# Significant Cases Referred to in Election Speech

1. Graham v. Reid
   334 Ill. App. 3d. 1017
   November 1, 2002

2. Qualkinbush v. Skubisz
   357 Ill. App. 3d. 594
   March 31, 2005

3. Andrews v. Powell
   365 Ill. App. 3d. 513
   May 5, 2006

4. Sherman v. Indian Trails Public Library Dist.
   2012 IL. App. (1st) 112771
   August 3, 2012

5. Roudez v. Covington
   2013 IL. App. (3d) 120963-U
   September 10, 2013

334 Ill.App.3d 1017
Appellate Court of Illinois,
First District, Sixth Division.

Deborah H. GRAHAM, Petitioner–Appellee,
v.
Dorothy REID and David Orr, as Cook County Clerk, One of the Local Election Authorities and Chairman of the Cook County Canvassing Board, Respondents–Appellants (Robert L. Johnson, Edie Jacobs, Clara Halls, Norma L. French, Carrie Sercye, and Annie Sanders, Additional Petitioners–Appellees; Chicago Board of Election Commissioners, and its Members as One of the Local Election Authorities, and The State Board of Elections, and its Members, Respondents).

No. 1–02–1827.
|
Nov. 1, 2002.

Defeated candidate, who had tied with successful candidate in primary election for office of representative in General Assembly brought election contest, claiming that she and other voters were denied constitutional right to vote based upon irregularities discovered during recount. The Circuit Court, Cook County, Raymond Jagielski, J., declared primary election void, and ordered new election to be held. Successful candidate appealed. The Appellate Court, Gallagher, J., held that, as a matter of first impression, (1) trial court was not entitled to order new election, and (2) trial court was required on remand to complete recount process.

Reversed and remanded.

West Headnotes (6)

**[1] Election Law**
Annulment of election

Trial court was not entitled to order new election in election contest of defeated candidate, where there was no systematic disenfranchisement of voters nor constitutional violation; although defeated candidate contended that votes in split precincts were not counted since they were given wrong ballot, there was no evidence that voters were intentionally given wrong ballot book, asked for or were refused correct ballot book, or were intentionally denied right to vote, and even if defeated candidate had claimed federal constitutional violation, alleged errors were garden variety election irregularities. S.H.A. 10 ILCS 5/7–63.

1 Cases that cite this headnote

**[2] Election Law**
Determination

Trial court was required on remand to complete recount process pursuant statute governing primary election contest in election contest of defeated candidate, who had tied with successful candidate in primary election for office of representative in General Assembly; statewide standard, that returns were prima facie evidence of results when ballots in precinct were missing, was uniform standard applied to all precincts, and thus, state law protections, both statutory and as established by case law, were sufficient and did not violate fundamental right to vote. S.H.A. 10 ILCS 5/7–63.

1 Cases that cite this headnote

**[3] Election Law**
Relative weight of ballots and returns or certificates

In an election contest, a court may accept ballots cast at election as better evidence of result than election returns if those ballots have been properly preserved.

1 Cases that cite this headnote

**[4] Civil Rights**
Governmental Ordinance, Policy, Practice, or Custom

Official policy, custom or usage at issue in a § 1983 claim must be moving force behind deprivation of federal right. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

  

**[5] Election Law**

Effect of Irregularities or Defects

There is a distinction between garden variety election irregularities and a pervasive error that undermines integrity of vote.

1 Cases that cite this headnote

**[6] Election Law**

Determination

Trial court was required on remand, pursuant to statute governing primary election contests, to ascertain and declare by judgment to be entered of record, result of contested primary election for office of representative in the General Assembly. S.H.A. 10 ILCS 5/7–63.

Cases that cite this headnote

**Attorneys and Law Firms**

****392 *1018 ***778** Robbins, Schwartz, Nicholas, Lifton & Taylor, Ltd. (Mathias W. Delort, of counsel), for Dorothy Reid.

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Odelson & Sterk, Ltd. (Burton S. Odelson, of counsel); Law Offices of James P. Nally (James P. Nally, of counsel); Lavelle, Motta, Klopfenstein & Saletta, Ltd. (Michael E. Lavelle, of counsel); Adducci, Dorf, Lehner, Mitchell & Blankenship, P.C. (J. Patrick Hanley, of counsel), for Appellees.

**Opinion**

Justice GALLAGHER delivered the opinion of the court:

This case is a contest of the March 19, 2002, Democratic primary ***1019** election for the office of representative in the Illinois General Assembly, 78th representative district. On June 24, 2002, the trial court declared the primary election void and ordered a new election to be held on September 10, 2002. The trial court's decision was based, in part, upon the United States Supreme Court decision in *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). We allowed an expedited appeal pursuant to Supreme Court Rule 311 (155 Ill.2d R. 311). On August 16, 2002, we entered an order with mandate to issue *instanter*, stating that an opinion would follow. See, *e.g.*, *Pochie v. Cook County Officers Electoral Board*, 289 Ill.App.3d 585, 587, 224 Ill.Dec. 697, 682 N.E.2d 258, 259 (1997). In that order, we reversed the judgment of the circuit court ordering a new election and remanded the matter for further proceedings. As we shall explain, this opinion, which is substantively the same as this court's previous order, now supercedes and replaces our order dated August 16, 2002.

BACKGROUND

Four candidates ran in the Democratic primary election for the office of representative in the Illinois General Assembly, 78th representative district. The 78th representative district includes part of the City of Chicago (the City) and part of Cook County (the County) outside the City of Chicago. The 78th district has 119 precincts. The division of precincts between the County and the City is 71 precincts in Oak Park, Proviso and River Forest Townships and 48 precincts in the 29th, 36th and 37th wards of the City of Chicago. The candidates in the election were respondent-appellant Dorothy Reid, petitioner-appellee-appellee ****393 ***779** Deborah L. Graham, Jesus "Jesse" Martinez, and Ted E. Leverenz. The canvass of election results showed there was a tie between Reid and Graham, each having received 6,934 votes. Candidate Ted Leverenz received 2,409 votes, and candidate Jesus Martinez received 2,231 votes. As required by statute (10 ILCS 5/22–4 (West 1998)), the State Board of Elections broke the tie by lot, which fell in favor of Reid.

On April 17, 2002, Graham filed a petition for election contest, pursuant to section 7–63 of the Election Code (10 ILCS 5/7–63 (West 1998)), which provides that any candidate whose name appears upon the primary ballot of any political party may contest the election of an opposing candidate nominated for the same office by filing a written petition with the clerk of the circuit court within 10 days after the completion of the canvass of the final returns by the canvassing board. 10 ILCS 5/7–63 (West 1998). In her petition, Graham alleged various errors in counting the ballots and requested the court to recount the ballots and declare Graham the winner. Graham later filed a first ***1020** amended petition for election contest and named as respondents Reid, the Chicago Board of Election Commissioners, the Cook County clerk, the Cook County canvassing board, and the State Board of Elections. Reid then

  

filed a counterclaim, within five days as required by section 7–63 (10 ILCS 5/7–63 (West 1998)) in which she alleged that Reid had in fact won the election, but that there were other errors in the ballot counting which would actually increase her margin of victory.

On April 30, 2002, the circuit court entered an agreed order providing that the election authorities would conduct the recount and establish how the recount would be conducted. The order also provided that the parties were excused from filing formal answers to each other's pleadings, that the parties were authorized to liberally amend their complaint or counterclaim as new facts were discovered in the recount, and that they would be deemed to deny each other's allegations.

On May 29, 2002, the Chicago Board of Election Commissioners and the Cook County clerk filed the precinct-by-precinct results of the court-ordered recount. One precinct, the 24th precinct of the 37th ward in Chicago, did not report results because the ballots had not been located. On the same day, an agreed order was entered allowing the parties to file amended pleadings. Graham was granted until May 30, 2002, to file pleadings; Reid was allowed time to file a response or counterclaim until June 6, 2002.

On May 30, 2002, Graham filed a second amended verified complaint for election contest in which she restated the basic allegations and prayers for relief contained in her previous petitions. In addition, citing *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), Graham claimed that she and other voters were denied their constitutional right to vote based upon irregularities discovered during the recount. These irregularities included missing ballots from an entire precinct, namely, the 24th precinct of the 37th ward, and incorrect ballots being given to voters in split precincts. Split precincts were those in which some of the voters lived in the 78th district and others lived in another representative district, thus requiring the issuance of different ballots to each group of voters. Graham thus sought, for the first time, a new election in the 78th district or, at a minimum, a new election in those precincts which contain split representative districts and in the precinct in which ballots were missing.

On June 4, 2002, Graham filed a pleading entitled "Motion for a New Election" ****394** *****780** which contained similar allegations as the second amended verified complaint for election contest and similar references to the fundamental right to vote and requested that "before the court begins the task of deciding the candidates' fate, ballot by ballot," it ***1021** consider ordering a special election to be held within 30 days. The motion for a new election was noticed up on an emergency basis.

On June 4, 2002, Reid filed a motion, pursuant to section 2–615 of the Code of Civil Procedure (735 ILCS 5/2–615 (West 2000)) to strike count III of Graham's second amended verified petition for election contest. Reid also filed a motion to strike certain paragraphs of exhibit B of the second amended verified complaint for election contest. Exhibit B, entitled "Verified and Specified Grounds of Contest," was a list of alleged errors and/or omissions discovered by Graham "after due investigation independent of the discovery recounts and concluding the discovery recounts." Reid also filed a response to Graham's motion for a new election in which she argued, among other things, that the court had no authority to grant the relief requested.

On June 10, 2002, Graham filed a "Motion to Amend Petition to Add Count Relative to Voters" which was accompanied by the affidavits of these voters. In this motion, Graham argued that six voters who allegedly wanted to vote for Graham could not do so because her name was not on the ballot book in the booth they were in, and also that election judges failed to give voters in the 78th district the correct ballot, namely, a type "A" ballot. In this motion, Graham requested that these six voters "be added as additional petitioners as to Count III of the Second Amended Petition and leave be granted to file a Third Amended Petition to include the allegations contained in this Motion."

On June 14, 2002, Graham filed a third amended petition for a new election. On June 20, 2002, Reid filed an amended counterclaim setting forth various irregularities, allegedly favorable to Reid, which were found at the court-ordered recount, as well as allegations of vote fraud in the 29th ward of Chicago. Reid also filed the following three motions: (1) to dismiss the claims of the six voters on the basis that there was no private right of action under section 7–63 of the Election Code (10 ILCS 5/7–63(West 1998)); (2) to dismiss the claim that missing ballots should require a new election; and (3) to strike the federal constitutional claims in the third amended petition because they failed to state a cause of action under applicable federal law, such as section 1983 of the federal Civil Rights Act (42 U.S.C. § 1983) (1994). Reid also filed affirmative defenses.

On June 24, 2002, the trial court heard arguments on Reid's pending motions and summarily denied all of them.

  

Thereafter, on the same day, the court conducted an evidentiary hearing on the claims in the third amended petition for election contest which were the subject of the motion for a new election. The six voter-petitioners did not testify at trial, nor were their affidavits ever offered into evidence. The ***1022** only witness to testify was Robert Sawicki, assistant executive director of the Chicago Board of Election Commissioners. At the conclusion of his testimony, both sides rested. The trial court then declared the primary election void, based upon the equal protection doctrines voiced in *Bush v. Gore*, granted Graham's "Motion for a New Election," and ordered the new election to be held on September 10, 2002. The court also declared that this disposition rendered moot all remaining issues in the case.

****395** *****781** On July 1, 2002, Reid filed a timely appeal in which she sought reversal of the circuit court's order granting a new election, as well as reversal of the denial of her various motions. On July 2, 2002, we granted a motion to expedite the appeal. Briefs and the record were filed on an expedited basis. On August 6, 2002, Graham filed a motion to strike the brief of appellant David Orr or, in the alternative, to strike the exhibits attached thereto. The motion was taken with the case. [1] Oral arguments were heard on August 15, 2002.

## ANALYSIS

**[1]** **[2]** This is a case of first impression in Illinois. One of the issues before us is whether the United States Supreme Court decision in *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), overruled the Illinois Supreme Court's decision in *McDunn v. Williams*, 156 Ill.2d 288, 189 Ill.Dec. 417, 620 N.E.2d 385 (1993). We hold that it did not.

It is undisputed that the ballots were missing from one of the precincts. The trial court concluded that conducting a recount pursuant to the Illinois Supreme Court's decision in *McDunn v. Williams*, 156 Ill.2d 288, 189 Ill.Dec. 417, 620 N.E.2d 385 (1993), which addressed the issue of missing ballots and which holds that the returns are *prima facie* evidence of the results, would not satisfy minimum requirements for nonarbitrary treatment of the voters necessary to secure the fundamental right of equal protection enunciated by *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). *Bush v. Gore* stands for the proposition that because there were no explicit statewide standards governing the manual tabulation of votes in Florida, votes would be counted differently in different parts of the state, which would effectively result in an impermissible denial of the right to an equal vote. *Bush v. Gore* is distinguishable not only because it was expressly limited to the circumstances of that case, but because Illinois has long-established standards regarding recounts, which have been codified and which have also been made clear by the Illinois Supreme Court decisions of ***1023** *Pullen v. Mulligan*, 138 Ill.2d 21, 149 Ill.Dec. 215, 561 N.E.2d 585 (1990), and *McDunn v. Williams*, 156 Ill.2d 288, 189 Ill.Dec. 417, 620 N.E.2d 385 (1993).

**[3]** With respect to the standard to be followed in the case of missing ballots, the Illinois Supreme Court has pronounced as follows:

> "The law has long been:
>
> 'The returns of the election officials are *prima facie* evidence of the result of the election. The ballots, however, are the original evidence of the votes cast. In an election contest, the court may accept the ballots cast at the election as better evidence of the result than the election returns if those ballots have been properly preserved. [Citations.]' " *McDunn v. Williams*, 156 Ill.2d at 321, 189 Ill.Dec. 417, 620 N.E.2d at 402, quoting *Pullen v. Mulligan*, 138 Ill.2d 21, 72, 149 Ill.Dec. 215, 561 N.E.2d 585 (1990).

This statewide standard—that the returns are *prima facie* evidence of the results when the ballots in a precinct are missing—is a uniform standard applied to all precincts. Although the particular *facts* may change from election to election, *i.e.*, ballots may or may not be missing from one or more precincts, the standard does not change. That one or more precincts ****396** *****782** may have missing ballots does not mean a different "standard" is applied. Similarly, if only one or more precincts have ballots with chads while other precincts have ballots with complete punches, that does not mean a different "standard" is applied to the precincts with chads. We do not read *Bush v. Gore* to now require that, any time a recount is ordered and ballots are missing, a new election must be held. We conclude that the state law protections, both statutory and as established by Illinois Supreme Court case law, are sufficient and do not violate the fundamental right to vote. Thus, the trial court should have completed the recount process pursuant to section 7–63. 10 ILCS 5/7–63 (West 1998).

We next address the argument related to the alleged irregularities in the split precincts. Graham contends that eligible voters were denied the right to vote and voters who

  

did cast ballots did not have their votes counted because they were given the wrong ballot style in the split precincts. Reid takes issue with the evidence before this court and argues that this court cannot consider the affidavits of the six voter-petitioners because they were never made a part of the record below. Assuming *arguendo* that the affidavits of the six voters are before this court, they merely establish that these six voters entered voting booths which contained the wrong ballot book, *i.e.*, a ballot book that did not have the name of Graham or the other 78th district candidates listed. There is, however, no statement in the affidavits (each one avers the same facts) nor any evidence that these voters were intentionally given the wrong ballot book, asked for or were ***1024** refused the correct ballot book upon request, or were intentionally denied the right to vote for the candidate of their choice.

**[4]** As Reid correctly notes, the petitioners did not bring a claim for a violation of rights guaranteed under the United States Constitution and did not invoke section 1983 of the federal Civil Rights Act (42 U.S.C. § 1983 (1994)), which provides, in relevant part, as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1994).

To state a cause of action for municipal liability under section 1983, our supreme court has explained that "plaintiffs must establish (1) that they have suffered the deprivation of a constitutionally protected interest, and (2) that the deprivation was caused by an official policy, custom, or usage of the municipality." *Doe v. Calumet City*, 161 Ill.2d 374, 402, 204 Ill.Dec. 274, 641 N.E.2d 498 (1994). The official policy, custom or usage at issue must be the "moving force" behind the deprivation of a federal right. *Doe*, 161 Ill.2d at 401, 204 Ill.Dec. 274, 641 N.E.2d at 511.

**[5]** Even if petitioners had invoked section 1983, they failed to allege any constitutional violations that were the result of an official custom or policy, nor was there any evidence whatsoever of any official custom or policy. The petitioners did not allege that election authorities intentionally violated any of their rights. Instead, the allegations regarding the irregularities in the split precincts, at most, merely hinted at negligence. There is a distinction between "garden variety" election irregularities and a pervasive error that undermines ****397** *****783** the integrity of the vote. See, *e.g.*, *Bodine v. Elkhart County Election Board*, 788 F.2d 1270, 1272 (7th Cir.1986) (where there was both mechanical error and human error in counting votes). Regardless of the effect such actions have on the outcome of an election, allegations of negligence or incompetence regarding election procedures are insufficient to state a claim under section 1983 of the federal Civil Rights Act. *Bodine*, 788 F.2d at 1272. Here, even if petitioners had claimed such a federal constitutional violation, the alleged errors were, at most, mere "garden variety" election irregularities.

Illinois has established statewide standards for discerning voter intent. State law protections, particularly those governing the situation of the missing ballots, are sufficient and do not violate the fundamental right to vote. Additionally, in the split precincts, the irregularities with regard to the different ballot types were "garden ***1025** variety" election irregularities which showed, at best, an inference that some voters may have not had their votes counted due to negligence, inadvertence or mistakes on the part of the election judges and/or the voters. Split precincts are not unconstitutional in general, nor were they unconstitutional as applied here. We now conclude that there was no evidence of any systematic disenfranchisement of the voters nor any constitutional violation that would justify a new election. We hold that the circuit court erred in ordering a new election and should have instead completed the recount process pursuant to section 7–63 of the Election Code. 10 ILCS 5/7–63 (West 1998).

**[6]** In accordance with the foregoing, we reverse the judgment of the circuit court and remand the case for further proceedings consistent with this opinion and with directions to the trial court to complete the recount process. In addition, the trial court, pursuant to section 7–63 of the Election Code governing primary election contests, "*shall* ascertain and declare by a judgment to be entered of record, the result of [the] election" at issue, the March 19, 2002, Democratic primary election for the office of representative in the Illinois General Assembly, 78th representative district. (Emphasis added.) 10 ILCS 5/7–63 (West 1998). The order for a new election is vacated. In view of our decision, we need not address Reid's request that we reverse the circuit court's denial of her various motions. In addition, because our opinion is substantially the same as our previously issued order, but for a slightly expanded recitation of the facts and a somewhat

  

more detailed explanation of our analysis, we now withdraw the Rule 23 (166 Ill.2d R. 23) order of August 16, 2002, and issue this opinion for publication effective August 16, 2002.

Reversed and remanded.

SHEILA M. O'BRIEN, P.J., and BUCKLEY, J., concur.

**All Citations**

334 Ill.App.3d 1017, 779 N.E.2d 391, 268 Ill.Dec. 777

Footnotes

1 We now deny that motion as moot and note that our opinion was based solely upon the arguments of Graham and Reid.

357 Ill.App.3d 594
Appellate Court of Illinois,
First District, Second Division.

Michelle Markiewicz QUALKINBUSH,
Petitioner–Appellee,
v.
Gregory SKUBISZ, Respondent–Appellant (David Orr, as Cook County Clerk, Dominick Gigliotti, Michelle Markiewicz Qualkinbush, Robert Fioretti, as the Calumet City Canvassing Board, Dominick J. Gigliotti and Nick Manousopoulos, Respondents).
Gregory Skubisz, Counterpetitioner,
v.
Michelle Markiewicz Qualkinbush, as Calumet City Clerk, David Orr, as Cook County Clerk, and the City of Calumet City, Counterrespondents.

No. 1–03–2528.
|
March 31, 2005.
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Nunc Pro Tunc Dec. 28, 2004.

**Synopsis**

**Background:** Unsuccessful mayoral candidate filed verified petition contesting mayoral election. Successful candidate filed verified counterpetition for election contest and filed motion to dismiss other candidate's petition. After a bench trial, the Circuit Court, Cook County, Michael J. Murphy, J., certified mayoral election results, declaring unsuccessful candidate the winner. Successful candidate appealed.

**Holdings:** The Appellate Court, Burke, P.J., held that:

[1] state statute restricting the individuals who may mail voters' absentee ballots in local election is not preempted by the federal Voting Rights Act or the Americans with Disabilities Act (ADA);

[2] such statute does not violate equal protection;

[3] voting authority's application for absentee ballot substantially complied with statutory forms;

[4] applicants for absentee ballot were required to identify a reason for their physical incapacitation;

[5] successful candidate failed to show sufficient chain of custody for three absentee ballots found in possession of another precinct;

[6] evidence supported trial court's finding of fraudulent conduct; and

[7] deduction of invalid votes from successful candidate's total, rather than apportionment, was the appropriate remedy.

Affirmed.

West Headnotes (46)

**[1] Appeal and Error**
Defects, objections, and amendments

Abstract of testimony was improperly included in the appendix to appellee's brief and, therefore, would be disregarded by the Appellate Court, where Appellate Court did not order an abstract. Sup.Ct.Rules, Rule 342(b).

