EFiled: Mar 04 2015 08:32AM EST
Filing ID 56859738
Case Number 717,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LA MAR GUNN, Petitioner-Below, Appellant, v. BETTY LOU MCKENNA, Respondent-Below, Appellee,	No. 717, 2014 Court Below: Superior Court of the State of Delaware in and for Kent County

APPELLEE'S ANSWERING BRIEF

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Dated: March 4, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

This action is ***not*** an appeal from the November 6, 2014 proceedings before the Kent County Board of Canvass. Rather, this action is an election contest under Chapter 59 of Title 15 which commenced on November 13, 2014, when Petitioner La Mar Gunn ("Gunn") filed a Verified Petition Contesting Election. (B-1-7).[1]

On November 17, 2014, the Respondent, Betty Lou McKenna ("McKenna"), filed a Motion to Dismiss, asserting *inter alia* that the Petition failed to allege any facts which would provide the Superior Court with jurisdiction to entertain the claims asserted by the Petition or grant the relief sought thereby. In particular, McKenna contended that the Petition failed to satisfy any of the statutory grounds for an election contest set forth in 15 *Del. C.* § 5941. (B-8-12). Gunn responded with two letters on November 18, 2014. (B-13-15). The Superior Court below held a teleconference with counsel for the parties on November 20, 2014 (B-16-30), after which Gunn filed an Amended Verified Petition Contesting Election (B-31-42). McKenna then submitted additional argument in support of her Motion to Dismiss, by letter dated November 20, 2014 (B-43-45), and Gunn submitted additional argument in opposition by letter dated December 1, 2014 (B-46-48).

[1] The designation "(B-__)" refers to the corresponding numbered pages within the Appendix to this Answering Brief.

On December 23, 2014, the Superior Court below issued its written decision upon McKenna's Motion to Dismiss, granting the Motion in part and denying the Motion in part, while at the same time granting Gunn's Petition and ordering an examination of absentee ballots to be conducted by the Department of Elections. (B-49-58).

On December 29, 2014, the Department of Elections conducted its examination of all 1,549 absentee ballots cast in the November 4, 2014 election for the Office of Kent County Recorder of Deeds, under the supervision of Superior Court Judge Robert J. Young. (B-59-81). At the conclusion of the Superior Court's examination of the absentee ballots, the election was declared a tie. (B-77-79). On December 30, 2014, the Superior Court issued its Order certifying this result (B-82-83), and on December 31, 2014, the Superior Court issued an Order providing the parties with copies of the only five ballots called into question during the December 29, 2014 examination of the absentee ballots (B-84-89).

On December 30, 2014, Gunn filed a Notice of Appeal from the Superior Court's December 30, 2014 Order and Certification with this Honorable Court. On December 31, 2014, Gunn filed an Amended Notice of Appeal. On January 13, 2015, this Honorable Court approved the parties' Stipulated Briefing Scheduling, and on February 13, 2015, Gunn filed his Opening Brief. This is McKenna's Answering Brief.

SUMMARY OF ARGUMENT

1. This is not a proper election contest. The members of the Board of Canvass are ***not*** "election officers or clerks holding the election" within the meaning of 15 *Del. C.* § 5941(1), and therefore, the claims asserted by Gunn's Petition were not subject to review by the Superior Court under 15 *Del. C.* § 5941.

2. The first argument set forth in the Appellant's Opening Brief is **DENIED**. The Superior Court did ***not*** commit legal error by certifying the results of its December 29, 2014 examination of the absentee ballots. The Superior Court was not required to keep counting until it reached the same result twice and, in any event, Gunn has waived this argument. The Superior Court was not required to "reconcile how the 'no vote' tally changed" from 60 votes to 56 votes, and, in any event, the explanation is readily apparent from the record below. Gunn's argument regarding 15 *Del. C.* §§ 5510(5) and 5511(e) was never raised below and, in any event, is misplaced.

3. The second argument set forth in the Appellant's Opening Brief is **DENIED**. Whether the recount conducted by the Board of Canvass on November 6, 2014 was properly certified is ***not*** the issue before this Court on appeal.

STATEMENT OF FACTS

At the outset of the examination of absentee ballots conducted by the Department of Elections on December 29, 2014, the parties agreed that two officials from the Department – one a Republican and one a Democrat – would conduct the ballot count in the presence of two representatives for each of the parties. (B-60-61). The officials from the Department of Elections were Doris Young and Douglas Greig. (B-62). Ms. McKenna's representatives were John Paradee and Craig Eliassen. (B-62). Mr. Gunn's representatives were Mr. Gunn himself and his counsel, Timothy Houseal. (B-62-63).

The ballots – which had been secured in zip-tied bags[2] and locked up since the conclusion of the Board of Canvass proceedings on November 6, 2014[3] – were removed from the secured bags, reviewed by the Department of Elections officials, and, with the parties' representatives observing, separated into one of three different piles – a vote for McKenna, a vote for Gunn, or no vote for either candidate. (B-64, lines 12-18). Any ballots which the officials from the Department of Elections or the parties' representatives deemed to be unclear or otherwise questionable were pulled out and placed aside for the Court to review. (B-65-66). At the end of this process, there were only five ballots which the

[2] (B-60, lines 8-9).

