UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES; DANIEL W. O'CONNOR; KENT BELL; and BETH BOWEN,

Plaintiffs, on behalf of themselves and others similarly situated,

vs. CASE NO. 3:01-cv-1275-J-25 HTS

KURT S. BROWNING, as Secretary of State for the State of Florida; AMY TUCK, as Director, Division of Elections; JERRY HOLLAND, as Supervisor of Elections in Duval County, Florida,

Defendants.

MOTION TO VACATE AMENDED ORDER (DOC. 294) AND JUDGMENT (DOC. 295) ENTERED ON SEPTEMBER 20, 2007, ORDER ENTERED ON MARCH 24, 2004 (DOC. 215), JUDGMENT ENTERED ON MARCH 26, 2004 (DOC. 216), FOR DISMISSAL OF CASE AND SUPPORTING MEMORANDUM

Defendant, Supervisor of Elections, Duval County, moves that the Order entered by the District Court on March 24, 2004 (Doc. 215), the corresponding Judgment entered on March 26, 2004 (Doc. 216), the Amended Order entered on September 20, 2007 (Doc. 294), and the corresponding Judgment entered on September 20, 2007 (Doc. 295), all be vacated, and that the case be dismissed. The

grounds for this motion are that the Court of Appeals declared that the "case" (not the **"appeal**") is moot. Accordingly, the judgments and related operative orders must be vacated and the case dismissed. A memorandum in support of this Motion follows below.

WHEREFORE, it is requested that this Motion be granted.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO VACATE AND DISMISS

A. Procedural Background-District Court

A Notice of Appeal was filed in this case on March 31, 2004. Appealed via that Notice were the Court's March 24, 2004 Order (Doc. 215), its March 26, 2004 Judgment (Doc. 216) and two earlier orders (Doc. 42 and Doc. 124). The appeal was

interlocutory because a final judgment had not been entered with respect to the State defendants (now Defendants Browning and Tuck). See Fed.R.Civ.P. 54(b); Williams v. Bishop, 732 F.2d 885, 885-886 (11th Cir. 1984); Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368-1369 (11th Cir.), cert. denied 464 U.S. 893 (1983). For this reason the Court of Appeals disallowed the appeal of the two earlier non-injunctive orders, Documents 42 and 124, and dismissed the appeal of these orders. See Court of Appeals Order attached hereto as **Exhibit A**.

Significantly, the two orders dismissed from the appeal were not orders that were dispositive of the case on the merits. Document 42 was an order that granted a motion to dismiss the Complaint, but permitted the filing of an Amended Complaint (See Doc. 42, pp. 37-39). Document 124 denied a motion to dismiss or, in the alternative, for summary judgment. They were not orders that constituted dispositive rulings on the merits which made the Plaintiff a prevailing party. In contrast, the order and judgment on which the appeal proceeded, Documents 215 and 216, were the initial and only determinations that a violation of law (a federal regulation) had occurred and mandated injunctive relief to correct same. See Doc. 215, pp. 20, 30-31; Doc. 216. It was with respect to these documents that the Court of Appeals ruled the case is moot.

B. Court of Appeals Order

A copy of the Court of Appeals order entered in this case on August 15, 2007, is attached hereto as **Exhibit B**. In the order the Court summarily reviewed the record to determine whether the Supervisor of Elections had complied with HAVA (Help American Vote Act), 42 U.S.C. § § 15301-15545, **not** the District Court's injunctive decree and judgment (Docs. 215, 216). This is evident because the Court concerned itself with whether the Supervisor of Elections was installing disabled- compliant voting machines in **all** of the City's 285 voting precincts, not **just** the one (1) in five (5) precincts which had been mandated by District Court (See Doc. 216), which would have required that only 57 disabled-compliant voting machines be installed. See **Exhibit B**, page 1.

To place the foregoing in context, it is important for this Court to be aware that the Supervisor of Elections had argued to the Court of Appeals (as he had previously to the District Court), that the action was rendered moot by HAVA, which had become law on October 29, 2002, which mandated by statute the precise relief Plaintiffs sought. See Excerpt from Initial Brief of Appellants' Stafford, filed May 12, 2004, attached hereto as **Exhibit C**. The Supervisor of Elections had pointed out in the District Court that he was complying with HAVA irrespective of this litigation,

because HAVA so required. [1]

The Court of Appeals in its order satisfied itself that the Duval Supervisor of Elections would in fact have one disabled-compliant for each precinct, as required by HAVA, and declared, based on this finding: "we conclude that the case is moot and therefore dismiss it." See **Exhibit B**, page 2. Significantly, the Court said "dismiss it", referring to "the case"; nowhere in this sentence did it refer to "the appeal". Obviously the Court of Appeals can and does distinguish between the words "appeal" and "case" when it wishes to, because it did so in the first sentence of its order, in which both words were used. See **Exhibit B**, page 1. Thus, it can and should be assumed that when the Court used the word "case" in the key sentence of its order, declaring that the case is moot, that it meant the "case", not the "appeal".

