was no longer a  
18 candidate.

19 THE COURT: And that any votes for him would  
20 be --

21 MR. LOWY: Would not be counted.

22 THE COURT: Correct.

23 MR. LOWY: Correct, Your Honor. Sadly, the  
24 efforts of the elected officials in performing  
25 those two tasks is inadequate under Florida Law in

1 order to discount those votes. That's what we're  
2 here asserting and we believe the law supports.

3 THE COURT: Let me ask you a question. Did I  
4 read somewhere in the filings that we were talking  
5 about 100 absentee ballots?

6 MR. LOWY: It's -- I think it's like 114, if  
7 I recall. I can double-check in a moment. But  
8 even if it were one vote, Your Honor, it would  
9 still not be adequate, because if one looks to the  
10 precedent that is most applicable to this case --  
11 and that's the Merrill v. Dade County case. And  
12 the reason that's most applicable is my adversaries  
13 would have you look at the McQuagge case --

14 THE COURT: Yes.

15 MR. LOWY: -- which is an earlier Florida  
16 Supreme Court case, and tell you that's the correct  
17 precedent and to ignore Merrill. But Merrill is  
18 from our own Third District, never overruled, and  
19 interprets McQuagge; and we're, therefore, bound by  
20 the Merrill case and its holding. And in the  
21 Merrill case, the Court was very specific. It  
22 discusses McQuagge; it discusses the fact that  
23 there was an unusual set of facts.

24 Mr. McQuagge in Dade County, the tax  
25 assessor, was a byproduct, a byline of the county.

1 Everyone knew him. It's almost like going back to  
2 the days of either Dante Fascell or -- or  
3 Congressman Pepper. These were names that everyone  
4 knew within the community; and when they passed  
5 away, everyone was aware. No mistake could be  
6 made.

7 The Third District in Merrill -- and I'm  
8 getting right to the crux of the issue, Your Honor.  
9 The Third District said Dade County is not like Bay  
10 County. As a matter of fact, the exact words the  
11 Court used in the Merrill decision is, "We think  
12 that after a due consideration of the size of Dade  
13 County and the problems of disseminating  
14 information to the voters during the course of a  
15 campaign, it cannot adequately be shown that those  
16 who voted for Mrs. Oesterle knew she was  
17 disqualified but went ahead and cast their vote for  
18 her anyway merely as a negative expression."

19 Now, while we're not talking about the entire  
20 Dade County here, we're talking about Sunny Isles,  
21 there's been no evidence presented to Your Honor  
22 anywhere in these pleadings -- and it's been  
23 represented that it is right for summary  
24 judgment -- that everyone within Sunny Isles knew  
25 Alex Amselem and knew that he had withdrawn.



1 THE COURT: But everybody who went to a  
2 polling place --

3 MR. LOWY: Well, let me -- let me go there.

4 THE COURT: There was a polling place --

5 MR. LOWY: And I want to reach there after I  
6 deal with the absentee ballots.

7 THE COURT: Okay. You -- you need to  
8 distinguish it --

9 MR. LOWY: And I will.

10 THE COURT: -- for me, because I've read it  
11 very carefully.

12 MR. LOWY: And I appreciate that.

13 THE COURT: I gather from the admitted facts  
14 that there was a notice on each and every polling  
15 place posted where voters who went in person to  
16 vote would see it.

17 MR. LOWY: That's correct, Your Honor. But  
18 the mere fact that something is posted at a voting  
19 place does not discount what you and I know occurs.  
20 People rush into the polls, intending to vote for  
21 the candidate of their choice, do not necessarily  
22 read the walls and study everything up there. They  
23 want to get to their booth, push the button, and  
24 get home. That's what many voters want to do. And  
25 there's no evidence that each voter saw this

1 notice. The mere fact that it's posted is not  
2 sufficient to prove that everyone observed it.

3 And what we also note is that no effort was  
4 made whatsoever to advise the absentee voters.

5 THE COURT: But there were only  
6 100-and-some-odd of those.

7 MR. LOWY: It wouldn't matter if there was  
8 one, Your Honor. It's illegal to throw out a  
9 single vote simply because it serves your purpose  
10 of helping you reach your 50 percent. Those votes  
11 should have been counted. And according to the  
12 Merrill and McQuagge cases, the only reason you use  
13 notice --

14 THE COURT: But even if they were, you'd  
15 still lose, wouldn't you?

16 MR. LOWY: Well, no, Your Honor. Here's why:  
17 First of all, McQuagge discusses -- and the  
18 Defendants have confused the word "notice"  
19 with "knowledge." Notice does not equate to  
20 knowledge.