[3] (B-62, lines 4-5).

parties' representatives questioned and asked the Court to review – one of which the Court determined was a vote for Gunn, and four of which the Court determined were votes for McKenna. (B-66-74).[4] Following the Court's determinations regarding the five questioned ballots, the officials from the Department of Elections placed the additional ballot for Gunn into the stack of Gunn votes and the additional four ballots for McKenna into the stack of McKenna votes, and commenced counting the number of votes in each stack. (B-76). At the conclusion of this count, the outcome was 803 votes for McKenna, 690 votes for Gunn, and 56 no votes – a total of 1,549 absentee ballot votes. When added to the machine vote totals for each candidate – 18,445 for McKenna and 18,558 votes for Gunn – the end result is a tie (19,248 to 19,248). (B-76-78).

Critically, no one disputed that – but for the four ballots initially questioned by Gunn – all of the ballots identified by the Department of Elections officials as votes for McKenna and placed into the McKenna stack were, in fact, votes for McKenna. (B-66, lines 9-15).[5] Additionally, everyone present – including Mr. Gunn – agreed that the total number of ballots reflecting "no vote" for either

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[4] Copies of the five ballots in question may be found at pages B-85-89 of the Appendix to this Answering Brief.

[5] "THE COURT: I understand they are not counted yet, but is there any dispute that any of the ballots in the McKenna stack are for anybody but McKenna?

MR. HOUSEAL: No, your Honor." (B-66 at lines 12-15).

candidate was 56. (B-75, lines 18-19). Finally, at the conclusion of the count conducted by the Department of Elections officials, everyone present – including Mr. Gunn – agreed that (a) the final count reflected 803 votes for McKenna, 690 votes for Gunn, and 56 "no votes", and (b) when combined with the machine vote totals, the end result was a tie. (B-76-78). At that point, the only argument which Gunn continued to reserve was his initial contention that one of the ballots cast for McKenna (B-87) should not count (B-79-80). Otherwise, Gunn conceded the accuracy of the tabulation with regard every other absentee ballot:

> THE COURT: Is there any dispute with the accuracy of the counting process? Has the counting been completed?
>
> MS. MANLOVE: Almost.
>
> THE COURT: Okay. Numbers aside, is there any question about the accuracy of the counting itself?
>
> MR. PARADEE: Your Honor, I believe we have agreement.
>
> MR. HOUSEAL: Yes, we do, Your Honor.
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> MR. PARADEE: On the total in the piles, there are 56 no-votes.
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> THE COURT: All right.
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> MR. PARADEE: 803 votes for McKenna and 690 votes for Gunn. And I believe, I would ask the Department of Elections to confirm this, that when these absentee ballots are added to the machine ballot totals, the result of the election, I believe, is a tie.
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> MR. HOUSEAL: Your Honor, just to further clarify, those numbers – I believe these numbers are correct. The 56-no-votes issue that we talked about before really is not the federal ballots that explain the

difference. The difference are the ballots that we sent up to the Court for your Honor to review were, I guess, previously for them considered no-votes. They weren't read. They couldn't decide. And that's what those four are. They have now been resolved by the Court, and I believe we have a tie, your Honor.

THE COURT: Is the [Department] of Elections in agreement with that?

MS. YOUNG: Yes.

MR. GREIG: Yes, sir. (B-76, line 12 through B-77, line 19).

Following this discussion with the Court, Gunn reiterated his challenge to one of the ballots which the Court had determined indicated an intent to cast a vote for McKenna:

MR. HOUSEAL: I'm not asking at the moment to revisit that one ballot, but we do believe that the one ballot that was sloppy and X'ed out all over it was difficult or we'd argue could not establish voter intent with that one ballot, but I don't want to waive any argument Mr. Gunn might have with respect to that ballot.

THE COURT: Fine. (B-79, lines 2-8).

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

THE COURT: It's a tie. And then I guess it's subject to whether or not Mr. Gunn wants to proceed with some other measure related to that one disputed ballot, but that's the determination that the Court's made for this matter.

MR. HOUSEAL: I understand, your Honor. We'll be discussing with Mr. Gunn his options. And as I've stated, he has not waived his rights with respect to that one ballot.

THE COURT: All right. (B-79, line 16 through B-80, line 2).

LEGAL ARGUMENT

I. THIS IS NOT A PROPER ELECTION CONTEST.

A. Question Presented

Are the members of the Board of Canvass "election officers or clerks holding the election" within the meaning of 15 *Del. C.* § 5941(1)?

B. Standard and Scope of Review

On appeal from a decision of the Superior Court, the Supreme Court reviews questions of law *de novo*.[6]

C. Merits of Argument

Four days after Gunn filed his Verified Petition, McKenna filed a Motion to Dismiss, asserting that the Petition failed to allege any facts which would provide the Superior Court with jurisdiction to entertain the claims asserted by the Petition or grant the relief sought thereby. In particular, McKenna contended that the Petition failed to satisfy any of the statutory grounds for an election contest set forth in 15 *Del. C.* § 5941.

