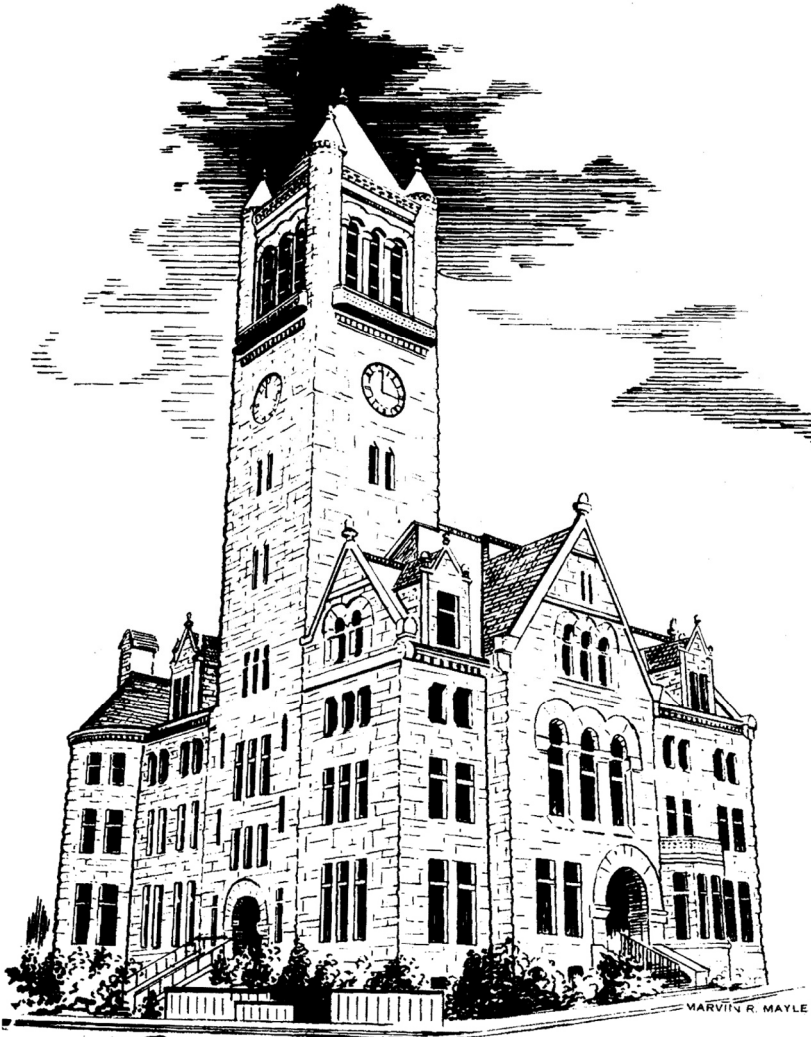


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JUDICIAL OPINION

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA
CIVIL DIVISION

JON R. MARIETTA, JR., PRO SE, Republican	:
Candidate for Commissioner and Qualified Elector	:
for Fayette County,	:
And	:
MICHELLE MOWRY, Fayette County GOP Chair	:
Qualified Elector,	:
and	:
MELANIE PATTERSON, PRO SE, Qualified Elector	:
for Fayette County,	:
and	:
ROBERT PATTERSON, Qualified Elector for	:
Fayette County,	:
and	:
CODY PATTERSON, Qualified Elector for Fayette	:
County,	:
And	:
MAUREEN ELIAS, PRO SE, Qualified Elector for	:
Fayette County,	:
and	:
THOMAS ELIAS, Qualified Elector for Fayette	:
County,	:
Plaintiffs, and	: No. 2332 of 2023, G.D.
	:
FAYETTE COUNTY, PA, and FAYETTE COUNTY	: PRESIDENT JUDGE
BUREAU OF ELECTIONS,	: STEVE P. LESKINEN
Defendants.	

OPINION AND ORDER

LESKINEN, P.J.

March 21, 2024

Before the Court are the Preliminary Objections of Respondents, Fayette County and the Fayette County Board of Elections. After consideration of the Preliminary Objections, the record, and the oral arguments offered by the parties, the Court hereby issues the following Opinion and Order granting the Respondents’ Preliminary Objections and dismissing the Petition to File Nunc Pro Tunc, and the Petition to Open Ballot Box and Recanvas Voting Machines.

Introduction

Free and fair elections are the cornerstones of our Commonwealth and our Country. At a time when so many people face a crisis of confidence in our electoral system, “[c]andidates must do more than earn votes; they must persuade people their votes count.” In re Petitions to Open Ballot Box Pursuant to 25 P.S. § 3261(A), 295 A.3d 325, 328 (Pa. Cmwlth. 2023) (hereinafter “Bucks”). Election fraud is a serious concern,

and our legislature has set forth specific procedural rules for candidates or electors to follow when they believe fraud has occurred. In *re* Recount of Berks County General Election of November 8, 2022, 296 A.3d 64, 67 (Pa. Cmwlth. 2023), affirmed at 297 A.3d 687 (hereinafter “Berks”). Our legislators drafted the Election Code and its subsequent amendments to balance the need for an efficient process to identify fraud or error and resolve election disputes with the need to prevent abuse of the system and false claims of fraud. *Id.*, at n.4. A poorly conceived or incompetently raised Election Code action benefits no one; taxpayers bear the cost of litigation, the resolution of the election may be delayed, confidence in the election process may be eroded, and the parties are denied the opportunity to have their case heard. That is the case here.