21 In McQuagge, the Court said every voter  
22 clearly had knowledge. First of all, it made --  
23 and if we look at the elements of what they said,  
24 every voter, not all but 100, all but 60, all but  
25 one, every voter knew in Bay County; and if anyone

1 voted for McQuagge, it was a sign of tribute or  
2 respect. It wasn't intended as anything different.  
3 To say that they voted for Alex Amselem, who had  
4 never been in office before, because it was some  
5 type of tribute or because they had knowledge is a  
6 leap. You and I know, Your Honor, the likelihood  
7 is those people that voted, the 10.46 percent --  
8 that's what we have to look at; not just a number  
9 of absentee voters, but the actual number of people  
10 that voted for Mr. Amselem -- likely did not know  
11 he had withdrawn from that race.

12 THE COURT: That's your assumption.

13 MR. LOWY: And that is an assumption that  
14 can't be made on the other side either. According  
15 to the Third District, the assumption has to be  
16 that you have to show, under McQuagge, that there  
17 was knowledge. Or, in fact, you have to count  
18 every vote. And that's what they held in Merrill.  
19 You have to count every vote, unless you can show  
20 that McQuagge applies. And McQuagge is distinct on  
21 its facts. They would have you suggest that  
22 McQuagge stands for the proposition of mere notice  
23 or effort. That's not what it says. It talks  
24 about knowledge.

25 In fact, let me show you the difficulty with

1 using "notice" versus "knowledge." We're in 2016,  
2 Your Honor. This election was last year. There  
3 are so many other methods today other than the  
4 Miami Herald, which is clearly a minority method,  
5 and the mere posting, which doesn't take into  
6 consideration those people that rush in, don't read  
7 well, may have a list they're voting from, aren't  
8 paying attention to the walls. To suggest that  
9 other methods weren't available to rise perhaps to  
10 the level of knowledge is ignoring the Internet,  
11 ignoring express overnight mail. All the voters  
12 could have been given notice in writing. There was  
13 still sufficient notice between the 13th of October  
14 and election day. A letter could have gone out to  
15 every single voter in the three languages that they  
16 could have read. That wasn't done, Your Honor.

17 The Miami Herald isn't sufficient. There's  
18 no Florida Statute that says, "We are overruling  
19 McQuagge and Merrill. If you send out notice or  
20 post notice, that's sufficient." We live in a  
21 country where the vote is supposed to be so crucial  
22 and so treasured that the Third District said, "You  
23 count every vote, unless you meet the unusual  
24 circumstances in McQuagge." And I think that if  
25 Your Honor takes into consideration the sad

1 reduction in voting over the last 50 years -- we've  
2 watched the percentages go lower and lower and  
3 lower -- I think we in the government sector,  
4 whether we're judges, elected officials, or even  
5 lawyers, have a duty to do everything possible to  
6 promote the vote, encourage the vote, and assure  
7 that it is counted and follow what the Third  
8 District wanted us to do.

9           It may result in an unnecessary election.  
10 George Scholl may be reelected. But in our  
11 civilization, in our democracy, the vote is what  
12 counts; and we're supposed to follow the rules.  
13 And every legal vote should be counted, and these  
14 were legal votes. These were not illegal votes.  
15 And for all of those reasons, Your Honor, we  
16 believe that this matter needs to be sent back for  
17 another election, runoff election.

18           And I would also point out to Your Honor that  
19 there are many elections in recent history, or in  
20 our history at least, where one candidate was far  
21 ahead in the pre-runoff but we saw the opposition  
22 win. One such race was the famous Elaine Bloom vs.  
23 Dermer race in Miami Beach. So to say that we can  
24 guess at the result had Mr. Amselem not been on the  
25 ballot, we can guess at the result if we count the

1 absentee ballots but forget those that walk into  
2 the polls and didn't see the notice, if we start  
3 making those types of exceptions and thinking in  
4 place of what the voter intended, I think we're --  
5 we're doing a poor duty here. And I think the  
6 Third District decided in Merrill that we have to  
7 go to the extreme. Unless you can show that there  
8 is no doubt that every voter knew, every vote has  
9 to be counted. It's that simple. It's a command  
10 to Your Honor. It's clear precedent from the Third  
11 District. It's on point. My adversaries would  
12 like you to distinguish Merrill somehow when it's  
13 McQuagge that is the case that was distinguished by  
14 Merrill. It's not Merrill that's to be  
15 distinguished.

