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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000488-MR

BEVERLY McCLENDON — APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE RON JOHNSON, SPECIAL JUDGE
ACTION NO. 06-CI-00180

JERRY R. HODGES — APPELLEE

OPINION
AFFIRMING IN PART; REVERSING IN PART;
AND REMANDING

** ** ** ** **

BEFORE: ABRAMSON AND TAYLOR, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Beverly McClendon brings this appeal from a judgment of the Monroe Circuit Court in an election contest that voided the November 7, 2006, mayoral election for the city of Tompkinsville, Kentucky. We affirm in part, reverse in part, and remand.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On November 17, 2006, Jerry R. Hodges filed a "Petition for Recount Pursuant to KRS 120.185 and Petition of Election Contest" in the Monroe Circuit Court challenging the legality of the general election for the mayor of the city of Tompkinsville. In the petition, Hodges initially named McClendon and the Monroe County Board of Elections (Board) as respondents. The Board conducted a recount of the mayoral election on December 15, 2006, and the election results were verified. Following the recount, the Board was dismissed as a party. Hodges specifically challenged the legality of the votes cast by walk-in absentee ballot in the West Tompkinsville and Courthouse Precincts, which are located within the city of Tompkinsville and comprise the Fourth Magisterial District (District 4).[2]

The record reveals that in the general election conducted on November 7, 2006, McClendon won the mayoral race by a **single vote**. McClendon's total was 325 votes, one more than the 324 votes received by Hodges.[3] Of this total vote, McClendon received 162 votes by walk-in absentee ballot and Hodges received 35. Of the 162 walk-in absentee votes for McClendon, 102 were from District 4. And, of the 35 walk-in absentee votes for Hodges, 9 of those votes were from District 4.

The petition filed by Hodges contained four counts. In count one, Hodges requested a recount of the mayoral election pursuant to KRS 120.185. Count two alleged McClendon and/or his agents violated KRS 117.235 by conducting election activities

[2] Relevant to this appeal, a walk-in absentee vote or ballot was one cast within the twelve days preceding the election by a qualified voter who was to be absent from the county on election day. Such votes were cast by voting machine in the Monroe County Clerk's Office.

[3] There were three other mayoral candidates: Windell Carter, who received 251 votes; Norman Clarkson, who received 183 votes; and Marrs Kerr, who received 47 votes.

within three hundred feet of a polling place during walk-in absentee voting. In count three, Hodges claimed McClendon and/or his agents violated the Corrupt Practices Act (KRS 121.055). And, count four alleged fraud. Specifically, the alleged fraud included "various and numerous individuals" who voted in District 4 by walk-in absentee ballot in the mayoral election, who were not residents of Tompkinsville, and/or who were not absent from the county on election day.

The action was tried upon the facts without a jury. CR 52.01. After a nine-day bench trial where more than one hundred witnesses testified, the circuit court found "there was no proof as to specific acts of misconduct by the Respondent Beverly McClendon." Rather, the circuit court found:

> 9. One important aspect of this case is the new electronic voting machines furnished by Harp Enterprises in 96 of Kentucky's 120 counties. These machines obviously cause some concern and intimidation on the part of certain voters. Many individuals apparently obtained assistance in voting that were not authorized to obtain assistance pursuant to Kentucky Statute because they were not blind, they understood the English language, and they have no physical disability which effected [sic] their ability to cast a vote. However, the newness of the voting machines did not create false addresses for certain voters, and **there was evidence that the utilization of false addresses in District #4 regarding the walk-in absentees was rampant.**
>
> 10. Other problems included individuals being within the County on Election Day when they indicated they would be out of the county, individuals who testified that they were in one location on Election Day when their absentee ballot application stated they would be elsewhere, individuals who improperly obtained assistance (generally from persons they did not know and who operated the machine on their behalf, to the extent that they were not even aware who they voted

for in certain races), and the fact that two individuals who were heavily involved in the Tony Gumm candidacy, namely Martha Hughes and Billy Proffitt, assisted a total of over 80 voters combined in District #4.[4] Various voters who lived outside the City voted in the City race and several indicated they went to Tony Gumm's car lot to obtain their false address, addresses within the City of Tompkinsville.

11. Based on the evidence heard by this Court in this proceeding, the taint in this matter is pervasive and cast a great doubt as to whether or not the results obtained **in District #4** reflect the true will of the electric [sic]**.** There has been repeated testimony that every vote should count but this Court concludes that every honest vote should count. The Court notes that this one vote margin in the outcome of the election causes this entire process to be examined very carefully.