In response to McKenna's Motion to Dismiss, Gunn suggested that the Petition adequately stated a claim under 15 *Del. C.* § 5941(1), on the theory that

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[6] *Stoltz Mgmt Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (citing *E.I. du Pont de Nemours Co., Inc., v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del.1985)).

the recount conducted by the Board of Canvass on November 6, 2014 evidenced "malconduct on the part of election officers or clerks holding the election" within the meaning of 15 *Del. C.* § 5941(1), because three different counts conducted by the Board of Canvass resulted in three different outcomes. As McKenna pointed out, however, the members of the Board of Canvass are ***not*** "election officers or clerks holding the election" within the meaning of 15 *Del. C.* § 5941(1), and therefore, the claims asserted by Gunn's Petition still did not fall within the purview of 15 *Del. C.* § 5941.

Ultimately, the Superior Court denied McKenna's Motion, finding that the conduct of the Board of Canvass was sufficiently "abnormal", "inadequate", "incorrect or deficient" to constitute "malconduct" within the meaning of 15 *Del. C.* § 5941(1). McKenna respectfully contends that the Superior Court missed the key point here – to-wit, regardless whether the conduct of the Board of Canvass rose to the level of "malconduct" within the meaning of 15 *Del. C.* § 5941(1), the members of the Board of Canvass are ***not*** "election officers or clerks holding the election", and therefore, the claims asserted by Gunn's Petition simply do not fit within the purview of 15 *Del. C.* § 5941(1). Accordingly, the Superior Court was without jurisdiction to entertain Gunn's Petition, and therefore, the Superior Court should have granted McKenna's Motion and dismissed the Petition.

As McKenna argued below:

> A plain reading of the phrase "malconduct on the part of election officers or clerks holding the election", as that phrase employed by 15 *Del. C.* § 5941, can only lead to one conclusion – "malconduct on the part of election officers or clerks holding the election" means wrongdoing in the conduct of the election itself (e.g., if an election clerk alters or interferes with a ballot cast at the polls). It does not mean errors allegedly made by the Board of Canvass in conducting the automatic recount required under 15 *Del. C.* § 5702(e), after the election has concluded. Here, the election in question was "held" on Tuesday, November 4, 2014. And the "election officers or clerks" who "held" that election were the name takers, poll watchers, judges, clerks, and other officials who were engaged by the Department of Elections to oversee the casting of ballots on November 4, 2014 – not the members of the Board of Canvass who conducted a manual recount of absentee ballots two days later. For this reason, the claims asserted by the Petition are not proper grounds for an election contest under 15 *Del. C.* § 5941.

This conclusion – that the members of the Board of Canvass are ***not*** "election officers or clerks holding the election" within the meaning of 15 *Del. C.* § 5941(1) – is readily apparent from a plain reading of the pertinent provisions of Title 15. In Chapter 47 (entitled "Election Officers"), for example, 15 *Del. C.* § 4701 authorizes the Department of Elections to appoint one "inspector", two "judges", and two "clerks" as the "election officers" for each election district. Additionally, 15 *Del. C.* § 4702 authorizes the Department of Elections to appoint "such additional election officers to serve as machine operators, greeters or for other purposes deemed necessary ***to facilitate the operation of the polling places***"

[emphasis added]. Moreover, and notably so, "election officers" are trained and paid by the Department of Elections.[7]

Similarly, Chapter 49 of Title 15 (entitled "Conduct of Election") contains numerous provisions which make it clear that the "election officers or clerks holding the election" are the officials engaged by the Department of Elections to oversee the casting of ballots on Election Day – ***not*** the members of the Board of Canvass who certify and proclaim the results two days later. For example, 15 *Del. C.* § 4902 provides that:

> If on the day of holding an election any election officer authorized by law to serve at the election in any election district shall be absent from the place of election at 7:00 in the forenoon, the inspector, if present, or, in the absence of the inspector, then any judge who may be present, shall immediately notify the department of elections for that inspector's or judge's county of such absence.

Likewise, 15 *Del. C.* §§ 4904 and 4909 require "election officers" to subscribe to an oath of office, swearing not to engage in any of the type of conduct which may give rise to various criminal offenses defined by Chapter 51 of Title 15.[8] And finally, numerous provisions of Subchapter II in Chapter 51 make it clear that the "election officers or clerks holding the election" are the officials engaged by the Department of Elections to oversee the casting of ballots on Election Day –

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[7] *See* 15 *Del. C.* § 4741 and 15 *Del. C.* § 4707, respectively.

[8] McKenna respectfully submits that the type of conduct prescribed by Chapter 51 of Title 15 is the "malconduct on the part of election officers or clerks holding the election" referred to by 15 *Del. C.* § 5941(1).

not the members of the Board of Canvass who certify and proclaim the results two days later.[9]

By contrast, 15 *Del. C.* § 5701 provides that the Board of Canvass is comprised of certain Judges of the Superior Court, "with the aid of such of its officers and such sworn assistants as it shall appoint". Additionally, 15 *Del. C.* § 5702 authorizes the Superior Court to "issue summary process against the election officers of such election district" if the records of an election are not produced in a timely fashion prior to convening the Board of Canvass. Lastly, 15 *Del. C.* § 5701 provides that all necessary costs and expenses incurred in carrying out the duties of the Board of Canvass – including the compensation of all personnel involved – "shall be paid by the State Treasurer from any moneys in the State Treasury not otherwise appropriated."