Cases that cite this headnote

**[2] Appeal and Error**
Defects, objections, and amendments

Where neither of parties' briefs on appeal stated the facts fairly or accurately without comment, Appellate Court would disregard those portions that it deemed failed to comport with supreme court rules. Sup.Ct.Rules, Rule 341(e)(6).

Cases that cite this headnote

**[3] Constitutional Law**
Voting rights and suffrage in general

**Constitutional Law**
Ballots and ballot access

**Election Law**
Absentee Ballots

There is a fundamental right to vote; however, there is no corresponding fundamental right to vote by absentee ballot.

Cases that cite this headnote

**[4] Election Law**

Application and delivery

The return provisions of statute restricting the individuals who may mail voters' absentee ballots are mandatory, not directory. S.H.A. 10 ILCS 5/19–6.

1 Cases that cite this headnote

**[5] Election Law**

Absentee Ballots

Purpose of statute restricting the individuals who may mail voters' absentee ballots is to safeguard the integrity of the election process by depriving unauthorized persons of the opportunity to tamper with ballots after they have been completed. S.H.A. 10 ILCS 5/19–6.

Cases that cite this headnote

**[6] Election Law**

Absentee Ballots

In determining whether statute governing return of absentee ballots has been violated, the relevant inquiry is not whether a ballot has actually been tampered with, but whether the opportunity for such tampering by unauthorized persons was present. S.H.A. 10 ILCS 5/19–6.

Cases that cite this headnote

**[7] States**

Preemption in general

Preemption doctrine provides that in some instances a federal law will override state laws on the same subject.

Cases that cite this headnote

**[8] States**

Congressional intent

Preemption doctrine requires courts to examine the federal legislation and determine whether Congress intended it to supplant state laws on the same subject.

Cases that cite this headnote

**[9] States**

Preemption in general

Federal statutes and regulations can preempt state law in the following circumstances: (1) the language of the statute or regulation expressly preempts state law; (2) Congress implemented a comprehensive regulatory scheme in a given area, removing the entire field from state law; or (3) state law as applied conflicts with federal law.

Cases that cite this headnote

**[10] States**

Occupation of field

Absent explicit preemptive language, courts may infer Congress's intent to preempt state law where a federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it or where a federal statute touches a subject or an object in which the federal interest is so dominant that the federal system will be assumed to preclude the enforcement of state laws on the same subject.

Cases that cite this headnote

**[11] States**

Conflicting or conforming laws or regulations

Even when Congress has not completely displaced state regulation of a specific subject or object, state law is nullified to the extent that it actually conflicts with federal law.

Cases that cite this headnote

**[12] States**

Conflicting or conforming laws or regulations

Actual conflicts between state and federal law arise, such that state law is preempted, when

  

it is physically impossible to comply with both federal and state regulations or when state law interferes with the accomplishment and execution of the purposes and objectives of Congress.

Cases that cite this headnote

**[13] Appeal and Error**

Cases Triable in Appellate Court

Preemption is a question of law which is reviewed de novo.

1 Cases that cite this headnote

**[14] Election Law**

Power to Restrict or Extend Suffrage

Individual states have the right to incidentally burden election laws and regulate elections in their own territories.

Cases that cite this headnote

**[15] Election Law**

Application and delivery

**States**

Public officers and employees; elections

State statute restricting the individuals who may mail voters' absentee ballots in local election does not actually conflict with, and thus is not preempted by, the federal Voting Rights Act or the ADA; state statute is designed to protect the rights of disabled voters, and restriction on who may return absentee ballot for disabled voter does not unduly burden individual's right to vote. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; S.H.A. 10 ILCS 5/19–6.

1 Cases that cite this headnote

**[16] Election Law**

Voting procedures

**States**

Public officers and employees; elections

States may impose restrictions on those individuals who may return a disabled voter's absentee ballot, and such restrictions may be above and beyond those set forth in the federal Voting Rights Act. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

Cases that cite this headnote

**[17] Constitutional Law**

Absentee ballots

**Election Law**

Application and delivery

State statute restricting the individuals who may mail voters' absentee ballots in local election does not violate equal protection; burden placed on absentee voters is slight and nondiscriminatory, and restriction furthers important State interest in safeguarding integrity of the election process. U.S.C.A. Const.Amend. 14; S.H.A. 10 ILCS 5/19–6.

1 Cases that cite this headnote

**[18] Constitutional Law**

Voting and political rights

Equal protection challenge to state statute restricting the individuals who may mail voters' absentee ballots was not governed by strict scrutiny test, but rather was subject to the "flexible standard" used when addressing constitutional challenges to voting laws; right to vote by absentee ballot was not a fundamental right which would trigger strict scrutiny. U.S.C.A. Const.Amend. 14; S.H.A. 10 ILCS 5/19–6.

Cases that cite this headnote

**[19] Constitutional Law**

Voting and political rights

The rigorousness of a court's scrutiny of an election regulation depends upon the extent to which the challenged regulation burdens Fourteenth Amendment rights; thus, when such rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance, but

  

when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

**[20] Election Law**

Statutory Provisions Conferring or Defining Right

The general purposes of election laws are to obtain fair and honest elections and to obtain a correct expression of the intent of the voters.

Cases that cite this headnote

**[21] Election Law**

Preservation of grounds of review

On appeal in election contest, Appellate Court would not address merits of candidate's argument that trial court erred in invalidating and deducting from his vote total, on summary judgment, nine votes by absentee voters on basis that candidate's agent was not identified as having given assistance to the voters, where candidate failed to identify which nine votes he was challenging or to specify the summary judgment ruling he was appealing from. S.H.A. 10 ILCS 5/19–5.

Cases that cite this headnote

**[22] Appeal and Error**

Form and requisites in general

**Appeal and Error**

Points and arguments

A reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented, and it is not a repository into which an appellant may foist the burden of argument and research.

Cases that cite this headnote

**[23] Appeal and Error**

References to Record

It is neither the function nor the obligation of the Appellate Court to act as advocate or search the record for error.

Cases that cite this headnote

**[24] Election Law**

Application and delivery

Application for absentee ballot used by voting authority, instructing applicant to check one of 11 listed reasons for absentee voting and setting forth two different "physically incapacitated" choices, substantially complied with forms set forth in voting statute, although application included additional language advising applicants that they would be required to complete another application for absentee ballot if they failed to specify a reason, and statutory form only identified one choice for physical incapacitation. S.H.A. 10 ILCS 5/19–3.

Cases that cite this headnote

**[25] Election Law**

Application and delivery

Applicants for absentee ballot, who indicated the reason for absentee voting was physical incapacitation, were required by statute to include or identify a reason for their physical incapacitation. S.H.A. 10 ILCS 5/19–3.

Cases that cite this headnote

**[26] Election Law**

Grounds for absence

Voting authority was not at fault with regard to failure of disabled voters to identify in their applications for absentee ballot the reason for their physical incapacitation, such that trial court's invalidation of those absentee votes was appropriate; absentee ballot application was not deficient or improper, and evidence demonstrated that candidate's agent himself had filled in the reason for the voter on some of the applications. S.H.A. 10 ILCS 5/19–3.

  

Cases that cite this headnote

**[27] Election Law**
Grounds for absence

If a space has been provided on an absentee ballot application to identify a reason for one's physical incapacitation, and the voter fails to fill that space in, his or her vote is invalid. S.H.A. 10 ILCS 5/19–3.

Cases that cite this headnote

**[28] Election Law**
Admissibility of ballots

Mayoral candidate failed to show sufficient chain of custody for three absentee ballots that were found in possession of a different precinct, and thus the ballots were not admissible and could not be counted in election contest, though election judge from correct precinct testified that an envelope presumably containing absentee ballots had been delivered to the correct precinct; there was no direct evidence as to what was contained in the delivered envelope on election day, election judge testified that envelope found in other precinct was not the same envelope delivered to correct precinct, and ballots were found four months after election when clerk's office was cleaning out its warehouse.

Cases that cite this headnote

**[29] Election Law**
Admissibility of ballots

For ballots to be admissible in an election contest, an adequate foundation must be laid, establishing that they are the same items as found on election night and that their condition has not substantially changed.

Cases that cite this headnote

**[30] Evidence**
Exhibition of person or object in general

A proper foundation for the introduction of an object may be laid either through identification of the object by a witness or through the establishment of a chain of custody.

Cases that cite this headnote

**[31] Evidence**
Exhibition of person or object in general

The chain of custody must be of sufficient completeness to render it improbable that the object to be introduced into evidence has either been exchanged with another or subjected to contamination or tampering.

Cases that cite this headnote

**[32] Election Law**
Presumptions and burden of proof in general

In an election contest, the burden rests upon the proponent of the admission of ballots into evidence to prove that the ballots have been kept intact.

1 Cases that cite this headnote

**[33] Election Law**
Admissibility of ballots

For ballots to be inadmissible in an election contest, it is not necessary that an unlawful interference with the ballots be shown; rather, it is sufficient to invalidate the ballots as evidence if the opportunity for interference of unauthorized persons existed.

Cases that cite this headnote

**[34] Election Law**
Admissibility of ballots

If ballots are produced in court, and it clearly appears that they are in the same condition as when counted by the judges of election, they are admissible into evidence in an election contest.

Cases that cite this headnote

**[35] Election Law**
Admissibility of ballots

  

The question of proper preservation and chain of custody for ballots is a factual one based on the circumstances of each election contest.

Cases that cite this headnote

**[36] Election Law**

Harmless error

Even if trial court erred in excluding three absentee ballots from evidence in election contest, such error was harmless, where three votes were not enough to change the result of trial court's determination of the winner.

Cases that cite this headnote

**[37] Election Law**

Review of questions of fact

In an election contest, the finding of the trial court, which observed the demeanor of the witnesses while testifying, will not be disturbed on appeal unless it is palpably against the manifest weight of the evidence.

Cases that cite this headnote

**[38] Appeal and Error**

Findings of Court or Referee

**Appeal and Error**

Manifest weight

A determination is against the manifest weight of the evidence where, upon reviewing the evidence in the light most favorable to the prevailing party, the opposite conclusion is clearly apparent or the finding is palpably erroneous or arbitrary and unsubstantiated by the evidence.

Cases that cite this headnote

**[39] Appeal and Error**

Manifest weight

A decision is against the manifest weight of the evidence where the facts demonstrate that the trial court should have reached the opposite conclusion.

Cases that cite this headnote

**[40] Election Law**

Scope of Inquiry and Powers of Court or Board

Questions concerning what level of assistance provided to absentee voters was required to be disclosed were for trial court's determination in an election contest; thus, trial court could disregard testimony of elections official in this regard.

Cases that cite this headnote

**[41] Election Law**

Weight and Sufficiency

Evidence in election contest supported trial court's finding that successful mayoral candidate's absentee voter campaign had committed fraud by using deliberate, intentional and aggressive practices to assure the votes of disabled voters; candidate's agent punched absentee ballots for disabled voters and was in near proximity to some voters as they voted, rendering their ability to vote in secret null, and candidate's agent also mailed most of the absentee ballots in violation of the Election Code. S.H.A. 10 ILCS 5/19–6.

Cases that cite this headnote

**[42] Election Law**

Votes to be counted

Whether an invalid vote should be apportioned or excluded depends on the circumstances present in the election case.

Cases that cite this headnote

**[43] Election Law**

Effect of Irregularities or Defects

Where fraud is involved in the election process, exclusion of the invalid votes is the procedure of choice.

Cases that cite this headnote

**[44] Election Law**

  

Deduction or apportionment of illegal ballots

When fraud is involved in the election process and the number of illegal votes cannot be ascertained, an entire poll or absentee ballots may be rejected; conversely, when the number of illegal votes can be ascertained, the entire poll need not be rejected.

Cases that cite this headnote

**[45] Election Law**

Deduction or apportionment of illegal ballots

Where fraud is not involved in the election process, but it cannot be ascertained for which candidate a ballot was cast, the remedy is apportionment.

1 Cases that cite this headnote

**[46] Election Law**

Deduction or apportionment of illegal ballots

Deduction of 38 invalid absentee votes from successful mayoral candidate's total, rather than apportionment of the votes, was the appropriate remedy for the fraudulent conduct of the candidate's staff in using deliberate, intentional and aggressive practices to assure the absentee votes of disabled voters.

Cases that cite this headnote

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**Opinion**

***597** Presiding Justice BURKE delivered the opinion of the court:

Respondent and counterpetitioner Gregory Skubisz [1] appeals from an order of the circuit court certifying the April 1, 2003, mayoral election results for Calumet City in which the court declared petitioner and counterrespondent Michelle Qualkinbush mayor. On appeal, Skubisz contends that the trial court erred in failing to dismiss Qualkinbush's petition for election contest on the basis that section 19–6 of the Election Code (10 ILCS 5/19–6 (West 2002)), the absentee ballot return provision, was preempted by the federal Voting Rights Act (42 U.S.C. § 1973aa–6 (2003)) and the Americans with Disabilities Act of 1990(ADA) (42 U.S.C. § 12132 (1995)), and that section 19–6 violates equal protection principles. Skubisz also contends that the trial court erred in: (1) invalidating nine absentee votes because the absentee ballot certification failed to disclose that those voters received assistance in voting; (2) invalidating certain absentee votes because the voters failed to state a reason for their physical incapacitation on their absentee ballot application form; (3) refusing to admit three misdelivered absentee ballots; and (4) finding that Skubisz's campaign engaged in fraudulent conduct and in deducting, in full, 38 votes from his vote total. For the reasons set forth below, we affirm.

STATEMENT OF FACTS

This lawsuit arose as a result of a special election held on April 1, 2003, for mayor of Calumet City. Four candidates ran for office: Skubisz, Qualkinbush, Dominick Gigliotti, and Nick Manousopoulos. After the ballots had been tallied, the results were: Skubisz, 2,542 votes; Qualkinbush, 2,518 votes; Gigliotti, 718 votes; and Manousopoulos, 1,480 votes. Skubisz was installed as the mayor on May 1.

On May 2, Qualkinbush filed a verified petition for election contest, alleging voter irregularities, including insufficient reasons being given by physically incapacitated voters on their applications for absentee ballots, improper assistance was given to disabled voters by members of Skubisz's campaign, particularly Michael Kaszak, voters failed to disclose that assistance had been given to them, and illegal delivery or mailing of absentee ballots by Skubisz or members of his campaign. On June 9, ****1187 ***751** Skubisz filed a verified counterpetition for election contest, also

  

alleging voting irregularities and challenging the validity of section 19–6 of the Election Code. With respect to the validity of section 19–6, Skubisz also filed a motion to dismiss Qualkinbush's petition. Subsequent to a hearing on July 2, the trial court concluded that section 19–6 was in compliance with the Voting Rights ***598** Act and ADA and it did not violate equal protection principles. Accordingly, the trial court denied Skubisz's motion to dismiss Qualkinbush's petition on the basis of preemption and equal protection.

On July 8, Qualkinbush filed a motion for partial summary judgment with respect to 51 votes on the basis that the voters failed to provide a sufficient reason or no reason at all for their physical incapacitation on their applications contrary to the mandatory provision of section 19–3 of the Election Code.[2] This motion was granted in part and denied in part by the court on July 25. After reviewing each voter separately, the trial court declared 18 votes invalid because the voters failed to provide any reason at all and two additional votes invalid for reasons irrelevant here.

Qualkinbush also filed a motion for partial summary judgment with respect to 18 voters based on the fact that these individuals, although they had received assistance in voting, failed to disclose that assistance on their certification as required by section 19–5. On July 30, Skubisz filed a response to this motion. The same day, the trial court heard arguments on this motion, and granted it in part and denied it in part.

During the course of the bench trial, which began on August 4, Qualkinbush filed two additional motions for partial summary judgment. First, Qualkinbush moved for partial summary judgment with respect to voters who received assistance, which was not disclosed, and with respect to improper delivery/return of ballots. The affidavits of 13 voters were attached, identifying the various assistance received from Kaszak, including filling out applications in part or whole, mailing applications, receiving assistance in voting, including punching ballots, and mailing of the ballots. Thereafter, the trial court granted the motion with respect to improper delivery in connection with eight voters and granted the motion with respect to improper assistance and delivery in connection with four voters. The trial court also granted the motion for summary judgment with respect to another voter on the basis of receiving assistance that was not disclosed (August 13 order).

Secondly, Qualkinbush filed another motion for partial summary judgment, relating to improper delivery of three ballots. Attached to this were the affidavits of the three voters. After hearing testimony from Kaszak in connection with the assistance he rendered to these three voters, the trial court granted the motion.

***599** At the bench trial, Skubisz was called as an adverse witness by Qualkinbush.[3] Skubisz admitted that his campaign undertook a concerted effort to procure absentee votes and he believed workers provided absentee ballot applications to “scores” of voters. Skubisz denied, however, being aware that any assistance was given to voters from his workers, including filling ****1188** *****752** out applications in whole or in part. Skubisz further denied knowing what steps were taken after someone requested an absentee ballot application, but stated it was his secretary's or campaign coordinator's duty to follow up and it was one of Kaszak's duties to provide absentee ballot applications to voters.

Kaszak confirmed that he procured absentee votes for Skubisz, beginning in 1993, the first time Skubisz ran for mayor. Kaszak also did so in 2001 and 2003, when Skubisz again ran for mayor. Kaszak admitted taking absentee ballot applications to voters, helping fill them out, placing applications in envelopes, providing stamps to voters, and mailing applications. According to Kaszak, all of this was done at the direction of the voters. Kaszak then left his telephone number on a “receipt” with the voters. When a voter called, following receipt of his or her ballot, requesting assistance, Kaszak returned to the voter's home. According to Kaszak, most of the voters were confused because they were elderly and the ballots contained too much “mumbo jumbo” for these “old timers.” Kaszak admitted instructing voters on how to vote, punching ballots for voters, placing ballots in envelopes, filling out certifications, and mailing ballots.

According to Kim Cornell, Skubisz's campaign secretary, she received numerous telephone calls from individuals requesting absentee ballots. She wrote their names and telephone numbers on a sticky note and left or gave the notes to those campaign workers, primarily Kaszak, who dealt with absentee ballots. According to Cornell, she prepared approximately 100 such sticky notes. Cornell further testified that she received calls from individuals after they had received their absentee ballot, asking what they should do. Cornell again took the individual's information and gave it to Kaszak or someone else to follow up on.

Gary Rycyzyn, stated that he was the director of elections for the Cook County Clerk's office. He testified in connection with the chain of custody for ballots from the precincts to the warehouse, the absentee ballot process, and absentee ballot applications.

On August 25, during a break in the bench trial, Skubisz filed a ***600** motion to count three misdelivered absentee ballots. At a hearing on this motion, it was determined that these votes had turned up the previous Thursday in a precinct not within Calumet City. Specifically, the ballots had been found in precinct one, Burnham, but belonged to precinct three, Calumet City. The court indicated that witnesses would need to be called with respect to these ballots to establish a chain of custody. In this regard, Skubisz offered the testimony of Jessica Belmares, the supervisor of the Cook County Clerk's office warehouse, and Ed Bieganik, an election judge for precinct three. According to Belmares, the envelope in which the ballots had been recently found, while cleaning out the warehouse, stated "precinct one," but the votes were for precinct three. Belmares did not know what precinct the ballots had been delivered to and only knew that they had been found in an envelope for precinct one. She also did not know how the ballots got from precinct three to precinct one. Belmares further testified that a note from the election judges accompanied the envelope, which stated: "Found after final result tape was run and the PBV was turned off. Please process these absentee ballots." Belmares stated that she had never seen a note like this before.

Bieganik testified that after the polls had closed on election night and the votes tabulated, the judges found an envelope that appeared to contain absentee ballots. ****1189 ***753** According to Bieganik, it was the last thing they found that night and, although the envelope was not opened, he believed there were three absentee ballots in it. Bieganik stated that the judges were at a loss as to what to do with the envelope, so they wrote a note, acknowledging receipt of it. Bieganik believed that the envelope was placed with the regular ballots and was taken from the polling place to the receiving station in the transfer case.

On cross-examination, Bieganik testified that Yolanda Wilheim had delivered the envelope to the precinct. When shown the envelope that that been recently found, containing the three ballots, Bieganik stated that it was similar, but was not the same envelope delivered to precinct three because the envelope he was shown at trial had precinct one written on it

Trial resumed and Qualkinbush rested. Six voters then testified on behalf of Skubisz, stating that they had contacted Skubisz's office for assistance in the absentee voting process and testifying to the assistance they had received. The assistance they detailed confirmed that testified to by Kaszak.

Skubisz then testified on his own behalf. According to Skubisz, absentee votes were important to him because he was running as an independent and needed to do everything possible to win. As such, Skubisz tried to generate as many people as he could to vote by ***601** absentee ballot. However, he denied being involved in the every day mechanics of the absentee ballot program. Skubisz knew Kaszak had delivered absentee ballot applications, but did not know how many and never asked. Skubisz admitted that he had seen sticky notes with respect to absentee ballot applications at the office, but denied seeing any notes in connection with ballots themselves. Skubisz then rested.

At a subsequent hearing on Skubisz's motion to count the three misdelivered ballots, Skubisz argued that the only logical explanation was that the envelope containing the ballots had been placed in the wrong supply carrier by a deputy clerk. Qualkinbush argued that there had been no evidence or testimony as to how the ballots got from the Calumet City precinct to the Burnham precinct and, therefore, no chain of custody had been established. The trial court noted that how the three ballots for precinct three got into precinct one "remain[ed] a mystery." The court found that someone had made an error and this error could have been an error in security. Accordingly, the trial court concluded that the ballots had not been sufficiently preserved and would not be counted.

