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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000661-MR

ADAIR COUNTY BOARD OF ELECTIONS — APPELLANT

v.

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JUDY D. VANCE, JUDGE
ACTION NO. 14-CI-00211

BEN ARNOLD, CURTIS HARDWICK,
RUTH SMITH, WILLIAM BURTON,
JUNE PARSONS, AND THE CITY OF COLUMBIA — APPELLEES

OPINION
REVERSING

** ** ** ** ** ** **

BEFORE: DIXON, KRAMER, AND THOMPSON, JUDGES.

KRAMER, JUDGE: This appeal arises from an election contest filed by Ben Arnold, an unsuccessful write-in candidate for Mayor of the City of Columbia, and two voters, Ruth Smith and William Burton, against several parties, including the appellant here, the Adair County Board of Elections (the Board); Curtis Hardwick, the successful mayoral candidate; June Parsons, another unsuccessful candidate;

and the City of Columbia. The circuit court voided the November 2014 election results and ordered a new mayoral election be held. The Board now appeals.

FACTUAL BACKGROUND

The City of Columbia lies within Adair County, Kentucky. Registered voters in Adair are considered either city residents or county residents for purposes of casting their ballots. The Mayor's office is, obviously, a governing body for which only city residents can vote. To ensure voters get the proper ballot at their polling place, they are coded as either a "city resident" or a "county resident" on the voting rosters. During the November 2014 general election, some apparent irregularities occurred when a number of city residents were coded as county residents and vice versa. Because of this and other irregularities, which he argued disenfranchised some voters, Appellee Arnold contested the election results. Appellees Burton and Smith[1] claimed their constitutional right to vote had been abridged because they were unable to vote in the mayoral race.

Arnold's argument to the circuit court was that the irregularities in the election reached the level of fraud required to render the mayoral election invalid. *See* KRS[2] 120.165(4). Arnold did not argue that the fraud was a deliberate attempt on anyone's part to affect the outcome of the election; instead, he argued that the irregularities constituted "constructive fraud," that is, "fraud [which] arises through some breach of a legal duty which, irrespective of moral guilt, the law would

[1] The three plaintiffs below—Arnold, Burton, and Smith—will be referred to in this opinion as "Arnold" for ease of reference.

[2] Kentucky Revised Statutes.

pronounce fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests." *Wood v. Kirby*, 566 S.W.2d 751, 755 (Ky. 1978).

On April 17, 2015, the Adair Circuit Court held a one-day bench trial, wherein thirteen witnesses testified for Arnold and six witnesses testified for the defendants. Ultimately, the circuit court found for Arnold:

> This Court is very mindful of the fact that the law supports and prefers that elections be upheld if at all possible. An election shall not be set aside for trivial causes, or in circumstances where the results of irregularities can be eliminated. Unfortunately the irregularities in this case are voluminous and cannot be remedied.

Apparently the most significant irregularity stemmed from the then county clerk's (Joyce Rogers) failure to properly update the voting rosters. Rhonda Loy, the current city clerk, testified that several properties had been annexed by the city since the year 2000. Each time a property is annexed, the city clerk duly notifies the county clerk and provides a map of the property annexed and a list of any registered voters affected by the annexation. Russell Heights, Green Hills, Parrot Avenue, and Bridgeport Estates, four subdivisions which had been annexed during 2008 and 2009, were the last annexations by the city before the November 2014 general election. Voters from these four subdivisions were those most often incorrectly coded on the rosters. Loy testified her office received complaints from voters throughout the day. When she herself went to vote early on election-day morning, her polling place was already out of paper ballots for the county election.

Numerous other people had trouble voting as well. Mary Thomas, a city resident for 15 to 20 years, was given a county ballot. Although she would have voted for Arnold, she did not get to vote in the mayoral race. Chad and Pam Bevins, city residents for 10 years, were incorrectly coded on the roster as county residents. They were only allowed to vote in the mayoral race because one of the poll workers recognized them. Anthony Grant was a county resident who was given a city ballot. Victoria Pike, her husband, and her mother were all improperly coded city instead of county, though they corrected the error.

Both Appellees Smith and Burton were precluded from voting in the mayoral race. Smith not only was given a county ballot, but later discovered her husband had been given a city ballot, although their addresses on the rosters were identical. Later testimony showed that she was actually coded correctly on the roster, but was apparently mistakenly given the wrong ballot by a poll worker. Burton and his wife got county ballots and filled them out before they realized the error. Out of frustration they left the polling place without voting. Thus, they too were also precluded from voting in the mayoral race.

Another irregularity occurred when city zoning maps were neither up-to-date nor made available to poll workers. Loy testified that there were no maps at her polling place, even though she had offered before the election to provide a current zoning map of the city, and to verify the list of registered voters and city addresses, for the county clerk. In fact, accurate maps were only provided to polling stations on Election Day itself. Jason Cross, the Chief of Police, was called

to the Mayor's office to pick up a map of the city for the county clerk's office to distribute to poll workers. The maps were printed and copied that day, and Cross had to handwrite the names of the four annexed subdivisions on the map before copying and delivering it.