In summary, members of the Board of Canvass are appointed by the Superior Court, while "election officers" are appointed by the Department of Elections. The costs and expenses of the Board of Canvass – including the compensation of all personnel involved – are paid by the State Treasurer, while the costs and expenses of conducting an election – including the compensation of "election officers" – are paid by the Department of Elections.

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[9] *See, e.g.*, 15 *Del. C.* §§ 4931 and 4947, which dictate that the "election" shall be opened at 7:00 a.m. and closed at 8:00 p.m. on the day of the election.

The foregoing review of pertinent provisions of Title 15 demonstrates that the "election officers or clerks holding the election" are the officials engaged by the Department of Elections to oversee the casting of ballots on Election Day – ***not*** the members of the Board of Canvass who certify and proclaim the results two days later. Because Gunn's Petition fails to allege any "malconduct on the part of ***election officers or clerks holding the election***", within the meaning of 15 *Del. C.* § 5941(1), the Petition fails to satisfy any of the jurisdictional prerequisites for an election contest under 15 *Del. C.* § 5941. For this reason, McKenna's Motion to Dismiss should have been granted and the Petition should have been dismissed. The Superior Court erred as a matter of law by allowing the Petition for election contest to proceed, an error which this Honorable Court should not allow to stand. That said, it is now clear that the election here in question is (and always was) a tie, leaving the parties and this Honorable Court in a difficult predicament – although the Superior Court should never have engaged in an examination of the ballots (because it was without jurisdiction to do so), that review has, in fact, revealed an error in the tabulation of absentee ballots conducted by the Board of Canvass on November 6, 2014. In the final analysis, whichever way this Honorable Court resolves this conundrum, the only consequence would appear to be the length of the term which McKenna should serve upon disposition of this controversy. That is, if this Honorable Court concludes that the Superior Court should have dismissed

Gunn's Petition for lack of jurisdiction under 15 *Del. C.* § 5941, then McKenna would serve a 4-year term. If, however, this Honorable Court concludes that the Superior Court did have jurisdiction to entertain Gunn's Petition, then the end result is a tie, and upon appointment by the Governor, McKenna would serve only a 2-year term.[10] In either event, Gunn's Petition must ultimately fail.

[10] *See* Article III, § 9 of the Delaware Constitution.

II. THE SUPERIOR COURT DID NOT COMMIT LEGAL ERROR BY CERTIFYING THE RESULTS OF ITS DECEMBER 29, 2014 EXAMINATION OF ABSENTEE BALLOTS.

A. Question Presented

Did the Superior Court commit legal error by certifying the results of its December 29, 2014 examination of the absentee ballots?

B. Standard and Scope of Review

On appeal from a decision of the Superior Court, the Supreme Court reviews questions of law *de novo*.[11] The Superior Court's determination of factual questions is entitled to deference, however, unless "clearly erroneous".[12]

C. Merits of Argument

Gunn's Opening Brief makes three distinct arguments in support of his contention that the Superior Court "committed multiple legal errors" below. First, Gunn contends that the Superior Court itself engaged in "malconduct" within the meaning of 15 *Del. C.* § 5941(1) by certifying the result of the absentee ballot examination conducted on December 29, 2014, simply because the outcome was different than the count conducted by the Board of Canvass on November 6, 2014. Second, Gunn contends that the Superior Court committed error by failing to

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[11] *Stoltz Mgmt Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992) (citing *E.I. du Pont de Nemours Co., Inc., v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del.1985)).

[12] *Hall v. State*, 14 A.3d 512, 516-7 (Del.2011).

"reconcile how the 'no vote' tally changed" from 60 votes on election night to 56 votes on December 29, 2014. And third, Gunn contends that the Superior Court committed error by failing to insure that, following the Board of Canvass proceedings on November 6, 2014, the absentee ballots were placed back into order by election district and "resealed in a secure manner or placed in another security envelope".

1. The Superior Court was not required to keep counting until it reached the same result twice and, in any event, Gunn has waived this argument.

