RENDERED: DECEMBER 13, 2018
TO BE PUBLISHED

Supreme Court of Kentucky

2018-SC-000351-TG

KENTUCKY STATE BOARD OF ELECTIONS; AND ALISON LUNDERGAN GRIMES, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE — APPELLANTS

V.

ON APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
NO. 18-CI-00576

KAREN E. FAULKNER; TANISHA ANN HICKERSON; ANDRE L. BERGERON; AND JEFFERSON COUNTY BOARD OF ELECTIONS — APPELLEES

OPINION OF THE COURT BY JUSTICE VENTERS

REVERSING

The Commonwealth of Kentucky, State Board of Elections (State Board); and Alison Lundergan Grimes in her official capacity as Secretary of State (Secretary),[1] appeal from an opinion and order of the Franklin Circuit Court addressing which candidates are entitled to appear on the ballot of the scheduled November 6, 2018, general election for the District Court Judge of the 9th Division of the Jefferson District Court. The Jefferson County Board of

[1] We refer to the State Board and the Secretary collectively as "the Appellants."

Elections (County Board), though allied with the State Board and the Secretary, is listed as an Appellee in the appeal.

The case was initially brought as a declaratory judgment action in the Franklin Circuit Court by Appellee Karen E. Faulkner, a candidate in the primary election for the office of District Court Judge for the 9th Division of the Jefferson District Court.

Because of the urgency of hearing the matter and issuing a final order in time to ensure an orderly process for the general election of November 2018, this Court heard oral arguments in August of 2018. We issued an order on August 10, 2018, immediately reversing and vacating the order and injunction of the Franklin Circuit Court and reserving the issuance of a formal written opinion. We now issue the opinion pertaining to that order.

For the reasons explained below, we have concluded that the Franklin Circuit Court had jurisdiction to issue its rulings against the Jefferson County Board and the other parties. We further concluded, however, that KRS Chapter 118A does not provide that the third-place primary election candidate ascends to second place, and hence, to a place on the general election ballot, when either of the top two vote-getters dies after the primary election but before certification of the primary election results.

Consequently, we reversed the decision of the Franklin Circuit Court and we reaffirm now that third-place finisher Karen E. Faulkner was not entitled to appear on the November 6, 2018 ballot for the election for the District Court Judge of the 9th Division of the Jefferson District Court.

I. FACTUAL AND PROCEDURAL BACKGROUND

Four candidates appeared on the ballot for the 2018 primary election for the office of Jefferson District Judge, 9th Division. On the day after the primary election, the County Board released the following "unofficial results" of the primary election: Daniel "Danny" Alvarez finished first with 28,694 votes; Tanisha Ann Hickerson finished second with 22,470 votes; Karen Faulkner finished third with 22,453 votes; and Andre L. Bergeron finished fourth with 19,830 votes.[2] Within hours of that release, Alvarez died.

KRS 118A.060(9) provides that "[t]he two (2) candidates receiving the highest number of votes for nomination for justice or judge of a district or circuit, or numbered division thereof if divisions exist, shall be nominated. Certificates of nomination shall be issued as provided in KRS 118A.190." Under ordinary circumstances, Alvarez and Hickerson were clearly entitled to the nomination and a place on the November 2018 ballot. However, because Alvarez died on the day after the election, Faulkner believed that under applicable provisions of KRS Chapter 118A, she should be elevated from a third-place finisher to a second-place finisher, and thus, entitled to a certificate of nomination placing her on the November general election ballot. To achieve that result, she filed an action for a declaratory judgment and related injunctive relief in Franklin Circuit Court.

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[2] Bergeron and Hickerson are named as Appellees in this appeal but neither has actively participated in the proceedings.

In its opinion and order, the Franklin Circuit Court directed that the votes cast for Alvarez in the primary election should not be counted. It further ordered the State Board not to issue a certificate of nomination for the general election to the deceased candidate, but instead, to issue certificates of nominations to Hickerson as the first-place finisher and to Faulkner as the second-place finisher. The State Board and Secretary Grimes appealed the circuit court holdings to the Court of Appeals, and we accepted transfer of the case because of the urgent need for a final resolution in advance of the November election.

As required by KRS 118A.190(2), the County Board submitted the aforesaid vote counts to the Secretary of State on May 25. On the same day, the Secretary received a request from Faulkner for a recanvass of the results due to the slim margin of seventeen votes between herself and Hickerson. On May 31, the County Board recanvassed the vote for all candidates in that race with the result that no candidate's vote tally changed.