16 And they have filed a notice of supplemental  
17 authority showing that the City of Miami City  
18 Attorney has issued some ruling finding that in its  
19 city, where you don't need 50 percent for a runoff  
20 and they decided not to count the votes of one of  
21 the candidates, that you should therefore follow  
22 the City Attorney's suggestion and the Department  
23 of Elections' recommendations. But the judiciary  
24 is not bound or supposed to follow recommendations  
25 of the Department of Elections. We're supposed to

1 follow Florida Statutes and common law. That's how  
2 I was trained, and I know that's how Your Honor was  
3 trained.

4 THE COURT: Interesting that in McQuagge the  
5 Court assumes -- and they use that word -- that all  
6 the voters of the county had knowledge of the  
7 death.

8 MR. LOWY: Yes. But they assume because of  
9 the size and because of the fame.

10 THE COURT: Because of the size and he was so  
11 prominent.

12 MR. LOWY: That's right. Exactly.

13 THE COURT: Right. So here we have also a  
14 size issue because there were, like, 14,000 votes,  
15 I think, in that case; and in this case we have,  
16 what, about 6,000.

17 MR. LOWY: If that. But the difference,  
18 Your Honor, is in Dade County --

19 THE COURT: Right. And we have those notices  
20 being posted on each and every polling place.

21 MR. LOWY: But keep in mind, Your Honor, that  
22 in Bay County you have people that have lived there  
23 for 50 years. This is a community that's  
24 long-existing in rural Florida, while Sunny Isles  
25 is candidly a brand-new community, with new

1 condominiums popping up and people just moving in  
2 and voting. It's nothing like Bay County where  
3 they knew the elected officials and knew who  
4 withdraws or who dies. I think it's quite  
5 distinguishable. And I think if -- if the Court  
6 would rule that Clara Oesterle, who -- who many of  
7 us, if not all of us, remember well because we're  
8 well-educated, even there, the Court found that a  
9 woman of her stature was not well enough known  
10 within Dade County to make that presumption.

11 THE COURT: In a county of millions.

12 MR. LOWY: I'm sorry, Your Honor?

13 THE COURT: In a county of millions.

14 MR. LOWY: Of course. But similarly, to  
15 assume that Alex Amselem is that well-known in  
16 Sunny Isles, no evidence has been presented. And  
17 that would be an unfair presumption. There's been  
18 nothing to suggest that the majority, an  
19 overwhelming number, or almost everyone, or in fact  
20 every single person, knew he withdrew. I think,  
21 actually, the opposite is more likely, based on the  
22 election and the results. And I think you have a  
23 right to look to the 10.46 percent, which is a very  
24 substantial number.

25 Thank you, Your Honor.



1 THE COURT: Thank you. Thank you for your  
2 excellent argument.

3 MR. SHUBIN: Thank you, Your Honor.

4 The colloquy that you had with Mr. Lowy I  
5 think demonstrates the strength of our position and  
6 the weakness of their position, but let me just try  
7 to put it in further emphasis as best as I can.  
8 Their argument is, essentially, that all votes cast  
9 for a withdrawn candidate must or should be  
10 counted, regardless of whether or not there was  
11 notice in the voting booth, in the absentee ballots  
12 that went out after the withdrawal, regardless of  
13 the fact that the Secretary of State in 2011 issued  
14 guidelines setting forth uniform guidelines for how  
15 that notice should read, the language in which it  
16 should appear, the typeface in which it should  
17 appear, something that was not present at the time  
18 of Merrill. So that's their argument.

19 And their argument is, essentially, that by  
20 not recognizing those votes, you are somehow  
21 disenfranchising a total of 304 voters who went  
22 into a voting booth, took an absentee ballot, had  
23 the notice --

24 THE COURT: No, wait. Those people who took  
25 an absentee ballot didn't go in the voting booth.

1           MR. SHUBIN: No, no, no. Either. Either  
2 they took an absentee ballot after the notice was  
3 put in the absentee ballot or went in the voting  
4 booth, saw in big bold letters that Alex Amselem  
5 had withdrawn, that a vote for him didn't count,  
6 and they ignored that.

7           Our position is that votes cast for a  
8 withdrawn candidate should not be counted when  
9 voters have knowledge and notice of the withdrawal.  
10 What they're asking you to do --

11           THE COURT: Well, we don't know whether they  
12 have the knowledge; but we know that notice was  
13 prominently posted.