Gunn's first contention is that the Superior Court itself engaged in "malconduct" (constituting legal error) by certifying the result of the absentee ballot examination conducted on December 29, 2014, simply because the outcome was different than the count conducted by the Board of Canvass on November 6, 2014. Essentially, Gunn suggests, the Superior Court should have required the Department of Elections to keep counting until it reached the same result twice. The problem with this argument, however, is three-fold: first, it is an argument that was never made below; second, it is wrong as a matter of law; and third, everyone present during the December 29, 2014 absentee ballot examination – including Gunn himself – agreed that, but for one particular ballot which Gunn reserved the right to further challenge (B-79, lines 2-7), the absentee ballot examination conducted on December 29, 2014 was wholly accurate. (B-66, lines 9-15; B-75,

lines 18-19; B-76-78). Accordingly, but for the one ballot which Gunn reserved the right to further challenge, Gunn has waived any argument that the absentee ballot examination conducted by the Superior Court was inaccurate or erroneous.[13]

Here, it is important to recognize what happened during absentee ballot examination conducted on December 29, 2014. The ballots – which had been secured in zip-tied bags[14] and locked up since the conclusion of the Board of Canvass proceedings on November 6, 2014[15] – were removed from the secured bags, reviewed by the Department of Elections officials, and, with the parties' representatives observing, separated into one of three different piles – a vote for McKenna, a vote for Gunn, or no vote for either candidate. (B-64, lines 12-18). Any ballots which the officials from the Department of Elections or the parties' representatives deemed to be unclear or otherwise questionable were pulled out and placed aside for the Court to review. (B-7-8). At the end of this process, there were only five ballots which the parties' representatives questioned and asked the Court to review – one of which the Court determined was a vote for Gunn, and four of which the Court determined were votes for McKenna. (B-66-74).

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[13] Where an appellant fails to raise a claim or contention below, the Supreme Court will not consider the claim for the first time on appeal. Sup. Ct. R. 8; *Ward v. Delmarva Power & Light Co.*, 70 A.3d 206 (Del. 2012); *Gamles Corp. v. Gibson*, 939 A.2d 1269 (Del. 2007).

[14] (B-60, lines 8-9).

[15] (B-62, lines 4-5).

Following the Court's determinations regarding the five questioned ballots, the officials from the Department of Elections placed the additional ballot for Gunn into the stack of Gunn votes and placed the additional four ballots for McKenna into the stack of McKenna votes, and commenced counting the number of votes in each stack. (B-76). At the conclusion of this count, the outcome was 803 votes for McKenna, 690 votes for Gunn, and 56 no votes – a total of 1,549 absentee ballot votes. When added to the machine vote totals for each candidate – 18,445 for McKenna and 18,558 votes for Gunn – the end result is a tie (19,248 to 19,248). (B-76-78).

Critically, no one disputed that – but for the four ballots initially questioned by Gunn – all of the ballots identified by the Department of Elections officials as votes for McKenna and placed into the McKenna stack were, in fact, votes for McKenna. (B-66, lines 9-15).[16] Additionally, everyone present – including Mr. Gunn – agreed that the total number of ballots reflecting "no vote" for either candidate was 56. (B-75, lines 18-19). Finally, at the conclusion of the count conducted by the Department of Elections officials, everyone present – including Mr. Gunn – agreed that (a) the final count reflected 803 votes for McKenna, 690 votes for Gunn, and 56 "no votes", and (b) when combined with the machine vote

[16] "THE COURT: I understand they are not counted yet, but is there any dispute that any of the ballots in the McKenna stack are for anybody but McKenna?

MR. HOUSEAL: No, your Honor." (B-66 at lines 12-15).

totals, the end result was a tie. (B-76-78). At that point, the only argument which Gunn continued to reserve was his initial contention that one of the ballots cast for McKenna (B-87) should not count (B-79-80). Otherwise, Gunn conceded the accuracy of the tabulation with regard every other absentee ballot:

> THE COURT: Is there any dispute with the accuracy of the counting process? Has the counting been completed?
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> MS. MANLOVE: Almost.
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> THE COURT: Okay. Numbers aside, is there any question about the accuracy of the counting itself?
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> MR. PARADEE: Your Honor, I believe we have agreement.
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> MR. HOUSEAL: Yes, we do, Your Honor.
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> MR. PARADEE: On the total in the piles, there are 56 no-votes.
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> THE COURT: All right.
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> MR. PARADEE: 803 votes for McKenna and 690 votes for Gunn. And I believe, I would ask the Department of Elections to confirm this, that when these absentee ballots are added to the machine ballot totals, the result of the election, I believe, is a tie.
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> MR. HOUSEAL: Your Honor, just to further clarify, those numbers – I believe these numbers are correct. The 56-no-votes issue that we talked about before really is not the federal ballots that explain the difference. The difference are the ballots that we sent up to the Court for your Honor to review were, I guess, previously for them considered no-votes. They weren't read. They couldn't decide. And that's what those four are. They have now been resolved by the Court, and I believe we have a tie, your Honor.
>
> THE COURT: Is the [Department] of Elections in agreement with that?

MS. YOUNG: Yes.

MR. GREIG: Yes, sir. (B-76, line 12 through B-77, line 19).

Following this discussion with the Court, Gunn reiterated his challenge to one of the ballots which the Court had determined indicated an intent to cast a vote for McKenna:

> MR. HOUSEAL: I'm not asking at the moment to revisit that one ballot, but we do believe that the one ballot that was sloppy and X'ed out all over it was difficult or we'd argue could not establish voter intent with that one ballot, but I don't want to waive any argument Mr. Gunn might have with respect to that ballot.
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> THE COURT: Fine. (B-79, lines 2-8),
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> THE COURT: It's a tie. And then I guess it's subject to whether or not Mr. Gunn wants to proceed with some other measure related to that one disputed ballot, but that's the determination that the Court's made for this matter.
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> MR. HOUSEAL: I understand, your Honor. We'll be discussing with Mr. Gunn his options. And as I've stated, he has not waived his rights with respect to that one ballot.
>
> THE COURT: All right. (B-79, line 16 through B-80, line 2).