Because there were no maps—correct or otherwise—to rely on, the county clerk attempted to correct the problem by allowing poll workers to let people vote "if they come in and say that they own property in the city." Two poll workers testified that they were told to let people who said they paid city taxes vote a city ballot and to ignore the coding on the rosters themselves. At least two voters, Steve and Leigh Ann Willis, were allowed to vote because they told a poll worker they paid taxes to the city.

Several other irregularities occurred. One election sheriff's report noted that "[t]he inherent problem associated with multiple ballots of any voting place virtually guarantees mistakes." Another sheriff's report noted being short of supplies and running out of paper ballots, thereby requiring voters to use the voting machines and wait in slow lines. She did not know whether some voters left the polling station without voting. In one of the annexations, one side of a street was coded on the rosters as being located in the county but the other side of the same street was coded as being located in the city. Workers, unaware it had been annexed, and without personal knowledge of the road's location, had no map to refer to.

Arnold, the unsuccessful write-in candidate, testified that he filed the election contest after several voters contacted him and were unhappy with how the election was conducted. He obtained a correct map of the city boundaries and a copy of all the voting rosters. When he compared the coding on the rosters to the residences on the map, he found many voters who were coded as county voters but were actually city voters. Three of the four annexed subdivisions—Bridgeport Circle, Russell Heights, and Green Hills—were the most problematic. All the voters in Bridgeport Circle, about fifty registered voters, were coded as county voters, though later evidence revealed that only six of them actually voted in the election. In Green Hills, about forty or fifty addresses were wrongly coded, although poll workers corrected them on Election Day. Russell Heights was mixed, with some addresses coded county and some coded city. In at least one instance, a husband and wife living at the same address were coded differently. Arnold estimated the number of voters miscoded was "something over a hundred."

Arnold also testified that 1505 city voters signed the precinct rosters, yet only 1273 voted for mayor, leaving 232 "under votes" not accounted for. And while under votes are not uncommon, the percentage of under votes in the city council race, also on the city ballot, was 3.3 percentage points, whereas in the mayoral race, under votes accounted for 14 percentage points. He counted 53 miscoded voters who signed the rosters and voted, but because of the error may have been precluded from voting in the mayoral race. He testified that 20 of those 53 voters signed affidavits swearing they had been given the wrong ballot.

However, affidavits filed by the defendants, when compared against those filed by Arnold, show that only 9 of the 20 were actually precluded from voting. When Arnold added those 53 voters to the 232 under votes, he believed the number of votes unaccounted for in the mayoral race was 285.

Arnold also questioned the county clerk's reporting accuracy. For example, 91 people had requested to vote an absentee paper ballot, but the clerk reported only 45 such votes. He counted 153 total absentee votes, but the clerk reported only 108. And the county clerk's roster was not properly updated: there was testimony that people who had moved remained listed, people who were deceased remained listed, and a foreign national was listed as a voter. Arnold compared the county roster to the State Board of Elections roster and discovered a 200-300 difference in the number of registered voters.

The defendants countered with testimony from Deputy County Clerk Natalie Asberry who codes voters for the county clerk's office. She testified that in 2011, KRS 116.200 had been revised to require the city clerk to provide a list of properties and a map of city boundaries in order for the county clerk to maintain a roster of voters. She said the county clerk's office had not received that information from the city clerk. She also refuted others' testimony that there was an unusually large number of complaints on the day of the election. Ben Loy, a member of the Board of Elections of Adair County for eight years, indicated that although there were complaints and irregularities because of coding and annexation problems, some of the complaints stemmed from the 2010 redistricting.

The 2014 election was the first election since redistricting, so some confusion was to be expected. Lisa Greer, a part-time county clerk, testified that the number of votes cast in each of the past four Columbia mayoral elections was relatively similar: in 2002, 1270 votes were cast; in 2006, 1109 were cast; in 2010, 1323 were cast; and in 2014, 1273 were cast. Finally, Shelia Blair, an assistant county clerk, disputed Arnold's assertion that potentially 285 votes were unaccounted for: of the total 1505 votes cast in the city races, something Arnold established in his testimony, 1273 were cast in the mayor's race, which resulted in 232 under votes. Of that number, 159 voters did not vote for anyone in the mayoral race, and 13 of the write-in votes could not be certified. Employing these figures, the number of votes she concluded were unaccounted for was sixty.

In its April 17, 2015 order voiding the election, the circuit court found the following facts required voiding the election:

> 6. During Election Day and the days following, poll workers and election officials received numerous complaints from voters. The majority of those complaints centered around the fact that some polling locations had run out of paper ballots, and the fact that many voters who were actually city residents were denied their right to vote in the city races, and that some county residents were permitted to vote in the city races.
>
> 7. In the midst of numerous complaints, poll workers were instructed to permit voters who pay city taxes to vote in the city.
>
> 8. Election precinct maps were not properly updated, nor provided to poll workers, for the November election. Several areas within the city limits of Columbia were not listed as being eligible to vote in the city election.