14           MR. SHUBIN: The notice -- but I think you  
15 can assume, Your Honor, just like the Supreme Court  
16 did -- and I was going to bring that to your  
17 attention -- that if you walk into a voting booth  
18 and you read -- you can read one of the languages  
19 in which the notice was published and you read it,  
20 that you did have knowledge that he had withdrawn.  
21 The suggestion that someone who is smart enough to  
22 figure out where Alex Amselem's name is somehow  
23 couldn't read the notice is just simply -- it  
24 doesn't make sense and it's inconsistent with the  
25 law.

1           And what they're asking you to do -- and this  
2    is what's important -- they're asking you to  
3    invalidate the 1489 votes for Bud Scholl, who's  
4    been the mayor for almost 16 months now.  And  
5    they're also asking you to invalidate the 1309  
6    votes for Thaler.  And what's interesting is and  
7    what Mr. Lowy doesn't bring to your attention --  
8    and he embraces the Merrill case but he doesn't  
9    appear to embrace all of it -- is that in the -- in  
10   the Merrill case, the Third District cites from the  
11   case of *Carn v. Moore*, a 1917 Supreme Court case  
12   where they acknowledge that the guiding principal  
13   should be that where the voter has done all that is  
14   necessary to honestly and intelligently cast his  
15   vote, unless fraud, corruption, or coercion has  
16   been exercised, an election should be upheld.  
17   There's no evidence of fraud, no evidence of  
18   corruption, no evidence of coercion.

19           And I think it's clear that the 2,798 people  
20   who honestly and intelligently cast their vote for  
21   both Thaler and Scholl should not be  
22   disenfranchised because of the 324 people who, at  
23   best, ignored the notice.  That was not done -- and  
24   I want to -- I wrote down Mr. Lowy's words.  He  
25   wanted to suggest to you that the City and the

1 County made something up once they learned that  
2 Mr. Amselem had withdrawn. No, they followed the  
3 Department of State guidelines. They printed the  
4 notice verbatim. And they're suggesting that those  
5 324 people who ignored that notice should trump the  
6 almost 2800 people who honestly and intelligently  
7 cast their vote.

8 They embrace -- I -- I don't mean to state  
9 the obvious. McQuagge is a Supreme Court case.  
10 Merrill is a Third District case, but we embrace  
11 Merrill because Merrill supports our position. In  
12 fact, after the Third District goes through its  
13 explanation of McQuagge and looks at it in the  
14 context of the facts in the Merrill case -- and it  
15 talks about criticism that applies to what's known  
16 as the English Rule. It says, "We think there is  
17 some merit to the criticism. Nevertheless, even if  
18 we were to adopt the minority view, we do not think  
19 that there is sufficient indication that the voters  
20 in this case knew Mrs. Oesterle was either  
21 disqualified or ineligible to be elected for the  
22 115th District C."

23 And let me also point out a fact that  
24 Mr. Lowy overlooked. This -- the Merrill case is a  
25 case where Mrs. Oesterle's name appeared twice on

1 the ballot, twice on the same ballot: once for  
2 House of Representatives, the second time for  
3 County Commission. And I don't know what was  
4 stipulated to, but the Third District seemed to  
5 accept the fact that it was a, quote, mistake; that  
6 there was a mistake in the ballot that had  
7 Mrs. Oesterle in two separate places. There was no  
8 notice along the lines of the notice in this case;  
9 and nevertheless, they went through the analysis,  
10 which is the same analysis that we think leads you  
11 to the conclusion under our facts, under both  
12 McQuagge and Merrill, that the only decision in  
13 this case is to uphold the election as it was  
14 certified by the Canvassing Board.

15 And, again, we went through this. I don't  
16 want to belabor it. The Court concluded that  
17 "after due consideration of the size of Dade County  
18 and the problems of disseminating information to  
19 the voters during the course of the campaign, it  
20 cannot adequately be shown that those who voted for  
21 Mr. Oesterle knew that she was disqualified but  
22 went ahead and cast their vote for her anyway,  
23 merely as a negative expression." And, again,  
24 we're not talking about the universe of people who  
25 didn't show up in the ballot box. We're not

1 talking about what they knew or what we -- what  
2 they didn't know. We're talking about a world  
3 post-Merrill. We're talking about Sunny Isles  
4 Beach, as opposed to Miami-Dade County. We're  
5 talking about notice. We're talking about a set of  
6 facts that didn't involve basically a mistaken  
7 ballot where one person's name appears on both --  
8 for both elections.