On September 2, the trial court entered its memorandum decision and final judgment order certifying the April 1, 2003, election results. The court first addressed the credibility of Kaszak's testimony and found that it was not an asset to Skubisz. The court also noted that, although Skubisz had attempted to distance himself from Kaszak, through not only his own testimony but other witnesses, this attempt lacked sufficient credibility.

The court then dealt with 39 votes (on a list attached to the order) that it had found were voted illegally for reasons previously stated by the court with respect to the various motions for partial summary judgment ruled on prior to trial.[4] Although the court acknowledged that it did not know who each voter had voted for, it did know that Kaszak assisted

each of these voters. In connection with this assistance, the court was not of the belief that the ****1190 ***754** voters had always asked for assistance as Kaszak had testified. Rather, the court noted that, after Kaszak filled out the absentee ballot application, he always left a "receipt" with his telephone number. The court found that this was done to encourage the voter to call him once they received their absentee ballot, to encourage the voter to vote for Skubisz, and so Kaszak could assure that he provided assistance to the voters during the voting process itself.

***602** The court then rendered certain findings with respect to Kaszak's assistance, specifically finding that the evidence demonstrated that, even when Kaszak only provided instruction to a voter, he could nonetheless watch the voter and see for whom he or she had voted. According to the court, Kaszak should not have placed himself in such a position. Specifically, the court found that "[t]he intimidation factor [the voter's knowledge that Kaszak was from the Skubisz campaign] would undoubtedly place undue pressure on the voter." Similarly, with respect to Kaszak's conduct in actually guiding a voter or voting for the voter, the court found that Kaszak's "oversight and presence lead to possibilities for intimidation" and concluded that Kaszak "guided these voters to his candidate either overtly or by his presence."

The court next found that the fact Kaszak filled out the certification for many voters was of significant importance because Kaszak skipped filling out the assistance portion in an overwhelming majority of the ballots upon which he had assisted. According to the court, "[t]his was no mistake." Kaszak's action was deliberate and intentional and "[i]t was designed to keep the extent of his assistance unknown and less likely to be detected." The court believed "that [Kaszak] made every effort to take the ballot from the voter for delivery and [found] this created the opportunity for KASZAK to taint the ballots."

The court then found that the testimony of the absentee voters "provided strong evidence of improper behavior by KASZAK and the SKUBISZ campaign. The confused testimony by these witnesses demonstrated to the court how easily someone of influence could manipulate their votes." The court concluded that Skubisz's conduct and his agent's was an "intentional, deliberate, and persistent pursuit of the absentee vote of handicapped voters," "this pursuit was fraudulent and designed to win an election at all costs," that "[t]he campaign targeted the sick, the infirm and the confused," and it was "obvious to the court" that Kaszak "made every effort to examine each and every vote." The court further concluded that Skubisz was aware of what Kaszak was doing because the practice of picking up absentee ballots was so widespread and Skubisz himself testified that he knew of the absentee voting efforts. Conversely, the court found that Qualkinbush and her campaign engaged in no wrongdoing during the campaign.

The court then found that Kaszak assisted at least 39 absentee voters and delivered the ballots. In this regard, the court found that Kaszak "not only had the opportunity to tamper with the ballots while assisting the voter in voting, but also when he assumed custody ***603** of the ballot in at least thirty-five separate instances. It is evident that delivery of these ballots is in violation of section 19–6, but also that the opportunity for tampering existed * * *. Being an unauthorized person to deliver absentee ballots under section 19–6[,] the presumption is that the ballots have been tampered with." Accordingly, the court held "the 38 votes where illegal delivery by KASZAK was proven or stipulated to and the votes illegally delivered by SKUBISZ ****1191 ***755** shall be subtracted from the SKUBISZ vote total." As to the remaining absentee ballots, the court concluded that "[t]he illegal scheme * * * was completely one-sided" and, "[f]or the sake of equity and fairness, the court will apportion the ballots between all four candidates among the pool of absentee ballots by precinct."

Ultimately, the trial court concluded:

> "In summary, the Court finds that the SKUBISZ absentee voter campaign followed deliberate, intentional and aggressive practices to assure the votes of handicapped voters. The ballots cast by these voters were poisoned by KASZAK to a degree that the fair and equitable remedy is to subtract each and every one of the votes from the SKUBISZ vote total. The Court finds that it would be inequitable, an injustice, to use Respondent's method of deducting votes."

Following the bench trial and rendering its rulings on the other issues raised by the parties, the court found the final result of the election was 2,530.642 votes for Qualkinbush and 2,504.0523 votes for Skubisz. Based on these totals, the court declared Qualkinbush to be the winner.

  

On the same day of the trial court's decision, Skubisz filed a motion to stay enforcement pending appeal, as well as a notice of appeal. The court granted Skubisz's motion to stay until 5 p.m. on September 3, 2003. Qualkinbush was installed as mayor after the expiration of this time.

## ANALYSIS

Initially, both parties challenge the other parties' brief on appeal. Qualkinbush contends that Skubisz misstated facts in his statement of facts, gave an incomplete statement of facts, and ignores the fact that the trial court found many of the facts he relies upon incredible. Skubisz, in his reply brief, asks us to strike Qualkinbush's brief and/or portions thereof because she included an abstract of testimony in her appendix without leave of this court to do so, her statement of facts contains misstatements, arguments, and irrelevant materials that are unsupported by the record, and, in her argument section, she fails to cite to the record, relies on the trial court's opinion as evidence, and instead of making her own arguments, uses the language from the trial court's decision as her arguments.

**[1]** ***604** With respect to Qualkinbush's abstract, Supreme Court Rule 342(b) provides that an abstract of the record shall not be filed unless it is ordered by the court. Since this court did not order an abstract, this attachment is improper and, therefore, we will disregard it. See *Swanson v. Board of Police Commissioners of the Village of Lake in the Hills*, 197 Ill.App.3d 592, 597, 144 Ill.Dec. 138, 555 N.E.2d 35 (1990).

**[2]** With respect to the parties' statement of facts, without specifically detailing any violations, both parties' statement of facts are deficient and fail to comply with Supreme Court Rule 341(e)(6). 188 Ill.2d R. 341(e)(6). Neither states the facts fairly nor accurately without comment. Accordingly, we will simply disregard those portions that we deem fail to comport with supreme court rules. *Merrifield v. Illinois State Police Merit Board*, 294 Ill.App.3d 520, 527, 229 Ill.Dec. 255, 691 N.E.2d 191 (1998).

## I. Validity of Section 19–6

### A. Voting Rights Act and ADA

Skubisz contends that the trial court erred in denying his motion to dismiss ****1192** *****756** with respect to 34 votes [5] because section 19–6 of the Election Code is preempted by and violates the Voting Rights Act and ADA since it restricts the individuals whom an absentee voter can entrust their ballot with for mailing. Specifically, Skubisz maintains that section 19–6 impermissibly infringes upon the superior rights set forth by the Voting Rights Act and wrongly denies benefits to and/or discriminates against disabled voters in violation of the ADA.

Qualkinbush contends that the trial court's finding that section 19–6 is valid was proper. According to Qualkinbush, *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969), answers the constitutional questions here and speaks directly to the points raised by Skubisz. [6]

**[3]** **[4]** **[5]** **[6]** "It has been established beyond question that there is a fundamental right to vote." *Griffin v. Roupas*, No. 02 C 5270, 2003 WL 22232839 (N.D.Ill. September 22, 2003), citing *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S.Ct. 2059, 2063, 119 L.Ed.2d 245, 252 (1992). Despite this principle, however, "there is no corresponding fundamental right to vote by absentee ballot." *Griffin*, slip op. at ——, citing *McDonald*, 394 U.S. at 807, 89 S.Ct. at 1408, 22 L.Ed.2d at 745. Specifically, the Supreme Court has held that the right to vote in any manner ***605** is not absolute. *Burdick*, 504 U.S. at 433, 112 S.Ct. at 2063, 119 L.Ed.2d at 252–53. Instead, the Court has "recognized that states retain the power to regulate their own elections." *Burdick*, 504 U.S. at 433, 112 S.Ct. at 2063, 119 L.Ed.2d at 253. As the *Griffin* court stated,

> "[i]t has long been held that the states' powers to determine the conditions under which the right to suffrage may be exercised broadly, so long as they do not do so in a discriminatory manner. [Citation.] The courts have held that the Constitution does not prohibit the States from enacting laws which incidentally burden election laws in order to ensure their integrity. [Citation.]
>
> 'Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.' [Citations.]" *Griffin*, slip op. at ——.

Section 19–6 of the Election Code provides:

> "* * * The voter shall then endorse his certificate upon the back of the envelope and the envelope shall be mailed in person by such voter, postage prepaid, to the election

> authority issuing the ballot or, if more convenient, it may be delivered in person, by either the voter or by a spouse, parent, child, brother or sister of the voter, or by a company licensed as a motor carrier * * *. It shall be unlawful for any person not the voter, his or her spouse, parent, child, brother, or sister, or a representative of a company engaged in the business of making deliveries to the election authority to take the ballot and ballot envelope of a voter for deposit into the mail unless the ballot has been issued pursuant to application by a physically incapacitated elector under Section 3–3 or a hospitalized voter ****1193** *****757** under Section 19–13, in which case any employee or person under the direction of the facility in which the elector or voter is located may deposit the ballot and ballot envelope into the mail. * * *." 10 ILCS 5/19–6 (West 2002).

The return provisions of section 19–6 are mandatory, not directory. *People v. Deganutti*, 348 Ill.App.3d 512, 284 Ill.Dec. 538, 810 N.E.2d 191 (2004). The purpose of this provision is to " 'safeguard the integrity of the election process by depriving unauthorized persons of the opportunity to tamper with ballots after they have been completed.' [Citation.]" *Deganutti*, 348 Ill.App.3d at 519, 284 Ill.Dec. 538, 810 N.E.2d 191. The relevant inquiry, however, " 'is not whether a ballot has actually been tampered with, but whether the opportunity for such tampering by unauthorized persons was present.' [Citation.]" *Deganutti*, 348 Ill.App.3d at 519, 284 Ill.Dec. 538, 810 N.E.2d 191.

Section 1973aa–6 of the Voting Rights Act provides: "Any voter who requires assistance to vote by reason of blindness, disability, ***606** or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 42 U.S.C. § 1973aa–6 (2003). Section 12132 of the ADA provides: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (1995).

Initially, we note that Skubisz cites no authority to establish that the Voting Rights Act is applicable to local elections. In fact, there is authority to the contrary—the Voting Rights Act is only applicable to federal elections. *In re Thirteen Ballots Cast in 1985 General Election in Burlington County*, 209 N.J.Super. 286, 289, 507 A.2d 314, 315 (1985); M. Waterstone, *Constitutional and Statutory Voting Rights for People With Disabilities*, 14 Stan. L. & Policy Rev. 353, 358 (2003). Moreover, the ADA is merely a broad discrimination statute that does not specifically address voting. In any event, we will presume these provisions are applicable to the election *sub judice.*

**[7] [8] [9] [10] [11] [12] [13]** "The preemption doctrine provides that in some instances a federal law will override state laws on the same subject." *Cohen v. McDonald's Corp.*, 347 Ill.App.3d 627, 633, 283 Ill.Dec. 451, 808 N.E.2d 1 (2004). This doctrine requires us to examine the federal legislation and determine whether Congress intended it to supplant state laws on the same subject. *Cohen*, 347 Ill.App.3d at 633, 283 Ill.Dec. 451, 808 N.E.2d 1. Specifically,

> "[f]ederal statutes and regulations can preempt state law in the following circumstances: (1) the language of the statute or regulation expressly preempts state law; (2) Congress implemented a comprehensive regulatory scheme in a given area, removing the entire field from state law; or (3) state law as applied conflicts with federal law." *Cohen*, 347 Ill.App.3d at 633, 283 Ill.Dec. 451, 808 N.E.2d 1.

With respect to these three bases, the following principles are relevant:

> "Absent explicit preemptive language, courts may infer Congress's intent to preempt where a federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it or where a federal statute touches a subject or an object in which the federal interest is so dominant that the federal system will be assumed to preclude the enforcement of ****1194** *****758** state laws on the same subject. [Citations.]
>
> Even when Congress has not completely displaced state regulation of a specific subject or object, state law is nullified to the extent that it actually conflicts with federal law. [Citations.] Actual conflicts arise when it is physically impossible to comply with both federal and state regulations or when state law interferes with the ***607** accomplishment and execution of the purposes and objectives of Congress." *Cohen*, 347 Ill.App.3d at 633–34, 283 Ill.Dec. 451, 808 N.E.2d 1.

Preemption is a question of law, which we review *de novo.* *Ramette v. AT & T Corp.*, 351 Ill.App.3d 73, 75, 285 Ill.Dec. 684, 812 N.E.2d 504 (2004).

  

**[14]** Although Skubisz cites general boilerplate preemption law, he does not specify which basis he relies upon here. However, clearly it is not either of the first two of the three possible preemption bases. Neither the Voting Rights Act nor the ADA expressly state that they preempt state law on the issue of voting by disabled individuals, let alone absentee voting, particularly, who can assist a disabled voter, and, more particularly, who can return an absentee ballot for a disabled voter. Moreover, the federal legislation is not so pervasive nor is a federal interest so dominant that preemption would exist under the second basis. As stated above, it has long been recognized and been the law in the United States that individual states have the right to incidentally burden election laws and regulate elections in their own territories. See *Clark v. Quick*, 377 Ill. 424, 427, 36 N.E.2d 563 (1941) ( "No one doubts the legislative power to prescribe reasonable conditions [on the right to vote]"). See also *Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir.1986) ("our federal system contemplates that states will be primarily responsible for regulating their own elections").

**[15]** The only basis Skubisz can rely upon is the third one. Thus, the question before us is whether section 19–6 *actually* conflicts with the Voting Rights Act or ADA. Skubisz's arguments do not address this question. Moreover, Skubisz cites no authority stating that section 19–6 is preempted by either the Voting Rights Act or the ADA because it limits who may deliver an absentee voter's ballot. Although Skubisz cites *DiPietrae v. City of Philadelphia*, 666 A.2d 1132 (Pa.Commw.Ct.1995) in support of his argument that the Voting Rights Act applies to absentee voting, this case does not address Skubisz's position that the federal provisions preempt the limitation on who may return an absentee ballot in section 19–6. In *DiPietrae*, the trial court entered an order, directing that

> "disabled voters [were] authorized to appoint any person of their choice as their agents to obtain absentee ballot applications, to deliver absentee ballot applications to the Board of Elections, to obtain absentee ballots, and to deliver completed absentee ballots to the Board of Elections in person or by mail with the limitation that an individual *cannot be the agent for persons living in more than one household.*" (Emphasis added.) *DiPietrae*, 666 A.2d at 1133.

On appeal, the question was whether the trial court erred in allowing this assistance. *DiPietrae*, 666 A.2d at 1132–33. The Pennsylvania ***608** statute governing return of absentee votes provided: " Such envelope [containing the completed absentee ballot] shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of electors." *DiPietrae*, 666 A.2d at 1135. The disabled voters, in arguing that the ****1195** *****759** trial court did not err in allowing them assistance, contended that the ADA "impose[d] an affirmative duty upon state and local governmental agencies to assure that all persons with disabilities are effectively able to exercise their constitutionally guaranteed rights, none of which is more important than the right to vote." *DiPietrae*, 666 A.2d at 1135. The voters further argued that the Voting Rights Act provides that a disabled voter may be given assistance by a person of the voter's choice. *DiPietrae*, 666 A.2d at 1135. The *DiPietrae* court concluded that "the trial court properly allowed a disabled voter to appoint a person of his or her choice to obtain an absentee ballot application, to deliver it to the Election Board, to obtain an absentee ballot from the Board and to deliver the completed ballot either to the mail box or to the Board." *DiPietrae*, 666 A.2d at 1135. However, the court further specifically found that "[t]he trial court's proviso that 'an individual cannot be the agent for persons living in more than one household' appear[ed] to be a reasonable means of balancing the rights of a disabled person who wishes to vote with the public need to insure a fair election." *DiPietrae*, 666 A.2d at 1135–36.

Skubisz ignores the court's language in *DiPietrae* upholding the limitation on who may deliver an absentee voter's ballot, *i.e.*, someone in a position similar to that of himself and his workers in the instant case since they acted as an agent for more than one household. Certainly, *DiPietrae* recognized the need for assistance in mailing absentee ballots, but also recognized the need to restrict those individuals who may do so to protect the integrity of the election process and found such restrictions permissible under the Voting Rights Act and ADA. Contrary to Skubisz's argument, *DiPietrae* supports a finding that states may limit who can return absentee ballots despite the language of the Voting Rights Act and ADA.

Our independent research has disclosed only one case that has directly addressed the question of whether the Voting Rights Act preempts a state law restricting the individuals who may mail disabled voter's absentee ballots. In *In re Thirteen Ballots*, the question before the court was the validity of 13 absentee ballots in a local election that had been delivered to the election board with certifications that the voters had been assisted by a candidate in the election in preparing their ballots because of illness or disability. ***609**

  

*In re Thirteen Ballots*, 209 N.J.Super. at 288, 507 A.2d at 315. The New Jersey statute provided for assistance to an incapacitated absentee voter, but specifically provided that "[i]n no event may a candidate for election provide such assistance, nor may any person, at the time of providing such assistance, campaign or electioneer on behalf of any candidate." *in rE thirteEN ballots*, 209 N.J.super. at 288, 507 A.2d at 315. the court then quoted section 1973aa–6 of the Voting Rights Act and noted that the issue before it was which provision controlled—the state or federal. *In re Thirteen Ballots*, 209 N.J.Super. at 289, 507 A.2d at 315. The *In re Thirteen Ballots* court concluded that "the New Jersey statute is not affected by the quoted provision of the Voting Rights Act when national candidates are not running for election." *In re Thirteen Ballots*, 209 N.J.Super. at 289, 507 A.2d at 315. According to the court, "[t]he clear purpose of the New Jersey statute's prohibition against absentee voter assistance by a candidate is the prevention of fraud. The prospect of improper influence of voter choices in such circumstances is obvious and underlined by problems previously reported [in other elections in New Jersey]." *In re Thirteen Ballots*, 209 N.J.Super. at 289, 507 A.2d at 315. In rejecting the superiority of the ****1196 ***760** Voting Rights Act to the state election at issue, the *In re Thirteen Ballots* court stated:

> "The federal statute ignores the possibilities of fraud in its provisions permitting assistance to absentee voters. It is not our role to debate its wisdom. We are, however, obliged to recognize its limitations. The Voting Rights Act and amendments thereto provided Congress with authority to control national elections and, to a limited extent, state elections. Its control of the latter is confined to the enactment of legislation enforcing provisions of the United States Constitution, notably, in the present case, its Thirteenth, Fourteenth, Fifteenth, Nineteenth and Twenty-fourth Amendments. The majority of the United States Supreme Court so held in *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970), in which, among other things, it upheld the provisions of the act lowering the voting age to 18 in national elections, but struck down the extension of those provisions to state and local elections." *In re Thirteen Ballots*, 209 N.J.Super. at 289, 507 A.2d at 315.

Thereafter, the court concluded that the "prohibition against candidate assistance to absentee voters is not discriminatory [and i]t is a reasonable regulation of our voting machinery, properly designed to prevent fraud." *In re Thirteen Ballots*, 209 N.J.Super. at 289, 507 A.2d at 316. See also *Gramlich v. Cottrell*, 204 N.J.Super. 490, 492–94, 499 A.2d 275, 275–77 (1985) (finding 18 absentee ballot votes invalid because a candidate or an agent of the candidate improperly provided assistance ***610** to 18 residents of a nursing home, noting that the no-candidate assistance provision was included because the legislature had "a clear desire to increase [the] government's ability to guarantee the integrity of absentee voting procedures [and o]f particular concern were those isolated from the rest of the community due to illness or infirmity"); *Gooch v. Hendrix*, 5 Cal.4th 266, 279–80, 851 P.2d 1321, 1329, 19 Cal.Rptr.2d 712, 720 (1993) (holding that absentee ballots collected from disabled voters by a political association and returned in person or mailed by members of this association were void since such conduct violated the California statute providing that only a "spouse, child, parent, grandparent, grandchild, brother, or sister" could return such ballot).

**[16]** These cases, although not binding on us, are persuasive and support a conclusion that, even in light of the federal provisions, states may impose restrictions on those individuals who may return a disabled voter's absentee ballot, and that such restrictions may be above and beyond those set forth in the Voting Rights Act. See also 3 McQuillin Municipal Corporations § 12.16, at 163 (3d ed.2001) (stating that state statutes may proscribe assistance by only certain persons and, if the state statute is more restrictive than the Voting Rights Act, then it applies only to local elections).

Skubisz also relies on the Senate Judiciary Committee comments to the 1982 amendments to the Voting Rights Act. However, when read in context, the legislative concerns clearly related to in-booth voting as established by the very language of the comments. Specifically, the comments included phrases such as: "within the voting booth," "discriminated against at the polls," "permit them [the disabled voters] to bring into the voting booth a person whom the voter trusts and who cannot intimidate him," and " 'pull the lever of a voting machine.' " S. Rep. 97–417, 1982 U.S.C.C.A.N. 177, 240 (May 25, 23, 1982). There is nothing in these comments relating specifically, or inferentially, ****1197 ***761** to absentee ballot voting, and, more specifically, to the return of absentee ballots.

