

IN THE CIRCUIT COURT, FOURTH  
JUDICIAL CIRCUIT, IN AND FOR  
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2012-CA-8211-XXXX-MA  
DIVISION: CV-A

THE CITY OF JACKSONVILLE,  
FLORIDA, a body politic and corporate,

Plaintiff,

vs.

JIM FULLER, in his individual capacity,

Defendant.

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### **FINAL JUDGMENT**

THIS CAUSE came before the Court for bench trial on August 7, 2012. This Court has jurisdiction over both the parties and subject matter of this action. The Court, having received evidence, including the testimony of the parties and of witnesses, having observed the demeanor of those testifying in court, and having considered argument and relevant authority, makes the following findings of fact and conclusions of law:

Jim Fuller was elected to the office of Clerk of the Circuit and County Courts for Duval County (hereinafter "Duval County Clerk") in 2000, and served a full four-year term. Mr. Fuller was re-elected as Duval County Clerk in 2004, serving a second four-year term, and was again re-elected in 2008. At the end of his current term, Mr. Fuller will have served three four-year terms as Duval County Clerk.

On July 15, 2010, Mr. Fuller filed a Statement of Candidate, notifying the Supervisor of Elections of his intent to run for a fourth term as Duval County Clerk. Since July 15, 2010, Mr.

Fuller has filed nine campaign treasurer reports. On February 12, 2012, Mr. Fuller filed several thousand candidate petitions to qualify for candidacy by petition. On February 23, 2012, a fee was paid to the Supervisor of Elections to verify the signatures on Mr. Fuller's petitions. On May 22, 2012, Mr. Fuller filed his qualification papers with the Supervisor of Elections. The Supervisor of Elections subsequently accepted Mr. Fuller's qualifying papers pursuant to section 99.061(7)(c), Florida Statutes. As of the date of this Judgment, several thousand absentee ballots have been received in the primary election for Duval County Clerk. Early voting began for this election on August 4, 2012, and primary voting will be held on August 14, 2012. The general election will take place on November 6, 2012.

On July 25, 2012, Mayor Alvin Brown approved a Jacksonville City Council resolution authorizing the Office of General Counsel to commence litigation in order determine Mr. Fuller's eligibility to seek re-election for a fourth term as the Duval County Clerk. On July 26, 2012, the City of Jacksonville (hereinafter "the City") filed this suit, bringing an action for declaratory judgment and ancillary injunctive relief pursuant to Chapter 86, Florida Statutes. In its Complaint, the City alleges that the Florida Supreme Court's recent decision in Telli v. Broward County, 37 Fla. L. Weekly S342 (Fla. May 10, 2012), "reactivated" section 12.11 of the Charter of the City of Jacksonville (hereinafter "Charter"), and requests that this Court (1) declare that section 12.11 is valid and in full legal force and effect; (2) declare that Mr. Fuller is ineligible to seek re-election for another term as Duval County Clerk; (3) grant permanent injunctive relief prohibiting Mr. Fuller from seeking re-election as Duval County Clerk, and if elected, from serving; and (4) grant permanent injunctive relief requiring Mr. Fuller to immediately withdraw his candidacy as Duval County Clerk.

### **History of Section 12.11**

By a referendum vote on November 3, 1992, the citizens of Duval County approved an amendment to Article 12 of the Charter, creating section 12.11, which states:

#### **Section 12.11. - Two Term Limit**

No person elected and qualified for two consecutive full terms as Clerk of the Court shall be eligible for election as Clerk of the Court for the next succeeding term. The two-term limitation shall apply to any full term which began in 1992 or thereafter. (Ord. 91-533-606, § 5 (Referendum of November 3, 1992))

In order to analyze the instant case, it is helpful to review the history of section 12.11. In 1988, Henry W. Cook was appointed as Duval County Clerk. Cook was subsequently elected in 1988 and re-elected in 1992 and 1996. On November 2, 1998, Cook presented to the Supervisor of Elections Cook's "Statement of Candidate" papers indicating his intent to seek re-election as the Duval County Clerk. The Supervisor of Elections refused to accept the completed papers on account of section 12.11. On November 4, 1998, Cook, in his individual capacity, sued the City of Jacksonville and the Supervisor of Elections, seeking a declaratory judgment invalidating section 12.11 and a writ of mandamus directing the Supervisor of Elections to accept Cook's candidacy papers. The trial court ruled that section 12.11 was an attempt to impose additional qualifications or disqualifications on the Duval County Clerk, and held that nothing in Article VIII, section 1(d), of the Florida Constitution authorized the City to impose additional qualifications or disqualifications, and that the only disqualifications for the clerk's job were contained in Article VI, section 4, of the Florida Constitution. Thus, the trial court held that section 12.11 added an unconstitutional additional qualification or disqualification. Accordingly, the trial court granted mandamus and ordered the Supervisor of Elections to accept Cook's candidacy papers.

