IN THE SIXTH JUDICIAL CIRCUIT

MACON COUNTY, ILLINOIS

JIM ROOT, Petitioner. v. TONY "CHUBBY" BROWN, as a candidate for Sheriff of Macon County; and JOSH TANNER, as Macon County Clerk constituting the Election Authority for Macon County, for the General Election held on November 6, 2018. Respondents.	)	Case No. 2018 MR 1027

PETITIONER'S RESPONSE TO RESPONDENT'S §2-615 MOTION TO STRIKE AND §2-619 MOTION TO DISMISS

Now comes Jim Root (hereinafter referred to as "Petitioner"), by and through his attorneys, and submits his Response to the §2-615 Motion to Strike and §2-619 Motion to Dismiss his Verified Election Contest Petition filed by Respondent Tony "Chubby" Brown ("the Respondent"). In support of his Response to the Respondent's Motions, the Petitioner states as follows:

INTRODUCTION

Petitioner and Respondent were candidates for the office of Sheriff of Macon County in the 2018 General Election. That election saw the Respondent prevail over the Petitioner by just one (1) vote out of over 39,000 ballots cast. The declared tally was 19,655 votes for the Respondent, and 19,654 votes for the Petitioner.

The Petitioner timely filed a Verified Election Contest Petition ("the Petition") to contest the outcome of the election, having determined that a number of errors in the conduct of the election and tabulation of votes occurred that, if corrected, would have resulted in his election as Sheriff of Macon County.

In his Petition, the Petitioner identified with specificity a number of ballots that were improperly not counted and a number that were improperly counted in two (2) precincts. Specifically, the Petitioner alleged that (a) an optical scan ballot was marked with an "X" and erroneously not counted for Petitioner in Hickory Point Precinct 7 (Pet. ¶ 6.1); (b) an optical scan ballot that was recorded as an undervote in the Sheriff's race in Hickory Point Precinct 7 should have been recorded as a vote for Petitioner (Pet. ¶ 6.2); (c) at least two optical scan ballots were erroneously counted for Respondent despite not being initialed by any election judge (Pet. ¶ 6.3); and that (d) two ballots in Hickory Point Precinct 1 were erroneously not tabulated at all, and both of which contained votes for the Petitioner (Pet. ¶ 7.1). The Petitioner alleged that after all of these errors were corrected, that the Petitioner would be declared the true winner of the election for the office of Sheriff of Macon County.

The Respondent now has filed a Motion to Strike the Petition pursuant to §2-615 of the Code of Civil Procedure and a Motion to Dismiss pursuant to §2-619 of the Code of Civil Procedure. For reasons that follow, neither Motion is well-taken, and both should be denied. Petitioner will first address the Respondent's §2-615 Motion.

ARGUMENT

I. THE RESPONDENT'S ARGUMENT THAT PETITIONER IS ONLY PERMITTED TO REQUEST THE RECOUNT OF A WHOLE PRECINCT IS UNSUPPORTED BY STATUTE OR CASELAW.

In his §2-615 Motion, the Respondent argues that the Petitioner's request for relief as to Paragraph 7.1 of the Petition, where it is alleged that two (2) validly-cast ballots were not

counted in Hickory Point Precinct 1, must be stricken on the grounds that this Court cannot "cherry pick" individual ballots to be re-counted. According to the Respondent, a petitioner in an election contest must request that an entire, whole precinct be recounted, rather than just certain ballots that exhibit irregularities. Respondent reads this portion of the Election Code too narrowly.

Section 23-20 of the Election Code requires a petitioner in an election contest to allege, in pertinent part, as follows:

> "that the petitioner voted at the election, and that he believes that a mistake or fraud has been committed in specified precincts in the counting or return of the votes for the office or proposition involved or that there was some specified irregularity in the conduct of the election in such precincts, and the prayer for relief shall specify the precincts in which the recount is desired."