Moreover, and quite importantly, Skubisz ignores the clear basis set forth by the legislature for allowing a voter to choose who will assist him or her—the potential for undue influence and manipulation. In this respect, the committee stated that "because of their need for assistance, members of these groups are more susceptible than the ordinary voter to having

  

their vote unduly influenced or manipulated." S. Rep. 97–417, 1982 U.S.C.C.A.N. at 240. In further discussing its concerns, a member of the committee stated: "The committee is concerned that some people in this situation do in fact elect to forfeit their right to vote. Others may have ***611** their actual preference overborne by the influence of those assisting them or be misled into voting for someone other than the candidate of their choice." S. Rep. 97–417, 1982 U.S.C.C.A.N. at 240–41. As such, the committee concluded that the only way "to avoid possible intimidation or manipulation of the voter" was to allow the voter to choose whom they desire to assist them. S. Rep. 97–417, 1982 U.S.C.C.A.N. at 241.

Lastly, Skubisz ignores the plain language used by the committee with respect to preemption. Specifically, a member of the committee stated:

> "The committee recognizes the legitimate right of any state to establish necessary election procedures, subject to the overriding principle that such procedures shall be designed to *protect the rights of voters.* State provisions would be preempted only to the extent that they *unduly burden* the right recognized in this section, with that determination being a practical one dependent upon the facts." (Emphasis added.) S. Rep. 97–417, 1982 U.S.C.C.A.N. at 241.

Clearly, the core concern in allowing assistance of a person of the voter's choice was the integrity of the vote. This, too, is the general purpose of election laws. It is evident that the integrity of a vote is even more susceptible to influence and manipulation when done by absentee ballot. See, *e.g.*, *State ex rel. Whitley v. Rinehart*, 140 Fla. 645, 651, 192 So. 819, 823 (1939) (the "purity of the ballot is more difficult to preserve when voting absent than when voting in person"). This is precisely what section 19–6 protects against—it prevents a candidate or his or her agent from asserting undue influence upon a disabled voter and from manipulating that voter into voting for the candidate or the agent's candidate. It is designed to protect the rights of disabled voters. Certainly, then, section 19–6 of the Election Code does not conflict with the intent and purpose of the Voting Rights Act or ADA. Moreover, engaging in a practical determination, as the federal legislature itself said was applicable, we do not find that the restriction on who may return an absentee ballot for a disabled voter under section 19–6 unduly burdens that individual's right to vote and, thus, is not preempted by the Voting Rights Act. Skubisz has not established that the federal legislature intended to preempt the rights of state legislatures to restrict absentee voting, and, particularly, who may return absentee ballots. Such a finding is simply not supported by the language of the federal provisions, the history and comments thereto, or the clear intent of Congress. Accordingly, we find that the trial ***612** court did not err in denying Skubisz's motion to dismiss on the basis that section 19–6 of the Election Code was preempted by the Voting Rights Act or ADA and did not err in invalidating the 38 votes.

B. Equal Protection

**[17]** Skubisz next contends that section 19–6 is unconstitutional because it violates ****1198** *****762** equal protection principles, maintaining that we must apply the strict scrutiny test since the right to vote is a fundamental right. Skubisz argues that the restriction as to who can assist absentee voters is not the least restrictive means of attaining the goal of the statute. Skubisz further maintains that the Illinois statute allows similarly situated incapacitated voters, those hospitalized (section 19–13 of the Election Code), to pick any person of their choice to mail their ballots.

Qualkinbush contends that section 19–6 does not violate equal protection. Qualkinbush maintains that the right to vote is not at issue and, therefore, the strict scrutiny test does not apply. Qualkinbush also argues that the hospital voter provision is very specific and narrow in its application and far more restrictive and burdensome than section 19–6 and, therefore, is not comparable.

**[18]** **[19]** Initially, as stated above, the right to vote is a fundamental right, but the right to vote by absentee ballot is not a fundamental right. As such, Skubisz's argument that the strict scrutiny test applies is erroneous. *Griffin*, slip op. at ——. Moreover, with respect to the right to vote, the Supreme Court has recently endorsed a "flexible standard" in addressing constitutional challenges to voting laws. *Burdick*, 504 U.S. at 434, 112 S.Ct. at 2063, 119 L.Ed.2d at 253. Specifically, in *Burdick*, the Court held:

> "A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.' [Citation.]" *Burdick*, 504 U.S. at 434, 112 S.Ct. at 2063, 119 L.Ed.2d at 253.

  

In other words,

> "[t]he rigorousness of a court's scrutiny depends upon the extent to which a challenged regulation burdens Fourteenth Amendment rights. [Citation.] Thus, when such rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' [Citation.] However, when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon Fourteenth Amendment rights of voters, ***613** 'the State's important regulatory interests are generally sufficient to justify' the restrictions. [Citation.]" *Griffin,* slip op. at ——.

As noted above, Qualkinbush maintains that *McDonald* answers all of the constitutional questions raised here. Conversely, Skubisz maintains that *Goosby v. Osser,* 409 U.S. 512, 93 S.Ct. 854, 35 L.Ed.2d 36 (1973), overrides *McDonald.* We need not address either case in detail since they are not directly on point and do not address the precise issue raised in the instant case. The Court in *McDonald* concluded that the Illinois Election Code, which denied the petitioners who were pretrial detainees the ability to receive an absentee ballot, did not deny them equal protection, finding that it was not the right to vote at stake, "but a claimed right to receive absentee ballots." *McDonald,* 394 U.S. at 807, 89 S.Ct. at 1408, 22 L.Ed.2d at 745. Specifically, the Court concluded that neither the absentee ballot provisions nor the Election Code, as a whole, operated to deny or preclude pretrial detainees the ability to vote at all. *McDonald,* 394 U.S. at 807–08, 89 S.Ct. at 1408, 22 L.Ed.2d at 745. As such, the absentee ballot provision did not deny the petitioners equal ****1199** *****763** protection of law. In *Goosby,* the Pennsylvania petitioners again were pretrial detainees and made a similar claim as that made in *McDonald.* The *Goosby* Court, however, distinguished *McDonald* and found that its holding was not controlling because the Pennsylvania election scheme, unlike the Illinois scheme, absolutely prohibited the petitioners from voting. *Goosby,* 409 U.S. at 521, 93 S.Ct. at 860, 35 L.Ed.2d at 44. As such, the *Goosby* Court found there was a "significant difference" between the two schemes. *Goosby,* 409 U.S. at 522, 93 S.Ct. at 861, 35 L.Ed.2d at 44. The *Goosby* Court did not decide the merits of the petitioners' equal protection claim and specifically stated it was making no judgment on the merits. *Goosby,* 409 U.S. at 522, 93 S.Ct. at 861, 35 L.Ed.2d at 44. Clearly, contrary to Skubisz's argument, *Goosby* does not overrule or "override" the holding of *McDonald.* In any event, as stated above, neither case addresses the question before this court and, therefore, neither is controlling.

**[20]** We find that the burden placed upon absentee voters by the restriction on who may mail an absentee ballot in section 19–6 is slight and is nondiscriminatory. This provision limits the number of third parties who come in contact with an absentee ballot and provides a safeguard that the ballot will be voted based on the intent of the voter, not someone else. Additionally, this provision limits the number of third parties who come in contact with the absentee ballot once it has been voted, thus limiting the number of individuals able to tamper with it, destroy it, or fail to mail it. As stated above, the legislative purpose of section 19–6 is to safeguard the integrity of the election ***614** process. This is an important state interest. Certainly, the restriction in section 19–6 furthers this goal and justifies the restriction. "The general purposes of election laws are to obtain fair and honest elections and to obtain a correct expression of the intent of the voters." *Courtney v. County Officers Electoral Board,* 314 Ill.App.3d 870, 872–73, 247 Ill.Dec. 861, 732 N.E.2d 1193 (2000). We believe the restriction imposed by section 19–6 substantially contributes to the integrity of the election process. This restriction is a reasonable means of eliminating opportunities for election fraud and uncertainty, and the important state interest in the integrity of the election process demands that provisions such as this, that contribute substantially to the integrity of the election process, be enforced by the courts. See also *Deganutti,* 348 Ill.App.3d at 520–21, 284 Ill.Dec. 538, 810 N.E.2d 191 (holding that section 29–20(4) of the Election Code, which provides that an individual who "takes an absentee ballot of another person in violation of Section 19–6 so that an opportunity for fraudulent marking or tampering is created," is guilty of a Class 3 felony, was "rationally related to the legitimate state goal of protecting and preserving the integrity of the election process"; specifically, "[s]ection 29–20(4) of the Code, * * * protects the integrity of the election process by depriving unauthorized persons of the opportunity to tamper with completed absentee ballots, thereby addressing such issues as coercion, fraud, and secrecy that potentially arise with absentee voting").

With respect to Skubisz's claim that equal protection principles are violated because similarly situated absentee voters, those under section 19–13 of the Election Code, are treated differently, *i.e.,* those voters are allowed to choose any person to mail their absentee ballots, we disagree. Section 19–13 relates to individuals who have been admitted to a hospital

not more than five days before an election and allows for personal delivery of an absentee ballot to that person upon application and certification from that individual's attending ****1200** *****764** physician. With respect to return of the absentee ballot, section 19–13 provides:

> "Upon receipt of the absentee ballot, the hospitalized voter shall mark the ballot in secret * * * [and] such voter shall give the envelope to the precinct voter [any person who is registered to vote in the same precinct as the hospitalized voter] or the relative who shall deliver it to the election authority in sufficient time * * *." 10 ILCS 5/19–13 (West 2002).

We first observe that there is nothing in this provision with respect to mailing the absentee ballot. Rather, section 19–13 speaks of delivering the ballot. Given the time frame, it is doubtful whether such absentee ballots could be mailed. In any event, the individuals in section ***615** 19–13 are not similarly situated to the general incapacitated voters. Most notably, these individuals would not have previously requested an absentee ballot and only do so because of a sudden and unusual situation, within five days of the election. The concerns with respect to targeting a certain infirm group and exerting influence and manipulation over these hospitalized individuals is not an issue since no one could foresee their situation and the fact they would have to vote by absentee ballot. This is certainly a very narrow class of individuals where the opportunity for fraud in connection with their voting is not as strong as with an incapacitated individual targeted by a candidate months before an election. Accordingly, we find that the trial court properly concluded that section 19–6 of the Election Code did not violate equal protection principles.

In summary, we find that the trial court did not err in denying Skubisz's motion to dismiss on the basis that section 19–6 of the Election Code was invalid or unconstitutional.

## II. Section 19–5 Challenge

**[21]** Skubisz next contends that the trial court erred in invalidating and deducting from his vote total, on summary judgment, nine votes under section 19–5 of the Election Code on the basis that Kaszak was not identified as having given assistance to the voters where the assistance only involved the giving of instructions.

Skubisz fails to identify which nine votes are at issue, or to which summary judgment ruling he is referring. On July 30, 2003, the trial court granted summary judgment in favor of Qualkinbush on the basis of the lack of disclosure. This ruling involved 18 votes of which Kaszak admitted to punching the ballots of 15 voters. On August 13, the trial court granted summary judgment in favor of Qualkinbush with respect to another voter on the basis of lack of disclosure. The extent of Kaszak's assistance to this voter is not apparent from the record. In any event, this would leave only four potential votes where Kaszak's assistance did not include punching the ballot. Where Skubisz obtains the other five votes is not evident.

**[22]** **[23]** "A reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented * * *, and it is not a repository into which an appellant may foist the burden of argument and research." *Obert v. Saville*, 253 Ill.App.3d 677, 682, 191 Ill.Dec. 740, 624 N.E.2d 928 (1993). "[I]t is neither the function nor the obligation of this court to act as advocate or search the record for error." *Obert*, 253 Ill.App.3d at 682, 191 Ill.Dec. 740, 624 N.E.2d 928. Based upon Skubisz's failure to identify which nine votes he is challenging or to specify the ruling he is appealing from, we decline to address the merits of this challenge.

## ****1201** *****765** ***616** III. Section 19–3 Challenge

**[24]** Skubisz next contends that the trial court erred in striking 6.16 votes for him based on noncompliance with section 19–3 of the Election Code, *i.e.*, the voters failed to sufficiently state the reason for their incapacitation, because the form used by the voting authority failed to substantially comply with the statutory form since it added language and provided two different boxes for physical incapacitation. According to Skubisz, because the deficiencies were due to election authority error, not voter error, the votes cannot be invalidated. Skubisz further maintains that the voters simply failed to provide a "subreason" for their disability, which is not a requirement under the statute.

Qualkinbush contends that the trial court properly invalidated these votes because no reason at all was given for the incapacitation, which is mandatory under the Election Code. Additionally, Qualkinbush argues that the form used by the election authority was in substantial compliance with the statutory form.

  

Skubisz has not specifically identified the votes he challenges, nor how he arrived at the figures he has set forth. Skubisz does, however, refer to the trial court's July 25, 2003, order in connection with Qualkinbush's motion for partial summary judgment on the basis that insufficient reasons were provided on the applications. In her motion, Qualkinbush challenged 51 applications. The trial court held 18 invalid because the applicant failed to provide any reason at all. We will presume it is these 18 votes Skubisz is challenging, as subsequently apportioned by the trial court.

Under section 19–3, sample statutory forms are set forth based on the different reasons for absentee voting. Most of the samples are reason-specific forms, *i.e.*, when the applicant expresses a specific reason for being absent from the polling place. One of the reason-specific forms is entitled "APPLICATION FOR BALLOT BY PHYSICALLY INCAPACITATED ELECTOR." On this form, the applicant must complete the following sentence, "I shall be physically incapable of being present at the polls * * * for the following reasons," which is followed by a blank space. 10 ILCS 5/19–3 (West 2002). Section 19–3 also sets out a sample form entitled "APPLICATION FOR ABSENT VOTER'S BALLOT." This form is nonreason-specific and instructs the applicant to "Check One" of the "following reasons." Nine different reasons are then set forth. One of the choices is, "I am physically incapacitated," followed, on the next line, by the word "Reason(s)" and a blank space. Numerous other choices also include additional blanks that are required to be filled in with respect to that particular choice for voting by absentee ballot. The form at issue in the instant ***617** case is akin to the latter form, although the form here contains 11 different choices. After stating, "Check One," but before setting forth the different choices, the form here also includes the following language: "**(YOU WILL BE REQUIRED TO COMPLETE ANOTHER APPLICATION FOR ABSENTEE BALLOT IF YOU FAIL TO SPECIFY A REASON.)**" Additionally, the form sets forth two different "physically incapacitated" choices. The first states, "I am temporarily physically incapacitated. Reason," followed by a blank space. The second states, "I am permanently physically incapacitated. Reason or Disabled Voter I.D.# ," followed by a blank space.

We disagree with Skubisz that the application at issue here does not substantially comply with the statutory form. The addition of the language typed in bold above does not render the form confusing nor out ****1202** *****766** of compliance with the statutory form. This language merely reinforces the statement above it that a reason must be checked and any additional information necessary to that reason filled in. Further, we do not find that the fact the form identifies two choices for physical incapacitation conflicts with the statutory form or renders the application confusing. The Election Code addresses permanently disabled individuals and the Illinois Disabled Voters Identification Card in various sections, including sections 17–14, 19–12.1, and 19–12.2. 10 ILCS 5/17–14, 19–12.1, 19–12.2 (West 2002). Section 19–12.1 provides, with respect to the absentee ballot application based on permanent disability, that "[s]uch application shall contain the same information as is included in the form of application for ballot by a physically incapacitated elector prescribed in Section 19–3 except that it shall also include the applicant's disabled voter's identification card number." 10 ILCS 5/19–12.1 (West 2002). The election authority in the instant case merely included both types of incapacitation on the nonreason specific form, which is actually in compliance with the Election Code, rather than in conflict with it, since permanent physical incapacitation is another choice/reason under the Election Code for voting by absentee ballot. Accordingly, we find that the form at issue here is in substantial compliance with the Election Code and, particularly, section 19–3.

**[25]** We further disagree with Skubisz that the voters simply failed to provide a subreason for their disability which, according to him, is not required by section 19–3. Whether denoted a subreason or reason, the absentee ballot applicants must identify why they are physically incapacitated. Not only does section 19–3 specifically require this, but case law interpreting section 19–3 holds that such identification is mandatory.

As set forth above, the nonreason-specific statutory form states, "I ***618** will be unable to vote in person at the polls of such precinct for the following *reasons:* (Check one)." (Emphasis added). 10 ILCS 5/19–3 (West 2002). Thereafter, the form identifies various specific choices, one being, "I am physically incapacitated. *Reason(s),*" followed by a blank space for stating the basis for the physical incapacitation, or, if we use Skubisz's term, a subreason. Clearly, the statutory form requires a voter to give two reasons: physical incapacitation and then the reason for their incapacitation be it back, leg, stroke, *etc.*

Moreover, case law has specifically held that a physically incapacitated voter must identify why he or she is incapacitated. In *People ex rel. Ciaccio v. Martin,* 220 Ill.App.3d 89, 162 Ill.Dec. 747, 580 N.E.2d 930 (1991), relied

upon by Qualkinbush, the sole question before the court was "whether the trial court erred in finding mandatory the requirement that a voter applying for an absentee ballot based on physical incapacity state the reason for that incapacity." *Ciaccio,* 220 Ill.App.3d at 90, 162 Ill.Dec. 747, 580 N.E.2d 930. In *Ciaccio,* although 25 absentee ballot applicants failed to state a reason for their physical incapacity as the application required, the county clerk apparently ignored that failure and issued ballots nonetheless. *Ciaccio,* 220 Ill.App.3d at 91, 162 Ill.Dec. 747, 580 N.E.2d 930. The petitioner argued that the court should not disenfranchise the voters since they were not at fault. *Ciaccio,* 220 Ill.App.3d at 91, 162 Ill.Dec. 747, 580 N.E.2d 930. The *Ciaccio* court disagreed, concluding that the language of section 19–3 was "mandatory and the ballots should not have been issued based on the incomplete applications." ****1203 ***767** *Ciaccio,* 220 Ill.App.3d at 91, 162 Ill.Dec. 747, 580 N.E.2d 930. In this regard, the court stated that the "legislature intended that the procedures for obtaining and using an absentee ballot be scrupulously followed" to "enhance the integrity of the electoral process." *Ciaccio,* 220 Ill.App.3d at 91, 162 Ill.Dec. 747, 580 N.E.2d 930. Accordingly, the *Ciaccio* court concluded that the trial court properly deducted the ballots from the electoral count. *Ciaccio,* 220 Ill.App.3d at 92, 162 Ill.Dec. 747, 580 N.E.2d 930.

In *In re Purported Election of Bill Durkin,* 299 Ill.App.3d 192, 233 Ill.Dec. 381, 700 N.E.2d 1089 (1998), relied upon by both parties, the petitioner challenged 185 absentee ballots because the voters failed to state on their applications the reason for their incapacity. *Durkin,* 299 Ill.App.3d at 194, 233 Ill.Dec. 381, 700 N.E.2d 1089. In addressing the issue, the *Durkin* court noted that one case had previously directly addressed the issue, citing *Ciaccio.* Although the *Durkin* court agreed with the *Ciaccio* court's determination "that the requirement that a voter applying for an absentee ballot on the basis of physical incapacity must specify the reason for the physical incapacity on the application form is a mandatory requirement under the Election Code," the *Durkin* court nonetheless concluded that the circumstances present in *Ciaccio* were distinguishable from those in the case before it. *Durkin,* 299 Ill.App.3d at 197, 233 Ill.Dec. 381, 700 N.E.2d1089. Specifically, the appellate ***619** court agreed with the trial court's finding that,"unlike the absentee ballot applications used in *Ciaccio,* the absentee ballot applications used in[*Durkin* ] did not indicate that the applicants should specify the reason for their physical incapacity." *Durkin,* 299 Ill.App.3d at 197, 233 Ill.Dec. 381, 700 N.E.2d 1089. In this regard, the *Durkin* court found that the "the voters who completed the forms did nothing wrong in completing the incorrectly prepared forms," and, thus, their votes should not be disenfranchised. *Durkin,* 299 Ill.App.3d at 197–98, 233 Ill.Dec. 381, 700 N.E.2d 1089. In addition, the *Durkin* court agreed with the trial court's finding that *Ciaccio* was distinguishable because in *Ciaccio* there were allegations of voter fraud, whereas in *Durkin* there were no such allegations. *Durkin,* 299 Ill.App.3d at 198, 233 Ill.Dec. 381, 700 N.E.2d 1089. In this regard, the *Durkin* court stated as follows: "We also note that the trial court stated that its research revealed that in *Ciaccio* the same person had written 24 of the 25 challenged absentee ballot applications in that case." *Durkin,* 299 Ill.App.3d at 198, 233 Ill.Dec. 381, 700 N.E.2d 1089. Ultimately, the *Durkin* court concluded that the "mandatory requirements [of section 19–3] are overcome by the equitable principle of disenfranchisement avoidance" in the case before it. *Durkin,* 299 Ill.App.3d at 198, 233 Ill.Dec. 381, 700 N.E.2d 1089. Clearly, these cases support a conclusion that an absentee ballot applicant must include or identify a reason for his or her physical incapacitation and the failure to do so will generally result in the vote being invalidated.

**[26] [27]** Lastly, with respect to Skubisz's argument that the election authority was at fault, not the voters, we do not agree. First, as discussed above, the application form was not deficient or improper. More importantly, the above cases stand for the proposition that if a space has been provided to identify a reason for one's physical incapacitation, and the voter fails to fill that space in, his or her vote is invalid. *Ciaccio,* 220 Ill.App.3d at 91, 162 Ill.Dec. 747, 580 N.E.2d 930. But see *Durkin,* 299 Ill.App.3d at 197–98, 233 Ill.Dec. 381, 700 N.E.2d 1089 (no space for reason provided). Additionally, we note that the case *sub judice* is akin to *Ciaccio* with respect to the fraud element. As in ****1204 ***768** *Ciaccio,* the evidence presented here demonstrates that, of the 18 votes held invalid, Kaszak himself had filled in the reason for the voter on 11 of the applications. Whether he did so for the other seven applications is not apparent from the record. Thus, clearly the election authority was not at fault.