12. Proof of pervasive illegal activity should cause an election to fall. The judiciary is a watch dog in regard to this process.

13. The Court again notes there was no proof as to specific acts of misconduct by the Respondent Beverly McClendon. The fact that McClendon was friends with Gumm and Page[5] does not make him liable for their actions. Politics makes strange bedfellows. However, in the opinion of the Court, the actions of a handful of people have been pervasive in this matter and have certainly affected the outcome of the election in a manner contrary to law. Reasonable inferences can be taken from Billy Pro[f]fitt's actions, but again, Proffitt is not specifically tied to Beverly McClendon. But the fact is that Tony Gumm, Billy Proffitt and to a lesser extent the Page family have been heavily involved in these violations of Kentucky Election law. Further, McClendon's margin in the walk-in absentees is evidence that he benefited from the manner in which the election was conducted.

[4] Tony Gumm was an unsuccessful candidate for magistrate in the Fourth Magisterial District (District 4).

[5]Mitchell Page was an unsuccessful write-in candidate for County Judge in Monroe County.

(Emphasis added.) Ultimately, the circuit court invalidated the mayoral election and specifically concluded:

> 1. **. . . the illegal acts regarding walk-in absentees in the 4th District** have been so pervasive and numerous so as to leave no reasonable person any doubt as to whether or not the results obtained **in that district** were the will of the electorate. Upton v. Knuckles, Ky 470 SW2d 822 (1971).
>
> 2. Due to the closeness of the election, all of the precincts can be called in to question, **even though the proof in this action was limited to the walk-in absentees in District #4.**
>
> 3. Because of the extent and number of the walk-in absentees, the Court concludes that the entire results in the Mayoral Election for the City of Tompkinsville November 7, 2006, are not a true sense of the electorate and the entire election should be set aside.

(Emphasis added.) This appeal follows.

We initially observe that the judiciary is empowered by the legislature to review and decide election contests. *Newsome v. Hall*, 169 S.W.3d 66 (Ky. App. 2005). This election contest was instituted in the circuit court by Hodges pursuant to KRS 120.155 and an appeal to this Court was filed under the provisions of KRS 120.175. As the circuit court tried this matter without a jury, we review the court's findings of fact under the clearly erroneous standard and the court's rulings of law *de novo*. *Black Motor Co. v. Greene*, 385 S.W.2d 954 (Ky. 1964); *Cinelli v. Ward*, 997 S.W.2d 474 (Ky. App. 1998). With these standards in mind, we shall now address McClendon's allegations of error.

McClendon alleges the circuit court erred by "trying this case beyond the allegations in the complaint." Specifically, McClendon points out that the circuit court ultimately found that the walk-in absentee votes in District 4 were tainted by pervasive fraud and that such fraud was perpetrated by individuals other than McClendon. However, McClendon maintains the petition did not assert a cause of action against anyone other than himself and the circuit court found he committed no election fraud. Consequently, McClendon argues Hodges' petition should have been dismissed.

To be sufficient, a complaint or petition must only give "fair notice" of the cause of action asserted and the relief sought thereunder. *Security Trust Co. v. Dabney*, 372 S.W.2d 401 (Ky. 1963). As to an election contest, the court is required to give the pleadings a "rational construction according to their general scope and tenor." *Upton v. Knuckles*, 470 S.W.2d 822, 825 (Ky. 1971). Moreover, we are directed to disregard "technical objections" to such pleadings. *Id*.

In Hodges' petition, count four generally alleged fraud and particularly alleged, *inter alia*:

> 15. That within said District, various and numerous individuals who were not legal voters within the City of Tompkinsville, Kentucky, by reason of ineligibility due to residence, were allowed to vote as walk-in absentees.
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> 16. That within said District, numerous individuals were allowed to vote as walk-in absentee voters when they at the time of their voting were aware they would be in Monroe County, Kentucky, on Election Day, November 7, 2006 and by reason of there being a substantial number of voters who were in fact in Monroe County, Kentucky, on Election Day who had previously voted by walk-in absentee, each voter