10 ILCS 5/23-20.

While the Respondent argues that this provision requires a petitioner to ask for the recount of full, whole precincts, the plain language of the statute contains no such strict requirement. While a petitioner obviously could request that an entire precinct be recounted, this statute also merely requires a petitioner to identify "some specified irregularity," and to specify in his or her prayer for relief the precinct(s) in which the alleged irregularities are to be correctly counted. 10 ILCS 5/23-20. In other words, the desired "recount" can refer to the "specified irregularity" in a particular precinct just as easily as it can refer to a desired recount of an entire "precinct."

The Respondent provides no authority (other than his narrow interpretation of the statute) to support his position that a petitioner is barred from asking that specific irregularities, rather than full precincts, be recounted. Moreover, in light of the sections of the Election Code governing the handling of an election contest petition, such a narrow view of the statute is illogical. As specified in § 23-23 of the Election Code, any respondent in an election contest

proceeding is entitled to request "a further recount of the votes cast in any or all of the balance of the precincts . . ." after a recount has been provided to a petitioner. 10 ILCS 5/23-23. Given this freedom to obtain a further recount in any precinct, it makes little sense to require that a petitioner request a recount only in whole precincts in the first place. According to the plain language of the statute, there is no risk that, if the respondent is concerned that a full precinct be counted, that precinct would not be fully recounted.

A hypothetical illustrates the problem with Respondent's position. For instance, assume *arguendo* that a box of 100 validly-cast vote-by-mail ballots, each from a separate precinct in a 100-precinct jurisdiction, had been overlooked and not counted with the regular election results, but later found by the election authority. Under the Respondent's logic, in this hypothetical, a petitioner in an election contest would be required to request a full recount of the results in every precinct in that jurisdiction – regardless of whether there was any issue other than the late-discovered vote-by-mail ballots. Such a construction of the statute makes no sense.

Indeed, the very purpose of an election contest is to ascertain how many votes were cast for or against a candidate and to thereby determine the will of the people. *Smith v. Township High School District No. 158*, 335 Ill. 346 (1929). Illinois courts determine the will of the people by focusing on the remedy of particular irregularities, not necessarily recounting specific precincts, although the two concepts often go hand in hand. Courts have long held that an election contest petitioner must allege and prove "that the irregularity complained of will change the results of the election; or that the irregularity, if proved, will impose on the trial court a duty to declare the election void." *Cummings v. Marcin*, 16 Ill.App.3d 18 (1st Dist. 1973), citing *McCaslin v. Moore*, 67 Ill.App.2d 355 (2nd Dist. 1966).

Further reference to §23-23 demonstrates that a petitioner need not necessarily request a full, whole precinct be recounted. Pursuant to §23-23, in the disposition of an election contest

case, a court is empowered to "refer the case to the election authority to recount the ballots" and to do such things as take evidence as to "any ballots cast or counted" and "to take all *necessary* steps and do all *necessary* things to determine the true and correct result of the election . . ." (emphasis added) 10 ILCS 5/23-23. It follows that where a full recount of all ballots cast in a precinct is not necessary to determine the true and correct result of an election, an election authority would not be required to fully recount a whole precinct in which an irregularity occurred. Finding otherwise would lead to the absurd result of requiring an election authority to conduct a pointless activity. It is well-settled that the primary rule of statutory construction is to ascertain and give effect to the intent of the legislature, and the best evidence of intent is the language of the statute itself. *Cinkus v. Stickney Municipal Officers Electoral Board*, 228 Ill.2d 200 (2008). It is also presumed that in enacting a statute, the legislature did not intend absurdity, inconvenience or injustice. *Midstate Siding & Window Co. v. Rogers*, 204 Ill.2d 314 (2003). Accordingly, it makes no sense to require that a petitioner recount any particular whole precinct, or that a petitioner be barred from requesting that only particular ballots be recounted. Accordingly, insofar as the Respondent moves this Court to strike Paragraph 7.1 of the Petition on this basis, such Motion must be denied.

