

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
(HEARD AT CHATTANOOGA)

FILED
March 23, 1998
FOR PUBLICATION
Cecil Crowson, Jr.
Appellate Court Clerk
March 23, 1998

WAYNE LEE AND)
C. EDDIE SHOFFNER,)
)
Plaintiffs/Appellees,)
)
v.)
)
ROBERT TUTTLE, JAMES K. LOOPE,)
ELEANOR Y. BREEDING,)
STEWART COLLINGSWORTH, and)
BETTY MANNING,)
)
Defendants,)
)
AND)
)
BILLY RAY CHEEK and)
BRUCE SEAL,)
)
Defendants/Appellants.)

CLAIBORNE CHANCERY
Hon. Billy Ray White, Chancellor
No. 03S01-9610-CH-00105

FOR DEFENDANTS/APPELLANTS:

A. Benjamin Strand, Jr.
Dandridge

FOR APPELLEE LEE:

Michael G. Hatmaker
Jacksboro

FOR APPELLEE SHOFFNER:

Mark C. Travis
Morristown

OPINION

COURT OF APPEALS REVERSED; CASE DISMISSED

HOLDER, J.

OPINION

This is an election contest alleging irregularities or mistakes in vote counting in the 1994 election for Claiborne County Sheriff and Circuit Court Clerk.¹ The issue with which we are confronted is whether votes shall be recounted when contestants allege that irregularities in vote tallying caused their defeat. The Court of Appeals ordered a recount pursuant to Blackwood v. Hollingsworth, 195 Tenn. 427, 260 S.W.2d 164 (1953). Upon review, we reverse. We distinguish the present case from Blackwood on the basis that Blackwood dealt with fraud and not mere irregularities or honest mistakes. We hold that the plaintiffs are not entitled to relief as they have neither shown fraud nor to a mathematical certainty that but for the irregularities they would have been victorious.

BACKGROUND

The plaintiffs, Wayne Lee and Eddie Shoffner, were contestants in the 1994 Claiborne County general election. Plaintiff Lee was a candidate for court clerk and was defeated by approximately 79 votes. Plaintiff Shoffner was a candidate for sheriff and was defeated by approximately 169 votes.

The plaintiffs' complaint alleged that in excess of 8,200 people voted in the contested election. They further alleged that approximately 2,595 of the total votes were cast by early or absentee voting. These early or absentee votes were cast on paper ballots. In addition, the plaintiffs alleged that there was a "vigorous write-in campaign for the office of Claiborne County Executive." The

¹ Oral argument was heard in this case in Chattanooga, Hamilton County, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

write-in campaign coupled with the early or absentee voting led to a high number of paper ballots. The basis of plaintiffs' suit is that irregularities in the counting of these paper ballots caused their defeat.

The machine votes were counted at their respective precincts, and the paper ballots were taken to the Office of the Election Commission in Claiborne County. The plaintiffs alleged that conditions at the Office of Election Commission were intolerable during the paper ballot count. Testimony at trial indicated that several individuals smoked and that the counting room was poorly ventilated and lacked air conditioning. There was also a temporary power outage. While counting ballots, the election judges, registrars, and vote counters remained in this environment for approximately 30 hours.

Plaintiffs also alleged that irregularities in ballot counting occurred. An election judge, Rocky Manning, testified at trial. He stated that ballots were rejected if a candidate's name had been properly marked and the same candidate's name was placed in the write-in column of the ballot.² He estimated that approximately 20 ballots per district were rejected. Steve Brogan, an election judge, testified that the rejection policy was applied uniformly to every ballot and not solely to ballots favoring the plaintiffs.

The trial court dismissed the plaintiffs' case, holding that the "[p]laintiffs had failed to establish a prima facie case by failing to show with mathematical certainty that any irregularity in the election held on August 4, 1994, would have affected the outcome of the election." The Court of Appeals reversed and held that a recount should take place. The appellate court quoted Blackwood v.

² Testimony indicates that the ballots were rejected as constituting two votes.

Hollingsworth, 195 Tenn. 427, 260 S.W.2d 164 (1953), in support of its holding.

For the reasons stated below, we reverse the appellate court's judgment.

