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Case Number 717,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LA MAR GUNN,	)	
	)	
Petitioner-Below, Appellant,	)	No. 717, 2014
	)	
v.	)	
	)	
BETTY LOU MCKENNA,	)	
	)	
Respondent-Below, Appellee.	)	

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND FOR KENT COUNTY

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ARGUMENT ON THE MERITS

I. This is a proper election contest

In her Answering Brief, McKenna argues that the Superior Court should not have entertained Gunn's election contest under 15 *Del. C.* §5941. This is an untimely argument.

Supreme Court Rule 7b provides that "any party may cross-appeal from any judgment or order from which an appeal may be taken." A cross appeal is required "[w]hen an appellee seeks to overturn a ruling adverse to it on an independent claim, then a cross appeal must be filed."[1] Furthermore, it is clear that "[a]n appellee who fails to file a cross-appeal 'may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below."[2]

Here, McKenna did not file a cross-appeal but attempts to raise an issue relating to a purported error of the Superior Court. Gunn respectfully submits that since McKenna did not file a cross-appeal that she should not be permitted to argue about that decision now.

Should the Court choose to hear the argument under Supreme Court Rule 8, Gunn submits that McKenna's substantive argument should not hold up. In short,

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[1] Robert J. Martineau et al *Appellate Practice and Procedure, 2nd Edition* 640 (1987).
[2] *Id. citing United States v. American Ry. Express Co.,* 265 U.S. 425, 435 (1924).

McKenna is arguing that the Board of Canvass are not "election officials" and therefore not subject to an election contest. It is noteworthy that in the December 23, 2014, Decision and Order, the Superior Court summarized McKenna's objections as concerning only the interpretation of "malconduct" and "holding" the election – not the definition of "election officers." A review of the lower record, though, shows that both McKenna and Gunn made arguments regarding the meaning of the term "election officials."

Gunn submits that McKenna's argument presented in her Answering Brief regarding Chapter 47 (entitled "Election Officers") and Chapter 49 (entitled "Conduct of Election")[3] is simply a reshaping of the unpersuasive arguments made in the Superior Court. In a November 20, 2014, letter to Judge Young, McKenna argued narrowly that "election officers or clerks holding the election . . . can only lead to one conclusion," that is, that "election officers or clerks" refers to the "name takers, poll watchers, judges, clerks and other officials" involved in the "conduct of the election itself." (AR11). Gunn's below-counsel correctly argued that there is nothing to suggest that such a limited reading was intended, that this narrow interpretation would limit election contests to conduct at the polls on election day, and would leave those harmed with no ability to challenge. (AR14-15).

[3] *See* McKenna's Answering Brief at pgs 10-11.

Gunn respectfully submits here that McKenna's understanding of "election officials" is overly narrow. Under 15 *Del. C.* 5702(e), the Board is directed to recount absentee ballots in an election with a vote differential of the lesser of 1,000 votes or one-half of one percent of all votes cast. Counting, or recounting, the votes cast in an election is an extension of the election itself. Therefore, a statute that provides for contesting election officials, who count the votes in an election, should encompass the Board of Canvass, a body that recounts votes. It is immaterial whether the "counters" are a part of the Department of Elections and count on the day of the election and the "recounters" are a part of the Board of Canvass and count two days after the election because they both do the exact same thing – they count. This Court's acceptance of McKenna's understanding of 15 *Del. C.* § 5941 would prevent the ability to challenge the recounts of the Board of Canvass.

II. The Superior Court Committed Legal Error By Certifying the Results of its December 29 Examination of Ballots

McKenna misconstrues Gunn's argument, stating that the Superior Court engaged in malconduct "simply" because the outcome was different than the count conducted by the Board of Canvass on November 6, 2014. While it is true that Gunn stated in his Opening Brief that it was legal error to certify the fourth recount that yielded yet another vote differential, Gunn also stated that the Superior Court committed legal error by *failing to apply its own holding.* The Superior Court held

that the Board of Canvass committed malconduct by certifying the third recount when each recount yielded a different vote differential. Gunn is arguing that the Court needed to apply its own holding to the December 29 recount when it yielded yet another result to avoid additional malconduct. While Gunn argues that the current version of 15 *Del. C.* § 5702(e), when considered with its predecessor versions,[4] provides for a single recount, Gunn also argues that once more than one recount was conducted, there is an underlying logic to counting until two counts match, and that the Superior Court recognized that logic by holding that three counts yielding three different vote differentials constituted malconduct.

a. The Superior Court was "required" to reconcile the no votes to avoid legal error and the explanation is <u>not</u> readily apparent from record below

Gunn's below counsel "fairly presented"[5] the no-vote tally issue to the below Court by questioning the change from sixty to fifty-six (AR17, lines 8-15).