> who is determined to have been present in Monroe County, Kentucky, on election day who had previously votes [sic] by walk-in absentee in District Four should have their vote not counted as they did not cast their ballot in compliance with Kentucky Law.
>
> 17. That such a substantial number of walk-in District Four voters were not qualified by reason of residency outside the City of Tompkinsville, or by reason of having voted by walk-in method when they were in fact within Monroe County, Kentucky between 6:00 a.m. and 6:00 p.m. on November 7, 2006 (Election Day), or they were not a resident of Tompkinsville, Kentucky within the corporate limits on November 7, 2006, that any hope of the walk-in absentees of District Four being a fair indication of the sense of voters in that District regarding the Mayoral race in the City of Tompkinsville has been destroyed.
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> . . . .
>
> 20. That due to gross irregularities in regard to walk-in absentee voting, as set forth herein, all walk-in votes cast within District Four (identified by the Monroe County Board of Elections as Ballot Style Eight) should be thrown out and not counted and if not counted, then the Petitioner Jerry R. Hodges would be the winner of said election by margin of 315-223.

Also, in the petition's prayer for relief, Hodges requests:

> For the Court to determine that the walk-in absentee votes from District Four, City Ballot, City of Tompkinsville are so tainted and subject to such gross irregularities that said walk-in votes from District Four should be thrown out and not counted.

In count four, Hodges specifically attacked the walk-in absentee votes in District 4 for "gross irregularities." He alleged that many of the walk-in absentee voters did not reside in the city of Tompkinsville and/or were not absent from Monroe County

on election day, November 7, 2006.[6] As previously recited, the trial court specifically found: 1) that "**a clear majority**" of the votes cast in District 4 by the walk-in absentee method were tainted for various reasons; 2) that the utilization of false addresses in District 4 regarding the walk-in absentees was "**rampant**;" 3) that over eighty (80) walk-in absentee voters in District 4 were assisted by individuals heavily involved in the the Tony Gumm candidacy; 4) that Gumm and individuals on behalf of Page and Gumm were involved in fraudulent activities by improperly assisting, recruiting, and supplying false addresses to walk-in absentee voters in District 4; 5) that there is cause for concern when the proof indicates that 75% of the walk-in absentee voters obtained assistance; and 6) that the actions of a handful of people have "certainly affected the election in a manner contrary to law."

Upon consideration of the petition and the circuit court's judgment, we do not agree with McClendon that the court erroneously "tried" the case beyond the claims presented in the petition. Rather, we interpret the petition as adequately setting forth a claim of fraud in relation to the walk-in absentee votes in District 4. Simply put, we hold that the petition gave McClendon "fair notice" as to the claims of fraud concerning the walk-in absentee votes in District 4.

Next, McClendon argues the circuit court erred by removing him from the office of mayor and by declaring the November 7, 2006, mayoral election void. We

[6] To be eligible to vote in the mayoral election for the city of Tompkinsville, it was mandatory that the voter reside within the city limits.

commence our review of the trial judge's decision by examining the statutory underpinnings of the election contest.

KRS 120.165(4) prescribes the remedy to be applied upon proof that the election has been tainted:

> If it appears from an inspection of the **whole record** that there has been such fraud, intimidation, bribery or violence in the conduct of the election that neither contestant nor contestee can be judged to have been fairly elected, the Circuit Court, or an appellate court, on appeal, may adjudge that there has been no election. In that event the office shall be deemed vacant, with the same legal effect as if the person elected had refused to qualify. If one of the parties is adjudged by the court to be elected to the office, he shall, on production of a copy of the final judgment, be permitted to qualify or be commissioned.

(Emphasis added.) Accordingly, the court is directed to void an election when fraud, intimidation, bribery, or violence has so corrupted the election that the true outcome of the election cannot be fairly determined from the **whole record.**

In the case *sub judice*, the circuit court found pervasive fraud *only in the walk-in absentee ballots in District 4* and yet voided the mayoral election because it could not determine a true sense of the electorate. Having reviewed the entire videotape of the trial proceedings, we believe the circuit court's finding of pervasive fraud in the walk-in absentee ballots in District 4 to be substantiated by the record but find no evidence to support a finding of pervasive fraud in the election as a whole. At trial, several witnesses testified to voting by walk-in absentee ballot in District 4. Many of those witnesses further testified that they were not residents of the city of Tompkinsville

and/or were not absent from the county on election day. Additionally, through the testimony of witnesses, it was established that false city addresses were supplied to voters by Gumm and/or by his supporters. Moreover, numerous witnesses testified to being "assisted" in the voting booth by Gumm's nephew, Billy Proffitt, and to being unaware for whom they voted for mayor. As such, although we concur in the circuit court's finding of pervasive fraud in District 4 concerning the walk-in absentee votes, we do not agree that the fraud so permeated the election as a whole as to require voiding the entire vote in the Tompkinsville mayoral race.