If Gunn intended to dispute the accuracy of the counting process or the tabulation of any of the absentee ballots other than the one ballot which he did question, the hearing before the Court on December 29, 2014 was his opportunity to do so. But he did not. Instead, Gunn conceded the accuracy of the counting process and the tabulation of every absentee ballot except for one. Gunn has thus

waived his right to challenge the accuracy of the counting process and his right to challenge all but the one ballot for which he reserved his rights at the end of the December 29, 2014 hearing.

Moreover, the argument which Gunn now attempts to make – that the Superior Court committed "malconduct" (and thus, legal error) by failing to require the Department of Elections conduct more than one count of the absentee ballots – was never raised below, and therefore, the argument is waived in any event.[17] Furthermore, there is no requirement under Chapter 59 of Title 15 that the Superior Court must conduct multiple examinations or counts of absentee ballots until it reaches the same result twice, and thus, the argument is simply wrong as a matter of law.

2. The Superior Court was not required to "reconcile how the 'no vote' tally changed" from 60 votes to 56 votes; and, in any event, the explanation is readily apparent from the record below.

As with Gunn's first allegation of error, Gunn's contention that the Superior Court committed error by failing to "reconcile how the 'no vote' tally changed" from 60 votes to 56 votes was never raised below, and therefore, the argument is waived.[18] That said, there is no requirement in Chapter 59 of Title 15 that the Superior Court must "reconcile" any part of an examination of ballots which the

[17] Sup. Ct. R. 8; *Ward v. Delmarva Power & Light Co.*, 70 A.3d 206 (Del. 2012); *Gamles Corp. v. Gibson*, 939 A.2d 1269 (Del. 2007).

[18] *Id.*

Court might conduct under Chapter 59 with the recount conducted by the Board of Canvass under Chapter 57, and thus, Gunn's argument here is simply unfounded as a matter of law.

Moreover, it is readily apparent from the record below – as Gunn's then-counsel conceded[19] – that there is a very simple explanation for the discrepancy: four of the five absentee ballots which were reviewed by the Superior Court below were incapable of being read by the absentee ballot scanner utilized by the Department of Elections on Election Day, and were therefore included in the "no vote" tabulation that evening.[20] Three of those ballots were cast in favor of McKenna (B-85, B-86, B-88) and one of those ballots was cast in favor of Gunn (B-89), which explains why McKenna's absentee vote total increased from 800 to 803 while Gunn's absentee vote total increased from 689 to 690, and, as well, why the number of "no votes" decreased from 60 to 56. The fifth of the five absentee ballots which were reviewed by the Superior Court below – the one that was

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[19] "The 56-no-votes issue that we talked about before really is not the federal ballots that explain the difference. The difference are the ballots that we sent up to the Court for your Honor to review were, I guess, previously for them considered no-votes. They weren't read. They couldn't decide. And that's what those four are." (B-19, lines 8 through 13).

[20] As Gunn's then-counsel acknowledged, two of these ballots could not be read by the absentee ballot scanner because they were filled out in red ink, and the other two could not be read because the "X" marks on the ballots fell outside the box provided on the ballot. (B-9, lines 13-16).

completely "colored in" (B-87) – was accurately read by the absentee ballot scanner on Election Day and included in the vote total for McKenna.[21]

3. Gunn's argument regarding 15 *Del. C.* §§ 5510(5) and 5511(e) was never raised below and, in any event, the argument is misplaced.

Gunn's third argument – that the Superior Court erred by failing to insure, following the Board of Canvass proceedings on November 6, 2014, that the absentee ballots were placed back into order by election district and "resealed in a secure manner or placed in another security envelope" – was never raised below, and therefore, the argument is waived.[22] Furthermore, the argument is misplaced, in as much as the requirements of 15 *Del. C.* §§ 5510(5) and 5511(e) apply only to the maintenance of absentee ballots by "election officers" prior to the Board of Canvass, and not to the Board of Canvass when conducting a recount under Chapter 57 of Title 15 or to the Superior Court when conducting a subsequent examination of ballots under 15 *Del. C.* § 5953. Were it otherwise, the requirements of 15 *Del. C.* §§ 5510(5) and 5511(e) would be found in Chapter 57 of Title 15, not in Chapter 55.

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[21] "MS. MANLOVE: Do you want to look at this one, too?

MR. GUNN: Yes, please.

MS. MANLOVE: All right. That would have read because it's colored in." (B-7, lines 10-14).

[22] Sup. Ct. R. 8; *Ward v. Delmarva Power & Light Co.*, 70 A.3d 206 (Del. 2012); *Gamles Corp. v. Gibson*, 939 A.2d 1269 (Del. 2007).