> 9. A close review of the precinct rosters reveals several clerical errors regarding identification of individual voters, as well as classification as to city or county residency.[3]
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> 10. The integrity of at least two of the voting machines is questionable, due to broken seals on that portion of the machines containing the actual ballots.[4]
>
> 11. Due to the numerous errors, omissions, and apparent acts of negligence committed on Election Day, an indeterminate amount of votes in the mayoral election were unaccounted for. It was undisputed that this number could have easily exceeded one hundred votes.

There is no question that irregularities occurred during the election for Columbia's mayor. The question before this Court is whether those irregularities were of such proportion as to void the election results.

In its brief, the Board argues that, although there were irregularities in the election, they did not reach the level requiring a new election because even given the trial court's determination that the number of votes unaccounted for could have been over one hundred, it remains possible to fairly determine the election results. The Board further argues that the trial court's finding that potentially one hundred or more votes in the race were unaccounted for is inaccurate, and that, in fact, Arnold admitted the number of voters who may have

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[3] Only copies of the absentee rosters were entered into evidence at trial. The circuit court apparently reviewed all the voting rosters after trial, but they are not included in the record to this Court. Without the records relied on by the circuit court, we must assume the trial court's findings of fact about the rosters are correct.

[4] This issue was not pled in Arnold's original petition, but was presented during his testimony at trial. The circuit court's order relies in part on its finding that the machines' integrity was questionable. Under KRS 120.155, the circuit court should not have relied on Arnold's testimony during trial: the petition "shall state the grounds of the contest relied on, and no other grounds should afterward be relied upon." Arnold pled his other grounds with specificity; the voting machines were not referred to in his petition.

been prevented from voting for mayor was only 53. In his brief, Arnold does not address whether it would be possible to fairly determine the outcome of the election: citing *Wood v. Kirby*, 566 S.W.2d 751 (Ky. 1978), he argues that the cumulative irregularities constitute constructive fraud sufficient to void the election as not being free and equal.[5] He also argues that only a successful candidate has standing to appeal a circuit court's decision, and Hardwick did not do so. Therefore, he asserts, the Board's appeal should be dismissed.

Whether the Board has standing is a threshold question: if Arnold is correct, we will not reach the merits of the appeal. *See, e.g., Com. ex rel. Brown v. Interactive Media Entertainment and Gaming Assn, Inc*., 306 S.W.3d 32 (Ky. 2010). We, however, disagree with this argument. Standing can be conferred by statute. *See Tax Ease Lien Investments 1, LLC v. Commonwealth Bank & Trust*, 384 S.W.3d 141, 143 (Ky. 2012). And KRS 120.175, the statute governing the appeals of election contests, grants the Board a right of appeal. It states in relevant part: "Any party may appeal to the Court of Appeals from a judgment [in an election contest]." The Board was a party below. It therefore has standing to appeal and we will address the merits of its arguments.

Standard of Review

The standard of review of a circuit court's decision in election contests is two-fold. First, the trial court's findings of fact are reviewed for clear error, and upheld when supported by substantial evidence. The trial court's

[5] The City of Columbia's Appellee brief takes no stand on the merits of the appeal. Curtis Hardwick's Appellee brief relies on the arguments presented by the Board.

conclusions of law, however, are reviewed *de novo. McClendon v. Hodges*, 272 S.W.3d 188, 190 (Ky. 2008); CR[6] 52.01. Factual findings are clearly erroneous if unsupported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003. We defer to the circuit court's factual findings after a bench trial because that court had the opportunity to observe, and assess the credibility of, the witnesses. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). As long as those findings are supported by substantial evidence we will not disturb them, even if we would have reached a different conclusion. *Moore v. Asente*, *supra*, at 354. Substantial evidence is "some evidence of substance and relevant consequence, having fitness to induce conviction in the minds of reasonable people." *Abel Verdon Const. v. Riveria*, 348 S.W.3d 749, 753 (Ky. 2011).

With the standard of review regarding the trial court's decision, we now set forth the burden that Arnold must meet to set aside this election. While our country's deep-rooted passion and hard-fought battle that the individual and collective voice of the people as to who will govern them should prevail in every election, this does not guarantee a flawless election, nor does it mandate that a flawed election must be voided. And, the law of election contests-- as we are bound to apply it-- does not set the standard that a flawed election cannot stand or even that the confidence of the voters in the election process must be preserved despite vast irregularities. Frankly, this Court's task would be much easier if that

[6] Kentucky Rules of Civil Procedure.

were the standard.