Accordingly, we find that the trial court did not err in invalidating absentee votes based on the fact the voters failed to specify a reason for their physical incapacitation on their absentee ballot applications.

## IV. Admission of Three Misdelivered Votes

  

**[28]** Skubisz next contends that the trial court abused its discretion in refusing to admit and count three absentee votes because they ***620** were found in the possession of a different precinct. According to Skubisz, the trial court erred in finding that these votes lacked a chain of custody. Skubisz argues that the votes were always in the custody of the election authorities, in their proper form, just in the wrong envelope, and there was no evidence of tampering. Qualkinbush contends that the trial court did not abuse its discretion in refusing to admit these ballots because there was no chain of custody shown for the large envelope in which they were found.

**[29]** **[30]** **[31]** **[32]** **[33]** **[34]** **[35]** In order for ballots to be admissible, an adequate foundation must be laid, establishing that they are the same items as found on election night and that their condition has not substantially changed. *Van Hattem v. Kmart Corp.*, 308 Ill.App.3d 121, 134, 241 Ill.Dec. 351, 719 N.E.2d 212 (1999). A proper foundation may be laid "either through identification of the object by a witness or through the establishment of a chain of custody." *Van Hattem*, 308 Ill.App.3d at 134, 241 Ill.Dec. 351, 719 N.E.2d 212. The chain of custody "must be of sufficient completeness to render it improbable that the object has either been exchanged with another or subjected to contamination or tampering." *Van Hattem*, 308 Ill.App.3d at 134–35, 241 Ill.Dec. 351, 719 N.E.2d 212. The burden rests upon the proponent of the evidence to prove that the ballots have been kept intact. *MacWherter v. Turner*, 52 Ill.App.2d 270, 273, 201 N.E.2d 325 (1964). It is not necessary that an unlawful interference with the ballots be shown. *Talbott v. Thompson*, 350 Ill. 86, 93, 182 N.E. 784 (1932). Rather, it is sufficient to invalidate the ballots as evidence if "the opportunity for interference of unauthorized persons existed." *Talbott*, 350 Ill. at 93, 182 N.E. 784; *MacWherter*, 52 Ill.App.2d at 273, 201 N.E.2d 325. "If, however, the ballots are produced in court, and it clearly appears that they are in the same condition as when counted by the judges of election," they are admissible into evidence. *Talbott*, 350 Ill. at 93, 182 N.E. 784. The question of proper preservation and chain of custody is a factual one based on the circumstances of each case. *Patterson v. Johnston*, 328 Ill. 101, 104, 159 N.E. 211 (1927); *MacWherter*, 52 Ill.App.2d at 274, 201 N.E.2d 325. The trial court's decision with respect to the admissibility of evidence lies within its discretion and we will not disturb that decision absent an abuse of discretion. *Van Hattem*, 308 Ill.App.3d at 135, 241 Ill.Dec. 351, 719 N.E.2d 212.

Here, Skubisz was required to demonstrate a sufficient chain of custody because there was no evidence establishing that the three ballots discovered late on election night as the same ballots discovered in the warehouse. We find that Skubisz failed to demonstrate a sufficient chain of custody. Again, these ballots had been discovered in materials from a precinct not within Calumet City, on or about August 21, during the course of trial, some four months after ****1205** *****769** the election, when the clerk's office was cleaning out its warehouse. The ballots belonged to ***621** precinct three, but were within precinct one materials, and were found within a larger envelope. A note from the election judges from precinct three was found within the envelope discovered on August 21. Although Belmares, the warehouse supervisor, had no knowledge as to what precinct the ballots found on August 21 had been delivered to, Bieganik, a precinct three election judge, testified that Wilheim had delivered an envelope to precinct three, presumably containing three absentee ballots. There was no direct evidence, however, as to what was contained in the envelope delivered to precinct three on election day. Although Bieganik testified that he believed it was three absentee ballots from some indication on the envelope, he was not positive because the judges never opened the envelope. In addition, Bieganik testified that the envelope delivered to precinct three on election day was not the same envelope discovered on August 21 and shown to him in court.

**[36]** Based on the facts of this case, there was no evidence that the ballots discovered on August 21 remained unchanged or were, in fact, the same ballots delivered to precinct three on election night. To the contrary, the evidence was clear that the envelope, at the least, found in the warehouse was not the same envelope delivered to precinct three. There was no evidence identifying for a fact what was contained in the envelope discovered in precinct three. As such, Skubisz could not show there was no opportunity for interference and could not establish a sufficient chain of custody. Accordingly, we find that the trial court did not abuse its discretion in denying admission of these three votes. Even if the trial court erred in denying admission of these votes, we would deem the error harmless because it would not change the result of the trial court's final determination, *i.e.*, the three votes would not tip the scale in favor of Skubisz and render him the winner of the election.

V. Propriety of Fraud Finding & Vote Reduction

Skubisz lastly contends that the trial court erred in finding that he committed fraud and in imposing a full vote reduction (of 38 votes), rather than proportional deduction. Skubisz maintains that the trial court erred in judging credibility and in not believing Kaszak's testimony in certain respects where it was uncontradicted. Skubisz also maintains that the trial court had no right to disregard Rycyzyn's testimony on matters involving voting secrecy and levels of assistance. Skubisz argues that the Election Code was not violated, as argued above, and/or certain provisions are invalid, and there is nothing in the law that says a candidate cannot seek votes. Accordingly, Skubisz contends that the trial court's findings were erroneous. Skubisz also ***622** argues that it was erroneous for the court to impose a full-vote reduction where proportional reduction was the proper remedy.

**[37]** **[38]** **[39]** "In an election contest the finding of the trial court [,] which observed the demeanor of the witnesses while testifying, will not be disturbed on appeal unless it is palpably against the manifest weight of the evidence." *Dirst v. McDonald*, 372 Ill. 498, 502, 24 N.E.2d 361 (1939). See *Park v. Hood*, 374 Ill. 36, 45, 27 N.E.2d 838 (1940); *City of Rolling Meadows v. National Advertising Co.*, 228 Ill.App.3d 737, 747, 170 Ill.Dec. 662, 593 N.E.2d 551 (1991) (the trial court's decision following a bench trial will not be disturbed unless it is against the manifest weight of the evidence). A determination is against the manifest weight of the evidence ****1206** *****770** "where, upon reviewing the evidence in the light most favorable to the prevailing party, the opposite conclusion is clearly apparent or the finding is palpably erroneous or arbitrary and unsubstantiated by the evidence." *Chicago Transparent Products, Inc. v. American National Bank & Trust Co. of Chicago*, 337 Ill.App.3d 931, 940, 272 Ill.Dec. 719, 788 N.E.2d 23 (2002). In other words, a decision is against the manifest weight of the evidence where the facts demonstrate that the trial court should have reached the opposite conclusion. *In re D.D.*, 196 Ill.2d 405, 417, 256 Ill.Dec. 870, 752 N.E.2d 1112 (2001).

**[40]** We initially note, with respect to Skubisz's argument that the trial court erred in judging credibility and disbelieving portions of Kaszak's testimony, that this is the trial court's function in a bench trial. *Dwyer v. Love*, 346 Ill.App.3d 734, 737, 282 Ill.Dec. 100, 805 N.E.2d 719 (2004) (the trial court is the trier of fact in a bench trial). Accordingly, Skubisz's "argument" is simply absurd. The same is true with respect to his argument in connection with Rycyzyn's testimony, particularly as to what assistance is required to be disclosed. This is a legal question, not for Rycyzyn's determination, but rather for the trial court.

**[41]** Substantively, we find that the trial court's decision was not against the manifest weight of the evidence. Specifically, there was overwhelming evidence that Skubisz and his workers engaged in extensive conduct in violation of valid provisions of the Election Code. As the trial court found, it is evident that Skubisz's campaign targeted elderly individuals in an effort to persuade or influence them into voting for Skubisz. Whether or not it is proper to solicit votes, the manner in which Skubisz's campaign did so was clearly improper. Kaszak not only punched the ballots for voters, but was in near proximity to other individuals as they voted, enabling him to see how they cast their ballots and rendering their ability to vote in secret null. Kaszak then mailed most of the ballots in violation of the Election Code. There can be no question, as the trial court found, that Skubisz and his workers' conduct was intentional and deliberate. Based on the ***623** evidence presented, we find that the trial court's decision was not palpably erroneous, arbitrary, or unsubstantiated by the evidence. No rational person could say, on the evidence presented here, that the trial court should have reached an opposite conclusion as to the illegality of these 38 votes. Accordingly, we affirm the trial court's decision.

**[42]** **[43]** **[44]** **[45]** With respect to fraudulent votes, the Illinois Supreme Court has stated:

> "The rule obtains in elections, as in other affairs, that a man shall not profit by his own wrong, nor by that of others done to allow him to reap the benefit. The only means by which approximate justice may be reached when the illegal acts render the result doubtful is to require the party to whose benefit they inure to purge the poll of their effect, or to suffer the penalty of having its majority excluded from his count of votes. (Citation). When the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed." *Lehman v. Hill*, 414 Ill. 173, 178, 111 N.E.2d 120 (1953).

Whether a vote should be apportioned or excluded depends on the circumstances present in the case. *Hileman v. McGinness*, 316 Ill.App.3d 868, 870, 250 Ill.Dec. 620, 739 N.E.2d 81 (2000). Where fraud is involved, exclusion is the procedure of choice. *Hileman*, 316 Ill.App.3d at 870, 250 Ill.Dec. 620, 739 N.E.2d 81. In this regard, when the number of illegal votes cannot be ascertained, an entire poll or ****1207** *****771** absentee ballots may be rejected. *Leach v. Johnson*, 20 Ill.App.3d 713, 718, 313 N.E.2d 636 (1974). See also

  

*Lehman,* 414 Ill. at 178–79, 111 N.E.2d 120 (rejecting an entire poll because fraud permeated the election and the illegal votes could not be segregated). Conversely, when the number of illegal votes can be ascertained, the entire poll need not be rejected. *Frese v. Camferdam,* 76 Ill.App.3d 68, 76, 31 Ill.Dec. 643, 394 N.E.2d 845 (1979). Where fraud is not involved, but it cannot be ascertained for which candidate a ballot was cast, the remedy is apportionment. *Hileman,* 316 Ill.App.3d at 870, 250 Ill.Dec. 620, 739 N.E.2d 81. See, *e.g., Hileman,* 316 Ill.App.3d at 871, 250 Ill.Dec. 620, 739 N.E.2d 81 (holding that apportionment of illegal absentee ballots would be proper if no evidence of fraud were found upon remand); *Webb v. Benton Consolidated High School District No. 103 in Franklin County,* 130 Ill.App.2d 824, 826, 264 N.E.2d 415 (1970) (holding that it was proper to apportion illegal votes where there was no evidence of fraud; particularly, there was no evidence any absentee voter had been influenced or coerced by any election official).

**[46]** Both parties here rely upon *Frese.* Skubisz maintains this case supports apportionment and Qualkinbush maintains it supports deduction of the 38 illegal votes from Skubisz's total. In *Frese,* 39 absentee ***624** ballots were invalidated on the basis of improper delivery and return. *Frese,* 76 Ill.App.3d at 73, 31 Ill.Dec. 643, 394 N.E.2d 845. However, the court specifically noted that there had been no evidence of fraud in connection with these ballots. *Frese,* 76 Ill.App.3d at 73, 31 Ill.Dec. 643, 394 N.E.2d 845. The *Frese* court then affirmed the trial court's apportionment of these votes between the candidates because the number of invalid votes could be ascertained, but it could not be determined who the votes were cast for and, as such, apportionment was the proper remedy. *Frese,* 76 Ill.App.3d at 76, 31 Ill.Dec. 643, 394 N.E.2d 845.

*Frese* does not support apportionment here, as urged by Skubisz, for the simple reason that *Frese* did not involve fraudulent conduct being the basis for declaring the votes invalid as the instant case does. The case *sub judice* clearly falls under the rules of exclusion. The 38 votes were declared invalid because of Skubisz or his workers' fraudulent conduct. Although the trial court acknowledged that "[s]ome may argue that we cannot determine with any degree of accuracy who the voters voted for in the election," we agree with the court that this proposition is "naïve" based on the fact Kaszak punched the votes for so many people and oversaw the remainder of the voters. Thus, based upon the principles espoused in *Lehman,* Skubisz should not be entitled to reap the benefits of his or his workers' wrongdoings and must suffer the penalty of exclusion of these 38 votes from his vote total. Accordingly, we affirm the trial court's method of deduction.

## CONCLUSION

For the reasons stated, we affirm the judgment of the circuit court of Cook County.

Affirmed.

WOLFSON and GARCIA, JJ., concur.

**All Citations**

357 Ill.App.3d 594, 826 N.E.2d 1181, 292 Ill.Dec. 745

Footnotes

1 Since Skubisz has not properly captioned the title of this case, we have corrected it.

2 Only those motions and decisions relevant to the issues on appeal are detailed here. Additionally, the trial court's rationale is not detailed with respect to these motions since our review is *de novo.*

3 During his examination, Skubisz would not answer questions as posed and, at one point, the trial court commented that his answers at trial, and in his deposition, were "pretty elusive."

4 We note that the trial court referred to both 39 and 38 illegal votes throughout the order. However, the court ultimately deducted 38 votes from Skubisz's vote total.

5 The trial court's ruling involved 38 votes, not 34.

6 This case involved an equal protection challenge, not a challenge in connection with the Voting Rights Act or ADA and, therefore, will be discussed below in its proper place.

365 Ill.App.3d 513
Appellate Court of Illinois,
Fourth District.

Bruce ANDREWS, Plaintiff–Appellant,
v.
Richard "Pete" POWELL; Lynn Foster, as Vermilion County Clerk; Betty Seidel, Jack Klage, and Charles Bostic, as Members of the Danville Board of Election Commissioners; and James Wilson, Judy Bodine, and Monte Goodwin, as Members of the Newell Township Canvassing Board, Defendants–Appellees.

No. 4–05–0726.
|
May 5, 2006.

**Synopsis**

**Background:** Losing candidate in election for township highway commissioner, who lost by eight votes, filed petition for election contest and recount, alleging various irregularities. The Circuit Court, Vermilion County, Gordon R. Stipp, J., granted winning candidate's motion to dismiss. Losing candidate appealed.

**Holdings:** The Appellate Court, Appleton, J., held that:

[1] fact that discovery recount revealed that two ballots for winning candidate were not initialed by an election judge established a reasonable likelihood that a full recount would change the results of the election;

[2] fact that some voters in three precincts that were split between two townships were given incorrect voter applications did not support recount petition;

[3] losing candidate failed to plead that a proportionate reduction of the votes cast in those three precincts would likely change the results of the election;

[4] allegations that election officials violated their duties under Election Code did not support candidate's petition contesting validity;

[5] fact that two ballots were not initialed by an election judge did not invalidate the entire election;

[6] allegation that some voters in the three split precincts were given incorrect voter applications was insufficient to support invalidation of the election; and

[7] trial court correctly denied motion for recount on the pleadings.

Affirmed in part and reversed in part.

West Headnotes (21)

**[1] Election Law**
Nature and form of remedy

An action to contest the results of an election is not the same as an action to contest the validity of an election.

Cases that cite this headnote

**[2] Election Law**
Nature and form of remedy

An action to contest the validity of an election centers upon whether the election was valid or invalid, irrespective of the result of the votes cast.

Cases that cite this headnote

**[3] Election Law**
Grounds for and objections to recount

Fact that discovery recount in four of 18 precincts revealed that two ballots for winning candidate in election for township highway commissioner were not initialed by an election judge established a reasonable likelihood that a full recount would change the results of the election, so as to support losing candidate's petition for recount; extrapolating the results of the discovery recount across all 18 precincts would result in a tie between the candidates. S.H.A. 10 ILCS 5/23–23.2.

Cases that cite this headnote

**[4] Election Law**
Indorsement

  

The requirement incumbent upon election judges to initial voted ballots is mandatory and not discretionary.

Cases that cite this headnote

**[5] Election Law**

Indorsement of ballots

Ballots that have not been initialed by an election judge are not to be counted in the tabulation of the results.

Cases that cite this headnote

**[6] Election Law**

Proceedings on recount or inspection

In the context of an election contest, the results of a discovery recount are to be mathematically extrapolated to interpret whether the facts discovered during the discovery stage are significant.

Cases that cite this headnote

**[7] Election Law**

Grounds for and objections to recount

Fact that some voters in three precincts that were split between two townships were given voter applications that directed poll workers to give them ballots for the wrong township did not support recount petition filed by losing candidate in election for highway commissioner of one township, even though two registered voters for such township submitted affidavits stating that they intended to vote for losing candidate but were unable to do so because they were given the wrong ballot; recount of such ballots would not likely change the results of election since voters who were given ballots for the other township did not in fact cast ballots for losing candidate that could be counted. S.H.A. 10 ILCS 5/23–23.2.

Cases that cite this headnote

**[8] Election Law**

Deduction or apportionment of illegal ballots

Process of allocating improperly cast ballots between candidates and proportionately reducing their respective vote totals prevents the disenfranchisement of legitimate voters.

Cases that cite this headnote

**[9] Election Law**

Result of election and effect of irregularities

Losing candidate in election for township highway commissioner, who filed petition to contest the election results, failed to plead that a proportionate reduction of the votes cast in three precincts that were split between two townships would likely change the results of the election, even if some voters in such precincts received voter applications that directed poll workers to give them ballots for the wrong township; candidate made no allegations as to how many voters voted for him and his opponent or how many voters received the wrong ballot, but rather merely stated that it was "highly likely" that some voters were given the wrong ballot. S.H.A. 10 ILCS 5/23–23.2.

Cases that cite this headnote

**[10] Election Law**

Effect of Irregularities or Defects

Errors or omissions by election officials in carrying out the duties imposed by the Election Code can cause an election to be invalidated. S.H.A. 10 ILCS 5/1–1 et seq.

Cases that cite this headnote

**[11] Election Law**

Effect of Irregularities or Defects

Invalidating an election due to errors or omissions by election officials in carrying out their duties under the Election Code is an extremely drastic measure, and Appellate Court must distinguish between garden-variety election irregularities and those errors that are so pervasive as to undermine the integrity of the vote. S.H.A. 10 ILCS 5/1–1 et seq.

Cases that cite this headnote

  

**[12] Election Law**

Errors and irregularities

Allegations by losing candidate in election for township highway commissioner that election officials violated their duties under Election Code by failing to perform a pretest of tabulation technology, misplacing 123 unvoted ballots, and failing to seal ballots in sealed containers with filament tape did not support candidate's petition contesting the validity of the election, absent an allegation of fraud; portions of Code that were allegedly violated were directory, rather than mandatory, since they did not delineate a consequence in the event of a failure to comply with the duties they imposed. S.H.A. 10 ILCS 5/24A–9, 24A–10.1, 24B–9, 24B–10.1.

Cases that cite this headnote

**[13] Election Law**

Dismissal

Absent an accompanying allegation of fraud, petitions contesting the validity of elections that allege only violations of directory, rather than mandatory, provisions of the Election Code are subject to dismissal. S.H.A. 10 ILCS 5/1-1 et seq.

Cases that cite this headnote

**[14] Election Law**

Construction and Operation

When a statute relating to elections specifies what result or penalty will ensue for failing to comply with its provisions, it will be construed as mandatory rather than directory. S.H.A. 10 ILCS 5/1-1 et seq.

Cases that cite this headnote

**[15] Election Law**

Effect of Irregularities or Defects

Mere technical statutory duties relating to elections generally will, after the election, be held to be directory only and a failure to comply therewith will not invalidate the election if such failure does not affect the fairness or merits thereof, nor obstruct nor prevent a free and intelligent vote of the people and ascertainment of the result. S.H.A. 10 ILCS 5/1-1 et seq.

Cases that cite this headnote

**[16] Election Law**

Indorsement of ballots

Fact that two ballots cast in election for township highway commissioner were not initialed by an election judge did not invalidate the entire election. S.H.A. 10 ILCS 5/24A–10.1.

Cases that cite this headnote

**[17] Election Law**

Voting by ballot

Allegation by losing candidate in election for township highway commissioner that some voters in three precincts that were split between two townships were given voter applications that directed poll workers to give them ballots for the wrong county was insufficient to support invalidation of the election; candidate did not allege that voters actually received ballots for the wrong township, there was no evidence that any voters were intentionally given the wrong ballot book or intentionally denied the right to vote for the candidate of their choice, and invalidation of the election might disenfranchise more voters than were given the wrong ballot.

Cases that cite this headnote

**[18] Election Law**

Scope of Inquiry and Powers of Court or Board

An election may be aborted where violations of the election laws were so numerous that no court could determine the number of legal votes for each candidate.

Cases that cite this headnote

**[19] Election Law**

Amendment

Amendments to petitions to contest elections that are filed beyond the statute of limitations are

  

not proper where the original petition cannot withstand a motion to dismiss.

Cases that cite this headnote

**[20] Election Law**

Sufficiency in general

Motion for recount on the pleadings that was filed by losing candidate in election for township highway commissioner was premature in that sufficiency of recount petition had yet to be established. S.H.A. 735 ILCS 5/2–615(e).

Cases that cite this headnote

**[21] Pleading**

Time for proceedings

A motion for judgment on the pleadings generally is made after the issues are settled by the pleadings. S.H.A. 735 ILCS 5/2–615(e).