The reduction of "no votes" is of paramount importance to this case. While Chapter 59 does not explicitly require the Court to "reconcile" the reduction, Gunn's argument in his Opening Brief was that *when the fourth recount rendered yet another vote differential* that the Court needed to reconcile the change in "no votes" to ensure that the vote really was a tie. McKenna states that the "no vote"

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[4] *See* Del. Const. art. V, §6 (1897); 21 *Del. Laws,* c.38, §23 (1898); 65 *Del. Laws* c.519, §1 (1986).

[5] *See Sergeson v. Delaware Trust Co.,* A2d 880, 881-82 (Del. 1980)(holding that the mere raising of the issue is sufficient to preserve it for appeal.

reduction was the product of votes that were not counted by the machines but were counted by hand, as if it were a fact. Unfortunately, that is not true. On November 6, it was *speculated* that the change was the result of hand-counting rather than machine-counting.[6] On December 29, it was *speculated* that the reduction was the result of the ballots presented to the Court for review.[7]

Furthermore, the record below is clear that, on December 29, Gunn's below-counsel stated "I guess" when talking about the change. "I guess" is hardly definitive and cannot be held against Gunn as acceptance of the tally. More importantly, the vote reduction was noted on November 6, *prior* to the December 29 ballot review. There was much discussion about the significance of the reduction in "no votes" from sixty (60) to fifty-six (56) on November 6 and it was never resolved. *See* AR1-6. The Department of Elections wanted to run the ballots back through the scanners to pin-point the ballots that had not been read by the machine but had been read by a human. *See* AR3, lines 15-17.[8] Below-counsel for Gunn argued:

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[6] *See* AR1, line 17 "an inexplicable change"; AR2, line 15-16 "...not entirely clear exactly what happened or how"; AR3, lines 9-10 "...*apparently* votes that were counted manually and possibly didn't scan. It is *possibly* due to..."(emphasis added).

[7] *See* AR17, lines 14-15 "It is possible that what you are have in your hands were included in no-votes."; AR20, lines 10-12 "The difference are the ballots that we sent up to the court . . .to review...I guess, previously for them considered no votes."

[8] Later in the November 6 transcript, on page 46, an "unidentified speaker" states that the Department of Elections was not asking for a rescan but if it chosen that would perform the duties.

> And so what we are asking for is actually a due process right which is a right to have the Board of Election – which we have requested of this Court --- this Board – to cull the votes that have not been electronically read but have been manually approved by the Board of Canvass, and Mr. Paradee and I on behalf of our clients can take a look at those and fairly argue whether or not those should be counted votes or not. (AR8, lines 4-11)

The Court ultimately held that it was beyond the jurisdiction of the Board of Canvass to engage in the rescan of the ballots. As a result, the four ballots that represented the reduction from sixty (60) to fifty-six (56) *were never identified.* Gunn submits that the failure to identify the four votes on November 6 and the *guess* that they were the same votes on December 29[9] constituted legal error because the outcome of the entire election was dependent on that decision.

b. Gunn's Argument regarding 15 *Del. C.* §§ 5510 and 5511 is not misplaced

While it is true that Gunn's counsel at the December 29 hearing did not specifically raise the issue of the order in which the ballots were counted or the security of the ballots, Gunn argued to this Court that it was legal error on the part of the below Court to not verify, *sua sponte,* that there had been strict adherence to the requirements of 15 *Del. C.* §§ 5510 and 5511 *when the fourth recount rendered yet another vote differential.*

Moreover, Supreme Court Rule 8 permits this Court to consider this issue in the interest of justice under the plain error standard of review. Plain errors are

[9] It is noteworthy that the Court reviewed five ballots on December 29 – not four.

"limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive ... a substantial right, or ... show manifest injustice.[10] Gunn submits that the plain error rule is applicable to the facts of this case because this case is about the integrity of the vote, a fundamental right.[11]

The substantive portion of McKenna's argument that the Board of Canvass enjoy unlimited discretion in the way they handle the ballots because 15 *Del. C.* §§ 5510 and 5511 does not apply to them, should not be permitted to stand. The General Assembly enacted the above-mentioned provisions with the intent to protect the integrity of the entire election, not just the integrity on election day. Therefore, to protect the integrity of future election recounts, this Court should hold that the Board of Canvass must follow the procedural requirements set forth in Title 15 regarding the handling of ballots.