Upon first blush, it appears that this election was ripe to be set aside for incompetence and incomprehensible carelessness. Unfortunately, that is not the standard that, as a matter of law, we are bound to apply. Rather, it has long been the law in Kentucky that mandates us to determine solely whether this election should be voided only if it cannot be fairly determined who was elected, not whether voters might lose confidence in the election process. *See Stewart v. Wurts*, 143 Ky. 39, 135 S.W. 434 (1911). The requirement that an election result must stand if the successful candidate can be fairly determined is also statutory. KRS 120.165(4) provides as follows:

> If it appears from an inspection of the whole record that there has been such fraud, intimidation, bribery or violence in the conduct of the election that neither contestant nor contestee can be judged to have been fairly elected, the circuit court, or an appellate court, on appeal, may adjudge that there has been no election. In that event the office shall be deemed vacant, with the same legal effect as if the person elected had refused to qualify. If one (1) of the parties is adjudged by the court to be elected to the office, he shall, on production of a copy of the final judgment, be permitted to qualify or be commissioned.

In *Johnson v. May*, 305 Ky. 292, 203 S.W.2d 37 (1947), the requirements for a free and equal election were addressed at length:

> Strictly speaking, a free and equal election is an election at which every person entitled to vote may do so if he desires, although, in dealing with the practical aspect of elections, it could hardly be said that, if only a few were prevented from voting, the election would not be free and equal, in the constitutional sense. The very purpose of

> elections is to obtain a full, fair, and free expression of the popular will upon the matter, whatever it may be, submitted to the people for their approval or rejection; and when any substantial number of legal voters are, from any cause, denied the right to vote, the election is not free and equal, in the meaning of the Constitution.

Id. at 39. *Johnson* further clarifies that although elections must be free and equal, the requirement that voiding an election is only appropriate when the successful candidate cannot be determined "by any reasonable method" is Kentucky law:

> To restate the rule adopted by this court, it is this: If the number of voters that were prevented from voting by fraud, bribery, violence, mistake of the election officers, or imperfection in the law would be sufficient to change the result if they had been cast for the minority, then the election should be set aside upon the ground that it could not be determined with certainty that the result, as certified to by the canvassing board, represented the will of the majority. A like conclusion should be reached if the bribery, fraud, intimidation, or other cause, whatever it may be, has affected the election to such an extent that it cannot be determined, by any reasonable method, for which side a majority of the legal votes were cast.

Id. at 40 (quoting *Wallbrecht, et al. v. Ingram, et al*., 164 Ky. 463, 175 S.W. 1022 (1915); *see also McClendon v. Hodges*, 272 S.W.3d 188 (Ky. 2008) (citing cases)). The requirement that an election must stand unless the result cannot be determined with certainty by using any reasonable method controls the outcome of this appeal.

The burden of proof to show that neither candidate can be judged to have been fairly elected rests on the contestant of an election:

> The burden of proof is on the contestant to show such fraud, intimidation, bribery, or violence in the conduct of the election that neither the contestant nor contestee can

> be adjudged to have been fairly elected. These things are not presumed, but it must be affirmatively shown, not only that they existed, but that they affected the result to such an extent that it cannot be reasonably determined who was elected. *Napier v. Cornett*, 68 S. W. 1076 [Ky. 1902]; *Motley v. Wilson*, 82 S. W. 1023 [Ky. 1904]; *Combs v. Combs*, 97 S. W. 1127 [Ky. 1906]; *Scholl v. Bell*, 102 S. W. 248 [Ky. 1907].

Skain v. Milward, 138 Ky. 200, 127 S.W. 773, 778-779 (1910) (citations shortened). Suspicion and speculation are insufficient to set aside an election. *Stewart*, 135 S.W. at 439. Rather, there must be clear and convincing tangible, positive proof presented that the irregularities were so pervasive that it cannot be reasonably determined who was elected. *Id.* Accordingly, the standard that Arnold must meet is soaring. In sum, he had the burden to affirmatively show by clear and convincing evidence, not only that there were irregularities, but also that despite even irregularities, that it "cannot be reasonably determined who was elected." With these high standards in mind, we move forward with our review.

Analysis

The trial court heard substantial evidence of various irregularities in the election process. Numerous witnesses testified to complaints of improper coding, the lack of any map of city boundaries, and of voters receiving the wrong ballot. Others testified that voters were told at the polling place that they could

vote in the city election "if they paid city taxes." Ballots and supplies were insufficient in some polling places, and the court's review of the voting rosters revealed clerical errors. Perhaps upward of one hundred voters had been *miscoded* on the rosters.

Regarding Arnold's theory concerning the number of *unaccounted for* votes, he combined the total number of *under votes* (*i.e.,* the missing votes of the 232 voters who signed and received a city ballot but did not vote in the mayoral race), with the 53 votes of those voters *wrongly coded* as county voters. His figure, when calculated, was 285 *unaccounted for* votes. Arnold's theory and his testimony regarding it cannot be quantified by the evidence of record in this case. It was indisputably his lofty burden to come forward with clear and convincing evidence.