The Election Code and Recounts

The Pennsylvania Constitution divides the government of our Commonwealth into three branches: the legislative, the executive, and the judicial branches. *Renner v. Court of Common Pleas of Lehigh County*, 660 Pa. 255, 268 (Pa. 2020), citing Pa. Const. Art II, §1. Each of these three branches is co-equal and independent. *Id.* The Pennsylvania General Assembly, the state legislature for our Commonwealth, has the power to make, alter, and repeal laws, including the exclusive power to regulate elections. *Id.* The General Assembly passed the current version of the Election Code in 1937 and has amended it many times since the original enactment. {1} The role of the judicial branch is to interpret the statutory provisions of the Election Code to resolve controversies that arise. *Bonner v. Chapman*, 298 A.3d 153, 168 (Pa. Cmwlth. 2023). Under the doctrine of the separation of powers, it is not the role of the courts to engage in judicial legislation by changing or otherwise rewriting the statutes. *Berks*, at n.2. If voters want changes to these rules, their recourse lies with the legislature. *Id.* In addition, under the doctrine of *stare decisis*, a Court of Common Pleas is bound by the relevant precedents set by the appellate courts on a particular issue. In *re* *Burt’s Estate*, 44 A.2d 670, 677 (Pa. 1945).

The Election Code has specific procedural guidelines for different types of challenges at every stage in the election process. As examples, there are statutory processes to challenge a candidate’s nomination, to challenge a voter’s registration, and to challenge the ultimate results of an election. {2} The provisions of the Election Code are the exclusive means to challenge the election process and election results. Strict adherence to the statutory requirements is required when pursuing an action under the Code. *Rinaldi v. Ferrett*, 941 A.2d 73, 78 (Pa. Cmwlth. 2007).

Setting “reasonable, nondiscriminatory restrictions” on the process of initiating recounts and other actions under the Election Code serves the important regulatory interest of ensuring that election challenges are swiftly and fairly resolved. *Stein v. Cortes*, 223 F.Supp. 3d 423, 439 (E.D. Pa. 2016). Recounts and other election challenges are costly to taxpayers and may prevent the timely resolution of an election. If the legislature were to determine that universal, automatic recounts were necessary to ensure transparency or election integrity and that this value outweighs the costs, they could mandate such automatic recounts by amending the Election Code.

{1} Act of June 3, 1937, P.L. 1333, as amended, 25 P.S. §§ 2600-3591.

{2} The Pennsylvania Department of State issued an Election Statutory Reference Guide on August 16th, 2021, which provides an index to these various provisions of the Election Code. <https://www.dos.pa.gov/VotingElections/Documents/Elections%20Division/Administration/Election%20statutory%20reference%20guide.pdf> (Accessed February 23rd, 2024.)

The General Assembly considered the issue of recounts after a “remarkably close” statewide election in 2003 for a Superior Court seat that was decided by only 28 votes out of 2,250,000. In response, they passed the Act of October 8, 2004, P.L. 807, which included, inter alia, two important amendments relevant to the instant case. Bucks, at 338. The first of these amendments was the addition of an automatic recount provision at § 3154(g)(1)(i). This amendment is relevant to this case for what it did not include, as the automatic recount provisions only apply when a statewide candidate is defeated by one-half a percent or less of the votes cast for the office. Under the rules of statutory construction, when the legislature includes specific designations in an act, any omissions from those designations should be considered an exclusion. City Council of City of Hazleton v. City of Hazleton, 578 A.2d 580, 583 (Pa. Cmwlth. 1990) and 1 Pa. C.S.A. § 1924. Here, when the legislature implemented automatic recounts, but only for statewide offices, we must interpret this as specifically excluding automatic recounts in local elections.

The 2004 Act not only excluded local offices from automatic recounts, it amended § 3263 to add additional requirements to § 3261 and § 3262 when requesting a recount absent specific allegations of fraud or error. The amendments to § 3263, defined two clear paths to a recount. Under the first option, if a petitioner can set forth a prima facie case for fraud or error, they may initially file in a limited number of precincts. If a recount of these limited precincts supports the fraud or error, then § 3263(a)(1) allows an additional five days to file additional petitions to expand the recount. When a petitioner is not alleging fraud or error, they must file separate petitions for each precinct where the office at issue appeared on the ballot. The Commonwealth Court in Bucks, at 338, illustrated the reasoning for this requirement (referencing the Superior Court election decided by 28 votes):

Hypothetically, if Driscoll (the losing candidate) had found a single election district with a 29-vote discrepancy in his favor, he could have changed the outcome of the election, even without evidence of fraud or error. This would have been a patently unjust result, however, if discrepancies existed in favor of Gantman (the winning candidate) in other election districts and Driscoll did not seek a recount in every district in which ballots were cast. Gantman's only recourse would be to search for the proverbial needle in a haystack, with no guarantee of deducing where, out of the thousands of possible election districts, she should file her own petitions. Requiring recounts in every district works to eliminate this problem by facilitating discovery of all possible discrepancies. It therefore promotes, rather than hinders, election integrity because it helps to ensure elections are decided by the will of the voters and not luck or successful lawyering.

Bucks, at 338. (Emphasis and explanatory parentheticals added.)

This is consistent with the well-established presumption that the returns of an election board were regular and that election officers performed their duties properly and in good faith. In re Ellwood City Borough's Contested Election, 286 Pa. 257, 260 (Pa. 1926). Though this presumption can be overcome by showing actual fraud or error, the burden of proof is on the petitioners in a matter to show such fraud or error. In re Haverford Tp. Election, 282 Pa. 504, 509-510 (Pa. 1925), In re Johnson, 509 Pa. 347, 354 (Pa. 1985). Additionally, the Pennsylvania Supreme Court has frequently held that “mere irregularities in the conduct of an election, not affecting the result,” are not sufficient to reject the entire vote of an election district. In re Ellwood City, at 260.