The First District Court of Appeal, in City of Jacksonville v. Cook, 765 So. 2d 289, 293 (Fla. 1st DCA 2000), reversed, concluding that neither Article VIII, section 1(d), nor Article V, section 16, of the Florida Constitution, provided specific qualifications for the clerk of the circuit court. The First DCA held that because no qualifications were established for the clerk of the circuit court in the Constitution and because Jacksonville's home rule powers authorized it to establish a government framework within its territorial boundaries, the two-term limit was constitutional. Id. In Cook v. City of Jacksonville, 823 So. 2d 86 (Fla. 2002), the Florida Supreme Court reversed the First DCA, holding that section 12.11 was invalid, as it unconstitutionally attempted to impose an additional disqualification from election to the office of clerk of court beyond those already established by the Florida Constitution.

In 2012, the Florida Supreme Court revisited its decision in Cook, 823 So. 2d 86. In Telli v. Broward County, 37 Fla. L. Weekly S342 (Fla. May 10, 2012), the Court expressly receded from its decision in Cook, and held that Broward County's amendment to its charter imposing term limits on county commissioners did not violate the Florida Constitution, finding that its prior holding in Cook undermines the ability of counties to govern themselves under the home rule power granted through the Florida Constitution.

### **Analysis of Affirmative Defenses**

The facts of the instant case are not in dispute. Thus, the disposition of this matter is simply a matter of law. Mr. Fuller has raised six affirmative defenses. In his first affirmative defense, Mr. Fuller argues that section 12.11 is unconstitutional because it places term limits on an Article V judicial office under the Florida Constitution. The clerk of court is mentioned twice in the Florida Constitution, in Article V, section 16, and in Article VIII, section 1(d). Article V, section 16, states

in part, “[t]here shall be in each county a clerk of the circuit court who shall be selected pursuant to the provisions of Article VIII section 1.” Article VIII, section 1(d), provides:

COUNTY OFFICERS. There shall be elected by the electors of each county, for terms of four years, a sheriff, a tax collector, a property appraiser, a supervisor of elections, and a clerk of the circuit court; except, when provided by county charter or special law approved by vote of the electors of the county, any county officer may be chosen in another manner therein specified, or any county office may be abolished when all the duties of the office prescribed by general law are transferred to another office. When not otherwise provided by county charter or special law approved by vote of the electors, the clerk of the circuit court shall be ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds.

Mr. Fuller interprets the language of Article V, section 16, to mean that clerks of the circuit courts are Article V officers. In conjunction with Article V, section 16, Mr. Fuller points to section 12.06 of the Charter, which places the Duval County Clerk under the Judiciary. Section 12.06 of the Charter states:

The office of the clerk of the circuit and county court shall continue, and all general and special laws applicable thereto and not in conflict with this act shall continue in full force and effect except that the clerk of the circuit and county court shall be elected as herein provided and shall no longer have any duty or right to act as clerk of the board of county commissioners or the ex officio auditor of the county. The salary of the clerk of the circuit and county court shall be fixed by the council. (Laws of Fla., Ch. 69-1175; Ord. 84-1307-754, § 9; Laws of Fla., Ch. 92-341, § 1)

Mr. Fuller avers that because the Charter limits the Duval County Clerk’s function by eliminating the office’s capacity to have any duty or right to act as clerk of the board of county commissioners or as the ex officio auditor of the county, the Duval County Clerk is limited solely to “judicial activities,” and thus, is purely a judicial office. As such, Mr. Fuller submits that section 12.11 is unconstitutional because it imposes an impermissible qualification/disqualification on a judicial office.