The trial court set aside this election based on the finding of fact that "it was undisputed that the [the number of *unaccounted* for votes] could have easily exceeded one hundred votes." (Emphasis added). However, our review of the evidence leads us to conclude that this finding is not supported by substantial evidence of record. Certainly, the trial court heard conflicting evidence, and who to believe is left to the sound discretion of the trial court. Nonetheless, we are tasked with reviewing the evidence to ensure that Arnold has met his burden, presenting clear and convincing, tangible evidence to prove that it cannot reasonably be determined who the victor was in this election.

What we discern from the trial court's findings is that it appears to

have concluded the one hundred or so *miscoded voters* on the rosters were instead "*unaccounted for*" *votes*. There is a pivotal distinction between *miscoded voters and unaccounted for votes* in this case. The testimony at trial was that, of those perhaps one hundred *miscoded* voters, *all voters from Green Hills were given city ballots*. And although approximately fifty registered voters in Bridgeport Circle were *miscoded,* only *six residents actually cast a ballot*. A close review of the record reveals only *thirteen voters* who intended to vote in the mayoral race but were precluded from doing so: Mary Thomas, Mr. and Mrs. Burton, Ms. Smith, and nine of the people who signed affidavits. Even Arnold himself counted only 53 *miscoded* voters who signed the rosters at their polling place and may have received the wrong ballot and been precluded from voting for mayor.

Although the trial court found there may have been more than one hundred *unaccounted* for votes, Arnold's actual testimony was that there may have been over one hundred voters who had been *miscoded*. *There was no evidence that these one hundred miscoded voters actually tried to vote but were precluded from doing so*. All indications are that they were not: miscoded voters from the Green Hills subdivision were allowed to vote in the city election because the poll workers recognized the error. And though approximately fifty registered voters in Bridgeport were improperly coded, only six actually voted.

To say this was shoddy election that does not reflect the principles upon which our country was founded is a gross understatement. However, that is not our standard by which we are held by the law to review this matter. Given the

evidence, even with the irregularities, there is nonetheless a reasonable method for determining the successful candidate here. The record reflects two figures for potentially disenfranchised voters: the 13 who either testified at trial or signed affidavits, and the 53 miscoded voters Arnold counted on the rosters who may have voted the wrong ballot. Thus, the record reflects a total of 66 potentially disenfranchised voters. Of the 1273 votes cast in the mayoral race, the successful candidate, Curtis Hardwick, received 562 while Arnold received 383, a difference of 179 votes. Even assuming all 66 voters were indeed disenfranchised, and assuming they all would have cast their votes for Arnold, his total vote count would be 449, well shy of the 562 votes garnered by Hardwick. In short, Hardwick can clearly be judged to have been fairly elected. While the difference in the total vote is not great (regardless of whether the votes are considered either before or after the election contest), Arnold has not met his burden of coming forth with clear and convincing evidence of record to disprove that the Court can reasonably determine that Hardwick was the victor in this election.

Finally, the Board also argues that the trial court erred in denying its motion to dismiss the constitutional claims of Plaintiffs Smith and Burton because under KRS 120.175, the general election contest statute, election contests are purely statutory and a citizen, no matter how disgruntled, does not have standing to bring an action under the statute. The Board is correct. "Even a citizen whose civil rights had been invaded by corrupt election practices may not bring a contest" under the statute. *Payne v. Blanton*, 312 Ky. 636, 229 S.W.2d 438, 440 (1950). It

does not appear Burton and Smith were properly joined as parties to an election contest.

Wherefore, we reverse the decision of the Adair Circuit Court voiding the November 2014 election for the Mayor of the City of Columbia and remand the case for the entry of a final judgment consistent with this opinion.

DIXON, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent. I believe the trial court's factual findings were amply supported by substantial evidence and provided an appropriate basis for voiding this election on the grounds that the numerous errors found could not be remedied by discounting contested votes.

The 2014 mayoral general election in the City of Columbia was fatally flawed by numerous irregularities. The trial court had before it evidence that for over a decade the county clerk was derelict in updating precinct rosters despite being furnished the relevant information enabling her to do so. For each annexation the city clerk provided the county clerk with the official annexation documents, legal descriptions of the area annexed, boundary maps and addresses of the affected property owners. Even though two city elections had been held since the last annexation, the county clerk failed to update the rosters to reflect voters annexed into the city. The county clerk also failed to update the rosters to eliminate citizens that had died, moved or were otherwise ineligible,[7] and did not

[7] In West Columbia, a voter asked precinct workers why her aunt, who had been dead for eleven years, was listed on the roster. In Hurt, voters pointed out a voter listed on the roster was

update rosters to conform to the State Board of Elections voter lists. As a result, coding errors abounded.

Additionally, precincts were deprived of vital supplies necessary for proper voting. Precinct officers lacked maps delineating the city boundaries. Two precincts ran out of paper ballots. In South Columbia #2, poll workers arrived to find inadequate pens (necessary where there were two write-in candidates), no cords to connect the voting machines and only fifty paper ballots for county voters, which ran out by 9:19 a.m. While new ballots were obtained about three hours later, in the meantime voters had lengthy waits for handicapped machines that no one had been trained to operate.