Why does this distinction matter? This Petition is not filed based on allegations of specific fraud or error. Nor do Petitioners suggest that the results of a recount would change the outcome for Marietta, who finished fifth in a race for three County Commissioner seats. The proposed Order submitted with the Petition does not request a recount by the Election Bureau, but would instead order the Bureau to provide Petitioners, within three business days, the opportunity to photograph all of the following: every ballot, all unredacted documents used in the adjudication of ballots, every unredacted mail-in or absentee ballot envelope, and all unredacted poll books. The proposed Order would also require the Bureau to provide Petitioners digital copies of images and other digital files from the machines used to open and tabulate the ballots. There is nothing in § 3261 or § 3262 that would allow any of the extraordinary relief Petitioners seek.

This historical context and the precedents of the Berks and Bucks appellate decisions make it clear that the legislature and the appellate courts have carefully considered the very real cost of recounts (in terms of money, time, and the effect on the election process) and intentionally set a high bar for the procedural and filing requirements for recounts for petitioners in the absence of specific allegations of fraud or error. This Court is bound by that precedent.

Mail-In and Absentee Ballots

Petitioners also raise various arguments related to mail-in and absentee ballots. Response, ¶¶18-32. State-wide, universal (meaning that no excuse or exception is required) mail-in voting was one of the many significant amendments to the Election Code under the Act of October 31, 2019, P.L. 552, No. 77, known as “Act 77.” *McLinko v. Department of State*, 279 A.3d 539, 543 (Pa. 2022). Act 77 was an enormously popular piece of legislation that passed with bipartisan support after twenty-seven months of hearings on the reform and modernization of elections in Pennsylvania. *Id.* Enacted and effective on October 31st, 2019, the timing appeared prescient when COVID-19 began its spread just a few months later. *Id.*, at 544. The implementation of the Act led to multiple court challenges. {3} Mail-in ballots have continued to be controversial, in part due to the clear partisan split between voting methods. *Id.* at 545.

§ 3261 and § 3262 are, at best, imprecise tools for addressing issues with mail-in and absentee ballots. Mail-in ballots are assigned to and reported in the precinct where the voter resides. There are no provisions in § 3261 or § 3262 to allow for the filing of a single petition for a County-wide recount of only mail-in and/or absentee ballots (in effect, a separate or “virtual” precinct, as has been argued in other 2023 Fayette County election cases). Any petitions filed under these sections must still comply with the same obligation to file in every precinct or to make specific allegations of fraud or error.

The Election Code specifies other methods to challenge mail-in and absentee ballots. For example, the application and approval process for mail-in and absentee ballots are set forth at § 3150.12b and § 3146.2b, respectively. The procedure to challenge the approval of a mail-in or absentee ballot application is found in § 3146.8. These challenges must be made to the county board of elections before 5:00 P.M. on the Friday before the election and challenges may only be made on grounds that the applicant was not a qualified elector. {4} § 3146.2b(c) and § 3150.12b(a)(2) and (3). There is no evidence in the record that Petitioners challenged any mail-in or absentee ballots under these provisions and they cannot do so now in the context of a petition filed under § 3261 or § 3262.

Other Forms of Relief

If the Petitioners felt that the Board of Elections violated any provisions of the Election Code that regulate how an election is conducted, their recourse would be to file a Petition for an election contest under § 3456. This procedure is intended to address matters of illegalities {5} in the election process itself, such as the balloting process, the tabulation of the results, election returns, etc.- “the bare mechanics of accurately and honestly ascertaining and recording the will of the electorate.” In re Petition to Contest Primary Election of May 19th, 1998, 721 A.2d 1156, 1159 (Pa. Cmwlth. 1998). Article XVII, (h) of the Election Code, General Provisions Relating to Contested Nominations and Elections (§ 3456 to § 3477) includes more than a dozen sections defining the process for election contests, including the conduct of hearings, the requirements for any Petitions filed under these Sections, and the assessment of costs of the contest. Election contests under § 3456 may be filed concurrently with petitions for recounts under § 3261 or § 3262, as the relief available under these Sections differs.

Petitioners also cite to § 3146.8 (Canvassing of official absentee ballots and mail-in ballots), § 3150.17 (Public records), and § 3154 (Computation of returns by county board; certification, issuance of certificates of election) in the first paragraph of the Petition to Open Ballot Box and Recanvas Voting Machines. However, the Petition does not set forth sufficient averments to support a cause of action under these Sections. It is unclear what claims Petitioners raise under § 3146.8 and § 3154. As discussed, supra, an election contest filed pursuant to § 3456 would be the proper means to dispute the mechanics of how the election was conducted. Such a petition must “aver plainly and distinctly such facts which if sustained by proof would require the court to set aside the result.” Pfuhl v. Coppersmith, 434 Pa. 361, 364 (Pa. 1969). “The court will not grope in the dark, or follow a contestant on a fishing expedition, in the hope of being able to find enough to enable him by the investigation to make out his case.” Id., at 365. The Petitioners cannot simply invoke a series of sections of the Election Code without sufficient factual averments to support a claim.

§ 3150.17 addresses public records related to mail-in voting and was amended as part of Act 77. {6} The Section defines which mail-in voting records are considered public records and specifies the information from applications for mail-in voting that a county board must maintain and make available upon request. Requests for public records or the voter registration data specified in § 3150.17(b) do not require a court process and the outcome of this case does not impact Petitioner's ability to request these records via the appropriate procedure.

{3} The Pennsylvania Supreme Court’s Opinion in McLinko includes a detailed history of mail-in and absentee voting in Pennsylvania.

{4} Notably, County Board of Elections are barred from rejecting absentee or mail-in ballots based on signature comparisons by election officials or for third-party challenges based on signature analysis or comparisons. In re November 3, 2020 General Election, 662 Pa. 718 (Pa. 2020).