This exact issue was addressed by the First DCA in Cook, 765 So. 2d 289. In Cook, the

appellee, then Duval County Clerk Henry Cook, argued that the 1972 amendment to Article V of the Florida Constitution, which created a statewide court system and required that there be a clerk of the circuit court, indicated an intent to preclude state and local governments from establishing qualifications for this office. Id. at 292-93. The appellee's argument sought to place the clerk of the court under the judiciary as a quasi judicial officer. Id. at 293. In rejecting the appellee's argument, the First DCA stated:

If that position is taken, however, a portion of Article VIII would be rendered useless. Not only are we required to construe provisions in harmony with one another, we are also precluded from construing constitutional provisions in such a way as to render other provisions meaningless. See, e.g., Chiles v. Phelps, 714 So. 2d 453, 459 (Fla.1998). If there is a construction which will uphold the constitutionality of a statutory provision, a court must adopt that construction. See Miami Dolphins Ltd. v. Metropolitan Dade County, 394 So. 2d 981, 988 (Fla.1981). If Jacksonville's charter provision can coexist with the Florida Constitution, then it is not unconstitutional. See State v. Sarasota County, 549 So. 2d 659, 660 (Fla.1989).

Id. The court further stated:

The appellee's theory also creates discord with Article III, section 11(a)(1) which provides in pertinent part as follows:

- (a) There shall be no special law or general law of local application pertaining to:
  - (1) Election, jurisdiction or duties of officers, *except* officers of municipalities, chartered counties, special districts or local governmental agencies.

(emphasis added). The constitution clearly contemplates that Jacksonville's charter provisions relating to elections will have local, not statewide application. Were this court to accept the appellee's position that the clerk is an article V officer protected from state and local legislation, and the county officers listed in article VIII, section 1(d) are really statewide officers, then article III, section 11(a)(1), allowing for local changes to the election process would have no meaning.

Jacksonville's home rule powers authorize it to establish a governmental framework within its governmental boundaries which may affect all county officers enumerated in the constitution, which would include establishing term limit

qualifications for the clerk of the circuit and county court. Pursuant to constitutional authority, Jacksonville's charter provides as follows:

The consolidated government shall have perpetual existence and shall have only such officers, departments, and other agencies as are provided in this charter or as may be established by the council.

§ 1.01(a), Charter of the City of Jacksonville. Jacksonville's charter provides for a sheriff, a supervisor of elections, a tax collector, a property appraiser, and a clerk of the circuit and county court. Specifically, as to the clerk of the circuit and county court, Jacksonville's charter provides as follows:

The office of the clerk of the circuit and county court shall continue and all general and special laws applicable thereto and not in conflict with this act shall continue in full force and effect except that the clerk of the circuit and county court shall be elected as herein provided.

The constitution is silent in both Article V, section 16 and Article VIII, section 1(d) as to specific qualifications for clerk of the court. The city of Jacksonville is not precluded from adopting and enforcing a two-term limit for the clerk of the court. The two-term limit of section 12 of Jacksonville's charter does not establish an unconstitutional qualification for the office of the clerk. We reverse.

Id. Not only did the First DCA state that the constitutional office of clerk of court is not a judicial officer under the Florida Constitution, but the First DCA also specifically found that the Duval County Clerk is not an Article V judicial officer.

This Court is aware that the First DCA's decision in Cook, 765 So. 2d 289, was quashed by the Florida Supreme Court in Cook v. City of Jacksonville, 823 So. 2d 86. However, the Florida Supreme Court did not address the issue of whether the Duval County Clerk is an Article V officer. Cook, 823 So. 2d at 88 n.3. More importantly, in Telli the Florida Supreme Court receded from its prior decision in Cook, and in doing so, explicitly agreed with Justice Anstead's dissenting opinion in Cook. 37 Fla. L. Weekly S342, \*8 (Fla. May 10, 2012). In his dissenting opinion, Justice Anstead indicated that he would affirm the First DCA's opinion in Cook. Cook, 823 So. 2d at 95–96. Thus,

it should stand that the First DCA's decision in Cook is now good law, and its analysis applicable to this matter.

Finally, in neither Telli nor Cook does the Florida Supreme Court draw any distinction between any of the county officers or commissioners set forth under Article VIII, section 1, when discussing the imposition of term limits on these offices via county charter. Thus, nothing in those two decisions suggests that any of the Article VIII, section 1, offices should be treated differently with regard to term limits.

In his second affirmative defense, Mr. Fuller asserts that the Florida Supreme Court's decision in Telli does not operate to revive section 12.11 as a constitutional and active provision of the Charter. Mr. Fuller contends that no court has overturned the Florida Supreme Court's ruling in Cook determining that section 12.11 of the Charter is unconstitutional. Conversely, Mr. Fuller argues that even if section 12.11 is deemed to be constitutional, it cannot be retroactively applied in order to prevent him from running in this election. He claims that the retroactive application of section 12.11 in this matter would unconstitutionally deprive him of his vested right to run for re-election.