Cases that cite this headnote

**Attorneys and Law Firms**

****246** Robert G. Day Jr., Law Offices of Day and Day, Peoria, for Appellant.

Samuel J. Cahnman, Springfield, David J. Ryan, Dukes, Ryan, Meyer, Fahey, Freed & Goodwin, Ltd., Danville, for Appellee.

**Opinion**

Justice APPLETON delivered the opinion of the court:

***515** *****246** On July 27, 2005, the Vermilion County circuit court granted defendant Richard Powell's motion to dismiss plaintiff Bruce Andrews's verified petition for election contest and recount. The court also denied Andrews's two motions to amend his petition and his motion for a recount on the pleadings. Andrews appeals the court's ruling as to each of the four motions. We affirm the dismissal of the petition for an election contest but reverse the dismissal of the petition for a recount.

I. BACKGROUND

Andrews filed suit against defendants, the Vermilion County clerk, members of the Danville Board of Election Commissioners (Board), members of the Newell Township Canvassing Board, and Powell, to contest the election for Newell Township highway commissioner. The ***516** election was held in Vermilion County on April 5, 2005. Andrews ran against Powell and was defeated by 8 votes, 1,113 votes to 1,105 votes. These votes came from a total of 18 different precincts: 14 within the City of Danville (Danville precincts) and 4 within Vermilion County, outside the City of Danville (Vermilion County precincts).

Andrews exercised his right under section 22–9.1 of the Illinois Election Code (Code) to a discovery recount of not more than 25% of the precincts within Danville and Vermilion County. 10 ILCS 5/22–9.1 (West 2004) (stating that candidates receiving at least 95% of the number of votes cast for a successful candidate for the same office may file a petition for discovery). On May 9, 2005, the Board conducted the discovery recount in 3 of the 14 Danville precincts and in 1 of the 4 county precincts. See 10 ILCS 5/22–9.1(b) (West 2004) ("ballots * * * shall be counted in specified precincts, not exceeding 25% of the total number of precincts within the jurisdiction of the election authority"). The record does not contain the exact results of the discovery recount in terms of the number of votes counted for each candidate in each respective precinct.

On May 19, 2005, Andrews filed a verified petition for election contest and recount. See 10 ILCS 5/23–20 (West 2004). The petition alleged the following improprieties in one or more of the precincts subject to the discovery recount: (1) two ballots with votes for Powell were not initialed by an election judge, as required by *****247** ****247** section 24A–10.1 of the Code, and were improperly counted for Powell (see 10 ILCS 5/24A–10.1 (West 2004)); (2) 123 unvoted ballots were missing from the fourth precinct; (3) the Board and county clerk violated section 24B–9 of the Code (10 ILCS 5/24B–9 (West 2004)) in that they failed to conduct a pretest of the voting-tabulation equipment; (4) the Board and the county clerk violated section 24B–10.1 of the Code (10 ILCS 5/24B–10.1 (West 2004)) in that, after the close of the polls, they failed to properly seal the ballots cast in the precinct polling places; and (5) Newell Township registered voters in the three Danville precincts were given a preprinted application that directed poll workers

  

to give the voters Blount Township, rather than Newell Township, ballots. (Blount Township voters in turn had voter applications that directed poll workers to give them Newell Township ballots.) Apparently, the three Danville precincts were "split precincts," where some voters belonged to Newell Township and others belonged to Blount Township. Newell Township registered voter Lisa Askins stated, in an affidavit attached to Andrews's petition, that she was improperly given a Blount Township ballot when she went to the polls; that, as a consequence, she was unable to vote for Andrews for Newell Township highway commissioner; and that she had in fact intended to vote for Andrews if given the opportunity.

***517** Andrews alleged, in his petition, that based on information from the discovery recount, the vote-count difference between himself and Powell had decreased from 8 votes to 5 votes and, thus, there was a "reasonable likelihood" that a recount of all 18 precincts would change the result of the election. Andrews also alleged that the additional improprieties called the integrity of the election into question, regardless of their impact on election results. Andrews requested that the court order (1) a full recount of the ballots cast in all 18 precincts and (2) an examination of the relevant voting devices, ballots, precinct binder cards, and voters' affidavits. Andrews also requested an order declaring himself to be the elected Newell County highway commissioner. On May 20, 2005, Powell was served a summons in this case, and copies of the petition were mailed to defendants.

On June 15, 2005, after the 30–day statute of limitations had passed (10 ILCS 5/23–20 (West 2004)), Andrews filed a motion for leave to amend his petition. The proposed amendment sought to add the affidavit of Graham Peck, a Newell Township registered voter. Graham attested he had intended to vote for Andrews but that the absentee ballot he was given did not list Andrews as a candidate. Graham turned in his ballot. However, after talking with his father, who shared the same address and who (unlike Graham) had been given a ballot with Andrews's name on it, Graham realized he may have been given the wrong ballot. Graham called the Board to ask if he had been given the wrong ballot, but the Board informed him he had been given the correct ballot.

On June 16, 2005, the Board filed an answer to Andrews's petition. The Board admitted that two ballots were not properly initialed by election judges and that preprinted applications in the three split precincts contained improper ballot-style designations. However, the Board stated it did not have sufficient knowledge to determine whether any voter actually voted on the wrong ballot due to the incorrect designations. The Board, therefore, denied Andrews's allegation to that effect.

Powell declined to answer Andrews's petition and, on June 21, 2005, filed a motion to dismiss it pursuant to section 2–615 of the Code of Civil Procedure ( *****248** ****248** 735 ILCS 5/2–615 (West 2004)). On June 22, 2005, Andrews filed a motion for recount on the pleadings pursuant to section 23–23.2 of the Code (10 ILCS 5/23–23.2 (West 2004)). Andrews filed a response to Powell's motion to dismiss on July 7, 2005.

At a hearing on July 27, 2005, the trial court denied Andrews's motion to amend the petition (filed June 15, 2005), denied Andrews's motion for a recount on the pleadings, and granted Powell's motion to dismiss the petition for failure to state a cause of action. Andrews's attorney ***518** then made an oral motion for leave to amend the petition, and the court denied this motion as well.

This appeal followed.

## II. ANALYSIS

### A. Legal Sufficiency of the Petition

Andrews argues on appeal that the trial court erred in finding the petition insufficient to contest the results of the election. Andrews also argues that the court erred in dismissing his petition, because the petition alleged facts that, if shown to be true, would be grounds for invalidating the election. We review *de novo* a motion to dismiss for failure to state a cause of action. *Krauss v. Board of Election Commissioners*, 287 Ill.App.3d 981, 983, 224 Ill.Dec. 199, 681 N.E.2d 514, 515 (1997).

**[1]** **[2]** An action to contest the results of an election is not the same as an action to contest the validity of an election. *Ross v. Kozubowski*, 182 Ill.App.3d 687, 694, 131 Ill.Dec. 248, 538 N.E.2d 623, 628 (1989). An action to contest the validity of an election centers upon whether the election was valid or invalid, irrespective of the result of the votes cast. *Ross*, 182 Ill.App.3d at 694, 131 Ill.Dec. 248, 538 N.E.2d at 628, citing *Village of Hinsdale v. County Court of DuPage County*, 281 Ill.App. 571 (1935). Accordingly, we will perform two separate analyses in determining the sufficiency of the petition.

  

1. *Sufficiency of the Petition Contesting Results*

a. Standard by Which Sufficiency Is Measured

The parties debate the appropriate standard to be used in determining the legal sufficiency of the petition for recount. Andrews contends that the petition conforms to sections 23–20 and 23–23.2 of the Code (10 ILCS 5/23–20, 23–23.2 (West 2004)) and is, therefore, sufficient. Section 23–20 governs petitions for election contests for offices other than statewide offices and requires specificity in the pleadings. 10 ILCS 5/23–20 (West 2004). Section 23–23.2 states as follows:

> "A court hearing an election contest pursuant to this [a]rticle or any other provision of the law shall grant a petition for a recount properly filed where, based on the facts alleged in such petition, there appears a *reasonable likelihood* the recount will change the results of the election." (Emphasis added.) 10 ILCS 5/23–23.2 (West 2004).

Though perfunctorily stating that the standard in section 23–23.2 controls, Powell substantively argues that case law requires the petition to allege that a recount *would in fact change* the results of the election. *Hoffer v. School District U–46*, 273 Ill.App.3d 49, 58, 209 Ill.Dec. 819, 652 N.E.2d 359, 365 (1995). Hence, the question becomes, what does "reasonable likelihood" mean?

***519** Prior to the enactment of section 23–23.2 in 1986, common law mandated that an election-contest petition contain a positive and clear assertion, allegation, or claim that a vote recount would in fact change the result of the election. *In re Contest of the Election for the Offices of Governor &* *****249** ***\249** *Lieutenant Governor Held at the General Election on November 2, 1982*, 93 Ill.2d 463, 491, 67 Ill.Dec. 131, 444 N.E.2d 170, 183 (1983) (hereinafter *In re Contest*); *Zahray v. Emricson*, 25 Ill.2d 121, 124, 182 N.E.2d 756, 758 (1962). These seminal cases also indicated that, absent a direct allegation that a recount would in fact change the result of the election, courts would consider petitions that alleged facts showing such a result. *In re Contest*, 93 Ill.2d at 491, 67 Ill.Dec. 131, 444 N.E.2d at 183; *Zahray*, 25 Ill.2d at 125, 182 N.E.2d at 758.

Since the enactment of section 23–23.2 in 1986, appellate courts have struggled to reconcile the old common-law rule that the petition contain an assertion that a recount would in fact change the result of the election with the new statutory rule that a court should grant a recount if the petition alleged facts demonstrating a "reasonable likelihood" that the recount would change the result of the election. 10 ILCS 5/23–23.2 (West 2004). Since 1986, four appellate decisions have touched on the issue: *Gribble v. Willeford*, 190 Ill.App.3d 610, 614–16, 137 Ill.Dec. 881, 546 N.E.2d 994, 997–98 (1989); *O'Neal v. Shaw*, 248 Ill.App.3d 632, 634, 639, 188 Ill.Dec. 210, 618 N.E.2d 780, 782–83, 786 (1993); *Hoffer*, 273 Ill.App.3d at 58, 209 Ill.Dec. 819, 652 N.E.2d at 365; and *DeFabio v. Gummersheimer*, 307 Ill.App.3d 381, 386, 240 Ill.Dec. 447, 717 N.E.2d 540, 544 (1999), *aff'd*, 192 Ill.2d 63, 248 Ill.Dec. 243, 733 N.E.2d 1241 (2000) (supreme court did not address legal-sufficiency issue).

Of the four opinions, only *Gribble* directly asserts that section 23–23.2 alone is the appropriate standard for measuring the legal sufficiency of the petition. *Gribble*, 190 Ill.App.3d at 615–16, 137 Ill.Dec. 881, 546 N.E.2d at 997–98, quoting Ill.Rev.Stat.1985, ch. 46, par. 23–23.2 (after a discussion of the old *In re Contest* standard, states: " '[A] reasonable likelihood the recount will change the results of the election' * * * is the standard against which we must * * * determine whether [the] petition was legally sufficient"). However, even *Gribble* ultimately merges the two standards in its reasoning:

> "Since [petitioner] made positive assertions that a recount * * * *would change* the result of the election, and this *likelihood was reasonable* * * *, the allegations in the petition were legally sufficient under section 23–23.2 * * *." (Emphases added.) *Gribble*, 190 Ill.App.3d at 616, 137 Ill.Dec. 881, 546 N.E.2d at 998.

The standards set forth in *O'Neal* and *DeFabio* are equally uncertain; in point of fact, each candidate cites the two cases in support of his preferred standard. The problem with *Gribble*, as with the other ***520** aforementioned appellate opinions, is that each relevant petition passes both the section 23–23.2 standard and the older, more stringent common-law standard. Only the instant case presents a factual situation in which the petition might arguably pass the more liberal section 23–23.2 standard yet fail the stricter common-law standard.

The court in *Hoffer* finds the two standards to be one and the same. *Hoffer*, 273 Ill.App.3d at 58, 209 Ill.Dec. 819, 652 N.E.2d at 365 ("we interpret [the reasonable-likelihood] standard to mean that, at a minimum, the specific irregularities alleged in the petition *would* be sufficient to change the result" (emphasis added)). For the reasons that

follow, we disagree with *Hoffer* in that respect. For one, the *Hoffer* standard defies a plain-meaning interpretation of the phrase "reasonable likelihood." Further, *Hoffer* improperly relied upon *In re Contest* when it found that section 23–23.2 did not "contravene the pleading requirements as announced in *Zahray* and *In re Contest*." ***250 **250 *Hoffer*, 273 Ill.App.3d at 56, 209 Ill.Dec. 819, 652 N.E.2d at 363. *Hoffer* cites *In re Contest* for the proposition that "a statute should not be construed to effect a change in the settled [case-]law of the State unless its terms clearly require such a construction." *Hoffer*, 273 Ill.App.3d at 56, 209 Ill.Dec. 819, 652 N.E.2d at 363, citing *In re Contest*, 93 Ill.2d at 483, 67 Ill.Dec. 131, 444 N.E.2d at 179. We find, however, that while the above-cited principle was applicable to the 1983 *In re Contest* case, it was no longer applicable in 1995 in *Hoffer*. When the court in *In re Contest* found that "nothing in the language of the statute * * * clearly requir[ed], or even indicat[ed]" that the strict-pleading requirements of *Zahray* should not apply, section 23–23.2 was not yet enacted. *In re Contest*, 93 Ill.2d at 483, 67 Ill.Dec. 131, 444 N.E.2d at 179. Prior to the enactment of section 23–23.2, the strict, common-law pleading standard merely conformed to existing legislation requiring that allegations of fraud, *et cetera*, be pleaded with factual specificity (*i.e.*, sections 23–1.2 and 23–20). In contrast, the strict, common-law pleading standard cannot logically be read in conjunction with section 23–23.2; each clearly states a completely different pleading standard.

In sum, unless our supreme court holds otherwise, a petition's failure to state or allege facts to show that the result of the election would in fact be different is not an absolute bar to further hearing.

b. Whether Andrews Alleged a "Reasonable Likelihood" That a Recount Would Change Results of the Election

1. *Failure To Initial Two Ballots*

**[3]** Andrews claimed that there was a reasonable likelihood that a recount would change the results of the election because two ballots *521 containing a vote for Powell were improperly counted in that they lacked the initials of an election judge.

**[4]** **[5]** It is well established that the requirement incumbent upon election judges to initial voted ballots is mandatory and not discretionary. *Snow v. Natzke*, 140 Ill.App.3d 367, 369, 94 Ill.Dec. 830, 488 N.E.2d 1077, 1078 (1986), *overruled on other grounds*, *Bazydlo v. Volant*, 164 Ill.2d 207, 213, 207 Ill.Dec. 311, 647 N.E.2d 273, 276 (1995); *Craig v. Peterson*, 39 Ill.2d 191, 194, 233 N.E.2d 345, 347 (1968). By corollary, it is well established that ballots that have *not* been initialed by an election judge are not to be counted in the tabulation of the results. *Snow*, 140 Ill.App.3d at 369, 94 Ill.Dec. 830, 488 N.E.2d at 1078. Through the discovery recount process, a total of two votes for Powell were eliminated from his vote total, resulting in a postdiscovery recount reduction of 25% in his electoral majority.

**[6]** The law and practice that has developed concerning discovery recounts and recount petitions provides that the results of the discovery recount are to be mathematically extrapolated to interpret whether the facts discovered during the discovery stage are significant. See *Cummings v. Marcin*, 16 Ill.App.3d 18, 22, 305 N.E.2d 606, 609 (1973). Here, such a process, standing alone, would result in a tie between the candidates. Using a proportional analysis, it is clear that the facts adduced during the discovery recount establish, for the purposes of the recount petition, a reasonable likelihood that the results of the election would change.

2. *Distribution of the Incorrect Ballot Type*

**[7]** The trial court had before it two voter affidavits that averred that the election authority distributed to them a ballot for the road commissioner election in Blount, rather than Newell, Township. Although the trial court did not consider the ***251 **251 second affidavit, for purposes of our discussion we will consider both affidavits. Doing so, however, does not affect the disposition of the petition for an election recount.

**[8]** In the instant case, neither Askins nor Peck *actually* voted for Andrews. In fact, none of the allegedly misdirected Newell Township voters actually voted for either Andrews *or* Powell. Needless to say, Andrews cannot make the legal argument that a recount would be reasonably likely to lead to a change in results based on the *intended* votes of registered voters. Therefore, we interpret Andrews's allegations pertaining to the misdirected voters to be an argument in support of a proportionate reduction in votes. Andrews seems to propose this analysis in his response to Powell's motion to dismiss, filed July 7, 2005. Andrews essentially wishes to apply a proportionate reduction of votes in each of the three split precincts, arguing that this reduction is reasonably likely to change the results of the

  

election. See *Jordan v.* ***522** *Officer*, 170 Ill.App.3d 776, 789, 121 Ill.Dec. 760, 525 N.E.2d 1067, 1075 (1988) (illegal votes must be apportioned in a ratio of each candidate's vote at a given precinct and reduced proportionately from the candidate's vote totals). This process prevents the disenfranchisement of legitimate voters. *Webb v. Benton Consolidated High School District No. 103, Franklin County*, 130 Ill.App.2d 824, 826, 264 N.E.2d 415, 418 (1970). Here, the petition, as well as Peck's affidavit, implies that some Newell Township voters in the split precincts did receive the proper ballot. If the illegality of votes cast does not affect the vote of the entire precinct, the burden of proving for whom the illegal votes were cast, and that they were sufficient in number to change the results of the election, falls on the petitioner. *Jordan*, 170 Ill.App.3d at 788, 121 Ill.Dec. 760, 525 N.E.2d at 1074.

**[9]** In the present case, Andrews does not sufficiently plead that a proportionate reduction in votes would likely change the result of the election. Andrews did not make any allegations as to how many voters received the wrong ballot. He merely stated "it is highly likely that some other Newell Township voters besides Lisa Askins were given Blount Township ballots." Andrews did not allege how many voters voted (either legitimately or illegitimately) for him and Powell, respectively, in each of the split precincts. How many Newell Township voters received Blount Township ballots? How many Blount Township voters received Newell Township ballots? What were the total votes received for each candidate? Without this information, any sort of proportional adjustment of votes would be based on speculation.

Moreover, absent further investigation, we are not certain that it is even appropriate to consider the allegation of misdirected voters in the context of a petition to contest results. If it is impossible to ascertain the number of legal and illegal votes (in this case, the number of Blount Township voters given Newell Township ballots and the number of Newell Township voters given Blount Township ballots), the rule of apportionment is inapplicable, and the question instead becomes whether to void the election. *Jordan*, 170 Ill.App.3d at 788, 121 Ill.Dec. 760, 525 N.E.2d at 1074. Accordingly, we will face this issue again when we discuss the election's validity.

3. *Sufficiency of the Petition Contesting Validity*

**[10]** **[11]** As Powell notes, errors or omissions by election officials in carrying out the duties imposed by the Code can cause an election to be invalidated. *****252** ****252** *Hester v. Kamykowski*, 13 Ill.2d 481, 484–85, 150 N.E.2d 196, 199 (1958). Invalidating an election is, however, an extremely drastic measure, and we must distinguish between garden-variety ***523** election irregularities and those errors that are so pervasive as to undermine the integrity of the vote. *Graham v. Reid*, 334 Ill.App.3d 1017, 1024, 268 Ill.Dec. 777, 779 N.E.2d 391, 396–97 (2002).

Andrews contends that four provisions of the Code were violated, thereby invalidating the election: (1) failure to perform a pretest of tabulation technology (10 ILCS 5/24A–9, 24B–9 (West 2004)); (2) 123 unvoted ballots were missing from the election materials (10 ILCS 5/24A–10.1, 24B–10.1 (West 2004)); (3) failure to seal ballots in sealed containers with filament tape (10 ILCS 5/24A–10.1, 24B–10.1 (West 2004)); and (4) ballots that were not initialed by a judge were improperly counted (10 ILCS 5/24A–10.1, 24B–10.1 (West 2004)). As stated above, we find that Andrews's contention regarding misdirected voters also speaks to the validity of the election.

**[12]** **[13]** **[14]** **[15]** His first three contentions lack merit. Absent an accompanying allegation of fraud, petitions that allege only violations of directory, rather than mandatory, provisions are subject to dismissal. *Goree v. LaVelle*, 169 Ill.App.3d 696, 700, 120 Ill.Dec. 167, 523 N.E.2d 1078, 1081 (1988); *Foster v. Chicago Board of Election Commissioners*, 176 Ill.App.3d 776, 779, 126 Ill.Dec. 293, 531 N.E.2d 920, 922 (1988). When a statute specifies what result or penalty will ensue for failing to comply with its provisions, it will be construed as mandatory rather than directory. *Marquez v. Aurora Board of Election Commissioners*, 357 Ill.App.3d 187, 192, 293 Ill.Dec. 567, 828 N.E.2d 877, 881 (2005). The rule is different when the statute specifies no penalty:

> " ' "[M]ere technical statutory duties relating to elections [generally] will, after the election, be held to be directory only and a failure to comply therewith will not invalidate the election if such failure does not affect the fairness or merits thereof, nor obstruct nor prevent a free and intelligent vote of the people and ascertainment of the result." ' " *Foster*, 176 Ill.App.3d at 779, 126 Ill.Dec. 293, 531 N.E.2d at 922, quoting *Vanderbilt v. Marcin*, 127 Ill.App.2d 192, 197, 262 N.E.2d 42, 44 (1970), quoting *People ex rel. Earley v. Bierman*, 249 Ill.App. 217, 220–21, (1928).