Two significant factors preclude us from extrapolating the conduct of walk-in absentees in two precincts to the entire city. First, the evidence clearly established that the illegal votes were procured for the purpose of affecting the District 4 magistrate race, a race confined to two precincts – the West Tompkinsville Precinct and the Courthouse Precinct. Given that the illegally procured votes were directed to that race, there is no basis for concluding that similar conduct occurred in other precincts where the District 4 magistrate race was not even on the ballot. Second, there was absolutely no evidence of any illegal or fraudulent conduct, even in District 4, on election day, November 7, 2006, when voters would have voted in their respective precincts as opposed to the county clerk's office. All of the illegal voting about which the trial judge heard evidence involved walk-in absentee votes cast at the county clerk's office in the days preceding the election. On election day, voters would have appeared at the polls where precinct election officers from the Democratic and Republican parties, drawn from the

community, would have had to personally identify or obtain identification from voters, allowing them to then sign the voter roll and receive their ballots. *See* KRS 117.045 and KRS 117.227. This process, which includes statutorily-mandated "checks" on the process by virtue of the precinct election officers drawn from opposing parties, is much less susceptible to abuse than the walk-in absentee process as administered by the county clerk's staff in Monroe County. In light of these two salient facts, the trial court erred in concluding that there was pervasive fraud requiring the entire mayoral election to be set aside.

We hasten to add that proof of illegal voting or fraud in one or two precincts could certainly be the basis for a conclusion that pervasive fraud occurred throughout the city. For example, if a candidate sponsored an event where the attendees were provided cash or other incentives for their votes and those attendees then scattered throughout the city to vote in their respective precincts, voiding the entire election might be appropriate in a close election even though only a few individuals who attended the event and sold their votes actually so testified. Proof of the "vote-buying" event, directed at multiple people who lived beyond the one or two precincts from which the witnesses came, might be sufficient to conclude that the seeds of fraud were pervasive. Other scenarios might similarly lead to the conclusion that the misconduct was so widespread that only by voiding the entire election could the true will of the electorate be determined. However, facts permitting a finding of citywide misconduct are plainly not the facts before this Court.

Here, the circuit court's findings of illegal voting and fraud were pinpointed to the District 4 walk-in absentee voting which occurred in the office of the Monroe County Clerk. Under these specific circumstances, we are convinced that it is unnecessary to disenfranchise the entire electorate of Tompkinsville when a less drastic alternative is available—the voiding of all of the walk-in absentee voting in District 4.

In reaching this conclusion, we find persuasive and instructive the rationale utilized by the Court in *Beauchamp v. Willis,* 300 Ky. 630, 637, 189 S.W.2d 938, 941-42 (1945), to support its conclusion that improprieties which are confined to certain precincts cannot be considered "pervasive":

> Courts should proceed slowly and carefully in undertaking to declare an election void; it should not be done unless the evidence is such as to convince the court that there was general fraud or irregularity. Here the charges of fraud were limited to a few of the 576 precincts; the same is true as to such irregularities in other precincts that could hardly be classified as fraud. The established rule is that where, after giving the evidence of fraud (or irregularities) its fullest effect, and fraudulent or illegal votes may be eliminated, and the result of the election be fairly ascertained from votes which were regular or untainted, the court should not go to the extreme of declaring the election void. Ferguson v. Gregory, 216 Ky. 382, 287 S.W. 952; Butler v. Roberson, 158 Ky. 101, 164 S.W. 340; Caudill v. Stidham, 246 Ky. 174, 54 S.W.2d 654; Watts v. Bowen, 250 Ky. 678, 63 S.W.2d 917. The rule applies here.
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> While there are shown irregularities, and proof indicative of fraud in a limited number of precincts, there is not enough to justify the court in concluding that such were 'general' to the extent that the election as a whole was tainted.

Here, in light of the trial court's specific finding that the proof in this case was limited to the walk-in absentee voting which was conducted in District 4, there is no doubt as to the sense of the electorate outside walk-in absentee voting in the two precincts comprising that district and we therefore find no basis for voiding the election as a whole.