In Christopher v. Mungen, 55 So. 273, 61 Fla. 513, 516-17 (Fla. 1911), the Florida Supreme Court held that "where a statute is judicially adjudged to be unconstitutional, it will remain inoperative while the decision is maintained; but, if the decision is subsequently reversed, the statute will be held to be valid from the date it first became effective, even though rights acquired under particular adjudications, where the statute was held to be invalid, will not be affected by the subsequent decision that the statute is constitutional." See also State ex rel. Badgett v. Lee, 22 So. 2d 804, 806 (Fla. 1945) (a statute that is declared unconstitutional is not dead, only dormant). In



similar fashion, it has been held that a decision of a court of appellate jurisdiction overruling its own former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. Jawish v. Morlet, 86 A. 2d 96, 97 (D.C.App. 1952).

The Florida Supreme Court's decision in Telli has in effect revived a dormant section 12.11. No legislative action must be taken for section 12.11 to take effect. Thus, the question is whether Mr. Fuller acquired a vested right to seek re-election prior to the decision in Telli.

According to the evidence and testimony presented at trial, the qualifying period for candidates seeking election to the office of Duval County Clerk was from June 4, 2012, to June 8, 2012. Thus, Mr. Fuller could not officially qualify as a candidate for the office of Duval County Clerk until June 4, 2012, at the earliest. The Telli decision was issued on May 10, 2012. Accordingly, section 12.11 was revived and in effect prior to Mr. Fuller officially qualifying as a candidate.

Furthermore, "the elements of eligibility to seek an office are not vested rights constitutionally protected." Holley v. Adams, 238 So. 2d 401, 408 (Fla. 1970). "A vested right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand." Coventry First, LLC v. State, Office of Ins. Regulation, 30 So. 3d 552, 558 (Fla. 1st DCA 2010). (internal citation omitted). As such, the Court does not find that Mr. Fuller obtained any established or vested right to seek re-election as Duval County Clerk prior to the Supreme Court's decision in Telli that would prevent the term limit requirement of section 12.11 from applying to him in this election.

Mr. Fuller's third affirmative defense is that the City lacks standing to bring an action to

challenge the ability [sic] of a candidate for elected office and to use the power of government to disenfranchise the voters of Duval County. Contrary to Mr. Fuller's assertion, the City has standing to bring the instant action pursuant to section 86.091, Florida Statutes.

In his fourth affirmative defense, Mr. Fuller contends that the City's complaint should be dismissed for laches. The Telli decision was issued by the Florida Supreme Court on May 10, 2012. Mr. Fuller argues that despite the fact that the City had issued an opinion finding that the decision in Telli made him ineligible to run for re-election, the City still waited over two months, after the issuance of absentee ballots, less than a week before the commencement of early voting on August 4, 2012, and less than three weeks before August 14, 2012, precinct voting, to file suit. Mr. Fuller reasons that the City had no justifiable reason to wait as long as it did to file suit.

There are four essential elements to the equitable defense of laches. The first element of laches is that there must be conduct on the part of the defendant, or on the part of one under whom he claims, giving rise to the situation of which complaint is made. Devine v. Dept. of Professional Regulation, Bd. of Dentistry, 451 So. 2d 994, 996 (Fla. 1st DCA 1984). Second, the plaintiff, having had knowledge or notice of the defendant's conduct, and having been afforded the opportunity to institute suit, is guilty of not asserting his rights by suit. Id. The third element of laches is lack of knowledge on the part of the defendant that plaintiff will assert the right on which he bases his suit. Id. Lastly, there must be an injury or prejudice to the defendant in the event relief is accorded to the plaintiff, or in the event the suit is held not to be barred. Id. at 997.

The Court finds that Mr. Fuller is unable to satisfy the elements of laches. The City did not unreasonably delay in filing suit. Furthermore, the Florida Supreme Court has explained that "[t]he true test to apply laches is whether or not the delay has resulted in injury, embarrassment, or

disadvantage to any person and particularly to the person against whom relief is sought.” Stephenson v. Stephenson, 52 So. 2d 684, 686 (Fla.1951) (quoting Lightsey v. Lightsey, 150 Fla. 664, 8 So. 2d 399, 400 (1942)). Mr. Fuller became ineligible to be re-elected for a fourth term the day that the Florida Supreme Court issued its decision in Telli. Accordingly, Mr. Fuller stands in exactly the same shoes as if the suit had been filed on May 10, 2012, the date that Telli was issued. Any delay that the City may have made in bringing suit had no bearing on Mr. Fuller’s eligibility. Thus, Mr. Fuller suffered no injury as a result of the City’s minor delay in filing suit.