  

Andrews's first three allegations pertain to merely technical duties; the statute delineates no consequences in the event of failure to comply with those duties. See 10 ILCS 5/24A–9, 24A–10.1 (West 2004). Absent an allegation of fraud, we cannot find that the irregularities prevent an ascertainment of the people's will.

**[16]** Andrews's fourth allegation, concerning initialed ballots, cannot invalidate the election. The Code provides merely that all uninitialed ballots must be invalidated, not that the presence of two uninitialed ballots must invalidate the entire election. 10 ILCS 5/24A–10.1 (West 2004).

**[17]** ***524** Finally, we address the question of whether Andrews's allegations concerning misdirected voters in split precincts, if true, are sufficient to nullify the election in the three split precincts. We find they are not. Andrews alleges that all Newell Township voters in the three split precincts were given voter applications that directed poll workers to give them Blount Township ballots. Andrews does not allege that all Newell Township voters actually received Blount Township ballots. Other courts have found such allegations to be insufficient to withstand dismissal of the petition. See *****253** ****253** *Carbonara v. North Palos Fire Protection District*, 192 Ill.App.3d 275, 276–77, 279, 139 Ill.Dec. 544, 548 N.E.2d 1100, 1101, 1103 (1989) (petition alleged that as many as 25 voters were purposefully or negligently directed to the wrong voting booth); see also *Graham*, 334 Ill.App.3d at 1024–25, 268 Ill.Dec. 777, 779 N.E.2d at 397 (trial court's nullification of election was improper where votes in split precincts were not counted since voters were allegedly given the wrong ballot). The defeated candidate in *Graham* attached the affidavits of six voters stating they received the wrong ballot. *Graham*, 334 Ill.App.3d at 1023, 268 Ill.Dec. 777, 779 N.E.2d at 396. The court in *Graham* reasoned that there was no evidence that the voters had intentionally been given the wrong ballot, had asked for or were denied the correct ballot, or were otherwise intentionally denied the right to vote for the candidate of their choice. *Graham*, 334 Ill.App.3d at 1023–24, 268 Ill.Dec. 777, 779 N.E.2d at 396. We do find Peck's statement that he questioned election officials regarding his ballot to be troublesome (assuming that we may even consider Peck's affidavit). However, the original petition attached only a single affidavit, and, like *Graham*, there was no indication that voters were intentionally given the wrong ballot book or were intentionally denied the right to vote for the candidate of their choice.

**[18]** The parties have cited no case holding that an error in ballot distribution, the magnitude of which is unknown, mandates that an election can or should be invalidated. Our research has found no such case in Illinois. While an election may be aborted where violations of the election laws were so numerous that no court could determine the number of legal votes for each candidate, this is not the case here. *Cf. Drolet v. Stentz*, 83 Ill.App.2d 202, 207, 227 N.E.2d 114, 116 (1967). It cannot be said that everyone in the affected precinct received the wrong ballot. Obviously, Peck's father received the correct ballot. While election officials can and do make mistakes, at some point a voter, who intends to vote for a particular candidate and is handed a ballot form that does not include that candidate, has some obligation to know in which township he resides and to inquire of the election officials why his or her ballot does not contain the name of the favored candidate.

***525** Such inadvertence, standing alone, is not sufficient to invalidate the entire election or even the election in the affected precinct. To do so would possibly disenfranchise more votes than those who were denied the opportunity to vote for Andrews. See *Graham*, 334 Ill.App.3d at 1025, 268 Ill.Dec. 777, 779 N.E.2d at 397 (finding "no evidence of any systematic disenfranchisement of the voters"); *Morandi v. Heiman*, 23 Ill.2d 365, 372–73, 178 N.E.2d 314, 318 (1961) ("the policy of directory construction should be applied to avoid disenfranchisement of the totally innocent * * * voter").

For these reasons, we find that the petition was insufficient to contest the election's validity.

B. Motions To Amend

**[19]** In accordance with our ruling that Andrews's petition is not legally sufficient as to the invalidation of the election, we find the trial court properly denied his motions to amend. Amendments to petitions to contest filed beyond the statute of limitations are not proper where the original petition cannot withstand a motion to dismiss. *Evans v. Preckwinkle*, 259 Ill.App.3d 187, 190–91, 201 Ill.Dec. 298, 636 N.E.2d 730, 732–33 (1994), citing *Zahray*, 25 Ill.2d at 124, 182 N.E.2d at 758; see also *Ross*, 182 Ill.App.3d at 696, 131 Ill.Dec. 248, 538 N.E.2d at 629, citing *Village of Hinsdale*, 281 Ill.App. at 588.

  

***254 **254 C. Motion for a Recount on the Pleadings

**[20]** **[21]** The trial court properly denied Andrews's motion for recount on the pleadings. In violation of Supreme Court Rule 341(e)(7) (Official Reports Advance Sheet No. 21 (October 17, 2001), R. 341(e)(7), eff. October 1, 2001), Andrews fails to cite any authority for the proposition that his motion for recount on the pleadings under section 23–23.2 should be treated any differently than any other motion for judgment on the pleadings (735 ILCS 5/2–615(e) (West 2004)). The court based its decision on the fact that the motion was premature, given that the sufficiency of the motion had yet to be established. A motion for judgment on the pleadings generally is made after the issues are settled by the pleadings. *Oak Park National Bank v. Peoples Gas Light & Coke Co.*, 46 Ill.App.2d 385, 393, 197 N.E.2d 73, 77 (1964).

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's dismissal of *526 Andrews's petition for an election contest but reverse the dismissal of his petition for a recount.

Affirmed in part and reversed in part.

MYERSCOUGH and KNECHT, JJ., concur.

**All Citations**

365 Ill.App.3d 513, 848 N.E.2d 243, 302 Ill.Dec. 243

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2012 IL App (1st) 112771
Appellate Court of Illinois,
First District, Fifth Division.

Robert I. SHERMAN, Celeste S. Sherman, Mary F. Day, Robert B. Dinnerman, and Ronald P. Mraz, Petitioners–Appellants,
v.
INDIAN TRAILS PUBLIC LIBRARY DISTRICT, a Body Politic; Gene Looft, Henry Hackney, Jr., Wally Salganik, Doris Wagner, Louise Barnett, Earl Sabes and Patricia Murray, as Trustees of Indian Trails Public Library District; David Orr, as Cook County Clerk; Willard R. Helander, as Lake County Clerk, Respondents–Appellees.

No. 1–11–2771.
|
Aug. 3, 2012.

**Synopsis**

**Background:** Voters brought action against public library district challenging election results on referendum question concerning property tax increases, and seeking to have election declared null and void. The Circuit Court, Cook County, Mark J. Ballard, J., dismissed voters' election contest petition, and they appealed.

**Holdings:** The Appellate Court, Epstein, P.J., held that:

[1] voters failed to allege any mistakes, violations, or fraud in the conduct of the election itself, as required to state an election contest claim;

[2] voters failed to allege any facts to support a finding of an impingement of their right to vote, that their votes were improperly counted, had any less influence than any other vote, or that the conduct of the election process was improper in any manner, as required to state a cause of action for violation of their right to vote; and

[3] failed to allege any facts sufficient to form the basis for a cause of action for a violation of voters' first amendment civil rights, including their right to free speech and to associate for political purposes.

Affirmed.

West Headnotes (7)

**[1] Appeal and Error**
Cases Triable in Appellate Court

**Appeal and Error**
Striking out or dismissal

When reviewing a motion to dismiss for failure to state a cause of action under which relief could be granted, the Appellate Court accepts as true all well-pled facts and interprets the allegations in the complaint in the light most favorable to the plaintiff; the Appellate Court reviews the circuit court's order granting the motion to dismiss de novo. S.H.A. 735 ILCS 5/2–615.

Cases that cite this headnote

**[2] Election Law**
Deduction or apportionment of illegal ballots

Voters seeking to nullify referendum election based upon the use of public funds for advocacy in violation of campaign financing and disclosure laws failed to allege any mistakes, violations, or fraud in the conduct of the election itself, as required to state an election contest claim. S.H.A. 10 ILCS 5/23–20; 10 ILCS 5/9–25.1.

Cases that cite this headnote

**[3] Constitutional Law**
Campaign finance, contributions, and expenditures

**Municipal Corporations**
Limitation on use of funds or credit in general

Voters seeking to nullify referendum election on the basis that public library district used public funds for advocacy in violation of campaign financing and disclosure laws failed to allege any facts to support a finding of an impingement of their right to vote, that their votes were improperly counted, had any less influence than

  

any other vote, or that the conduct of the election process was improper in any manner, as required to state a cause of action for violation of their right to vote. U.S.C.A. Const.Amends. 1, 14; S.H.A. 10 ILCS 5/9–25.1.

Cases that cite this headnote

**[4] Constitutional Law**

Voting rights and suffrage in general

Each voter's right to cast an equally weighted vote is a fundamental right at the core of democracy. U.S.C.A. Const.Amends. 1, 14.

Cases that cite this headnote

**[5] Civil Rights**

Particular cases and contexts

"Willful conduct" as required for finding of infringement of voting rights means, at a minimum, that the defendants acted with the intent of subverting the electoral process or impairing a citizen's right to vote.

Cases that cite this headnote

**[6] Constitutional Law**

Campaign finance, contributions, and expenditures

**Constitutional Law**

Expenditures

**Municipal Corporations**

Limitation on use of funds or credit in general

Voters seeking to nullify referendum election on the basis that public library district used public funds for advocacy in violation of campaign financing and disclosure laws failed to allege any facts sufficient to form the basis for a cause of action for a violation of voters' First Amendment civil rights, including their right to free speech and to associate for political purposes. U.S.C.A. Const.Amend. 1; S.H.A. 10 ILCS 5/9–25.1.

Cases that cite this headnote

**[7] Appeal and Error**

Constitutional questions

The mere fact that arguments offered for the first time on appeal raise constitutional questions does not prevent the otherwise proper application of the forfeiture rule; in civil cases, constitutional issues not presented to the trial court are deemed forfeited and may not be raised for the first time on appeal.

4 Cases that cite this headnote

**Attorneys and Law Firms**

***1174** Andrew Finko, Chicago, for appellants.

Kenneth M. Florey, Nanci N. Rogers, Robbins, Schwartz, Nicholas, Lifton & ***1175** Taylor, Ltd., Christopher J. Dallavo, Schueler, Dallavo & Casieri, Chicago, for appellee Indian Trails Public Library District.

**OPINION**

Presiding Justice EPSTEIN delivered the judgment of the court, with opinion.

****866** ¶ 1 Petitioners Robert I. Sherman, Celeste S. Sherman, Mary F. Day, Robert B. Dinnerman, and Ronald P. Mraz appeal the circuit court of Cook County's decision to dismiss their election contest petition pursuant to section 2–615 of the Code of Civil Procedure (735 ILCS 5/2–615 (West 2010)) for failure to state a cause of action. We affirm.

¶ 2 BACKGROUND

¶ 3 The relevant facts are not disputed. On April 2, 2011, the voters of the Indian Trails library district, including petitioners, voted on a referendum question concerning property tax increases designated for the library district. A "yes" vote on the referendum would result in an increase to 9.8% for 2011. A "no" vote would leave the extension limitation at the statutory level that would be calculated as the lesser of 5% or the percentage increase in the Consumer Price Index over the prior levy year (or 1.438%). The Cook County clerk issued the official proclamation of the referendum results on April 26, 2011, with 2,132 "yes" votes and 1,985 "no" votes.

  

¶ 4 On May 18, 2011, petitioners filed an election contest petition in the circuit court of Cook County against respondents, Indian Trails Public Library District, a body politic (Library District); Gene Looft, Henry Hackney, Jr., Wally Salganik, Doris Wagner, Louise Barnett, Earl Sabes and Patricia Murray, as trustees of Indian Trails Public Library District; David Orr, as Cook County clerk; and Willard R. Helander, as Lake County clerk, alleging that the Library District or its trustees violated certain campaign financing and disclosure laws. The individual trustees were later dismissed from the suit by agreement. Specifically, petitioners alleged that the Library District decided and voted to take steps to support and encourage passage of the referendum and expended public funds for the purpose of promoting, and advocating for, the passage of the referendum. Petitioners sought to have the election declared null and void. Petitioners additionally sought to "permanently restrain and enjoin [the Library District] from any further and additional illegal expenditures of public funds for partisan political and other private purposes."

¶ 5 On June 30, 2011, pursuant to section 2–615 of the Code of Civil Procedure (735 ILCS 5/2–615 (West 2010)), the Library District filed a motion to dismiss the election contest petition for failure to state a cause of action under which relief could be granted.

¶ 6 After full briefing and oral arguments, the circuit court granted the motion to dismiss on July 29, 2011. On August 24, 2011, the court denied petitioners' motion to reconsider. Petitioners filed this timely appeal.

## ¶ 7 ANALYSIS

### ¶ 8 Standard of Review

**[1]** ¶ 9 When reviewing a section 2–615 motion to dismiss, we accept as true all well-pled facts and interpret the allegations in the complaint in the light most favorable to the plaintiff. *Seith v. Chicago Sun–Times, Inc.*, 371 Ill.App.3d 124, 133, 308 Ill.Dec. 552, 861 N.E.2d 1117 (2007). This court reviews the circuit court's order granting the section 2–615 motion to dismiss *de novo*. *Id.*

***1176 **867** ¶ 10 Election Contest Petition

**[2]** ¶ 11 Section 23–20 of the Election Code states, in pertinent part, that the petition filed by a person who desires to contest an election "shall allege that the petitioner voted at the election, and that he believes that a mistake or fraud has been committed in specified precincts in the counting or return of the votes for the office or proposition involved or that there was some other specified irregularity *in the conduct of the election* in such precincts, and the prayer of the petition shall specify the precincts in which the recount is desired." (Emphasis added.) 10 ILCS 5/23–20 (West 2010).

¶ 12 It is undisputed that public funds cannot be used to urge persons to vote in a particular way. The Election Code states:

> "No public funds shall be used to urge any elector to vote for or against any candidate or proposition, or be appropriated for political or campaign purposes to any candidate or political organization. This Section shall not prohibit the use of public funds for dissemination of factual information relative to any proposition appearing on an election ballot, or for dissemination of information and arguments published and distributed under law in connection with a proposition to amend the Constitution of the State of Illinois." 10 ILCS 5/9–25.1 (West 2010).

See also *Citizens Organized to Save the Tax Cap v. State Board of Elections*, 392 Ill.App.3d 392, 331 Ill.Dec. 196, 910 N.E.2d 605 (2009).

¶ 13 There is no authority cited by petitioners, however, for nullifying an election based upon the use of public funds for advocacy. Petitioners have failed to cite any legal authority in Illinois, or any other jurisdiction (state or federal), where a court has invalidated an entire election on this basis.

¶ 14 Moreover, as respondents note, "the General Assembly has specifically provided that prosecution under Article 9 for campaign financing violations may be commenced by a state's attorney or the Attorney General, and that the State Board of Elections may impose a fine or require remedial action of an offender." See 10 ILCS 5/9–3, 9–10, 9–26 (West 2010).

¶ 15 Article 17 of the Election Code, "Conduct of Elections and Making Returns," deals with "the actual conduct of elections and making of returns from and in the election precincts." 10 ILCS Ann. 5/art. 17, Official Comments on Drafting Commission, at 274 (Smith–Hurd 2010); see 10

ILCS 5/17–1 *et seq.* (West 2010). As respondents and the trial court noted, the petition did not allege any mistakes, violations or fraud in the conduct of the election itself. Petitioners instead allege that campaign financing laws and disclosure laws were violated. Taking petitioners' allegations as true, they have failed to state a claim for an election contest claim. Petitioners assert in their petition that "because of the mistakes made and the frauds and other prohibited and illegal acts committed in the conduct of the April 5, 2011 Library District referendum election that said election was so corrupted that it failed to obtain and determine a free, fair and untrammeled expression of the voters' choice [and] must be declared null and void." Petitioners, however, fail to allege any facts regarding any error or fraud in the "conduct" of the election by election authorities. They do not allege that the Library District administered the election, or caused the election to be administered, in a fraudulent or irregular manner, or that the Library District compromised the actual ballots or the act of voting. We conclude that the alleged violations of the Election Code do not form the basis for a ****868 *1177** cause of action for an election contest petition.

**[3]** ¶ 16 Petitioners have also failed to state a claim for violation of the state or federal constitution. Petitioners have described their constitutional rights with respect to elections and include in their brief on appeal those "[c]onstitutional implications of the [Library] District's political activities to support the Referendum through use of public funds." Petitioners assert on appeal that "the [Library] District's use of public funds for political purposes has violated petitioners' First and Fourteenth amendment rights to vote and associate for the common expression of political ideas."

**[4]** **[5]** ¶ 17 Petitioners correctly state that "[e]ach voter's right to cast an equally weighted vote is a fundamental right at the core of our democracy." The Library District agrees and, citing *Goree v. LaVelle,* 169 Ill.App.3d 696, 699, 120 Ill.Dec. 167, 523 N.E.2d 1078 (1988), notes that "[i]n an election, the constitutional requirement is for each voter to have the right and opportunity to cast his or her vote without any restraint and for his or her vote to have the same influence as the vote of any other voter." Petitioners have failed to provide a reasoned argument as to why the Library District's activities violated their right to vote. Before the trial court and on appeal, respondents noted as follows:

> "Infringement of voting rights found to have risen to this constitutional level include dilution of votes by reasons of malapportioned voting districts or weighted voting systems, purposeful or systematic discrimination against voters of a certain class or political affiliation, or other 'willful conduct which undermines the organic process by which candidates are elected.' "

See *Hennings v. Grafton,* 523 F.2d 861, 864 (7th Cir.1975). Petitioners assert that the Library District's conduct was "willful conduct which undermine [d] the organic [election] process." " 'Willful conduct' means, at a minimum, that the defendants acted with the intent of subverting the electoral process or impairing a citizen's right to vote." *Parra v. Neal,* 614 F.3d 635, 637 (7th Cir.2010). Petitioners have alleged no facts to support any such infringement of their right to vote, nor have they alleged that their votes were improperly counted or had any less influence than any other vote. As noted earlier, petitioners have failed to include any allegation that the conduct of the election process was improper in any manner. Although petitioners assert that individual votes "might" be impermissibly diluted by the expenditure of public funds to advocate a substantive position on a referendum question, respondents note that petitioners provided no authority in support of their contention.

¶ 18 Before the trial court, petitioners relied on the case of *Smith v. Cherry,* 489 F.2d 1098 (7th Cir.1973) (*per curiam* ), in support of their argument that voters' rights had been violated warranting nullification of the referendum election. The trial court found the reliance unpersuasive.

¶ 19 In *Smith,* an unsuccessful candidate for the Democratic nomination for the Illinois Senate and a voter in the primary challenged the results of the primary election, alleging that the winner was a "sham" candidate in that he intended to, and did, run as a stand-in so that he could use his popularity to win the nomination and then withdraw so that party insiders could fill the vacancy with a candidate of their choosing. *Smith,* 489 F.2d at 1100. The *Smith* court noted that the fraud involved was intimately connected with the face of the ballot and had the purpose and effect of deceiving voters as to the actual effect of their votes because a vote for a sham ****869 *1178** candidate was really a vote for another, undisclosed person. *Id.* at 1101. By contrast, the instant case does not involve a facial fraud. In granting the Library District's motion to dismiss, the trial court noted, "the referendum question at issue was written plainly and unambiguously and was set out on the face of the ballot using prescribed wording required by the Property Tax Extension Limitation Law." See 35 ILCS 200/18–205 (West 2010).

¶ 20 Petitioners contend "there are no prior decisions that could be located by counsel, regarding a public body taking such liberties with public funds." Yet petitioners cite *Elsenau v. City of Chicago*, 334 Ill. 78, 165 N.E. 129 (1929). In *Elsenau*, the court explained that the conduct of a campaign before an election for purpose of exerting influence on voters was not a "corporate purpose" of the municipality and the appropriation for advertising in support of proposed bond issues to be submitted to voters was unauthorized. However, the plaintiff taxpayer in *Elsenau* sought only to enjoin the issuance of warrants and the payment of money for the advertisements and did not seek to overturn an election. Contrary to petitioners' assertion, there is a substantial body of case law on the issue of a public body taking "liberties" with public funds. See, *e.g.*, *Kidwell v. City of Union*, 462 F.3d 620 (6th Cir.2006) (city did not improperly compel taxpayers to support its positions by expending public funds to advocate for them); *Alabama Libertarian Party v. City of Birmingham*, 694 F.Supp. 814 (N.D.Ala.1988) (city's use of tax revenues to promote passage of measures to enhance city services did not violate first amendment right of association); *Lash v. City of Union*, 104 F.Supp.2d 866 (S.D.Ohio 1999) (city's use of funds to promote tax levy did not violate taxpayers' free speech rights but its use of public funds to oppose citizen initiative to defeat city counsel's proposal for new fire department did violate rights); *Stanson v. Brown*, 49 Cal.App.3d 812, 122 Cal.Rptr. 862 (1975) (dismissing complaint for failure to state cause of action where complaint sought, among other things, to set aside election based on parks and recreation director's expenditure of public funds to promote passage of bond act, but complaint was deficient under relevant section of state's election code); see also Angela C. Poliquin, *Kromko v. City of Tucson: Use of Public Funds to Influence the Outcomes of Elections*, 46 Ariz. L. Rev. 423 (2004). These cases stand for the proposition that the unlawful advocacy of a governmental entity may be enjoined and fined. Not surprisingly, however, we have found no case where a court set aside an election on that basis. As respondents note, the distinction is enormous. Although this court does not condone the Library District's actions at issue here, setting aside an election would disenfranchise all voters who voted in support of the referendum and who did nothing wrong in exercising their right to vote. Petitioners, having failed to allege that their votes were improperly counted or had any less influence than any other vote, and having failed to allege any facts to support an infringement of their right to vote, have failed to state a cause of action for violation of their right to vote.