There was confusion at the South Columbia-Harmony, South Columbia #2, North Columbia, West Columbia and Hurt precincts as to whether voters should get county or city ballots. At South Columbia-Harmony some voters that received city ballots believed they should have received county ballots and some voters that received county ballots believed they should have received city ballots. At other precincts, voters were complaining they should have received city ballots instead of county ballots.

Coding errors resulted in voters receiving the wrong ballots. Incorrect ballots were given to both absentee voters and those voting on election day at their

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dead and another had moved out of state. In South Columbia #2, a voter told precinct workers that a non-citizen was registered to vote at the address of the voter's workplace.

precincts.[8] Many city voters were erroneously coded as county voters and were given county ballots.[9] While some of these voters were ultimately able to get city ballots, others were not, and still others may have been dissuaded from voting once the word of this error was circulated by disgruntled voters.

Some county voters were also miscoded as city voters and given city ballots.[10] Some of the county voters corrected this error and others did not.

Because precincts lacked maps to refer to determine whether voters resided in the city or county, precinct workers were not able to confirm whether voters' registered addresses were incorrectly coded because they lacked maps delineating the City of Columbia's boundaries. Therefore, precinct workers had to call the county clerk's office for clarification of which ballot voters should receive. In some instances, it took hours for precinct workers to get through via phone to obtain clarification. As a result, some poll workers depended upon their own knowledge of the boundaries to determine which ballots voters should receive.

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[8] For example, a poll worker testified two members of her household received city absentee ballots although they lived in the county; she called the county clerk's office and arranged to return the incorrect ballots and receive county ballots. However, when the poll worker went to vote on election day, she was still coded to receive a city ballot.

[9] Fifteen voters submitted affidavits that they were city residents but were given county ballots; this included two voters voting absentee in advance of the election via machine. Voters testified that four city residents were given county ballots and were not able to vote in the city mayoral race. A voter testified that he and his wife were initially given county ballots, but after a lengthy delay and calls to the clerk's office they were able to vote on city ballots. Twelve voters were noted on precinct reports as being erroneously coded county instead of city.

[10] Three voters submitted affidavits that they were county residents, were given city ballots but noticed the error and returned the ballots. Another voter's affidavit indicated she was registered as a county voter, had moved to a city location but not changed her voter registration, and received a city ballot and voted on it. Another voter testified he was a county resident but received a city ballot.

The confusion over coding and the lack of paper ballots led to many complaints at the precincts, and calls to the county clerk, city clerk and the mayor's office. Later in the day, the sheriff attempted to remedy the coding problem by copying and handing out maps of the city boundaries.

Additionally, in a flawed attempt to correct the coding problem, poll workers were instructed by the county clerk to give ballots out based upon voters asserting they paid city taxes or owned property in the city.[11] This resulted in an unknown number of voters being given city ballots that may not have been entitled to vote in the mayoral election.

Mayoral candidate Ben Arnold testified about additional irregularities he discovered when investigating the ballots and official vote counts including evidence of missing election day ballots and absentee ballots, a high number of machine errors, statistically significant under votes in the mayoral race and possible machine tampering. There were 1,266 election day ballots, compared with 1,312 roster signatures and 1,316 ballot stubs. The absentee ballot total was 153, but only 108 absentee votes were counted. A total of 1,505 voters signed the city roster, but of those voters only 1,273 voted in the hotly contested three-candidate mayoral race, with larger percentages of under votes (that is, ballots with no vote in the mayoral race) coming from precincts in which there was coding

[11] Precinct workers from South Columbia #2 and North Columbia testified to receiving this advice and acting accordingly. City Clerk Rhonda Loy also testified to hearing the county clerk give this instruction when she was at her polling place.

confusion.[12] Voters were prevented from voting because they were erroneously coded for the county. There were 66 machine errors in which ballots were not counted. There were 78 additional machine errors where the box for a write in candidate was not marked, but a write in candidate was written in.[13] The seal was not affixed to two machines.

Based on all of these errors, it could not be determined how many city residents were deprived of the opportunity to vote in the mayoral election, how many county residents voted on a city ballot and of them how many illegally voted in the mayoral election. The total number of city ballots could not be allocated between these groups. County voters had an incentive to try to obtain city ballots in precincts where county ballots ran out and city ballots were available. There is also no way to determine how many voters were dissuaded from voting due to these various conditions or dissuaded from casting a write-in vote because of the difficulty in voting write-in on a machine.

"In decision after decision, [the United States Supreme] Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 1000, 31 L.Ed.2d 274 (1972). "No right is more precious in a free country than that of having a voice in the election of those who

[12] Deputy County Clerk Sheila Blair testified that there were 159 under votes on the city ballot for the mayoral race.

[13] Arnold testified that voting write-in on the machines required both writing in a candidate and checking a box. The vote would not be counted if the box was not checked, even though this was not a statutory requirement.

make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 535, 11 L.Ed.2d 481 (1964). "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S.Ct. 5, 7, 166 L.Ed.2d 1 (2006).