{5} Here, “illegalities” would refer to a failure to follow applicable statute in a civil, not necessarily in a criminal context.

{6} § 3146.9 similarly addresses records relating to absentee ballots.

Strict Compliance with Statutory Requirements

There are fundamental policy reasons behind the strict time and filing requirements of the Election Code. *Koter v. Cosgrove*, 844 A.2d 29, 33 (Pa. Cmwlth. 2004). “The continuing and efficient operation of government is dependent upon the prompt resolution of election contests. Our system depends on the timely certification of a winner.” *Id.* This is reflected in the shortened 10-day period for appeals for matters arising under the Election Code as compared to the general rule that appeals be filed within 30 days. Pa. R.A.P. 903. The Election Code’s strict procedural requirements and short deadlines for filing can result in the dismissal of improperly filed cases with no opportunity to amend if the applicable time period has expired.

This was the case in *In re Election of Tax Collector, Horsham Tp.*, 356 Pa. 60, 62 (Pa. 1947), where Petitioner, who lost her bid for tax collector by 17 votes according to the certified election results, filed for a recount under § 3261. The results of the recount showed that Petitioner had won by 3 votes due to a discrepancy in the count of military votes. However, once an election has been certified the results can only be changed by a timely filed election contest petition, even if a recount under § 3261 or § 3262 finds an error that would impact the outcome. *In re 2003 General Election*, at 12. Petitioner then sought leave to file an election contest under § 3456, *nunc pro tunc*, after the recount was completed and after the statutory period for an election contest had expired to invalidate the certified election results. The Pennsylvania Supreme Court held that Petitioner was obligated to follow the statutory procedure for an election contest and thus the Court had no power to grant the relief requested. *Horsham*, at 62. Even though Petitioner properly filed for the recount, which showed that she had won, the Court held that “Appellant failed to comply with the provisions of the election code, and thereby lost her opportunity to contest the election.” *Id.*

Though a petitioner has every right to represent themselves in a proceeding, the courts have long recognized that though they may liberally construe materials filed by a pro se litigant, pro se status confers no special benefit. “To the contrary, any person choosing to represent himself in a legal proceeding must, to a reasonable extent, assume that his lack of expertise and legal training will be his undoing.” *Jordan v. Pennsylvania State University*, 276 A.3d 751, 761 (Pa. Super. 2022). This is particularly relevant to Election Code matters, where the parties and the courts are bound by strict statutory requirements.

In the Berks decision, the Commonwealth Court specifically set out to “shed light on what must happen when people believe fraud is in play in an election in this Commonwealth.” *Id.* at 67. It chose to highlight “important takeaways” in the Opinion with bold font to serve as an “educational summary.” *Id.* at 67. In a footnote, the Court expressed the hope that “Surely, for example, parties alleging fraud in the future will follow the rules for doing so explained at length and placed in bold font above.” *Id.* at 67 and n.25. Unfortunately, Petitioners were unaware of this important appellate decision, or deliberately ignored the Commonwealth Court’s direction.

Factual and Procedural History

The above-captioned case is one of ten separate matters that have been filed in the Pennsylvania Courts relating to the 2023 race for Fayette County Commissioner. Of these, eight matters were related to the 2023 Municipal Primary, and the remaining two matters, including this case, were related to the 2023 General Election. {7} The General Election was held on November 7th, 2023. The computational canvassing of the returns was completed on November 27th, 2023.

The original Petitioners {8} filed this Petition to File Nunc Pro Tunc, Petition to Open Ballot Box and Recanvass Voting Machines on November 20th, 2023. The same Petitioners had also filed a separate election-related Petition on November 15th, 2023, at 2292 of 2023, G.D., specific to the Washington Township precinct. In their Petition to File Nunc Pro Tunc, Petitioners allege that they attempted to file the underlying Petition {9} on November 15th, 2023, but the filing was refused by the Fayette County Prothonotary based on her determination that separate petitions with separate filing fees were required for each precinct.

Both cases were initially assigned by the Prothonotary's software system to Judge Nancy Vernon. On December 18th, 2023, Petitioner Marietta and then-Petitioner Gregory Stenstrom appeared in Motions Court before Judge Vernon. The record is unclear as to whether Petitioners appeared in an attempt to present the actual Petitions or to present other motions related to the Petitions. Motions Court Procedure in the Fayette County Court of Common Pleas is governed by F.C.R. 208.3(a). {10} Motions must be accompanied by a Certificate of Service and a Certificate of Presentation (with the format for each Certificate specified by rule). Motions must be filed in advance with the Prothonotary with a copy delivered to the Court Administrator and must be served on the other party at least two business days before the presentment. Though the Petitioners delivered documents to the Court Administrator, the Motions were never filed with the Fayette County Prothonotary before presentation as required under local rule F.C.R. 208.3(a)(8). Judge Vernon issued an Order dated December 20th, 2023, specifically directing Petitioners to file the Motions of record, however, Petitioners have not complied with this Order and the Motions are still not of record as of this date. By that same Order, Judge Vernon recused herself from the case, directing that it be reassigned to President Judge Leskinen. {11} As the Motions were never filed of record as required by the December 20th, 2023, Order, no further action was taken on them.

{7} These actions include the six Petitions to open ballot boxes and recanvass voting machines filed at Nos. 1205, 1206, 1207, 1208, 1209, and 1211 of 2023, G.D., a tort action filed at No. 1759 of 2023, G.D., a matter initially filed with the Commonwealth Court of Pennsylvania at docket No. 448 MD 2023 and later transferred to the Court of Common Pleas of Fayette County for lack of original jurisdiction that was docketed in Fayette County at No. 2071 of 2023, G.D.; and two matters filed seeking the opening of ballot boxes and recanvassing related to the 2023 General Election at Nos. 2232 and 2292 of 2023, G.D.