Also, on May 31, Faulkner filed the present lawsuit in Franklin Circuit Court for a declaration of rights and injunctive relief requiring the State Board of Elections to certify her nomination and place her name on the upcoming November election ballot. Faulkner asserted that, given the fact of Alvarez's death, KRS Chapter 118A provided that she be deemed the second-place vote-getter and thus nominated for the general election.

In response, the State Board maintained that the relevant provisions of KRS Chapter 118A held that Alvarez's votes must still be counted despite his

post-election death, leaving Faulkner as the third-place finisher ineligible for the general election ballot. Pursuant to KRS 189A.190(3), the State Board planned to certify the results of the primary election on June 5 consistent with the actual vote count tabulated by the County Board and issue certificates of nomination, accordingly. Under that approach, as the only living nominee, Hickerson would be the only living recipient of a certificate of nomination, and virtually assured success in the general election.

However, the Franklin Circuit Court granted Faulkner's motion and temporarily enjoined the State Board from counting the votes cast for Alvarez in its certification process. The circuit court further enjoined the State Board from issuing a certificate of nomination to Hickerson without also issuing one to Faulkner. In its final opinion and order dated June 25, 2018, the circuit court concluded that KRS 118A.150(6) requires a county board of elections to amend primary election returns so as to record and tabulate zero votes for any judicial primary candidate who has withdrawn or died before the county board of elections has performed its final act of recordation or tabulation of results on the Friday immediately following the Tuesday primary election. The Franklin Circuit Court thus enjoined the County Board from counting any of Alvarez's votes and it ordered the County Board to amend the election returns to reflect zero votes for Alvarez, thus advancing Faulkner into second place. The circuit court enjoined the State Board and the Secretary of State from issuing a certificate of nomination to Alvarez and ordered the issuance of certificates of nomination to both Hickerson and Faulkner. This appeal followed. Due to the

urgency generated by the upcoming general election, we granted transfer of the case to this Court.

II. JURISDICTION

Although not raised before the lower court, Appellants now claim for the first time that Franklin Circuit Court lacked subject matter jurisdiction over the case and that Faulkner's case should have been dismissed for that procedural defect. Acknowledging their failure to raise the issue in the lower court, Appellants correctly argue that, in exception to the normal preservation rules, a trial court's lack of subject matter jurisdiction may be raised for the first time on appeal. *Commonwealth v. B.H.*, 548 S.W.3d 238, 245 (Ky. 2018) ("Subject matter jurisdiction cannot be waived or conferred by agreement, and a party may challenge a court's lack of subject matter jurisdiction any time, even for the first time on appeal."); *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422, 431 (Ky. App. 2008).

Appellants assert three points of authority in support of their argument that the Franklin Circuit Court lacked subject matter jurisdiction over this case: (1) the circuit court lacked subject matter jurisdiction under *Noble v. Meagher*, 686 S.W.2d 458 (Ky. 1985), and KRS 118.176; (2) the circuit court lacked subject matter jurisdiction under the Declaratory Judgment Act, KRS 418.005, *et. seq.*; and (3) the circuit court lacked subject matter jurisdiction because Faulkner's proper avenue for relief arises under the election contest statutes, KRS 120.055 and KRS 120.095, which assign subject matter

jurisdiction to the Jefferson Circuit Court rather than the Franklin Circuit Court.

For the reasons explained below, we conclude that the Franklin Circuit Court had subject matter jurisdiction over this declaratory judgment action.

1. *Noble v. Meagher* and KRS 118.176

Appellants argue that KRS 118.176, which is entitled, "Challenging good faith of candidate," provides the exclusive remedy for challenges to judicial elections. In support of this contention, they cite *Noble v. Meagher*, 686 S.W.2d at 461, in which we stated:

> KRS 118.176 . . . provide[s] the exclusive remedy for challenges to judicial elections. The law does not provide any opportunity to name the Board of Elections or the Secretary of State so as to create jurisdiction in the Franklin Circuit Court. The forum and the procedures have been precisely stated by the General Assembly, and the courts of this Commonwealth have been consistent in holding that such a procedure is the exclusive remedy. *See Wooton v. Smith*, Ky., 155 S.W.2d 466 (1941); *Thomas v. Lyons*, Ky., 586 S.W.2d 711 (1979).