While it is perhaps more conventional for the Court of Appeals to remand a case to the District Court after a finding of mootness, with directions to dismiss, there can be no doubt that the Court of Appeals has the authority to dismiss a case itself, as it has done here. Accordingly, the District Court must regard this case as being dismissed.

In summary, Court of Appeals order declared the case moot and dismissed the

[1] The Supervisor had also argued that the federal regulation at issue, 28 C.F.R. 35.151(b), was inapplicable to voting machinery and, even if it were applicable, that is was preempted by HAVA.

case. Accordingly, the District Court can take no action in the case unless it is to facilitate the ordered dismissal.

C. The Applicable Law

It is very clear that the law requires vacating of the judgment or judgments entered in and dismissal of a case determined to be moot. This requested action is thoroughly justified under applicable case law. In United States v. Munsingwear, Inc., 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed 36 (1950), the Supreme Court stated: "The established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." The identical practice has been followed in the Eleventh Circuit:

> In this circuit, when a case becomes moot after the panel publishes its decision but before the mandate issues, we dismiss the appeal, vacate the district court's judgment, and remand to the district court with instructions to dismiss the case.

IAL Aircraft Holding, Inc. v. Federal Aviation Administration, 216 F.3d 1304, 1305 (11th Cir. 2000). To the same effect, see National Advertising Co. v. City of Miami, 402 F3d 1329, 1335 (11th Circ. 2005); Troiano v. Supervisor of Elections, 382 F3d 1276, 1382 (11th. Cir. 2004).

The Troiano case is particularly compelling because it involves issues almost

identical to those in this case. The Supervisor of Elections in Palm Beach County, Florida, was sued for not having yet provided audio components which allowed certain disabled voters to vote without receiving assistance. 382 F.3d at 1285. AS in the case of the Supervisor of Elections in Duval County in this case, her delay in installing the audio voting equipment was caused by the State of Florida's failure to timely certify the voting machines for which she had contracted. Id. The district court ruled that the case was moot because the Supervisor intended to continue making the audio equipment available in each precinct as required by law. Id.

The Court of Appeals affirmed the Troiano decision and provided a detailed analysis of the applicability of the mootness doctrine in cases of this nature, concluding with the following:

> In short, this Court has consistently held that a challenge to a government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated. In the absence of any such evidence, there is simply no point in allowing the suit to continue and we lack to *[sic]* power to allow it to do so.

382 F.3d at 385. This Court knows very well that disabled-compliant voting machines have been available in Duval County in every election at every precinct where there was voting since late 2005, prior to the required compliance date established by HAVA, and that this will continue to be the case. If the Troiano case

was moot, as it was, then this case is also moot. This Court should so determine on its own initiative if it is reluctant to accept the determination of the Court of Appeals that this is the case. Because the case is moot, this Court is without authority or power to continue issuing orders in this case that relate to the merits of the case. 382 F.3d at 385.

Conclusion

The mootness of the case has rendered it non-justiciable. This works not only to the detriment of the Plaintiff, but also to the detriment of the Defendant, who in this case was deprived of a ruling on the merits by the Court of Appeals with respect to the District Court's prior determination in document 215 that a Department of Justice regulation somehow transcended HAVA's applicability to the facts in this case. The Supervisor of Elections believes this ruling would necessarily have been reversed by the Court of Appeals if the Court had addressed this issue on the merits, which would have been absolutely necessary had the case not been declared moot, because an injunctive order was involved.

When a party is denied appellate review on the merits of an adverse decision because of a determination that a case is moot as here, obviously it is not just for any Court to tax costs, award attorney's fees, and render other rulings relating to the merits of the case. By analogy, this situation is comparable to the instances in which

a convicted criminal defendant dies while his case is on appeal. When this occurs, this Court vacates the criminal judgment because there has been an absence of appellate review on the merits. For the same policy reasons, that is the just result here, and must occur pursuant to the law of mootness.

Finally, there is no legally correct way the Court of Appeals can determine that this case is moot on its merits, and that this Court can continue to proceed as if that hadn't occurred. If nothing else, the Court of Appeals decision constitutes the law of the case, and must be followed, unless reversed by a higher court.

For all the foregoing reasons it is requested that this Motion be granted.

Respectfully submitted,

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Request for Oral Argument

The undersigned requests that the Court schedule oral argument on this Motion if the Court believes it will aid the Court in resolving this Motion.

s/ Ernst D. Mueller
Ernst D. Mueller
Deputy General Counsel

Local Rule 3.01(g) Certificate

The undersigned hereby certifies that he has conferred with opposing counsel, Sasha Dimitroff, Esquire, concerning this Motion, and that Mr. Dimitroff, on behalf of his client, opposes the granting of same.

s/ Ernst D. Mueller
Ernst D. Mueller
Deputy General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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I further certify that I provided the foregoing document via e-mail transmission to:

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I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

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