The Kentucky Constitution similarly extends a right for citizens to participate equally in elections. Section Six of the Kentucky Constitution provides "all elections shall be free and equal."

> [A]n election is free and equal within the meaning of the Constitution when it is public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

Asher v. Arnett, 280 Ky. 347, 132 S.W.2d 772, 776 (1939) (quoting American Jurisprudence, Elections, Volume 18, 184-185). "We have consistently held that under this Section an election is not free and equal if a substantial number or percentage of qualified electors are deprived of their right to vote." *Johnson v. May*, 305 Ky. 292, 294, 203 S.W.2d 37, 38-9 (1947). *See Barbour v. Gunn*, 890 So. 2d 843, 847 (Miss. 2004) (allowing a re-vote where an entire sub-precinct was not allowed to vote because there could be no interpretation of the will of the voters where they were not allowed to vote); *In re Election for House of*

Representatives Dist. 71, 987 So. 2d 917, 920-21 (Miss. 2008) (following the reasoning of *Barbour* in allowing re-vote where three precincts were given the wrong ballots and could not vote). The right to vote includes the right to vote for a write-in candidate. *Asher*, 132 S.W.2d at 775.

Kentucky Revised Statutes (KRS) 120.165(4) provides in relevant part as follows:

> If it appears from an inspection of the whole record that there has been such fraud, intimidation, bribery or violence in the conduct of the election that neither contestant nor contestee can be judged to have been fairly elected, the circuit court, or an appellate court, on appeal, may adjudge that there has been no election.

In *Wood v. Kirby*, 566 S.W.2d 751, 755 (Ky. 1978), the Kentucky Supreme Court explained how to interpret this statute:

> The fraud contemplated by KRS 120.165(4) . . . includes what might be classified as constructive fraud. Constructive fraud arises through some breach of a legal duty which, irrespective of moral guilt, the law would pronounce fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.

In *Wood*, a mechanical failure in a voting machine as to the tabulation was determined to constitute constructive fraud. The Court concluded it was appropriate to void the election where in light of that fraud "the proper tabulation of votes could not be done with a reasonable degree of certainty." *Id.* This interpretation was in accordance with *Wallbrecht v. Ingram*, 164 Ky. 463, 477, 175 S.W. 1022, 1028 (Ky. 1915), which held an election should be set aside "if the bribery, fraud, intimidation, or other cause, whatever it may be, has affected the

election to such an extent that it cannot be determined, by any reasonable method, for which side a majority of the legal votes were cast." *See Lakes v. Estridge*, 294 Ky. 655, 172 S.W.2d 454, 456 (1943).

In *McClendon v. Hodges*, 272 S.W.3d 188, 189-90 (Ky. 2008), the trial court determined there was pervasive fraud in the walk-up absentee vote in district four but it was impossible to determine exactly which votes were tainted and the true will of the electorate in a close mayoral race; therefore, it was proper to set aside the results of the election. In affirming the trial court and reversing the Court of Appeals determination that the proper remedy was to deduct the absentee walk-in votes from district four, the Kentucky Supreme Court opined "[e]ven when evidence of fraud is limited to only a portion of the electorate or to specific precincts, it may nonetheless be necessary to set aside the entire election" because eliminating a portion of the vote would "necessarily void many valid ballots and would change the result of the entire election." *Id.* at 191-192. "Though an inconvenience to the citizens of Tompkinsville . . . the electorate's right to a fair, reliable and democratic voting process must prevail." *Id.*

Our sister courts have determined it is appropriate to void elections where the fraud or errors "are so significant in number or so egregious in character as to seriously undermine the appearance of fairness," *McNally v. Tollander*, 100 Wis. 2d 490, 505, 302 N.W.2d 440, 447-48 (1981), or the "official disregard of the election laws is . . . pervasive[,]" *Alvarez v. Espinoza*, 844 S.W.2d 238, 249 (Tex.App. 1992). The Court in *Rogers v. Holder*, 636 So.2d 645, 651 (Miss.

1994), went even farther, holding when mandatory procedural requirements are willfully violated and there is a reasonable inference of fraud, a court is warranted in holding a new election.

Having reviewed the trial record and the trial court's findings of fact and conclusions of law, I conclude the underlying evidence was more than sufficient to support the trial court's decision to void the election for constructive fraud. The trial court found a number of errors in the election process including: polling locations running out of paper ballots, city residents being denied the right to vote in city races, county residents being permitted to vote in city races, poll workers being instructed to permit voters who pay city taxes to vote in city races, election precinct maps not being properly updated or provided to poll workers, several areas within the city limits of Columbia not being listed as eligible to vote in city elections, clerical errors regarding identification of individual voters and classification as to city or county residency and the questionable integrity of at least two voting machines. The trial court's final finding explained the cumulative effect of all of these errors:

> Due to the numerous errors, omissions, and apparent acts of negligence committed on Election Day, an indeterminate amount of votes in the mayoral election were unaccounted for. It was undisputed that this number could have easily exceeded one hundred votes.