9 And I think it's overwhelmingly clear that  
10 using the analysis of Merrill that attempts to  
11 reconcile itself with McQuagge, looking at the  
12 Supreme Court, looking at the Third District, the  
13 only conclusion that you can reach is that you need  
14 to validate the 2798 people who voted for both  
15 Thaler and Scholl and respect the decision of the  
16 Canvassing Board that has been in place and has  
17 been honored for almost 16 months. And unless you  
18 have any questions, I'll relinquish some time to  
19 co-counsel.

20 THE COURT: Thank you.

21 MR. DE GRANDY: Again, good afternoon,  
22 Your Honor.

23 THE COURT: Good afternoon.

24 MR. DE GRANDY: Miguel De Grandy on behalf of  
25 Sunny Isles Beach. And I would adopt the arguments

1 made by Mr. Shubin, with the exception that I  
2 pronounce the case McQuagge; and we may never know  
3 whether it's McQuagge, McQuagge, or McQuagge. But  
4 I'll try not to be too repetitive.

5 Your Honor, the Plaintiff has invited this  
6 Court to set an unattainable goal, which is to  
7 prove actual knowledge of every voter who cast  
8 ballots for Amselem. And to meet that standard, we  
9 would have to interview every voter who  
10 participated in the entire election; and that is  
11 not what the law requires. There is no case that  
12 was cited to support that proposition, nor I dare  
13 say any case that you could find, Your Honor, that  
14 supports that position.

15 Now, clearly, McQuagge, a Supreme Court  
16 decision, is controlling law in this matter.  
17 Merrill is not inconsistent with McQuagge nor could  
18 it service to overrule a Supreme Court decision.  
19 Merrill was also decided based on the adequacy of  
20 notice of voters and, in that case, lack thereof.  
21 Now, in this case, we have actual notice provided  
22 in every voting booth. Now, Your Honor is an  
23 elector, as am I. Your Honor knows that the voting  
24 booth is about this wide (indicating) and about  
25 this deep (indicating), and the notice is right in

1 front of your face. And so the question in this  
2 case is, does actual notice of that nature, right  
3 in front of your face at every polling booth, allow  
4 this Court to conclude, as the McQuagge Court did,  
5 that it is, quote, natural to assume that all the  
6 voters of the city had knowledge of the withdrawal  
7 of Alex Amselem. And that question has been  
8 answered by several Appellate Courts Plaintiff did  
9 not discuss in this case.

10 In Cobb vs. Thurman, the Court approved a  
11 notice very similar to this case. In that case you  
12 had a Republican candidate that withdrew. The  
13 party substituted Mr. Negron for Mr. Foley, that  
14 had withdrawn. In that case, the Court accepted a  
15 notice very, very similar to this case. Now,  
16 Plaintiff tries to distinguish that, arguing that  
17 Cobb was about giving notice of a replacement  
18 candidate as opposed to a withdrawn candidate; but  
19 that misses the point, which is, is notice at  
20 polling places sufficient to inform voters of a  
21 change in circumstances? And Cobb stands for the  
22 proposition that providing actual notice at the  
23 polling place, quote, is essential to the voters  
24 casting an effective ballot, unquote, at Page  
25 644-645.



1 Cobb is also specifically referenced as  
2 authority by the Fourth DCA in Levey vs. Dijols,  
3 and that was a case where an individual was taken  
4 off the ballot because of a complaint of a  
5 third-place candidate based on the fact that she  
6 had used her maiden name instead of her married  
7 name. And the Court reinstated her and said if the  
8 Department of Elections cannot reprint the ballots  
9 in time, a notice such as the one in Cobb must be  
10 provided.

11 Now, Plaintiff's argument, Your Honor -- let  
12 me shift to the charter. Plaintiff's argument  
13 regarding the charter is also unavailable. The  
14 charter speaks to a total number of ballots cast,  
15 but that language is further informed by State law  
16 to mean valid ballots; thus, invalid ballots cannot  
17 be counted. If Your Honor were to accept the  
18 Plaintiff's simplistic interpretation of the  
19 charter, it would lead to absurd results. For  
20 example, there is no question, Your Honor, that an  
21 undervote is part of a ballot. You have a ballot,  
22 five races, you voted on four. The fifth is an  
23 undervote. Now, based on the Plaintiff's  
24 interpretation, that undervote would count towards  
25 determining whether there should be a runoff. And

1 yet State law in Bush vs. Gore made clear that  
2 those are not to be counted and cannot affect the  
3 result.