DISCUSSION

There are two grounds in Tennessee upon which an election contest may be predicated. In Forbes v. Bell, 816 S.W.2d 716, 719 (Tenn. 1991), this Court delineated the grounds for an election contest. In Forbes, we held that a contestant may either file a suit to be declared a winner or file a suit to have the election declared void. In an election contest suit, courts are vested with the statutory authority to: (1) confirm an election; (2) declare an election void; (3) declare an election a tie; and (4) declare a contestant a winner. Tenn. Code Ann. § 2-17-112 (1994 Repl.). On appeal to the appellate court, the plaintiffs requested a recount and did not request that the election be declared void. The appellate court ordered a recount. Accordingly, our scope of review is whether the appellate court erred in ordering a recount.

In a suit to be declared the winner, contestants must show: (1) that the number of illegal votes exceeded the margin of victory; and (2) that to a mathematical certainty they would have been victorious had the illegal votes not been counted. Millar v. Thomas, 657 S.W.2d 750, 751 (Tenn. 1983). To obtain mathematical certainty, contestants must: (1) specifically identify each illegal voter; and (2) show for whom the illegal voters voted.

This Court has also previously recognized that a recount by the trial court may be ordered where fraud has permeated the election process and it is impossible for a contestant to show fraud absent a recount. In Blackwood v. Hollingsworth, 195 Tenn. 427, 260 S.W.2d 164 (1953), the contestant alleged

that election officials fraudulently miscalled several hundred legal votes for the contestee that had been marked for the contestant. We held that when legal votes were fraudulently miscalled the contestant may be entitled to a recount if the proof was sufficient to justify going behind the official returns. Factors justifying a recount in Blackwood were: (1) it was impossible for the contestant to point out the identity of the legal voters whose ballots had been fraudulently miscalled; (2) it was impossible to show fraud absent a recount; and (3) the ballot box had been properly secured and admitted into evidence.

The appellate court found that the present case was controlled by our holding in Blackwood. Blackwood, however, held that a recount was appropriate when legal ballots had been fraudulently miscalled. We are unpersuaded that Blackwood should stand for the proposition that courts should go behind official results whenever a contestant alleges irregularities or honest mistakes occurring during the tallying of legal votes. Such a holding could potentially render every election subject to both a recount and judicial scrutiny.

The plaintiffs also cite Dixon v. McClary, 349 S.W.2d 140, 209 Tenn. 81 (1955), in support of their argument. In Dixon, armed men entered the ballot counting room, attempted to destroy ballots and threatened election officials with bodily harm. One of the individuals illegally present in the counting room then marked approximately 98 unopened and uncounted ballots void.

Dixon is inapposite to the present case. In Dixon, absentee ballots were marked void and not counted due to duress and threats made by armed individuals. The ballots voided under duress were subsequently opened and counted by the trial court. Accordingly, Dixon permitted counting of legal votes illegally voided during a scheme to defraud an election's results.

Similarly, in Summitt v. Russell, 285 S.W.2d 137 (Tenn. 1955), the contestant requested a recount alleging "mistakes, and illegal and fraudulent count in various precincts." Id. at 138. Evidence showed that an election official "was getting all the votes he could get off the contestant." Id. at 139. Testimony also indicated that legal votes for the contestant were marked by an election official for the contestee. The ballot box had been secured and was admitted into evidence. This Court held that a recount was proper.

Upon review, we find that the plaintiffs have not met their burden in a suit to be declared a winner. They have neither alleged that the election was permeated with fraud nor that illegal votes had been cast. Absent fraud or illegal votes, courts should strive to refrain from interfering with official election returns. We, therefore, hold that contestants must show to a mathematical certainty that but for the mistakes or irregularities they would have been victorious when election contests are predicated on mere irregularities or honest mistakes in the tallying of legal votes.

The plaintiffs' proof is speculative and falls well short of establishing to a mathematical certainty that they should have been declared the winners. The record indicates that the rejection policy was uniformly applied to every ballot and, therefore, had a potentially equal impact on all candidates. One could assume that the margins of victory for the defendants would be even greater upon a recount. Accordingly, the plaintiffs' proof is speculative and does not entitle the plaintiffs to their requested relief.