{8} The caption is styled here as it was filed in the initial Petition, except that Gregory Stenstrom was stricken from the matter and caption as an improper party by Order dated January 11th, 2024. Though the original caption designates the parties as Plaintiffs and Defendants, the matter before the Court is a Petition. Therefore, this Opinion and Order refers to the respective parties as Petitioners and Respondents.

{9} The underlying Petition to Open Ballot Box and Recanvass Voting Machines at 2332 of 2023, G.D. has not been independently filed of record; it appears in the record only as an attachment to the Petition to File Nunc Pro Tunc.

On January 5th, 2024, the Fayette County Election Bureau filed a Motion to Strike Improper Party. The required Certificate of Presentation included with the Motion indicated that it would be presented as a Priority Motion on January 11th, 2024. On January 10th, 2024, Petitioner Marietta and then-Petitioner Stenstrom filed a Motion for Continuance with the Prothonotary but did not otherwise follow F.C.R. 208.3(a) relating to Motions Court Procedure to present that Motion to the Court for consideration. The Court heard the Motion to Strike as scheduled and struck Gregory Stenstrom from the caption by Order dated January 11th, 2024. {12}

{10} Marietta and Stenstrom had previously presented motions on multiple occasions before Senior Judge Wagner and President Judge Leskinen in other 2023 election cases before presenting these Motions before Judge Vernon, and thus had reason to be familiar with the process. In addition, this Court specifically referenced the local Rules of Civil Procedure for the Court of Common Pleas of Fayette County, Pennsylvania, in an Opinion and Order dated November 13th, 2023, in the tort action filed by Marietta at No. 1759 of 2023, G.D., providing both the URL for the Local Rules as posted on the Court Administrator’s page on the County website and a notation that the Local Rules were also available at the Fayette County Law Library (which is located in the Fayette County Courthouse).

{11} After the Motions Court presentation, Judge Vernon had initially entered a scheduling Order dated December 19th, 2023, but after further review of the Petitions filed, she determined that this Petition sought relief in all voting precincts in Fayette County, not just Washington Township. Judge Vernon’s husband was a candidate on the ballot for Supervisor in South Union Township, Fayette County, which would not have been at issue with the Washington Township precinct but was at issue with a County-wide request, so she determined her recusal was warranted. As two of the three remaining Judges in the Court of Common Pleas (Judge Linda Cordaro and Judge Joseph George, Jr.) were on the ballot for retention in the election at issue, the matters were reassigned to the only remaining Court of Common Pleas Judge (excluding Senior Judges), President Judge Steve Leskinen.

{12} Stenstrom has predicated his standing to file as a Plaintiff/Petitioner in multiple 2023 election cases before this Court on his purported role as an “authorized representative” for candidate Marietta pursuant to §3146.8. §3146.8(g)(1.1) and (2), permit each candidate to designate one authorized representative to remain in the room and observe meetings for pre-canvass and canvassing of absentee and mail-in ballots. There are no averments in the Petition nor is there any other evidence in the record that Stenstrom served in this statutorily defined role by being present in the room for any pre-canvass or canvass meeting conducted by the Fayette County Board of Elections for the 2023 General Election. This Court finds no support in the Election Code that a candidate may designate an authorized representative who would then have independent standing to file Petitions pursuant to §§ 3261-3263, particularly when that Representative has not served any of the functions delineated in the statute. Nor has Stenstrom have any other rationale allowing him to serve as a Petitioner, since he is a resident of Delaware County, Pennsylvania, and has never been registered as a voter in Fayette County, Pennsylvania.

The Respondents filed the Preliminary Objections currently before this Court on January 12th, 2023. On February 7th, 2024, the day before the Objections were scheduled to be presented at Motions Court, Petitioners filed a single document titled “Response to Defendants’ Preliminary Objections Notice of Appearance and Presentation, Petition for Leave to File Nunc Pro Tunc, and Motion for Reconsideration of Pro Se Plaintiff Stenstrom.” This document includes a Verification made subject to the penalties of 19 Pa. C.S. § 4904 relating to unsworn falsification to authorities dated February 7th, 2024, with what appear to be digitally pasted copies of signatures of the seven Petitioners and Gregory Stenstrom. The attached Certificate of Service, also dated February 7th, 2024, states that the Response was “properly served” on the Respondents without specifying the method of service, {13} accompanied by a typed notation that is ostensibly intended to represent a digital signature.

The Court heard arguments on the Preliminary Objections filed in both matters at Motions Court on February 8th, 2024, including arguments from the Petitioners on their Response. The Court did not consider the Motion for Reconsideration of Removal of Pro Se Plaintiff Stenstrom that was included in the Response to the Preliminary Objections, as the Certificates attached to the filing showed that Petitioners did not provide the two days’ notice before presentation required by F.C.R. 208.3(a)(8). At Motions Court, Renee Mazer, Esq. appeared on behalf of the “qualified elector” Petitioners other than Marietta. As Attorney Mazer had not filed a written entry of appearance before Motions Court, her appearance was taken on the record and memorialized by Order dated February 9th, 2024.

At oral argument, Attorney Sheryl Heid, the Solicitor for the Fayette County Election Bureau, appeared on behalf of the Respondents and presented the Preliminary Objections. During the argument, Attorney Heid noted that the Petition to File Nunc Pro Tunc alleges (beginning in ¶2 of the Petition), inter alia, that she was present in the Fayette County Prothonotary’s Office when Marietta allegedly tried to present his Petition on November 15th, 2023, that she acted as the Solicitor for the Prothonotary, and that she directed the Prothonotary to take certain actions with respect to the Petition. In their Response to the Preliminary Objections at ¶16, Petitioners expanded these allegations to include an allegation that Heid “aggressively confronted and argued” with Marietta in the Prothonotary’s Office.