4 Now, Your Honor, there's -- it is also clear  
5 that the case law gives wide deference to an  
6 agency's own interpretation of its rules,  
7 regulations, and ordinances. And here, the City  
8 Attorney has opined that the charter must be read  
9 consistent with State law; and, therefore,  
10 withdrawn candidates' votes are null and void. The  
11 governing body of Sunny Isles Beach has unanimously  
12 ratified that opinion, and the County who conducts  
13 the elections also takes the same position.

14 Now, let me address very quickly the issue of  
15 absentee ballots. Even if all 100 -- all 100  
16 absentee ballots would not change the result of  
17 this election. And what they have to prove is that  
18 there is a sufficient number of illegal ballots  
19 such that the election would be in doubt. And so  
20 whether you counted the 100 ballots or not, it  
21 doesn't change the result of the election. The --  
22 he still gets over 50 percent.

23 Now, in closing, Your Honor, let me just say  
24 that because all voters had actual notice, there is  
25 no question that this Court can conclude that

1 voters had knowledge of the withdrawal; and under  
2 McQuagge, therefore, the votes for Amselem were  
3 properly found to be null and void.

4 If you have any questions, I'd be happy to  
5 answer them.

6 THE COURT: Thank you.

7 Do you want to respond, Mr. Lowy?

8 MR. LOWY: Thank you.

9 MR. VALDES: Your Honor, I want to --

10 THE COURT: Oh, sorry.

11 MR. VALDES: It's okay.

12 THE COURT: I don't want to cut you out.

13 MR. VALDES: Your Honor, I believe much of  
14 the argument and facts have already been  
15 established well enough already; but I just want to  
16 emphasize a couple of things that I believe weren't  
17 as adequately addressed or I want to emphasize.

18 First and foremost, the -- it's been  
19 stipulated by all of the parties that notice was  
20 provided at all of the precinct locations in all  
21 the individual polling booths and in -- it was  
22 mailed as a notice in all of the absentee ballots  
23 that had not yet been sent up at the time  
24 Mr. Amselem formally withdraw and followed the  
25 official procedures to withdraw. We weren't able

1 to distinguish between the absentee ballots that  
2 were sent down at that date and after that date, so  
3 we've assumed, even if all the absentee ballots are  
4 included in that figure, it would still be  
5 irrelevant to the calculus; but there were a  
6 significant number of absentee ballots that would  
7 have had that noticing done all the same.

8         Second, I think the major issue in this case  
9 is, what does it mean for there to be knowledge?  
10 Or how do we establish that knowledge can -- can be  
11 found on the part of the voters that this vote  
12 would not count if it was voted for Mr. Amselem?  
13 And in looking to McQuagge, the only thing I ask  
14 Your Honor to recognize is that if the Supreme  
15 Court of Florida found that knowledge can be  
16 established by an individual's renown, then how can  
17 it not be established by actual notice placed in  
18 front of every voting booth and in front of every  
19 precinct to all the voters in Sunny Isles Beach  
20 that were voting on election day?

21         And I think the best fact that we have that  
22 this particular type of notice is sufficient is the  
23 fact that Courts routinely order notice as a remedy  
24 in a variety of cases. And if we look at some of  
25 the cases that were provided in -- and cited to in

1 our brief and have been established elsewhere, Diaz  
2 vs. Lopez, which was a recent case dealing with the  
3 City of Sweetwater's mayoral election, the District  
4 Court authorized the Department of Elections in  
5 conducting the election to follow the procedures  
6 outlined by the Department of State. The  
7 Third DCA, on appeal, affirmed that decision and  
8 ordered us to comply with those -- with those  
9 provisions in -- in explaining to the voters and  
10 providing notice to the voters as to exactly how  
11 they should be informed that a vote for the  
12 candidate that was no longer eligible to run for  
13 office would not count.

14 And I believe that the most important thing  
15 that we would try to stress, as the agency  
16 oftentimes required to run these elections, is that  
17 if this particular type of notice, in complying  
18 with the Department of State's guidelines, is  
19 insufficient, then this Court effectively removes  
20 any remedy that the States or the Courts can  
21 possess to establish that a candidate has been  
22 disqualified and to allow the orderly conduct of  
23 elections. I believe that we brought up three --  
24 three different types of examples where under the  
25 Plaintiff's interpretation of the rules, depending

1 on how the votes aligned, there would be three  
2 entirely different ways of dealing with that  
3 situation, whereas complying with the State  
4 guidelines provides one clear-cut way of resolving  
5 all three of those cases.