The Court of Appeals' decision ordering a recount is reversed and the plaintiffs' case is dismissed. Costs of this appeal are taxed to the plaintiffs, Wayne Lee and Eddie Shoffner, for which execution may issue if necessary.

Janice M. Holder, Justice

CONCURRING:

Anderson, C.J.
Drowota and Birch, JJ.

SEPARATE CONCURRING OPINION:

Reid, J.

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12	Plaintiffs-Appellees,	(
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15	v.	(Hon. Billy Joe White,
16		(Chancellor
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19	00105		
20	ELEANOR Y. BREEDING, STEWART	(
21	COLLINGSWORTH, BETTY MANNING,	(
22	BILLY RAY CHEEK AND BRUCE SEAL,	(
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24	Defendants-Appellants.	(
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CONCURRING OPINION

I concur with the conclusion that the contestants cannot prevail in this election contest suit. I write separately to expand upon some points which are not, in my view, adequately developed in the main opinion.

The pleadings in a suit to contest an election are critically important, particularly the allegations of fact on which the claim for relief is based and the relief sought. A contest may be based on the allegation that the election was valid as well as the allegation that the

1 election was void. The contestant may limit the relief
2 sought to a determination that the contestant is entitled
3 to be declared the winner of the election or to an
4 adjudication that the election is void. Tenn. Code Ann. §
5 2-17-112 (1994). The contestant may seek relief in
6 the alternative, that the contestant be declared the winner
7 or that the election be declared void. A contestant may
8 also seek a recount of the ballots cast in the election.
9 However, the relief sought must be consistent with the
10 allegations of fact, and, if the allegations of fact and
11 the relief sought are not consistent, the suit may be
12 dismissed for failure to state a cause of action on which
13 relief can be granted. Tenn. R. Civ. P. 12.02(6). If the
14 proof does not support the relief sought, the suit will be
15 dismissed, even though the proof may support relief which
16 is not sought. For instance, the contestant in Forbes v.
17 Bell, 816 S.W.2d 716 (Tenn. 1991), sought a declaration
18 that she was the winner upon the allegations that "the
19 wholesale disregard of the election laws" resulted in 861
20 illegal ballots. The Court noted that because the
21 complaint did not set forth the number of votes each
22 candidate received "we have no way of determining whether
23 the number of allegedly illegal votes equals or exceeds the
24 margin of [the contestee's] victory." The Court held,
25 "[t]his omission alone is fatal to Forbes's claim that she
26 should be declared the duly elected winner" and affirmed

1 the dismissal of the complaint for failure to state a cause
2 of action. Id. at 719.

3
4 The contestant cannot be declared the winner upon
5 the allegation that the election was void; the only relief
6 available is a new election. In Emery v. Robertson Co.
7 Election Comm'n, 586 S.W.2d 103 (Tenn. 1979), the election
8 was declared void and a new election ordered upon the
9 allegation and proof that fraud or other illegality so
10 permeated the election as to render the results incurably
11 uncertain.

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14 The courts may also void elections
15 upon a sufficient quantum of proof that
16 fraud or illegality so permeated the
17 conduct of the election as to render it
18 incurably uncertain, even though it
19 cannot be shown to a mathematical
20 certainty that the result might have
21 been different.

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25 Id. at 109. In Shoaf v. Bringle, 192 Tenn. 695, 241 S.W.2d
26 832 (1951), the contestant sought alternative relief,
27 either that the contestant be declared the party elected or
28 a declaration that the election was void. The Court found
29 that the proof did not support the claim that the
30 contestant was entitled to be declared the winner but that
31 the election was rendered void by the fraudulent and
32 illegal acts of the election officials. The Court stated:
33