McKenna's briefing fails to address the issue involving the security of the ballots. It is not enough to simply state that the ballots were "secured in zip-tied bags."[12] A zip-tie is not secure because it may be substituted without detection.

15 *Del C.* §5511 (e) states:

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[10] *Wainright v. State,* 504 A.2d 1096, 1100 (Del. 1986).
[11] *See* Joshua A. Douglas *"Is the Right to Vote Really Fundamental"* 18 Cornell J. L. & Pub. Pol'y 143 (2008)
[12] *See* McKenna's Answering Brief at pg 4.

> Upon completion of any inspection of votes pursuant to this subsection, absentee ballots shall be returned to the carrier envelopes from which they were removed and the carrier envelopes shall be:
>
> > (1) Resealed in a secure manner, or shall be placed in another security envelope, for the purposes of securely protecting the contents thereof from tampering, removal, or *substitution without detection*; and (emphasis added)

Importantly, actual tampering with the ballots need not be shown; the ballots lose evidential integrity when the *opportunity* for unlawful interference by unauthorized persons exists.[13] Here, the opportunity for interference was created when the ballots were secured with a device which could be substituted without detection.

McKenna states that Gunn's averments regarding the sorting of the ballots and security of the ballots are not supported by the record.[14] Conspicuously absent is a denial of Gunn's averments. Furthermore, there is support in the record regarding the sorting of the ballots. McKenna states that "there is nothing anywhere in the record below to support Gunn's averment that 'the first and second recounts before the Board were tallied in election district order"[15] yet McKenna's own counsel stated in a November 20, 2014 teleconference with Judge Young "But I was told that the reason that they did a third recount is because,

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[13] *Armbrust v. Starkey*, 119 N.E. 2d 910, 911 (Ill. 1954) (emphasis added)
[14] One of Gunn's arguments in his Opening Brief is that the record is devoid of many key facts and that the lack of a record undermines the integrity of the process.
[15] See McKenna's Answering Brief at pg 24.

during the first two, the absentee ballots *were separated by election district* because that's how they come in from the polls. *They were counted by election districts* and, then, the subtotals were added up." *See* AR10, lines 7-12. (emphasis added). It appears that Gunn's averment regarding the sorting of the first two recounts was absolutely correct.

III. The Recount Conducted by the Board of Canvass May Be an Issue Before this Court on Appeal

While the instant appeal is not a direct appeal of the Board of Canvass proceedings, the acts of the Board of Canvass are within the purview of this Court because they are at the crux of the election contest. Specifically, the conduct of the Board of Canvass is central to the holding of the Superior Court ordering the fourth recount. Furthermore, consideration of what happened at the Board of Canvass is relevant in determining if the Superior Court erred in its December 30 order.

This Court may consider the actions of two different Superior Court tribunals. Justice Rodney contemplated this exact scenario dissenting in *Walker v. Harrington*, stating that:

> Such a proceeding [an election contest] would be held before the Superior Court, as part of the general judiciary system, and appellate proceedings brought therefrom to this Court. We might then find this Court confronted with substantially the same problem, reviewing the acts of two separate and distinct Courts from the same count, and with entirely different Judges constituting

such Superior Court, and neither proceeding would be res adjudicate as to the other.[16]

Gunn respectfully submits that this is the exact posture of the instant case and that this Court has the authority to review the acts of the Board of Canvass, give guidance to future Boards and issue a writ of mandamus if deemed appropriate.

a. Certification after the first recount

McKenna contends that Gunn's argument regarding a singular recount "flies squarely in the face" of the argument Gunn made below that the Board was required to keep counting until it reached the same result twice. The two are reconciled as follows: the first recount should have been certified pursuant to 15 *Del. C.* §5702 but, once a second recount was performed, it became necessary to match the two vote counts to ensure accuracy.

McKenna argues that the Board can count as many times as it wishes because there is no statutory preclusion from doing so. Gunn argues that the current version of 15 *Del. C.* § 5702(e), when considered with its predecessor versions,[17] provides for a single recount, creating a statutory preclusion from additional counts. Furthermore, Gunn submits that the purpose of a recount is to

[16] *State ex rel. Walker v. Harrington*, 27 A.2d 67, 74 (Del. 1942). The Court held that it had original jurisdiction to issue a Writ of Mandamus to the Board of Canvass.
[17] See Del. Const. art. V, §6 (1897); 21 *Del. Laws*, c.38, §23 (1898); 65 *Del. Laws* c.519, §1 (1986).

ensure that the winner on election night is still the winner after the recount – and in this case that was Gunn.