Furthermore, “the doctrine of laches cannot be permitted to achieve an inequitable or illegal result.” Polly v. Navarro, 457 So. 2d 1140, 1143 (Fla. 4th DCA 1984). Pursuant to section 12.11, Mr. Fuller is barred from seeking re-election. If he were to win the election, Duval County would have a clerk of court in office exceeding the term limit provision of section 12.11. The application of the equitable doctrine of laches cannot countenance such a result, nor can the defense of laches be used as a basis for giving legal effect to a void act. Id.

The Court is mindful of the fact that extreme care must be given to post-election challenges to avoid disenfranchising Florida’s voters. See Levey v. Dijols, 990 So. 2d 688, 692 (Fla. 4th DCA 2008). “[B]arring fraud, unfairness, disenfranchisement of voters, etc., it is too late to attack the validity of an election after the people have voted.” Polly v. Navarro, 457 So. 2d at 1143-44 (quoting Baker v. State ex rel. Caldwell, 122 So. 2d 816, 826 (Fla. 2d DCA)). Nevertheless, the Court is aware of no authority suggesting that an otherwise unqualified candidate should be allowed to run for re-election simply because the lawsuit challenging the candidate’s eligibility was brought after limited voting had begun in a primary election. This is not a case where a plaintiff has filed suit after an election has been concluded challenging the eligibility of the winning candidate in either a

primary or general election. Thus, the Court does not find that laches or estoppel serves to prevent the City from prevailing in this action.

In his fifth affirmative defense, Mr. Fuller asserts that for the reasons set forth in his fourth affirmative defense, the Complaint should be dismissed as moot, as his name has already been placed on the ballot for the primary election. For the reasons explained above, it is unnecessary for the Court to address this argument.

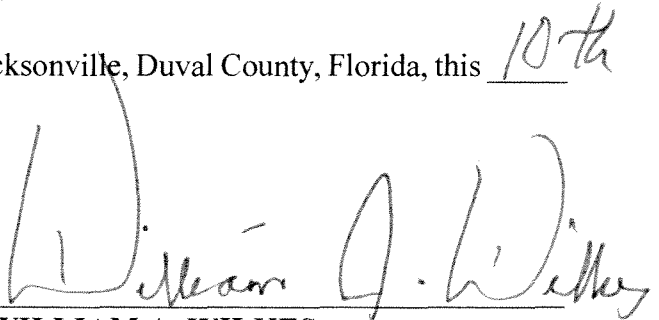
Finally, in his sixth affirmative defense, Mr. Fuller avers that the City erred by failing to join him in his official capacity as Duval County Clerk. It is Mr. Fuller's position that section 89.091, Florida Statutes, requires that he be joined in his official capacity as Duval County Clerk. However, the City's suit does not request that Mr. Fuller perform any duty in his official capacity as Duval County Clerk. Instead, the City seeks a declaration that Mr. Fuller, as a citizen seeking re-election to fill the office of Duval County Clerk, be deemed ineligible, and requests injunctive relief prohibiting Mr. Fuller, the candidate, from seeking re-election, and requiring him to withdraw his candidacy for this position. As such, Mr. Fuller was properly joined in his individual capacity. See, e.g., Cook, 823 So. 2d 86.

Accordingly, it is:

**ORDERED AND ADJUDGED** that:

- A. Section 12.11 of the Charter is valid and in full legal force and effect;
- B. Jim Fuller is ineligible serve another term as Clerk of the Circuit and County Courts for Duval County, Florida, and as such, is ineligible to seek re-election in the current election to fill that office;
- C. Jim Fuller is enjoined from seeking re-election to a fourth term as Clerk of the Circuit and County Courts for Duval County, Florida; and
- D. Jim Fuller is hereby directed to immediately withdraw his candidacy for Clerk of the Circuit and County Courts for Duval County, Florida.

**DONE AND ORDERED** in Chambers at Jacksonville, Duval County, Florida, this 10<sup>th</sup>  
day of August, 2012.

  
**WILLIAM A. WILKES**  
Senior Circuit Judge

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