1 Such allegations in the bill as
2 "many legal votes" and "many votes" and
3 such general statements are entirely
4 too general under the ground that the
5 election was valid. Maloney v. Collier
6 [112 Tenn. 78, 83 S.W. 667 (1904)]. But
7 when we come to consider the ground
8 that the election was void because of
9 the fraudulent and illegal acts of
10 those holding the election such general
11 allegations if supported by any
12 specifically stated facts may be taken
13 into consideration. The allegations of
14 fraud must be supported by some
15 specific allegation of fact.
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19 Id. at 835. In Millar v. Thomas, 657 S.W.2d 750 (Tenn.
20 1983), the Court reaffirmed the holding in Emery v.
21 Robertson Co. Election Comm'n that an election can be found
22 void upon a showing "that fraud or illegality so permeated
23 . . . the election as to render it incurably uncertain,
24 even though it cannot be shown to a mathematical certainty
25 that the result might have been different." Millar v.
26 Thomas, 657 S.W.2d at 751 (quoting Emery, 586 S.W.2d at
27 109). In Millar, the contestant, who was defeated by a
28 margin of 162 votes, sought a declaration that the election
29 was void upon the allegation that 251 absentee ballots were
30 illegal. The Court affirmed the trial judge's finding that
31 the technical discrepancies shown by the contestant did not
32 render the ballots void and dismissed the contestant's
33 suit.
34

1 An election may also be declared void in the
2 absence of allegations and proof of pervasive fraud or
3 illegality. An election may be declared void upon
4 allegation and proof that the number of invalid ballots
5 tallied equals or exceeds the margin whereby the contestant
6 was declared the winner.

7
8 The reported decisions of this
9 State uniformly authorize the courts to
10 void an election where the evidence
11 reveals that the number of illegal
12 ballots cast equals or exceeds the
13 difference between the two candidates
14 receiving the most votes. The rule is
15 based upon the rationale that if all of
16 the illegal votes had been cast for the
17 unsuccessful candidate the result would
18 have been changed. In Southall v.
19 Billings, 213 Tenn. 280, 375 S.W.2d 844
20 (1963), Mr. Justice White, writing for
21 the Court, suggests that such a
22 mathematical purging of votes renders
23 the election void because of the
24 uncertainty of result. Id. 375 S.W.2d
25 at 850.

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29 Emery v. Robertson Co. Election Comm'n, 586 S.W.2d at 108-
30 09 (citations omitted). These decisions also show that
31 the cause or nature of the error or irregularity that
32 renders the ballots invalid is not determinative; they may
33 be invalid because of fraud, honest mistake, or
34 carelessness.

35
36 A contestant can assert the right to be declared
37 the winner only upon the allegation that the election was

1 valid. The claim to the office for which the contestant
2 was a candidate must be based upon alleged errors regarding
3 specifically identified ballots and may relate to the
4 inclusion of invalid ballots, the exclusion of valid
5 ballots, errors in tallying valid ballots and other errors
6 relating to specifically identified ballots. Accordingly,
7 the contestant is entitled to be declared the winner of the
8 election only upon allegation and proof that the correction
9 of errors relating to the specifically identified ballots
10 will result in the contestant receiving a majority of the
11 valid ballots cast. The rule was clearly set forth in
12 Shoaf v. Bringle, 241 S.W.2d 832 (Tenn. 1951), where the
13 Court stated:

14
15 When we consider this case from
16 the aspect that it was a valid election
17 and that the petitioner, contestant,
18 had received more votes than the
19 contestee it becomes necessary for the
20 contestant to show on the face of his
21 petition or complaint that the illegal
22 votes cast should be thrown out and
23 that when this is done that the vote
24 that he received plus the legal votes
25 of which he claims to have been
26 deprived was greater than that of the
27 contestee. In making these allegations
28 it was necessary that the contestant
29 specifically point out each and every
30 vote that was fraudulently or illegally
31 cast on behalf of the contestee and
32 against him and that the total of these
33 votes when taken from the contestee and
34 added to him would give him a majority.
35 Under the factual situation as set
36 forth in this bill the contestant fails
37 to show specifically that the number of
38 votes cast illegally here if thrown out

1 would give him a majority. Therefore,
2 when we come to purging the polls the
3 contestant fails to sustain his
4 position that there was a valid
5 election and that he received a
6 majority of the votes. It thus appears
7 and there is nothing else that can be
8 done but to hold that the demurrer on
9 this feature of the case should have
10 been sustained by the Chancellor and
11 the suit dismissed as to this branch of
12 the lawsuit.

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16 Id. at 833.