Finally, as even Gunn concedes,[23] the record below is devoid of any facts which might support Gunn's contentions here. For example, while Gunn "avers" that, following the recount conducted by the Board of Canvass on November 6, 2014, "the ballots were put in carrier envelopes for each candidate" and "not recombined or put in election district order, but rather, were grouped by candidate so several carrier envelopes contained all Gunn votes and several carrier envelopes contained all McKenna votes",[24] there is simply nothing in the record below to support this averment. Nor is there anything in the record below which confirms Gunn's averments that, on December 29, 2014, "the ballots were removed from the carrier envelopes" and "Gunn and McKenna ballots were combined in carrier envelopes, in a seemingly random order – not by election district." [25] Likewise, 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" and "Gunn won the first and second recounts".[26] All that the record below reveals here is that the absentee ballots were "zip-tied the night after the vote" (B-60, lines 8-9) and "locked up since that night" (B-62, lines 4-5). In any and all

[23] *See* pages 13 and 14 of Gunn's Opening Brief ("Although the first and second recounts are not on the record of the Board…" and "Although not described in the record…").

[24] *See* Gunn's Opening Brief at page 12.

[25] *See* Gunn's Opening Brief at page 12.

[26] *See* Gunn's Opening Brief at page 13.

events, as articulated above, what happened to the absentee ballots after the Board of Canvass proceedings concluded on the evening of November 6, 2014 is immaterial, as the requirements of 15 *Del. C.* §§ 5510(5) and 5511(e) simply do not apply to the Superior Court's examination of the ballots under 15 *Del. C.* § 5953.

III. WHETHER THE RECOUNT CONDUCTED BY THE BOARD OF CANVASS ON NOVEMBER 6, 2014 WAS PROPERLY CERTIFIED IS NOT THE ISSUE BEFORE THIS COURT ON APPEAL.

A. Question Presented

Is the recount conducted and certified by the Board of Canvass on November 6, 2014 subject to review by this Court on appeal?

B. Standard and Scope of Review

On appeal from a decision of the Superior Court, the Supreme Court reviews questions of law *de novo*.[27]

C. Merits of Argument

McKenna respectfully submits that – in the context and posture of the case at bar – what transpired before the Board of Canvass on November 6, 2014 is simply immaterial here. This action is ***not*** an appeal from the Board of Canvass.[28] Instead, this action is an election contest proceeding under Chapter 59 of Title 15. Stated otherwise, this Court is not sitting in review of what occurred before the Board of Canvass on November 6, 2014.[29] Rather, this Court is sitting in review of

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[27] *Stoltz Mgmt Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992) (citing *E.I. du Pont de Nemours Co., Inc., v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del.1985)).

[28] Thus, the transcript of the November 6, 2014 proceedings before the Board of Canvass is ***not*** part of the record below for purposes of this appeal.

[29] Indeed, it appears that this Honorable Court is without jurisdiction to review the acts of the Board of Canvass. *See State ex rel. Walker v. Harrington*, 27 A.2d 67, 75 (Del. 1942)("The acts

what transpired in the Superior Court below, based upon the election contest petition filed by Gunn on November 13, 2014. As the Court below aptly noted, the examination of the ballots conducted by the Superior Court on December 29, 2014, pursuant to 15 *Del. C.* § 5953, "is the only counting that matters." (B-72, lines 1-2).[30] In any and all events, the arguments here presented by Gunn are ultimately unavailing.

1. The Board of Canvass was not limited to conducting merely one count of the absentee ballots.

Gunn's first argument here is that the Board of Canvass should have conducted only one count of the absentee ballots, not three. Notably, this argument – which was never made below and is therefore waived[31] – flies squarely in the face of the argument which Gunn ***did*** make below, to-wit, that the Board of Canvass was required to keep counting the absentee ballots until it reached the same result twice: "So, as we say in our Petition, we believe there just needs to be two recounts in a row that reach the same results so everybody can have a complete faith in the result." (B-33, lines 17-20).

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of the Superior Court, sitting as a Board of Canvass, are not subject to review by the Supreme Court on appeal or by writ of error.").

[30] Or, as the Superior Court later stated, "this is the count that's going to be the count." (B-16, lines 14-15).

[31] Sup. Ct. R. 8; *Ward v. Delmarva Power & Light Co.*, 70 A.3d 206 (Del. 2012); *Gamles Corp. v. Gibson*, 939 A.2d 1269 (Del. 2007).

Furthermore, the record does not support Gunn's contention that there were "three recounts". However many times the Board may have counted the absentee ballots, there was only one "recount" which the Board certified. Gunn's reading of 15 *Del. C.* 5702 and Article V, § 6 of the Delaware Constitution is too literal. McKenna respectfully submits that the term "recount" refers to the process conducted by the Board of Canvass, not the number of times the Board may count the ballots. That is, even if the Board were to count the ballots 100 times, there is only one "recount" certified by the Board. In any and all events, there is nothing in the statutory scheme of Chapter 57 of Title 15 or Article V, § 6 of the Delaware Constitution which suggests that the Board is only authorized to count the ballots one time. McKenna respectfully submits that the Board was permitted to count the ballots as many times as necessary in order to insure that the result is accurate, and obviously, the Board here believed that the count which it certified was correct (even if, as is now evident, it was not).