Next, McKenna's statement that "the record does not support Gunn's contention that there were 'three recounts'" is puzzling. While it is true that the first two recounts were not on the record, something that Gunn has raised as an issue with respect to the integrity of the process, the fact that there were three recounts is *uncontested* in the lower record.[18]

McKenna's statement that the "Board was permitted to count the ballots as many times as necessary in order to insure that the result is accurate"[19] when the Board certified a count that was incorrect (a point conceded by McKenna) seems to add even more justification to counting until two counts matched. Doing so here could have avoided certification of inaccurate results.

Here, because the Board did not keep a record as it was counting, and for reasons that are not in the record chose to keep counting, an election contest had to be filed in order to force another count.

b. The fact that the tabulation of absentee ballots certified by the Board of Canvass "does not add up" <u>is</u> material

[18] *See* Verified Petition Contesting the Election (A56-61); Richard Forsten's letter of November 19 (A62-63), John Paradee's letter of November 20 (AR11-13), Richard Forsten's letter of December 1 (AR14-16), Judge Young's December 23 Decision. (A67-76).
[19] *See* McKenna's Answering Brief at pg 28.

McKenna concedes that the Board certified an improper vote count but states that it is immaterial at this juncture. As a result of the improper certification, Gunn had to contest the election. McKenna would like this Court to consider only the fourth count and certification of the election by the Superior Court, ignoring the need to ensure integrity of the whole election process.

As previously stated, there is much that is not included in the record and the fact that the record is so sparse undermines the integrity of the process. McKenna's recitation of "what really happened" is pure conjecture. The statement that "Unfortunately, the Board of Canvass subtracted a vote from Gunn's absentee vote total rather than adding a vote to Gunn's absentee total, and that is how the Board of Canvass incorrectly concluded that McKenna had won by two votes when, in fact the race was tie all along"[20] has no support in the record. Furthermore, if it were true that had a vote (note singular) been added to Gunn's absentee total that would have taken Gunn's total from 688 to 689, not 690. Again, one vote was still missing because there were TWO votes unaccounted for – not one. It is pure conjecture at this point as to what those two missing votes would have meant and pure conjecture that it would have resulted in a tie.

McKenna crafts an argument to induce this Court into believing that the third recount and the fourth recount resulted in the same vote tally. But the

[20] *See* McKenna's Answering Brief at pg 30-31.

numbers do not lie. Two votes were unaccounted for – not one – and the Board of Canvass certified it. McKenna's conjecture that the Board subtracted a single vote instead of adding a single vote is a red herring.

IV. The Authority of this Court to Grant Relief

Turning now to the relief requested, while it is true that there is nothing in the Delaware Code that authorizes this Court to order the Superior Court to decertify the election and order a special election, if the Court were to reverse the Superior Court's decision to certify the tie, an extraordinary writ could provide the mechanism to reach the Department of Elections.

In *Sussex Cnty. Dep't of Elections v. Sussex Cnty. Republican Comm.,* 58 A.3d 418 (Del. 2013), this Court affirmed the Chancellor's mandate to the Department of Elections to add a candidate to the ballot based on the incapacity of the candidate that won the primary election, and there was no provision for that in the Delaware Code.[21]

[21] *See* 2012 Del. Lexis 562 for the actual Order from this Court indicating that "The mandate shall issue immediately."

CONCLUSION

McKenna is suggesting that what happened before the Board of Canvass is immaterial and that the fourth recount was the remedy for anything that went wrong prior to December 29. The Superior Court apparently also believed that the fourth recount addressed any deficiencies of the Board of Canvass.[22]

Gunn submits that to let an election certification stand where the ballots were not counted in the order specified by the Delaware Code, were not secured in accordance with the Delaware Code, were not fully accounted for and where the lower court failed to apply its own holding would send a message that the integrity of the process does not matter. It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[23]

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[22] *See* AR18, lines 1-2 "This is the only counting that matters"; AR19, lines 14-15 "I don't know, but this is the count that's going to be the count"; AR19, line 23 "...so this is the count that matters."

[23] *Bush v. Gore*, 531 U.S. 98, 104 (2000), citing *Reynolds v. Sims*, 377 U. S. 533, 555 (1964).