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18 The contestant may in certain limited
19 circumstances be entitled to a recount of the ballots, even
20 though the allegations would not entitle the contestant to
21 be declared the winner. Upon allegations and proof that
22 there were errors or irregularities relating to the
23 tallying of ballots properly voted, that the ballots have
24 been securely preserved and that the number of ballots not
25 properly tallied equals or exceeds the margin of victory,
26 the court may order a recount of the ballots. If, upon
27 recount, the contestant receives a majority of the valid
28 ballots cast, the contestant will be declared the winner.
29 In Blackwood v. Hollingsworth, 195 Tenn. 427, 260 S.W.2d
30 164 (1953), in which the margin of victory was 159 votes,
31 the contestant sought a recount of the ballots on the
32 allegation that more than several hundred legal votes cast
33 for the contestant were fraudulently called by the election
34 official and credited to the contestee. The Court

1 overruled the contestee's demurrer and held that the trial
2 court would be justified in recounting the votes, upon
3 proof that there had been no tampering with these ballots
4 in the meantime. In distinguishing the situation in
5 Blackwood from that in Shoaf v. Bringle, the Court stated:

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7 In considering whether the
8 allegations of the petition were
9 sufficient to withstand demurrer, this
10 case must not be confused with one in
11 which it is sought to overcome the
12 official returns by alleging that
13 illegal votes are included therein in a
14 number sufficient to reverse the result
15 when the official returns are purged of
16 such votes. In that situation, as held
17 in Shoaf v. Bringle, 192 Tenn. 695, 241
18 S.W.2d 832, the contestant must
19 specifically point out the allegedly
20 illegal votes cast for the contestee.
21 Otherwise, there would be no basis upon
22 which to determine for whom those
23 illegal votes were cast. In the
24 instant case the contest is based upon
25 the allegation that more than several
26 hundred legal votes cast for the
27 contestant were fraudulently called by
28 the election officials and credited to
29 the contestee. Once a ballot is placed
30 in the box there is no way of
31 ascertaining the identity of the person
32 who cast it. Therefore, to require the
33 contestant to allege in her petition
34 the identity of the voter whose ballot
35 was fraudulently called for the
36 contestee, though cast for contestant,
37 would be to require of the contestant
38 that which is impossible. But if the
39 proof be sufficient to justify the
40 Court in going behind the official
41 returns and sufficient to conclude that
42 an unauthorized approach to the ballots
43 in the box has been sufficiently
44 guarded against, then the recount of
45 these ballots establishes the truth or

1 falsity of the charge made as to
2 miscalling ballots.
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6 Id. at 166. See also Dixon v. McClary, 209 Tenn. 81, 349
7 S.W.2d 140 (1961); Summitt v. Russell, 199 Tenn. 174, 285
8 S.W.2d 137 (1955).
9

10 In their brief, the plaintiffs state that they
11 are not seeking to have the election declared void. The
12 contestants allege, in effect, that the election was valid
13 and they seek a recounting of the ballots. The contestants
14 allege specifically that there were irregularities in the
15 counting of the ballots. Each contestant contends that a
16 recounting will show that the contestant received a
17 majority of the valid ballots cast. The only evidence on
18 this issue was the estimate by one election judge that
19 "approximately 20 ballots per district" in all nine
20 districts were invalidly rejected, and the testimony of
21 another judge that the rejection practice was applied to
22 ballots cast for the contestees as well as for the
23 contestants but it was possible that if the rejected
24 ballots were counted, the results of the election would
25 have been different. This testimony is not sufficiently
26 probative to establish that the claimed errors exceed the
27 margins of victory. The record supports the finding that
28 the ballots were securely preserved and that there were
29 errors in tallying the votes. However, it does not

1 establish that the number of ballots improperly tallied
2 equals or exceeds the margins of victory. This
3 mathematical conclusion is essential to establishing the
4 right to have a recounting. Therefore, the trial court
5 properly found that the contestants failed to show that a
6 recounting "would have changed the result of the election
7 or rendered its outcome uncertain." Forbes v. Bell, 816
8 S.W.2d at 724. I agree that the trial judge properly
9 dismissed the suit.

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Reid, J.