We are also guided by caselaw in which similar improprieties resulted in all of the absentee ballots being discarded and the election decided on the basis of the remaining votes. In *Arnett v. Hensley,* 425 S.W.2d 546, 552-53 (Ky. 1968), for example, the Court voided all absentee voting on the basis of "gross irregularities" in the handling of the absentee ballots:

> The court is reluctant to disfranchise voters because of irregularities or derelictions on the part of election officials, but it will face its responsibility and approve such a result if the departures from legal requirements are so broad as to taint the election or **so as to require rejection of the part affected**.

(Emphasis added.) The "part affected" in this case is the walk-in absentee voting in District 4. This principle was succinctly reiterated in *Upton v. Knuckles* regarding the invalidation of the vote in a precinct or precincts:

> ...we conclude the law to be (1) that the vote of a precinct can be thrown out for irregularities in the conduct of the election therein of such magnitude as effectively to destroy any hope that the results as tabulated were a fair indication of the sense of the voters in that precinct and (2) that the result of the election can be determined on the basis of the votes from the remainder of the election territory unless the number of votes in the voided precinct constituted a substantial portion (20 percent or more) of the votes in the entire territory.

470 S.W.2d at 825. The walk-in absentee vote in District 4 falls within those criteria.

Lastly in this regard, we emphasize the holding of the Court in *Hale v. Goble,* 356 S.W.2d 33, 35 (Ky. 1961):

> To say the least, the absentee voting law is difficult to administer. However, it confers a privilege and not an absolute right, and failure of election officials to carry out the provisions of the law may result in disfranchisement of voters taking advantage of it.

356 S.W.2d at 35. On the basis of the facts before the trial court, we conclude that the walk-in absentee voting in District 4 must be discarded as permeated with illegality and fraud.

McClendon insists, however, that it would be manifestly unfair to change the election result by discarding the walk-in absentee votes given the fact that there was absolutely no proof at trial that he had engaged in any wrongdoing whatsoever, or even that the illegal walk-in absentee votes were intended to influence the mayoral race. While we acknowledge that there is no proof that McClendon engaged in any wrongdoing, we cannot agree with his proposition that it would be unfair or erroneous to discard the illegal walk-in absentee votes in District 4.

The trial court specifically found that although there was "no proof of specific acts of misconduct" by McClendon, his margin in the walk-in absentee voting did indicate that "he benefited from the manner in which the election was conducted." In fact, with the exception of a single precinct, McClendon did not finish first among the five mayoral candidates in the voting on election day and he finished in fourth place in the regular absentee votes. However, in District 4 where "illegal acts regarding walk-in

absentees" were found to be pervasive, McClendon received 109 votes compared with the 9 votes for Hodges who won five of the six precincts on election day by a substantial margin. Although we recognize the existence of exceptions to the generalization noted by the Court in *Arnett*, we nevertheless concur in its assessment that "[i]n the absence of some plausible explanation, it would be supposed that the general ratio of voting as between poll voters and absentee voters would be more nearly equal." 425 S.W.2d at 553. There appears to be no explanation for the huge discrepancy in this case other than the pervasive illegalities concerning the walk-in absentee voting in District 4.

In S*ims v. Atwell,* 556 S.W.2d 929, 935 (Ky.App. 1977), the Court observed that it is not essential to establish a nexus between proven misconduct and the candidate that benefited from the illegality:

> Sims suggests that the actions of the precinct election officers were not intended to benefit either candidate. Even if this were true, the absence of an express intent to benefit a specific candidate does not detract from the wrong done to the voters themselves.

Furthermore, we emphasize that McClendon could have no reasonable expectation that he would receive any of the substantial number of illegal votes cast by walk-in absentee voters who either did not reside within the district, would not be absent from the district on election day, or did not legitimately require assistance in voting. In the oft-cited words of Chief Justice Palmore, "[w]hen all else is said and done, common sense must not be a stranger in the house of the law." *Cantrell v. Kentucky Unemployment Insurance Commission,* 450 S.W.2d 235, 237 (Ky. 1970). Because the true sense of the electorate

was not in doubt except for the walk-in absentee voting in District 4, there is no basis for setting aside the entire mayoral vote.