II. THE RESPONDENT'S ARGUMENT THAT THE PETITIONER IS BARRED FROM USING MATTER OBSERVED IN A DISCOVERY RECOUNT TO SUPPORT AN ELECTION CONTEST PETITION MUST BE REJECTED.

In his Memorandum in Support of his §2-615 Motion, Respondent argues that Paragraph 7 of the Petition should be stricken because "the results of a discovery recount cannot be used in an election contest to change or amend the results of an election." Memo., p. 5. According to the Respondent, the Petitioner alleges that he "found" two favorable ballots in Hickory Point Precinct 1 during the discovery recount in this case. Memo., p. 6.

Again, the Respondent's position is unavailing. Of course, the two ballots identified in Paragraph 7 have not been "counted" in any official manner, either before, during or after the discovery recount conducted prior to the filing of this Petition. Moreover, the Petition alleges that two such ballots were "observed" during the discovery recount – not necessarily "discovered." Petition, ¶ 7.1.

More to the point, however, the Respondent too narrowly reads Section 22-9.1 of the Election Code, which governs the manner in a discovery recount is to be conducted. All would agree that the results of an examination conducted during a discovery recount cannot *ipso facto* change the result of an election, nor bind a Court or election authority. However, it is illogical to think that the legislature would conceive of an election code that would allow a "discovery recount" where a candidate may file a "petition for discovery" following an election but would bar information actually discovered from forming the basis of an election contest. To the extent the Respondent takes this position, he is flatly incorrect.

III. PARAGRAPH 6.1 OF THE PETITION ALLEGES SUFFICIENT FACTS TO SUSTAIN PETITIONER'S CLAIM THAT THE SUBJECT BALLOT MARKED WITH AN "X" BE COUNTED.

On page 7 of his Memorandum, the Respondent argues that Paragraph 6.1 of the Petition, in which the Petitioner alleges that a particular ballot on which a voter placed an "X" next to the name of the person for whom he or she wished to vote, should be stricken or "made more definite and certain." Memo. p. 7. According to the Respondent, the Petitioner is required to allege whether Article 24A or 24B of the Election Code should apply to this particular ballot. The Respondent further argues that the ballot identified by the Petitioner contains an "identifying mark," and therefore cannot be counted in favor of the Petitioner. Memo. p. 9. The Respondent is incorrect.

If anything, the Respondent has simply identified a question of fact, which calls for the denial of his Motion on this point. When reviewing a section 2–615 motion to dismiss, a Court accepts as true all well-pled facts and interprets the allegations in the complaint in the light most favorable to the plaintiff. *Seith v. Chicago Sun–Times, Inc.*, 371 Ill.App.3d 124 (1st Dist. 2007). In the context of a section 2–615 motion to dismiss, "[t]he proper inquiry is whether the well-pleaded facts of the complaint, taken as true and construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Thurman v. Champaign Park Dist.*, 2011 IL App (4th) 101024 (4th Dist. 2011); citing *Loman v. Freeman*, 229 Ill.2d 104, 109 (2008).

At a minimum, the Petitioner has alleged sufficient facts -- including a photo of the ballot in question attached as Exhibit A to the Petition – to demonstrate that the ballot could be counted as a vote for the Petitioner given the "X" marks next to candidates' names on the ballot pictured. Section 24B-9.1(b)(5) defines a vote for optical scan ballots, as, among other things, when

> "the designated area for casting a vote for a particular ballot position on the ballot sheet is not marked, but the ballot sheet contains other markings associated with a particular ballot position, such as circling a candidate's name, that indicates the clearly ascertainable intent of the voter to vote, based on the totality of the circumstances, including but not limited to, any pattern or frequency of markings on other ballot positions from the same ballot sheet."

10 ILCS 5/24B-9.1(b)(5).

Taken in the most favorable light, the "X" marks on the subject ballot are "markings associated with a particular ballot position . . . that indicates the clearly ascertainable intent of the voter . . " *Id*. Accordingly, Respondent's Motion on this point must be denied.