{13} Service issues, both of original service of process and service of subsequent legal filings have been an ongoing issue in the various 2023 election cases listed, supra. The Court has repeatedly referenced improper service during court proceedings and in written orders, including the Orders entered in the tort action filed by Marietta at No. 1759 of 2023, dated September 21st, 2023, in which this Court directed Plaintiffs Marietta and Stenstrom to obtain original service of process and specified in detail in the Order each of the applicable rules of civil procedure relevant to such service, and the Order dated September 26th, 2023, wherein the Court excused the named Defendants from any obligation to file responsive pleadings until such service had been effectuated. Though the Respondents have not specifically raised service in their Preliminary Objections in this matter, the Court notes that the Certificates of Service Petitioners have included with their various filings in this matter continue to be fatally deficient.

Marietta acknowledged during the argument that Heid was not in the Prothonotary's Office when he attempted to file his Petition on November 15th, 2023, and that statements to that effect in the Petition and Response were incorrect. {14} On February 15th, 2024, Petitioners filed a "Praecipe for Correction," wherein Marietta requests that "the record be corrected to reflect that the Prothonotary requested separate counsel regarding accepting the subject petitions from another solicitor," but then goes on to state that further details will "be a subject of the forthcoming requested jury trial."(Praecipe, ¶¶1 and 2.) {15, 16}

Standard of Review

When considering preliminary objections, a court must consider as true all well-pleaded material facts and all reasonable inferences that may be drawn from those facts. *Richardson v. Beard*, 942 A.2d 911, 913 (Pa. Cmwlth. 2008). However, the court need not accept as true any conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinions. *Id.* Preliminary objections will only be sustained where it is clear and free from doubt that the facts pleaded are legally insufficient to establish a right to relief. *Id.*

Respondents raise Preliminary Objections under Pa. R.C.P. 1028(a)(1), lack of subject matter jurisdiction; 1028(a)(4), legal insufficiency of a pleading; and 1028(a)(7), the failure to exercise or exhaust a statutory remedy.

Discussion

Nunc Pro Tunc Filing

Petitioners sought leave to file their Petition to Open Ballot Box and Recanvas Voting Machines Nunc Pro Tunc. Paragraph 2 of the Petition states that the deadline for filing recount petitions was November 15th, 2023, at 12:00 P.M. It is not clear how Petitioners determined that deadline, as § 3263 sets forth the requirement that petitions to open ballot boxes or to recanvass votes under § 3261 and § 3262, respectively, shall be filed no later than five (5) days after the completion of the computational canvassing of all returns of the county by the county board. For the November 7th, 2023, General Election, that canvassing was completed on November 27th, 2023, after which Petitions could be filed for an additional five days. Here, a Petition filed on November 20th, 2023, would not have been late, and no leave to file nunc pro tunc was necessary.

{14} As the parties were before the Court for oral arguments on Preliminary Objections and not an evidentiary hearing, there was no sworn testimony taken on this issue. However, Marietta's representations to the Court call into question the veracity of the documents submitted by Petitioners in this matter.

{15} This Court has previously addressed Marietta's improper use of Praecipies by Orders filed on September 26th, 2023, and November 14th, 2023, in the Tort action filed at No. 1759 of 2023. Even if Marietta had followed the proper procedure to amend a pleading, the two paragraphs that make up the entirety of this Praecipe are utterly lacking any sort of specificity as to the "corrections" requested. Of note, this "Praecipe" includes the same digitally copied signatures as the Petitioners' other documents.

{16} No provision of the Election Code allows for a jury trial.

However, the underlying Petition to Open Ballot Box and Recanvass Voting Machines was never separately filed in this matter; it is only of record as an Exhibit to the Petition to File Nunc Pro Tunc. As other independent grounds require the dismissal of the Petition, *infra*, the Court need not address whether this filing defect independently bars consideration of the underlying Petition.

Verification

§ 3261(a)(1) and § 3262(a)(1) both require that any petition filed under those sections be “duly verified” by three qualified electors of that election district. The Electors signing the petition must verify them by oath or affirmation before a notary or other public official. In *re* 2003 General Election for Office of Prothonotary, 578 Pa. 3, 19 (Pa. 2004).

Petitioners’ Response to Preliminary Objections repeatedly cites 52 Pa. Code § 1.36 in support of their position that notarization is not necessary where verification under 18 Pa. C.S. § 4904 is permitted. (Response ¶¶35, 36, 88, and 89.) Though 52 Pa. Code § 1.36 contains the language Petitioners reference, Title 52 of the Pa. Code regulates Public Utilities, and § 1.36 is part of the rules of documentary filings in administrative practice before the Pennsylvania Public Utilities Commission. It is not applicable to the matter before this Court.

The Pennsylvania Supreme Court in *In re* 2003 General Election, provides a detailed analysis of the meaning of “duly verified” as applied to petitions filed under § 3261 and § 3262 before concluding that verification requires an oath or affirmation before a notary or other public official. As that Court notes, the Election Code does not define the term “verified” and the interpretation of the term in this context lies with the Statutory Construction Act, 1 Pa. C.S. § 1991, rather than with the Judicial Code or the Rules of Civil Procedure. *Id.* The failure to duly verify is a jurisdictional defect that cannot be cured, and the Petition must be dismissed on this basis. *Id.* This Court is bound by the Pennsylvania Supreme Court’s precedent on this issue.