Considering the lack of caselaw interpreting the requirements of KRS 120.165 since the relatively recent advent of walk-in absentee voting in the year 2000, we believe it appropriate to comment upon the dangers inherent in that procedure which are so clearly demonstrated by the facts of this case. Rather than ameliorating the problems associated with traditional absentee voting, the walk-in absentee voting process appears to have in fact generated new avenues for potential abuse—at least where the process lacks proper oversight by the county clerk. We reiterate the conclusion of the court in *Arnett*, that "the county court clerk is in a particularly sensitive position as respects the proper handling of absentee ballots." 425 S.W.2d at 553. Because that position of trust appears to have been abused in the conduct of walk-in absentee voting concerning Magisterial District 4, we DIRECT the CLERK of this Court to serve a copy of this opinion by certified mail on the Honorable Gregory D. Stumbo, Attorney General of Kentucky; the Honorable Trey Grayson, Secretary of State of Kentucky; and the Honorable Teresa McMillin Sheffield, Monroe County Clerk. The Court requests that the Attorney General and the Secretary of State take whatever action that they may deem to be warranted concerning the conduct of the walk-in absentee voting in the November 7, 2006 mayoral election, as well as to prevent such abuses in the conduct of future elections.[7]

[7]We are mindful that the conduct of elections in the West Tompkinsville Precinct (one of the very same precincts involved in this appeal) and Monroe County has previously been the subject of published opinions of this Court and the former Court of Appeals, now the Supreme Court of

In sum, that portion of the judgment of the Monroe Circuit Court which found evidence of fraud in the walk-in absentee voting in Magisterial District 4 is affirmed. And, that portion of the judgment which voided the entire voting in the mayoral election held on November 7, 2006, is reversed and remanded to the Monroe Circuit Court. The winner of the Tompkinsville mayoral election shall be determined by deducting the walk-in absentee votes in District 4 from the total votes received by each mayoral candidate as previously certified in the November 7, 2006, election.

ABRAMSON, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE: Respectfully, I dissent. I would affirm the judgment of the Monroe Circuit Court that set aside the election results for the office of mayor of Tompkinsville, Kentucky, in the November 2006 general election and further, directing that a new election be held.

There is substantial legal precedent to guide courts in election contests where votes from a particular precinct(s) were obtained by fraud or other illegality. A court may either (1) declare the entire election void and the office vacant, (2) declare the

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Kentucky, on at least two occasions. In *Jernigan v. Curtis*, 622 S.W.2d 686, 689-90 (Ky.App. 1981), a panel of this Court noted that the "conduct of this election smacks of almost incredible misfeasance and in one case, at least, deliberate malfeasance," concluding that the "election officials at the West Tompkinsville precinct were either ignorant of their function or didn't care how they performed it." In support of its conclusion that all the absentee ballots in a Monroe County election were illegal and void, the Court in *Crowe v. Emmert*, 305 S.W.2d 272, 274 (Ky. 1957), cited the trial court's finding that "there is no conceivable abuse of the absentee-voting law which is not reflected in this record; and the proved violations of both letter and spirit are so many and so extensive that the touch of fraud, actual or constructive, extends to every ballot, making it impossible to segregate the valid from the invalid."

illegally obtained votes void, or (3) declare all votes from such precinct(s) void. *See Anderson v. Likens*, 20 Ky. L. Rptr. 1001, 47 S.W. 867 (1898); *Stewart v. Rose*, 24 Ky. L. Rptr. 1759, 72 S.W. 271 (1903); *Scholl v. Bell*, 125 Ky. 750, 102 S.W. 248 (Ky. 1907); *Felts v. Edwards*, 181 Ky. 287, 204 S.W. 145 (1918); *Taylor v. Neutzel*, 220 Ky. 510, 295 S.W. 873 (1927); *Scott v. Roberts*, 265 Ky. 375, 96 S.W.2d 1046 (1936); *Napier v. Noplis*, 318 S.W.2d 875 (Ky. 1958); *Watts v. Fugate*, 442 S.W.2d 569 (Ky. 1969); *Upton v. Knuckles*, 470 S.W.2d 822 (Ky. 1971); *Ellis v. Meeks*, 957 S.W.2d 213 (Ky. 1997). Under the first option, a new election would be held for the entire electorate. Under the later two options, the election would be determined based upon the remaining valid votes.

The trial court chose the first option by throwing out the entire election and ordering a new election for the mayor of Tompkinsville. The majority has chosen one of the later options, voiding all of the walk-in absentee ballots in District 4, which effectively results in Hodges winning the mayoral election.