The Respondent also makes an alternate argument, asserting that the Petitioner's allegations in Paragraph 6.1 of the Petition must be made "more definite and certain." Memo. p. 7. However, given that Petitioner has gone so far as to provide the Respondent with a picture of

the ballot at issue, it is difficult to see, at this point, how the Petitioner could make his allegations in Paragraph 6.1 more definite or certain. Rather, with respect to this ballot, what remains is a matter of proof, for which the Petitioner carries the ultimate burden. With this alternative argument, the Respondent has only underscored that a question of fact that calls for the denial of his Motion.

IV. RESPONDENT'S ARGUMENT THAT THE BALLOT DESCRIBED IN PARAGRAPH 6.1 OF THE PETITION CANNOT BE COUNTED DUE TO AN "IDENTIFYING MARK" MISSES THE MARK.

On pages 8 through 14 of his Memorandum, the Respondent makes lengthy argument that the "X" mark identified by the Petitioner on the subject ballot is an "identifying mark" that cannot be counted "as a matter of law." Memo., pp 8-14. At the outset, it must be noted that for at least a century, the Illinois Supreme Court has held that any question as to whether a mark on a ballot is an "identifying mark" is a question of fact. *Winn v. Blackman*, 229 Ill. 198 (1907); *Watkins v. Road Dist. No. 10*, 413 Ill. 331 (1952), citing *Boland v. City of LaSalle*, 370 Ill. 387 (1938)("Whether a particular mark upon a ballot is an identifying mark which invalidates it is largely, if not wholly, a question of fact to be determined from an inspection of the original ballot.")

In addition to the uniform treatment of the issue by Illinois Courts contrary to the Respondent's position here, the Respondent attempts to misconstrue the statute to his own benefit. For instance, on page 11 of his Memorandum, the Respondent attempts to argue that the voter's use of an "X" rather than "circling a candidate's name," means that §24B-9.1(b)(5) could not possibly apply to the ballot pictured in the Petition. However, the statute quite clearly states that possible votes may be denoted by "other markings associated with a particular ballot position, ***such as*** circling a candidate's name . . ." that evince a voter's intent. 10 ILCS 5/24B-9.1(b)(5)(emphasis added). Obviously, a plain reading of this provision of the Code

demonstrates that "circling a candidate's name" is not the only means for a voter to evince his or her intent to vote for a particular candidate. Accordingly, the Petitioner has pled the requisite facts on this issue, and the Motion must be denied.

V. RESPONDENT'S ARGUMENT THAT PARAGRAPH 6.3 OF THE PETITION SHOULD BE STRICKEN IS AGAIN OFF THE MARK.

On page 14 of his Memorandum, the Respondent argues that Paragraph 6.3 of the Petition should be stricken because the Petitioner has failed to allege whether two un-initialed ballots were vote-by-mail ballots or ballots voted in-precinct. Memo. p. 14. Again, the Respondent has merely identified a question of fact that requires the denial of his Motion on this point.

The Election Code requires an election judge to initial a ballot before it may be validly counted. See, e.g., 10 ILCS 5/17-9. The existence of an election judge's initials on a ballot is seen as a safeguard to the integrity of the voting process – that no person is voting a ballot that had not been provided by an election judge (in the case of in-precinct voters). The Illinois Supreme Court in *Pullen v. Mulligan*, 138 Ill.2d 21 (1990) dealt extensively with the judge initial issue, with respect to vote-by-mail ballots, as opposed to ballots voted in-precinct. The parties in *Pullen* stipulated that ballots cast in-precinct that did not contain the initials of an election judge could not be counted. 138 Ill.2d at 46. The *Pullen* Court followed *Craig v. Peterson*, 39 Ill. 2d 191 (1968) in finding the initialing requirement to be directory as to vote-by-mail ballots, however. The *Pullen* Court concluded that applying a mandatory analysis to the requirement in the case of vote-by-mail ballots, because of the nature of the vote-by-mail process, would not contribute to the integrity of the electoral process and thus could be considered directory. As for in-precinct voters, the initialing requirement is mandatory because it affords the only means of

detecting fraudulent practices, such as stuffing the ballot box, and culling illegal ballots from legal ones. *Bazydlo v. Volant*, 264 Ill.App.3d 105 (1st Dist. 1994), citing *Pullen*, 138 Ill.2d at 53.