Applicability of § 3263

The procedures to open ballot boxes and to recanvass voting machines are delineated in § 3261 and § 3262. In addition, § 3263, as amended in 2004, {17} imposes additional limitations on initial recount petitions filed under § 3261 and § 3262. Berks at 75. As such, any petition to open ballot boxes or to recanvass voting machines requires Petitioners to file their petitions as to each election district in which ballots were cast or to plead and offer prima facie evidence that a particular act of fraud or error occurred. *Id.* at 68. Here, the Petitioners filed only one Petition encompassing all voting precincts in the County (“For the District of Fayette County” in ¶2.) and did not plead or offer evidence of a particular act of fraud or error. Under Berks, *supra*, p.75, this failure by the Petitioners independently requires dismissal of the Petition.

Petitioners argue in their Response to Preliminary Objections that the Petition was not filed under § 3263 and that any references to that Section are “not relevant, responsive, or applicable to Plaintiff’s petition.” Response, ¶¶48 and 49. This exact argument was rejected by the Commonwealth Court in Berks.

{17} 2004, Oct. 8, P.L. 807, No. 97, §13.

The Commonwealth Court has also previously addressed Petitioners' argument that filing separate Petitions, with separate bonds and filing fees, each requiring the verification of three qualified electors of the precinct, would be functionally impossible. In Berks, at 339, the Commonwealth Court reiterated the viability of § 3261 and § 3262 in local races. At n.11, the Court opines that the cost to file a petition in a particular precinct would always be spread across at least three petitioners, which could be as little as \$16.67 per petitioner {18, 19} The cost per petitioner would remain consistent regardless of the number of precincts at issue.

Inclusion of Scandalous or Impertinent Matter

In their Preliminary Objections, Respondents have raised the issue of the inclusion of scandalous or impertinent matter under Pa. R.C.P. 1028(a)(2). Though this issue is not dispositive, the language at issue here warrants further consideration by the Court.

“To be scandalous or impertinent, the allegations must be immaterial and inappropriate to the proof of the cause of action.” *Common Cause/Pennsylvania v. Com.*, 710 A.2d 108, 115 (Pa. Cmwlth. 1998). In *Common Cause*, Petitioners provided an introductory statement with an editorialized history of lawmaking in Pennsylvania related to other pieces of legislation not before the court and contained statements that improperly cast a derogatory light on the legislative and executive branch leadership. *Id.*, at 115. The Commonwealth Court struck that introductory statement from the petition for review. *Id.*

The instant Petition (including the underlying Petition attached as Exhibit A) and the Response to the Preliminary Objections go far beyond that of the *Common Cause* language. They include inappropriate accusations of misconduct, misrepresenting the record and procedural history, legal conclusions that are not remotely supported by statute or case law, and allegations that Petitioners have acknowledged are false. These statements have no place in any pleading or other court filing.

For example, Paragraph 2 of the Petition to File *Nunc Pro Tunc* avers that “on November 15th, 2023, with two witnesses present when Fayette County Solicitor Sheryl Heid intervened and unlawfully directed Fayette County Prothonotary Nina Capuzzi Frankhauser {20} to refuse to time stamp, nor accept lawful filing of subject petition.” In their Response to the Preliminary Objections, Petitioners expand this allegation even further, averring in Paragraph 16,

Defendants' Solicitor Heid appeared in the Prothonotary's office on November 13th, 2023, (sic) when Pro Se Plaintiff Marietta tried to file the PETITIONS and aggressively confronted and argued with Pro Se Plaintiff Marietta to prevent him from filing the PETITIONS to which Pro Se Plaintiff Marietta refused to comply, whereupon Solicitor Heid unlawfully ordered the Fayette County Prothonotary Nina Capuzzi Frankhauser, and her staff, to refuse to accept the filings.

{18} The \$16.67 figure is based on the \$50 bond requirement, but use of the “as little as” language appears to recognize that there may be other filing fees or costs.

{19} The required bond is refunded to the Petitioners upon a finding of fraud or error, but retained by a county if no fraud or error is shown. The \$50 amount was first set in the Act of April 23, 1927, P.L. 360, the predecessor to the 1937 Election Code, and has not been updated since then. Indexed for inflation, a \$50 filing fee in 1927 would be roughly \$1,000 today.

{20} The Petition repeatedly misspells the name of Fayette County Prothonotary Nina Capuzzi Frankhauser as “Frankhauser” (¶2,3) and “Frankenhauser” (¶6,7, 18).

At the oral arguments on the Preliminary Objections, Marietta acknowledged to the Court that these allegations were false and that Heid was not present in the Prothonotary's Office when he attempted to file his Petition. These are no mere typographical errors. These allegations were made with great specificity and were purportedly verified by Marietta and filed at a time when he should have known them to be false.

As another example, in ¶11 of the Petition to File Nunc Pro Tunc, Petitioners allege that the undersigned committed misconduct "in admonishing and refusing to permit Pro Se Plaintiffs from presenting their previous election law complaints and petitions without licensed attorneys as counsel." This is not supported by the record, as all of Petitioners' filings in this case were filed Pro Se, as were Marietta's pleadings and filings in the other election cases, and the records from the various arguments and Motions presentations demonstrate that Petitioner Marietta had the opportunity to address the Court on his behalf whenever he appeared for proceedings.

The undersigned has attempted to correct Petitioners for their repeated disregard of procedural rules, as Petitioners' unforced errors are preventing the Court from reaching any meritorious claims they may have raised. Their various petitions, motions, and requests have not been denied because they were raised pro se, they were denied because they were filed improperly or lacked any legal basis on which any court could grant relief.