After noting the statutory responsibilities the city clerk and county clerk had to delineate city voters and code them properly pursuant to KRS 116.200(1)(a), (3),

and reciting the relevant legal standards for election contests, the trial court made the following conclusions of law:

> This Court is very mindful of the fact that the law supports and prefers that elections be upheld if at all possible. An election should not be set aside for trivial causes, or in circumstances where the results of irregularities can be eliminated. Unfortunately, the irregularities in this case are voluminous and cannot be remedied.
>
> . . . .
>
> When applying the above-cited statutes and case law to the facts of this case, this Court is not convinced that the election for the office of Mayor of the City of Columbia on November 4, 2014, was a free and equal election within the meaning of Section 6 of the Kentucky Constitution. Further, the combination of numerous, varying forms of error committed on Election Day constitute a constructive fraud upon the voters of the City of Columbia.
>
> For the foregoing reasons enumerated above, the November 4, 2014, election to the office of Mayor of the City of Columbia must be declared VOID. . . .

I believe the majority errs by parsing and discounting the trial court's findings of fact and failing to consider its conclusions of law. The majority opinion focuses on the second part of the trial court's final factual finding, that "[i]t was undisputed that this number [of unaccounted for votes] could have easily exceeded one hundred votes[,]" twists its meaning and then discounts it and ignores the earlier portion of this finding of fact as well as the effect of all its previous findings of fact. The majority makes two errors regarding the finding that the number of unaccounted votes could exceed one hundred: first, it determines

that this finding refers to miscoded voters and second, it determines that this finding is not supported by substantial evidence of record.

I believe it is appropriate to accept the trial court's finding as written, rather than assume it meant something different. There were many figures testified to supportive of the trial court's setting of a minimum of 100 unaccounted for votes. Additionally, the trial court's finding could be the result of its examination of the precinct rosters.

All parties agreed it was appropriate to admit certified copies of the precinct rosters and these records would be accurate in determining how voters were coded at the time of the election. While these rosters were not included in the record to this Court, the majority opinion correctly states that "we must assume the trial court's findings of fact about the rosters are correct." However, our Court's obligations regarding this missing record go even further. "It has long been the settled rule in this state that, where portions of evidence bearing on the questions involved are omitted from the record on appeal, it will be conclusively presumed that the omitted evidence was sufficient to support the judgment, and the judgment will be affirmed." *Wheeler v. Patrick*, 192 Ky. 529, 233 S.W. 1054, 1055 (1921). Inexplicably, the majority ignores our obligation to presume the precinct rosters support the trial court's factual finding and instead determines that the trial court's factual finding is incorrect, even though a review of the rosters could justify such finding. We must assume that the rosters support a finding of more than 100 unaccounted for votes, a fact which could not be disputed because the parties

agreed the rosters accurately reflected the coding of voters and signatures would indicate who voted that was miscoded.

The majority opinion then compounds its previous error by engaging in improper fact-finding by determining that the number of potentially disenfranchised voters is sixty-six. The trial court made no such determination and it is improper for our Court to do so. *See Med. Vision Grp., P.S.C. v. Philpot*, 261 S.W.3d 485, 491 (Ky. 2008).

Furthermore, it is inappropriate for our Court to make its own factual finding and use it to determine the appropriate outcome of this election. However, the majority opinion does so, concluding that because sixty-six disenfranchised voters could not change the results of the mayoral race the election should be upheld.

By deciding the appropriate resolution to this election contest in this manner, the majority opinion ignores the most important portion of the trial court's final factual finding, that "an indeterminate amount of votes in the mayoral election were unaccounted for." (Emphasis added). This statement is not limited to those votes from voters that may have been miscoded, but can encompass the whole gambit of election errors. The trial court found the evidence was such that a high but unknown amount of votes could not be cast by city voters, were voted illegally by county voters, or were otherwise not cast properly due to numerous errors, omissions and acts of negligence. It is from this finding that the trial court's conclusions of law and the ultimate outcome of declaring the election void, logically follow.

By making this finding, and then concluding that "the irregularities in this case are voluminous and cannot be remedied[,]" the trial court was justified in determining that "the combination of numerous, varying forms of errors committed on Election day constitute a constructive fraud upon the voters of the City of Columbia." Because a proper tabulation of the votes for mayor "could not be done with a reasonable degree of certainty[,]" *Wood*, 566 S.W.2d at 755, and because it was impossible to determine exactly which votes were tainted, it was proper for the trial court to set aside the entire election, *McClendon*, 272 S.W.3d at 191.

In summary, the trial court had before it substantial evidence of total chaos in this election process. The negligence of the county clerk in failing to perform her duties is beyond repair. The majority's focus on one particular irregularity and the total disregard for the numerous irregularities is an improper invasion of the trial court's discretion in fact-finding. Under these circumstances, I would affirm.

Accordingly, I dissent.

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