The bottom line in this analysis however, for the purposes of Paragraph 6.3 of the Petition, is that the facts pled, taken as true and viewed in the light most favorable to the Petitioner, state a claim for which the relief sought by Petitioner may be granted. Accordingly, the Respondent's Motion on this point must be denied.

VI. THE RESPONDENT'S MOTION TO DISMISS PURSUANT TO §2-619(a)(9) SHOULD BE DENIED.

The Respondent also brings a Motion pursuant to 2-619(a)(9) of the Code of Civil Procedure, arguing that discovery recount results in can act as a bar to the Petitioner bringing this election contest. The Respondent is flatly incorrect in several respects.

At the outset, it must be noted that §2-619(a)(9) requires that a movant support his motion with affidavit where "the grounds do not appear on the face of the pleading attacked . . ." 735 ILCS 5//2-619(a). Here, the Respondent has attached a variety of materials related to the discovery recount, however, none are supported by affidavit. For this initial reason, this Motion should be denied.

More importantly, neither the case cited by the Respondent, nor any other identified authority provides the Respondent with the legal authority that would bar the Petitioner's Petition in this case. "The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter v. Darien Park District*, 207 Ill.2d 359 (2003). The Respondent's Motion disposes of no issue of law, nor does he offer easily proven fact. A motion to dismiss pursuant to §2-619(a)(9) of the Code permits involuntary dismissal where the claim asserted is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). Affirmative matter is

considered to be "in the nature of a defense which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469 (1994).

In no way does the matter attached to the Respondent's Motion negate completely the Petition, nor any conclusion of material fact contained in the Petition. Notwithstanding the *dicta* in *Andrews v. Powell*, 365 Ill.App.3d 513 (4th Dist. 2006) cited by the Respondent, there has never been a decision by an Illinois Court that has held that a particular result reached in a discovery recount may bar an election contest petition. No Court has ever adopted the idea of "extrapolation" of discovery recount results as an actual holding, or rule of law, in the context of an election contest. Quite simply, this is not the law in the State of Illinois.

The reasons for this are many. A litigant may choose 25% of the precincts in a jurisdiction in which to conduct discovery in a discovery recount, and there is strategy as to which precincts may be selected. For instance, a litigant may choose to review precincts in which he or she did very well. On the other hand, a litigant may choose to review precincts where he or she did poorly. Or, perhaps precincts that were reported to have had particular issues with certain machines, or election judges, would be chosen to be examined. The strategy could be endless. Extrapolating "results" from precincts that may be chosen for a variety of reasons, and that may be observed for a variety of issues, simply makes no sense.

In this case, the Petitioner chose to observe only 5 precincts; thus a hand recount was conducted in only 5 precincts. Memo. p. 3. Insofar as the hand recount of those five precincts resulted in an advantage for the Petitioner, could the Petitioner simply extrapolate those results to demonstrate he is entitled to a recount? Of course not. If anything, the fact that machine recounts produced varying, uneven results further impeaches the official results of this election.

If it were the state of the law that the observed outcome of a discovery recount could be used as a bar to an election contest, certainly the Election Code would provide so. As argued by the Respondent in his §2-615 Motion, and agreed by the Petitioner, the observations made in a discovery recount do not *ipso facto* change the official result of an election. The Respondent's Motion must be denied.

CONCLUSION

The Petitioner here has alleged facts concerning issues in the administration of the election for Sheriff of Macon County that, if corrected, would change the results of the election. The Respondent's Motions do no more than identify questions of fact that justify denying the Motions, and proceeding with the recount requested by the Petitioner.

Wherefore, the Petitioner respectfully requests that the Respondent's Motions be denied.

Respectfully submitted,

Jim Root, Petitioner

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