In the Response to the Preliminary Objections, Petitioners repeatedly categorize appropriate and ethical behavior on the part of Respondents and other officials as intentionally misleading, procedural chicanery, false statements, gross misrepresentations, perpetrating fraud on the court, or aggressive obstruction. (See ¶¶35, 37, 45, 46, 52, 62, 71, 88, 91, 93, 114, 115, and 127 of Response.)

For example, in ¶35, Petitioners allege that Attorney Heid "attempts to mislead and perpetrate fraud upon the Honorable Court by stating that the Petition must be notarized, when in fact, a licensed attorney has a duty to know that separate, sworn Verifications (s) signed by all Plaintiffs, have been made in accordance with 52 Pa. Code §§ 1.36(a)-Verification, and § 1.36(b) format with required reference to 18 Pa.C.S. § 4904, and that "notarization is not necessary." (Emphasis from original.) As discussed, supra, verification by oath or affirmation before a notary or other public official is required and the criticized statements by Respondents are correct. Petitioners are free to argue that the applicable case law was wrongly decided, but it is still the relevant precedent and Respondents accurately stated that law. There is no place for these types of baseless histrionic allegations. Petitioners are accusing Respondents of exactly the kind of reprehensible behavior in which the Petitioners themselves are engaging. Had their Petition not been dismissed on other independent grounds, these statements would be stricken.

Conclusion

The Election Code sets forth specific statutory procedures to challenge different aspects of the election process. The provisions of the Election Code are the exclusive means to challenge the election process and election results. Petitioners must strictly adhere to these requirements when pursuing an action under the Code. This Court is bound by the provisions of the Election Code and by the decisions of the appellate courts on election matters. The precedent is clear that any recount petition filed under § 3261 or § 3262 must be verified by oath or affirmation before a notary or other public official and the failure to do so is a jurisdictional defect that cannot be cured. Recount

petitions must also be filed in every election precinct where the office at issue appeared on the ballot or must allege facts sufficient for a prima facie case of fraud or error. The Petition in this case did not contain the proper verifications and did not meet either of the two specified methods for filing. Each of these is an independent basis for dismissing the Petition.

WHEREFORE, the Court issues the following Order:

ORDER

AND NOW, this 21st day of March, 2024, upon consideration of the Preliminary Objections of Respondents, Fayette County, PA, and the Fayette County Board of Elections, the record in this matter, and the oral arguments submitted by the parties, the Court ORDERS and DIRECTS as follows:

The Petition to File Nunc Pro Tunc, Petition to Open Ballot Box, and Recanvas Voting Machines is DISMISSED as moot. A Petition filed under 25 P.S. § 3261 or § 3262 on November 15th, 2023, as to the General Election would have been timely, and no leave to file nunc pro tunc was required.

To the extent that the Petition to File Nunc Pro Tunc, Petition to Open Ballot Box, and Recanvas Voting Machines could be considered a Petition to Open Ballot Box, and Recanvas Voting Machines due to the inclusion of the proposed underlying Petition as Exhibit A to the nunc pro tunc Petition, {1} Respondents' Preliminary Objections to the Petition are SUSTAINED. The failure to verify the Petition by means of an oath or affirmation before a notary or other public official deprived this Court of the jurisdiction to hear this case. In addition, because the Petitioners did not file separate Petitions for each precinct at issue or plead and offer prima facie evidence that a particular act of fraud or error occurred, they have failed to state a cause of action for which relief may be granted. The Petition to Open Ballot Box and Recanvass Voting Machines is hereby DENIED and DISMISSED, with prejudice.

This is a Final Order resolving all claims.

BY THE COURT:
STEVE. P. LESKINEN,
PRESIDENT JUDGE

ATTEST:
PROTHONOTARY

{1} This Court need not address whether filing the underlying Petition to Open/Recanvas only as an Exhibit to the nunc pro tunc Petition was so procedurally deficient as to prevent the Court from considering it, as the Petition is invalid on other grounds, each of which is separately sufficient as to warrant dismissal.

129TH ANNUAL
FAYETTE COUNTY BAR ASSOCIATION

BAR BANQUET

FRIDAY, APRIL 26, 2024

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6:30 | FABULOUS BUFFET

SIGNATURE COCKTAIL | CEASE AND DESIST
CATERED BY THE YARD

THE GRAYSON HOUSE

157 RIGGIN HILL ROAD
UNIONTOWN, PA 15401

RSVP TO THE ASSOCIATION BY APRIL 5
724-437-7994 OR CINDY@FCBAR.ORG
NO CHARGE FOR FCBA MEMBERS
GUESTS WELCOME/GUEST FEE \$100



LUNCH & LEARN SERIES

The Fayette County Bar Association's next presentation in its Lunch & Learn Series will be:

- Date: **Wednesday, April 17th from 12:00 p.m. to 1:30 p.m.**
- Location: **Courtroom No. 2 of the Fayette County Courthouse**
- Discussion topics: **Staying Safe and Sound – Maintaining a Realistic Work/Life Balance in 2024**
- Presenters: **Brian S. Quinn, Esquire
Lawyers Concerned for Lawyers**

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1.5 hours of Ethics CLE credit for the program. The fees are as follows:

Members of the FCBA

- \$5 fee for attendance without CLE Credit
- \$15 fee for attendance with CLE Credit

Attorneys admitted to practice in Pennsylvania after January 1, 2019

- \$5 fee for attendance with CLE Credit

Non-members of the FCBA

- \$15 fee for attendance without CLE Credit
- \$40 fee for attendance with CLE Credit

**** All fees to be paid at the door ****
A light lunch will be provided.

RSVP

If interested in attending, please call Cindy at the Bar office at 724-437-7994 or email to cindy@fcbbar.org on or before Monday, April 15th.

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