6 For those reasons and the reasons stated in  
7 our response, we rest.

8 THE COURT: Thank you.

9 MR. LOWY: Thank you, Judge.

10 I'll try to make it short and simple. First,  
11 responding to the last argument in all the  
12 different alternatives that are available, we only  
13 see one alternative, Your Honor: Count the votes.  
14 If no one gets 50 percent, there's a runoff.  
15 That's what the law says in Sunny Isles; that's  
16 what was supposed to occur. What they're trying to  
17 do is create an artificial rule that says, "Well,  
18 if we post, then we don't have to follow what  
19 Merrill or the case law says. We don't have to  
20 follow the charter exactly. We can do something  
21 different because we posted a notice." But all  
22 they have to do, if that's how they want to  
23 operate, is convince the Florida Legislature and  
24 the governor to pass such a statute; but there is  
25 no such statute. So they want Your Honor to,

1 basically, judicially legislate that the mere  
2 placement of notices will now equate with knowledge  
3 and it doesn't matter if there are some voters who  
4 don't come to the polls because they've already  
5 voted absentee. It doesn't matter if those votes  
6 are counted or not; they're just disqualified, even  
7 though they intended to vote and did vote legally.

8 Let me -- let me say, Your Honor, that one of  
9 the cases here was slightly misquoted; and I want  
10 to refer to that. It was suggested that in  
11 McQuagge, or McQuagge, that an assumption was being  
12 made and that assumptions are okay. But let's be  
13 precise about what the Court actually said.

14 THE COURT: They said they assumed.

15 MR. LOWY: Well, but why did they assume?  
16 They gave a reason. They said --

17 THE COURT: Yes.

18 MR. LOWY: -- "Because the death was widely  
19 publicized over radio, telephone" -- and by not  
20 just a local newspaper, it uses the plural --  
21 "newspapers, and general discussion throughout the  
22 county" -- I think that's a typo. It  
23 says "country." I think they meant county -- "it  
24 is therefore natural to assume that all the voters  
25 of the county had knowledge." Nowhere have they

1 suggested this was a matter of public discourse,  
2 great public discussion, public knowledge. All  
3 they're saying is, "We posted a notice."

4 THE COURT: Right in front of the voters'  
5 face. Give me a break.

6 MR. LOWY: Right in front of some of the  
7 voters' faces, not all.

8 THE COURT: In every polling place.

9 MR. LOWY: Yes, but not the ones who voted  
10 absentee.

11 THE COURT: But those would not have made  
12 your candidate win.

13 MR. LOWY: Are you allowed to make that  
14 decision and say, "Well, you can discount those  
15 because it wouldn't have changed the result"? They  
16 had no right to declare those votes illegal. And  
17 if some votes are counted as illegal, then all the  
18 votes are. It wouldn't matter if it were 10  
19 instead of 100. As a matter of fact, in the  
20 Merrill case, Your Honor, it says -- and by the  
21 way, I only read this momentarily ago because  
22 Mr. Shubin quoted the prior paragraph talking about  
23 Carn v. Moore, an old case which suggested you have  
24 to show corruption or some other motive. Here it  
25 says, in the following paragraph, "We agree with



1 these principles, but the precise question  
2 presented here is whether or not all" -- and it  
3 capitalizes the word "all" in the middle of the  
4 sentence to highlight the fact that every vote is  
5 important -- "all votes cast in the election must  
6 be counted in order to correctly ascertain if a  
7 runoff election is required." It doesn't  
8 say, "Well, you can say that some don't matter  
9 because there was a notice here" and that the  
10 remaining ones wouldn't have changed anything. It  
11 says, "All votes must be counted," not some of the  
12 votes, not part of the votes you would like, not  
13 the ones that you think had knowledge, but the ones  
14 that didn't we're gonna count.

15 What we know here, Your Honor, is that all  
16 the votes were not counted. We know that none of  
17 the absentee ballots for Mr. Amselem were counted.  
18 We know that that alone is a violation of the law.  
19 It had to have been counted. Those were legal  
20 votes. So the certification by the Election  
21 Department was blatantly illegal and did not even  
22 follow the rule that they claimed they were trying  
23 to follow, which is to count the votes which were  
24 noticed, which they equate with knowledge. I don't  
25 equate notice with knowledge, because in Merrill it

1 continuously used the word "knowledge," as did  
2 McQuagge; and neither talks simply about the  
3 word "notice." As a matter of fact, the  
4 word "notice" does not really appear. It's the  
5 word "knowledge."