**[6]** **[7]** ¶ 21 On appeal, petitioners have also asserted for the first time that the Library District's actions violated petitioners' first amendment civil rights, including their right to free speech and to associate for political purposes. The Library District asserts that the issue has been forfeited where petitioners failed to raise the issue below and where the trial court allowed petitioners the opportunity to replead their petition but they declined to do so and instead filed the instant appeal. The mere fact that arguments offered for the first time on appeal raise constitutional questions does not prevent the otherwise ****870** ***1179** proper application of the forfeiture rule. See, *e.g.*, *People v. 1998 Lexus GS 300*, 402 Ill.App.3d 462, 467, 341 Ill.Dec. 372, 930 N.E.2d 582 (2010). In civil cases, constitutional issues not presented to the trial court are deemed forfeited and may not be raised for the first time on appeal. See, *e.g.*, *Alarm Detection Systems, Inc. v. Village of Hinsdale*, 326 Ill.App.3d 372, 385, 260 Ill.Dec. 599, 761 N.E.2d 782 (2001); *cf. Forest Preserve District v. First National Bank of Franklin Park*, 2011 IL 110759, ¶ 27, 356 Ill.Dec. 386, 961 N.E.2d 775 (party's failure to challenge the constitutionality of a statute in the circuit court normally forfeits that challenge on appeal in a civil case). In any event, as the Library District correctly notes, even if these arguments had been raised below, there are no well-pled facts in the petition that could form the basis for a cause of action for petitioners' personal civil rights.

¶ 22 Invalidating an election is a remedy that courts have recognized as an extremely drastic measure. See, *e.g.*, *Andrews v. Powell*, 365 Ill.App.3d 513, 522, 302 Ill.Dec. 243, 848 N.E.2d 243 (2006). We agree with the Library District that petitioners have failed to allege any acts or omissions that, even if taken as true, form a legal basis for invalidating each and every vote cast by electors in the April 5, 2011 referendum election. The trial court correctly granted respondents' motion to dismiss the election contest petition. The judgment of the circuit court of Cook County is affirmed.

¶ 23 Affirmed.

Justices McBRIDE and HOWSE concurred in the judgment, and opinion. *

**All Citations**

2012 IL App (1st) 112771, 975 N.E.2d 1173, 363 Ill.Dec. 864

  

Footnotes

* Justice Joseph Gordon participated in this case. Following his passing, Justice McBride has replaced him on the panel and has reviewed the briefs.

2013 IL App (3d) 120963-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois,
Third District.

Joseph E. ROUDEZ, Petitioner–Appellant,
v.
Vivian E. COVINGTON, as a candidate for Mayor of the Village of University Park; Larry "LB" Brown, as a candidate for Mayor of the Village of University Park; and Nancy Schultz Voots, as Will County Clerk, and David Orr as Cook County Clerk, constituting the Election Authorities for the Village of University Park, Illinois, for the Consolidated Election held on April 5, 2011, Respondents–Appellees.

No. 3–12–0963.
|
Sept. 10, 2013.

Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, Circuit No. 11–MR–479, Barbara Petrungaro, Judge, Presiding.

**ORDER**

Justice CARTER delivered the judgment of the court:

***1** ¶ 1 *Held:* In a case involving an election contest to the results of the April 5, 2011, mayoral race in University Park, the circuit court found, *inter alia,* that one challenged ballot was properly counted and three provisional ballots were properly not counted. Accordingly, the circuit court dismissed the verified election contest petition and granted a motion by the respondent to have her declared the winner of the mayoral race. On appeal, the appellate court affirmed the circuit court's judgment.

¶ 2 The petitioner, Joseph E. Roudez, filed a verified election contest petition against the respondents, Vivian E. Covington, Larry "LB" Brown, Nancy Shultz Voots, and David Orr. Roudez contested the University Park mayoral election, which was conducted on April 5, 2011, and which resulted in Covington winning the election by two votes. In relevant part, Roudez argued that Jermalle Wright's vote should not have been counted and that the provisional ballots of Sidney Bell, Darla Boyd, and Aaron Parker should have been counted. After a hearing, the circuit court found that Wright's vote was properly counted and that the provisional ballots of Bell, Boyd, and Parker were properly not counted. On appeal, Roudez challenges the court's findings on Wright's ballot and the provisional ballots of Bell, Boyd, and Parker. We affirm.

¶ 3 FACTS

¶ 4 On April 5, 2011, a mayoral election was held in University Park which resulted in Covington receiving two more votes than Roudez. On May 25, 2011, Roudez filed a verified election contest petition, alleging that several ballots had been improperly counted and others had been improperly not counted, and requested a full recount. In part, Roudez argued that Jermalle Wright's vote should not have been counted because he voted from an address—548 Allan Lane—at which he did not reside, and also that the provisional ballots of Aaron Parker, Sidney Bell, and Darla Boyd should have been counted.

¶ 5 On April 24–25, 2012, the circuit court held a hearing on Roudez's petition. The evidence presented at the hearing that is relevant to the disposition of this appeal is as follows. Richard Cobbins testified that he was Jermalle Wright's landlord between November 2009 and July 2011 in University Park. Cobbins stated that Wright and his family moved out in July 2011 over a period of less than 30 days after Cobbins had Wright evicted. It was Cobbins' belief that Wright in fact resided at the rental property at 657 Sullivan Lane in University Park between November 2009 and July 2011. Roudez presented no other evidence on Jermalle Wright's residency.

¶ 6 Sidney Bell, Jr., testified that he had lived at 1024 Monterey Court in University Park for approximately two years. Prior to that time, he lived at 8044 South Woodlawn Avenue in Chicago. He used to live at 8100 South Woodlawn, but that was his father's address and he moved out of that house at age 23 to 8044 South Woodlawn. However, he agreed that his signature was on a November 2010 provisional ballot in Cook County on which he listed his address as

8100 South Woodlawn. He voted in Cook County because he did not know where to vote in Will County from his new University Park address, even though he had registered to vote from his University Park address around September 2010. He claimed that he did not receive his University Park voter registration card until December 2010 or January 2011. When he went to vote in the April 2011 election in University Park, he was told that his name was not in the voter registry. He was given a provisional ballot, which he filled out and turned in. He was not told of any additional steps that he had to take to ensure that his vote would be counted, and he did not take any such action.

***2** ¶ 7 Darla Boyd testified that she had lived at 689 Sullivan Lane in University Park for approximately 10 years. She registered to vote from that address in 2004. At the time of the hearing, she was in the process of purchasing a home in Sauk Village in Cook County on a rent-to-buy agreement. She did not live at that house; her daughter and her daughter's son lived there. While Boyd had a driver's license with her University Park address on it, she also had a state identification card that had the Sauk Village address on it. Boyd testified that she applied for the identification card in 2009 because she needed it to be able to pay the utilities on the Sauk Village home, which were in her name. She never intended to live at the Sauk Village home, and when she applied for the identification card, she told the Secretary of State's office employee that she did not want to change her voter registration. When she went to vote in the April 2011 election in University Park, she was told that her name was not in the voter registry. She was given a provisional ballot, which she filled out and turned in. She was not told of any additional steps that she had to take to ensure that her vote would be counted, and she did not take any such action.

¶ 8 Aaron Parker testified that he has resided at 515 Barrington Court in University Park for approximately five years. He completed a voter registration form to vote from that address in January 2011 when he applied for an Illinois Link card with the Department of Human Services in Will County. He did not read the entire voter registration form, including the section that informed the applicant that if he or she did not receive a confirmation within two weeks, he or she should contact the County Clerk or the Board of Election Commissioners. Parker testified that he in fact did not receive a registration confirmation within two weeks of filling out the application, but he did not take any responsive action. When he went to vote in the April 2011 election in University Park, he was told that his name was not in the voter registry. He was given a provisional ballot, which he filled out and turned in. He was not told of any additional steps that he had to take to ensure that his vote would be counted, and he did not take any such action.

¶ 9 Judith Wiedmeyer testified that she was the chief deputy clerk at the Will County Clerk's Office. Among other things, Wiedmeyer testified regarding the process for evaluating whether provisional ballots would be counted. Initially, there must be a name, address, and signature on the sealed envelope. Then, there are three steps taken to determine whether the provisional ballot is counted. First, the Will County Clerk's Office searches their voter registration database by name, address, and/or birth date. Second, if the initial search produces no results, then the Secretary of State's database is searched. Third, if the Secretary of State's database produces no results, the Illinois Voter Registration System is searched, which is a database containing all registered voters for the entire state. Wiedmeyer testified that these procedures are performed according to statutory mandates.

***3** ¶ 10 Wiedmeyer further testified regarding what occurs if the voter's name is found in any of the databases. She stated:

> "if it was in our database and the voter simply did not change their address but they did go to the correct polling place for their new address, then the ballot would count. If they were an actively [*sic* ] voter in Will County, they went to the correct polling place and voted, then the ballot would count."

If the voter's name was not found in any of the databases, however, the ballot would not count because "there is nothing to support the fact that they are even registered."

¶ 11 Wiedmeyer also provided specific details regarding the provisional ballots filled out by Bell, Boyd, and Parker. With regard to Bell's provisional ballot, Wiedmeyer testified that the search of the Will County voter database showed that Bell's registration had been deleted. The Clerk's Office also searched the Illinois Voter Registration System and found that Bell was registered in Chicago as of January 4, 2011, at 8100 South Woodlawn Avenue. Accordingly, his provisional ballot from the April 2011 University Park election was not counted because he was registered to vote at that time in Cook County and because he did not provide any additional information supporting his right to vote in University Park within two days of the election.

  

¶ 12 With regard to Boyd's provisional ballot, Wiedmeyer testified that the search of the Will County voter database showed that Boyd was registered to vote out-of-county. The State Board of Elections was responsible for changing Boyd's registration to out-of-county, which they do when they find duplicate registrations for one voter. Wiedmeyer testified that they also searched the Illinois Voter Registration System and found that Boyd was actively registered in Cook County from the Sauk Village address.

¶ 13 With regard to Parker's ballot, Wiedmeyer testified that the search of the Will County voter database produced no results on Parker, but a search of the Illinois Voter Registration System returned a result that Parker was registered to vote from a Cook County address in Blue Island as of October 1, 2008. She testified that she was not presented with any information to dispute Parker's Cook County voter registration within two days of the election. On cross-examination, Wiedmeyer stated that she did not believe that election judges were told to tell voters filling out provisional ballots that they could present additional information within two days of the election regarding their eligibility to vote from that location. She also stated on cross-examination that it is the obligation of the state agency who takes a person's voter registration to transmit that registration to the Will County Clerk's Office.

¶ 14 At the close of the hearing, the circuit court took the matter under advisement.

¶ 15 On July 19, 2012, the circuit court issued its written order. Of relevance to this appeal, the court found that: (1) Jermalle Wright's vote was properly counted because the testimony presented failed to definitively establish that he was not living at his registered voting address and because no testimony was presented on where he intended to reside; (2) Sidney Bell's vote would not be counted because the fact that he voted in Cook County after he had registered in Will County caused him to be registered in Cook County; (3) Darla Boyd's vote would not be counted because she had two different identification cards with two different addresses; and (4) Aaron Parker's vote should have been counted because the Department of Human Services was at fault for his registration problem.

***4** ¶ 16 On August 3, 2012, Roudez filed a motion to reconsider in which he challenged only the circuit court's rulings on Jermalle Wright's ballot and the provisional ballot of Darla Boyd. In addition, the propriety of opening Parker's provisional ballot was addressed. Along with her response to Roudez's motion to reconsider, Covington filed a motion to dismiss the election contest and to declare her the winner of the mayoral race. The court heard arguments on the motions and later issued an order denying Roudez's motion to reconsider and granting Covington's motion. Roudez appealed.

¶ 17 ANALYSIS

¶ 18 On appeal, Roudez argues that the circuit court erred when it found that: (1) the ballot cast by Jermalle Wright was properly counted; and (2) the provisional ballots cast by Sidney Bell, Darla Boyd, and Aaron Parker were properly not counted.

¶ 19 On appeal from a circuit court's decision in an election contest, we will not disturb the court's rulings unless they are against the manifest weight of the evidence. *Qualkinbush v. Skubisz*, 357 Ill.App.3d 594, 622 (2004) (quoting *Dirst v. McDonald*, 372 Ill. 498, 502 (1939)). A ruling is against the manifest weight of the evidence if the opposite conclusion is clearly apparent. *Qualkinbush*, 357 Ill.App.3d at 622.

¶ 20 I. JERMALLE WRIGHT'S BALLOT

¶ 21 First, Roudez argues that the circuit court erred when it found that Jermalle Wright's vote was properly counted. Roudez argues that Wright voted from 548 Allan Lane in University Park, but he actually lived at 657 Sullivan Lane in University Park, which was in a different precinct.

¶ 22 Our supreme court has recently reiterated the principles behind residency for voting purposes:

> "First, to *establish* residency, two elements are required: (1) physical presence, and (2) an intent to remain in that place as a permanent home. *Hughes v. Illinois Public Aid Comm 'n*, 2 Ill.2d 374, 380 (1954) (citing voting cases). Second, once residency is established, the test is no longer physical presence but rather abandonment. Indeed, once a person has *established* residence, he or she can be physically absent from that residence for months or even years without having abandoned it:

  

> '[T]he shortest absence, if at the time intended as a permanent abandonment, is sufficient, although the party may soon afterwards change his intention; while, on the other hand, an absence for months, or even years, if all the while intended as a mere temporary absence for some temporary purpose, to be followed by a resumption of the former residence, will not be an abandonment.' *Kreitz v. Behrensmeyer*, 125 Ill. 141, 195 (1888).

Stated differently, a residence is not lost 'by temporary removal with the intention to return, or even with a conditional intention of acquiring a new residence, but when one abandons his home and takes up his residence in another county or election district.' (Internal quotation marks omitted.) *Clark v. Quick*, 377 Ill. 424, 427 (1941). Third, both the establishment and the abandonment of a residence is principally a question of intent. *Park v. Hood*, 374 Ill. 36, 43 (1940). And while '[i]ntent is gathered primarily from the acts of a person' (*Stein v. County Board of School Trustees*, 40 Ill.2d 477, 480 (1968)), a voter is competent to testify as to his intention, though such testimony is not necessarily conclusive *(Coffey v. Board of Election Commissioners*, 375 Ill. 385, 387–88 (1940)). Fourth, and finally, once a residence has been established, the presumption is that it continues, and the burden of proof is on the contesting party to show that it has been abandoned. *People v. Estate of Moir*, 207 Ill. 180, 186 (1904)." [Emphases in original.] *Maksym v. Board of Election Commissioners of City of Chicago*, 242 Ill.2d 303, 319 (2011).

***5** ¶ 23 In this case, with regard to Wright's residency, Roudez presented only the testimony of Cobbins, from whom Wright rented a home at 657 Sullivan Lane in University Park. While Cobbins's testimony established that Wright had rented that home from November 2009 to July 2011, and Cobbins opined that Wright resided at that address, the circuit court correctly noted that Cobbins's testimony by itself was insufficient to establish that Wright did not reside at 548 Allan Lane in University Park, which was his registered address. As *Maksym* points out, once residency has been established, it is presumed that such residence continues, and it is incumbent on the contesting party to show that such residency has been abandoned. *Maksym*, 24 Ill.2d at 319. Roudez presented no evidence whatsoever on whether Wright had abandoned his residency at 548 Allan Lane in accord with the well settled residency principles recited in *Maksym*. Under these circumstances, we agree with the circuit court that Roudez failed to definitively establish that Wright was not residing at his registered address. Accordingly, we hold that the circuit court did not err when it ruled that Wright's vote was properly counted.

## ¶ 24 II. THE PROVISIONAL BALLOTS OF SIDNEY BELL, DARLA BOYD, AND AARON PARKER

¶ 25 Second, Roudez argues that the circuit court erred when it ruled that the provisional ballots of Sidney Bell, Darla Boyd, and Aaron Parker were properly not counted.

¶ 26 Section 18A–15 of the Election Code (10 ILCS 5/18A–15 (West 2010)) provides procedures for the validation and counting of provisional ballots in elections. Initially, we note that with regard to the provisional ballots of Bell and Boyd, Roudez does not allege that the Will County Clerk's Office violated this section when it invalidated those two provisional ballots.

¶ 27 With regard to Sidney Bell's provisional ballot, we first note that Roudez did not challenge the court's ruling on this ballot in his motion to reconsider. To properly preserve an alleged error for appellate review, the complaining party must raise the issue during trial and in a posttrial motion. *People v. Enoch*, 122 Ill.2d 176, 186 (1988); see also *Hoffer v. School District U–46*, 273 Ill.App.3d 49, 57 (1995) (applying forfeiture principles in an election contest appeal). However, waiver and forfeiture principles are an admonition to the litigants and not a limitation upon the reviewing court. *Jackson v. Board of Election Commissioners of City of Chicago*, 2012 IL 111928, ¶ 33 (also noting that this "principle is not and should not be a catchall that confers upon reviewing courts unfettered authority to consider forfeited issues at will"). Given the importance of this type of case and that Covington has addressed the issue on appeal without claiming forfeiture, we will address the merits of this issue.

¶ 28 Roudez argues that Bell's provisional ballot should have been counted because the fact that he did not receive his voter registration card until December 2010 or January 2011 caused him to be unaware of where to vote in University Park in the November 2010 election and thereby vote in Cook County instead. We are not persuaded.

***6** ¶ 29 Here, the evidence established that despite the fact that he registered to vote in University Park around September 2010, Bell voted in the November 2010 election via provisional ballot in Cook County. Doing so changed

  

his voter registration to Cook County. *See* 10 ILCS 5/18A–15(b)(1) (West 2010) ("[t]he provisional voter's affidavit shall serve as a change of address request by that voter for registration purposes for the next ensuing election if it bears an address different from that in the records of the election authority"). As Wiedmeyer testified, at the time of the April 5, 2011, election, Bell was registered to vote in Cook County. Accordingly, under these circumstances, we hold that the circuit court did not err when it ruled that Bell's provisional ballot would not be counted.

¶ 30 With regard to Darla Boyd's provisional ballot, Roudez argues that the ballot should have been counted because the Secretary of State's office improperly changed Boyd's voter registration address from University Park to Sauk Village and thereby improperly disenfranchised her in University Park. The only case Roudez cites in support of this argument is *Pullen v. Mulligan,* 138 Ill.2d 21, 70 (1990), for the proposition that "[a]s a general rule, ignorance inadvertence, mistake, or even intentional wrong on the part of election officials will not be permitted to disenfranchise voters." However, *Pullen* cited that principle with regard to the invalidation of ballots that had numbers written on them by election officials (*Pullen,* 138 Ill.2d at 70), and tracing that principle back through case law reveals that those cases all involved the conduct of officials in charge of an election (see *Sibley v. Staiger,* 347 Ill.2d 288, 293 (1932); *Allen v. Fuller,* 332 Ill. 304, 314 (1928); *People ex rel. Vance v. Bushu,* 288 Ill. 277, 280 (1919)) and not the situation as presented by Boyd's provisional ballot in this case.

¶ 31 Here, Boyd testified that she did not intend to change her voter registration from University Park to Sauk Village when she applied for a state identification card with the Sauk Village address. Nevertheless, as Wiedmeyer testified, the search that occurred pursuant to section 18A–15 of the Election Code revealed that the State Board of Elections had changed Boyd's voter registration to the Sauk Village address in Cook County because it found duplicate voter registrations for Boyd. Roudez has not established that the Will County Clerk's Office committed any error with regard to the process it employed in invalidating Boyd's provisional ballot. Accordingly, under these circumstances, we hold that the circuit court did not err when it ruled that Boyd's provisional ballot would not be counted.

¶ 32 With regard to Aaron Parker's provisional ballot, we first note that Roudez trailed Covington by two votes. Even if Parker's provisional ballot was improperly discounted, such error would be insignificant. Given that no error occurred with regard to the other ballots challenged in this case, even if Parker had voted for Roudez, adding Parker's vote to Roudez's total would not change the outcome of the election. Accordingly, we reject Roudez's argument on this issue. *See* 10 ILCS 5/23–23.2 (West 2010) ("[a] court hearing an election contest pursuant to this Article or any other provision of the law shall grant a petition for a recount properly filed where, based on the facts alleged in such petition, there appears a reasonable likelihood the recount will change the results of the election"); see also *Qualkinbush,* 357 Ill.App.3d at 621 (holding that even if the circuit court erred when it denied the admission of certain votes, that error would have been harmless because it would not have changed the outcome of the election).

***7** ¶ 33 Moreover, with regard to all three of these provisional ballots, the evidence established that neither Bell, Boyd, nor Parker provided additional information to the county clerk or the board of election commissioners within two days of the election regarding their voter registration status to support their attempts to vote in University Park for the election that was held on April 5, 2011. *See* 10 ILCS 5/18A–15(d) (West 2010) (stating that "[t]he provisional voter may, within 2 calendar days after the election, submit additional information to the county clerk or board of election commissioners"). The failure of Bell, Boyd, and Parker to do so provides further support for the circuit court's findings that those three provisional ballots were properly invalidated.

¶ 34 Under the circumstances presented by this case, we hold that the circuit court did not err when it dismissed Roudez's petition and declared Covington the winner of the April 5, 2011, mayoral election in University Park.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 37 Affirmed.

Presiding Justice WRIGHT and Justice LYTTON concurred in the judgment.

  

**All Citations**

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