We are persuaded that *Noble* has no application to the present case. *Noble* involved a lawsuit by which a candidate for district court judge challenged the residency qualifications of his opponent thirty-two days before the general election. We held in that regard that under KRS 118.176, the proper forum in which to challenge a judicial candidate's qualifications for the office is the circuit court of the county in which the candidate was alleging residence in order to qualify for office of district judge; and that the challenge to the residency qualifications of judicial candidate was required to be brought

prior to the primary election pursuant to the statute dealing with challenges to good faith of a candidate, KRS 118.176.[3]

Noble involved a pre-election challenge to a judicial candidate's legal eligibility to hold the office to which election was sought. *Noble* has no significant relation to the issue we address—the death of a successful primary-election candidate after the votes were cast but before the certification of those results by the county board of elections. *Noble* dealt with the eligibility of a candidate after the certification of his nomination, not the death of a candidate before certification. Statutes addressing the former do not resolve questions about the latter. We cannot stretch *Noble*'s holding to cover the present circumstances. Although as further discussed below, more specific statutes address the death of a candidate following an election, those statutes do not address the circumstances we confront in this case.

Noble is further distinguished upon examination of its underlying rationale, KRS 118.176. KRS 118.176 is concerned with the bona fides of a candidate, and states, as relevant here, as follows:

> (1) A "bona fide" candidate means one who is seeking nomination in a primary or election in a special or regular election according to law.
>
> (2) The bona fides of any candidate seeking nomination or election in a primary or in a special or regular election may be questioned

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[3] *Noble* was rendered in 1985. KRS 118.176 has been amended twice since then: 2010 Ky. Acts ch. 123, sec. 1, effective July 15, 2010, and 2001 Ky. Acts ch. 52, sec. 1, effective June 21, 2001. Although we need not examine these amendments in this review, we note that the requirement that a challenge be brought prior to the primary is not in the present version of the statute. At least in that respect, *Noble* has been superseded, in part, by statute.

> . . . by an opposing candidate by summary proceedings consisting of a motion before the Circuit Court of the judicial circuit in which the candidate whose bona fides is questioned resides. An action regarding the bona fides of any candidate seeking nomination or election in a primary or in a special or regular election may be commenced at any time prior to the regular election. . . .
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> (3) In any action or proceeding under this section the burden of proof as to the bona fides of a candidate shall be on the person challenging the bona fides of a candidate.
>
> (4) If the court finds the candidate is not a bona fide candidate it shall so order, and certify the fact to the board of elections, and the candidate's name shall be stricken from the written designation of election officers filed with the board of elections or the court may refuse recognition or relief in a mandatory or injunctive way.

The focus of KRS 118.176 is concerned with a candidate's bona fides, which *Merriam-Webster* defines as: "1: good faith: sincerity; 2: the fact of being genuine . . .; 3: evidence of one's good faith or genuineness . . .; 4: evidence of one's qualifications or achievements . . . ."[4]

As used in KRS 118.176, bona fides refers to the good faith, genuineness, and qualifications of a candidate to hold the office to which election is sought. In context, we construe KRS 118.176's reference to "bona fides" as relating to a living candidate's legal qualification and eligibility for the office sought. We are comfortable with the conclusion that, as used in the context of KRS 118.176, the legislature's use of the term "bona fides" has no application to whether a candidate is alive or dead after the votes are counted. This case simply is not "[a]n action regarding the bona fides of any candidate

[4] https://www.merriam-webster.com/dictionary/bona%20fides (accessed September 2018).

seeking nomination or election in a primary or in a special or regular election" which KRS 118.176 (2) requires to be brought in the circuit court of the judicial circuit in which the challenged candidate resides. *Noble v. Meager* and KRS 118.176 do not vest subject matter jurisdiction of this controversy in the Jefferson Circuit Court.

2. The Declaratory Judgment Act

The Appellants also argue that the Franklin Circuit Court lacks subject matter jurisdiction over this proceeding because "the Declaratory Judgment Act does not encompass *a post-election action to recount votes or adjudge prevailing candidates.*" (emphasis added). We first note that Appellants mischaracterize Faulkner's declaratory judgment action. As revealed by the plain text of her complaint, Faulkner did not seek a recount of the votes, nor did she seek to determine the prevailing candidates. Her complaint advocated for and sought an interpretation of KRS Chapter 118A as holding that the votes of a judicial candidate who dies during the two-and-a-half-day interval between the primary election day and certification of the election results by the county board cannot be counted. Stated simply, Faulkner sought an interpretation of the applicable election statutes, *not* a recount of votes or an adjudication of the prevailing candidates. Although we ultimately determined Faulkner's interpretation to be incorrect, it is clear that all she sought in her petition was a judicial interpretation of Chapter 118A and whatever ancillary orders that were

necessary to vindicate her rights under that interpretation as provided by KRS 418.055.[5]

We also are unpersuaded that Franklin Circuit Court did not have subject matter jurisdiction over *this type of proceeding*, which is the dispositive test for subject matter jurisdiction. This conclusion is supported by our holding in *Wingate v. Davis*, 437 S.W.3d 720 (Ky. 2014).