6 So we know that they acted improperly when  
7 they did not count those absentee ballots. And now  
8 we have a directive from the Third District which  
9 tells us all votes must be counted. I think it's  
10 just a matter of applying the precedent. We may  
11 not want to agree with it. We may have our own  
12 logical methods of analysis that could justify why  
13 we think this election was fair; but the real test  
14 is, what does the Third District tell us to do?

15 Thank you, Judge.

16 THE COURT: Thank you.

17 Now, thank you all for your excellent  
18 arguments.

19 I'm persuaded by the Defendants in this case,  
20 based upon McQuagge. I think that that's the case  
21 that is most similar to what we have before us, and  
22 the Merrill case is quite distinguishable based on  
23 its facts. McQuagge was decided based upon the  
24 Court's assumption that all voters knew that  
25 Mr. McQuagge had died because it was a small

1 community.

2 In this case, the agreed facts are that a  
3 notice in big print was placed in every single  
4 voting booth where the -- I think it was  
5 approximately 6,000 people went to vote. I think  
6 we can assume knowledge based upon that in the same  
7 way that the Supreme Court assumed knowledge based  
8 upon the prominence of an individual in a small  
9 community. And even if the 114 absentee ballots  
10 were included in the count, the 114 that were  
11 apparently cast after the Department had provided  
12 the notice of the withdrawal of that candidate, it  
13 still would not have -- have put the Plaintiff up  
14 above the 50 percent. And so to make the City go  
15 through another election process under these  
16 circumstances, I don't think so.

17 But I appreciate the -- the good work of all  
18 counsel. It was very helpful for me to have all of  
19 that, and I did have the time today to read it  
20 pretty carefully.

21 So does somebody on the Defense side want to  
22 draft an order?

23 MR. SHUBIN: We'll draft an order and we  
24 should submit it directly to you, Your Honor.

25 THE COURT: Submit it through

1 Judge Cardonne-Ely's chambers. They'll track me  
2 down. I have to sign it.

3 MR. SHUBIN: Are you on E-Filing and  
4 eCourtesy, or we do it the old-fashioned way?

5 THE COURT: Well, you can do it through  
6 E-Filing/eCourtesy; and I'll have them tell me.  
7 However you submit things to Judge Cardonne-Ely, do  
8 it with me.

9 MR. SHUBIN: All right. We'll -- we'll do  
10 that promptly, Your Honor.

11 THE COURT: Exactly. And I'll instruct the  
12 bailiff to get it to me as soon as possible.

13 If you submit it next week, don't be  
14 concerned if you don't get it back right away  
15 because I'm going to be out of town for four days  
16 next week.

17 MR. LOWY: I trust the Defense will draft the  
18 order to align with the oral ruling, as opposed to  
19 their briefs, Your Honor.

20 THE COURT: Well, I -- I have no qualms about  
21 editing what I don't think is appropriate. I may  
22 include an elaboration of the reasoning, because I  
23 have read the cases and I -- there's no point in  
24 holding you here to go into great detail.

25 MR. SHUBIN: Thank you, Your Honor.

1           MR. LOWY: I assume they'll send me a  
2 courtesy copy.

3           THE COURT: I trust that they will before  
4 submitting it.

5           MR. SHUBIN: Yes, we will. We'll first look  
6 at the transcript. We'll get the transcript  
7 expedited. We'll look at it and we'll draft it  
8 consistent with the transcript --

9           THE COURT: Right.

10          MR. SHUBIN: -- and provide a copy to  
11 Mr. Lowy.

12          MR. VALDES: We'll provide it to Your Honor  
13 in Word so that you can edit whatever you feel is  
14 appropriate.

15          THE COURT: Yes, yes. That's great. Thank  
16 you.

17          (The proceedings concluded at 3:41 p.m.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA:  
COUNTY OF MIAMI-DADE:

I, Lesly Montes, Court Reporter, certify that I was authorized to and did report the foregoing proceedings; that the foregoing pages 4 through 37, inclusive, are a true and complete record of the proceedings; and that said proceedings have been transcribed by me or under my direction.

I further certify that I am not a relative or employee of any of the parties, nor am I a relative or counsel connected with the parties' attorneys or counsel connected with the action, nor am I financially interested in the outcome of the action.

DATED this 26th day of February, 2016.

*Lesly Montes*

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Lesly Montes, FPM,  
Court Reporter

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