Tellingly, Gunn is arguing out of both sides of his mouth. Previously, Gunn has argued that the Board should have kept counting on November 6, 2014 (B-33, lines 17-20), and the Superior Court should have kept counting on December 29, 2014,[32] until the same result was twice achieved. Here, however, Gunn argues that

[32] See page 10 of Gunn's Opening Brief.

the Board should have counted the ballots only one time. Respectfully, Gunn cannot have it both ways.

2. McKenna concedes that the tabulation of absentee ballots certified by the Board of Canvass on November 6, 2014 "does not add up" to the same total certified by the Superior Court on December 29, 2014, but all of this is simply immaterial at this juncture.

McKenna concedes that the Board of Canvass "got the math wrong" on November 6, 2014. The total number of absentee ballots cast in this election is known to be 1,549. (B-65, line 19; B-73, lines 2-5; B-73, lines 21-22). That number comports with the result reported on the night of the election (800 for McKenna, 689 for Gunn, and 60 "no votes"), and also with the result certified by the Superior Court on December 29, 2014 (803 for McKenna, 690 for Gunn, and 56 "no votes"). (B-78, lines 2-20). As explained above, four of the 60 "no votes" reported on election night were actually ballots cast for either McKenna or Gunn which simply could not be read by the Department of Elections absentee ballot scanner (three for McKenna and one for Gunn). The count certified by the Board of Canvass on November 6, 2014 (803 for McKenna, 688 for Gunn, and 56 "no votes") adds up to 1,547, rather than 1,549, and is clearly incorrect. As the parties agreed on December 29, 2014, however, the count certified by the Superior Court below (803 for McKenna, 690 for Gunn, and 56 "no votes") adds up to 1,549 and is indisputably correct, and the end result is a tie. (B-77-78). In any event, what transpired before the Board of Canvass on November 6, 2014 is not the subject of

this appeal and is not before this Honorable Court. For this reason, all of the arguments presented at pages 16-29 of Gunn's Opening Brief are simply immaterial.

The alternative remedies sought by Gunn – a special election or a remand "for the purpose of fact-finding and creation of a record" regarding "what really happened" before the Board of Canvass – are unwarranted and without authorization. Nowhere in the Delaware Code is there provided any mechanism or basis for this Court to "decertify" to outcome of the examination conducted by the Superior Court below and order a special election.

Furthermore, no remand is necessary. There is no longer any mystery about "what really happened". No fact-finding is necessary, no testimony regarding the "security procedures" or "why the ballots were taken out of election district order" is required, and there is no need to review any tally sheets from the Board of Canvass proceedings on November 6, 2014. What happened is clear. On Election Day, four of the absentee ballots cast in this election (B-85, B-86, B-88, and B-89) did not scan and were counted as "no votes". Upon review of those four ballots, it is clear that McKenna's absentee votes increased by three (B-85, B-86, and B-88) and Gunn's absentee votes increased by one (B-89). Unfortunately, the Board of Canvass subtracted a vote from Gunn's absentee vote total rather than adding a vote to Gunn's absentee vote total, and that is how the Board of Canvass

incorrectly concluded that McKenna had won by two votes when, in fact, the race was a tie all along. The Superior Court having conducted a full examination of the absentee ballots, this much is now perfectly clear. There is no need or point in any further counts or any remand, as the outcome of the examination certified by the Superior Court on December 29, 2014 is unquestionably accurate. Furthermore, neither of the alternative remedies now sought by Gunn were prayed for within Gunn's Petition or otherwise requested and preserved during the proceedings below, and therefore, these prayers for relief have been waived.[33] For all of the reasons, this Honorable Court should affirm the decision of the Superior Court below.

[33] Sup. Ct. R. 8; *Ward v. Delmarva Power & Light Co.*, 70 A.3d 206 (Del. 2012); *Gamles Corp. v. Gibson*, 939 A.2d 1269 (Del. 2007).

CONCLUSION

None of the arguments raised in Gunn's Opening Brief were raised below, and therefore, all of those arguments are waived.[34] Curiously, Gunn's Opening Brief does not make the one and only argument which Gunn ***did*** make below – i.e., that one of the ballots which the Superior Court below determined to count as a vote for McKenna (B-87) should be stricken because the intent of the voter was unclear. (B-69, lines 1-7; B-71, lines 11-16; B-79, lines 2-7). Having failed to make this argument in his Opening Brief, Gunn is now precluded from raising the argument in his Reply Brief.[35]

For all of the reasons set forth above, this Honorable Court should affirm the decision of the Superior Court below.

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[34] Sup. Ct. R. 8; *Ward v. Delmarva Power & Light Co.*, 70 A.3d 206 (Del. 2012); *Gamles Corp. v. Gibson*, 939 A.2d 1269 (Del. 2007).

[35] Sup. Ct. R. 14(b)(vi)(A)(3); *Jones v. State,* 62 A.3d 1223 (Del. 2013); *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).