While the majority's position is arguably supported by applicable precedent, so is the trial court's position which they are overturning without sufficient justification. In my opinion, the majority's reasoning is misplaced given the totality of the circumstances surrounding this case. In election contests, I believe it is the duty of our Courts to ensure fairness for both the voters and candidates in order to preserve the integrity of the electoral process for all participants. While the majority's result may be expedient, the result is totally inequitable - again, considering the circumstances of this case.

I might agree with the majority's result if we knew exactly which votes were fraudulent or illegal and how the walk-in absentee voters in District 4 actually voted. There were one-hundred forty-three (143) walk-in absentee ballots cast, and McClendon received one-hundred two (102) of these votes. However, upon review of the record in detail, none of the walk-in absentee voters who were called as witnesses to testify at trial were asked how they voted – presumably due to an agreement between counsel. McClendon argues that only thirty-eight (38) walk-in absentee voters could be determined to have cast an illegal or fraudulent vote based on the testimony at trial. Given that there were forty-one (41) walk-in absentee votes cast for candidates other than McClendon, under his theory, this Court would have no way of knowing whether the fraudulent votes affected the election. Conversely, Hodges argues that approximately ninety (90) of the one-hundred forty-three (143) walk-in absentee ballots casts in District 4 were fraudulent or illegal. The trial court made no determination on the actual number of fraudulent or illegal votes, finding only that a majority "were tainted for various reasons." More importantly, the trial court concluded that there was absolutely no evidence presented during the nine day trial that McClendon participated in any way in the alleged fraud or illegality surrounding the walk-in absentee ballots in District 4. McClendon was elected mayor by one vote. By voiding the walk-in absentee ballots in District 4, the majority has chosen to change the outcome of the election – which is not the proper result, in my opinion.

I agree that ordering a new election for the mayor of Tompkinsville will certainly inconvenience the registered voters of the City of Tompkinsville. However, none of the voters would be disenfranchised. Under the majority's opinion, legal walk-in absentee voters in District 4 will lose their vote. In a democratic society, our citizens are occasionally going to be inconvenienced in the protection of their rights and freedoms. One needs only look at the events since September 11, 2001, to understand this concept. Yet, that is the price we have paid in this country for over two-hundred thirty years to ensure free and open elections, which is the cornerstone of our democracy and the primary reason that our democratic system of government has prevailed. Those citizens who have made the ultimate sacrifice during our country's history to preserve and protect the freedoms that most of us take for granted on a daily basis would most certainly find laughable any notion that the minor inconvenience of voters would take priority over ensuring fair and open elections for all citizens.

Our Court, in reviewing the trial court's judgment, must balance the fairness to the candidates for mayor of Tompkinsville with the inconvenience to be placed on voters in six precincts in the City of Tompkinsville by having a new election. Equally important, we should not substitute our judgment for that of the trial court absent a valid reason. The trial court, having conducted a nine day trial and having heard testimony from more than one-hundred witnesses, balanced the equities involved and concluded that McClendon should not be penalized for the fraud of others and thus, the voters, not the court, should ultimately determine who should be mayor of Tompkinsville. The

majority has not presented a sufficient legal reason to overturn the trial court's judgment, in my opinion. I agree with the trial court's reasoning and outcome.

I believe that the trial court's finding of blatant and pervasive fraud in two of the six city precincts is sufficient to throw out the entire election under applicable precedent. As articulately stated in *Ellis v. Meeks*, 957 S.W.2d 213, 217 (Ky. 1997):

> Every candidate who runs for office is entitled to an even playing field, especially at a time when the electorate's confidence in the electoral process is increasingly diminished, as evidenced by the fewer number of voters who actually participate in the voting process. . . . There was definitely not an even playing field in this case and if we were to leave this case as it currently stands, the confidence of the voters would not only diminish with respect to the electoral process, but also with the judicial process as a whole.

As stated, our Supreme Court has set forth three specific remedies in election contest cases. Considering the unique circumstances of this case, I believe the proper remedy is to declare the entire November 7, 2006, mayoral election void and to declare the office of the mayor of the City of Tompkinsville vacant. Thus, a new election for the office of the mayor of the City of Tompkinsville should be held for the entire electorate. This would ensure that all candidates for mayor are treated fairly and no voter loses his vote in this election.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
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