In *Davis*, Marc I. Rosen, a recently-retired senior status judge, submitted nominating papers to become a candidate for district court judge in Boyd County. At the same time, he filed a declaratory judgment action in the Franklin Circuit Court against the Secretary of State and the State Board of Elections challenging the constitutionality of a statute that prohibited senior status judges from running for elective office within five years of their retirement. Rosen's opponent, incumbent district court judge George Davis, who was seeking re-election, intervened and moved to dismiss for lack of subject matter jurisdiction, asserting that the proper venue and jurisdiction for the action was in Boyd County where the election was to occur. Davis argued that Franklin Circuit Court lacked subject matter jurisdiction over Rosen's constitutional challenge because the General Assembly, through KRS 118.176, had created a statutory mechanism to determine the bona fides of a candidate

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[5] "Further relief, based on a declaratory judgment, order or decree, may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief, either in the same proceeding wherein the declaratory judgment, order or decree, was entered, or, in an independent action. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment, order or decree, to show cause why further relief should not be granted forthwith."

and that statute placed exclusive jurisdiction of the matter in the candidate's county of residence. In rejecting that argument, this Court said:

> KRS 418.040 allows a claim for a declaration of rights to be brought in any court of record in the Commonwealth. As previously mentioned, circuit courts are such courts of record. So, beyond cavil, the Franklin Circuit had jurisdiction over Rosen's declaratory action. Again, subject-matter jurisdiction relates to a court's ability to hear a particular kind of case, not this particular case. Theoretically, by statutory and constitutional design, Rosen was permitted to file his declaratory action in any circuit court in the Commonwealth. The remaining question is whether KRS 118.176 strips the Franklin Circuit of jurisdiction because, as Davis argues, Rosen's declaratory action is in actuality a challenge to a candidate's bona fides as described under KRS 118.176.
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> With its limiting language, KRS 118.176, on the other hand, is not nearly as broad as KRS 418.040. The relevant portion of KRS 118.176 reads:
>
> > The bona fides of any candidate seeking nomination or election in a primary or in a special or regular election may be questioned by any qualified voter entitled to vote for the candidate or by an opposing candidate by summary proceedings consisting of a motion before the Circuit Court of the judicial circuit in which the candidate whose bona fides is questioned resides.
>
> In *Noble v. Meagher*, we held KRS 118.176 provided the "only proper procedure for challenging the qualifications of a [ ] candidate before the election[.]" And that holding remains true today: KRS 118.176 is the only statutory method to challenge a candidate's bona fides in court before election. Unquestionably, an action challenging Rosen's bona fides under KRS 118.176 would not have been proper in Franklin Circuit. These facts, however, are not dispositive of the instant case because Rosen simply did not bring an action, in form or substance, challenging the bona fides of a candidate. Davis's reliance on *Noble* is misguided.
>
> The distinction here is admittedly fine; but it is an important distinction, nonetheless. Rosen is challenging the constitutionality of a statute delineating the requisite bona fides. But he is not challenging whether he possesses those bona fides. That determination currently pends in its rightful place, the Boyd Circuit.

. . . .

> The important point is that Rosen's declaratory action was a permitted action. The Franklin Circuit has jurisdiction to hear Rosen's declaratory action regarding the constitutionality of HB 427. As we have stated before, the remedy for the unfortunate possibility of inconsistent results between judicial circuits lies with the General Assembly.

Davis, 437 S.W.3d at 724-727 (citations and footnotes omitted).

Davis plainly holds that the Franklin Circuit Court had subject matter jurisdiction over Rosen's declaratory judgment action. It follows that the Franklin Circuit Court would have subject matter jurisdiction over a declaratory judgment action seeking an interpretation of KRS Chapter 118A. Of equal importance is the fact that Faulkner's complaint sought relief against the State Board of Elections and the Kentucky Secretary of State as the principal defendants in the action, with the Jefferson County Board of Elections and the surviving judicial candidates, Hickerson, and Bergeron, named as interested and necessary parties to the litigation.[6] The Franklin Circuit Court is the proper venue for suits against the State Board and the Secretary of State, and thus may be viewed as the more appropriate venue for the proceeding.

In summary, the Franklin Circuit Court had subject matter jurisdiction and was the proper venue for this declaratory judgment action. The County

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[6] In this vein we note that the Franklin Circuit Court could have ordered Faulkner onto the November general election ballot by orders to the State Board and the Secretary only, without the involvement of the Jefferson County Board of Elections.

Board waived any objection to venue and personal jurisdiction by appearing and participating in the Franklin Circuit Court proceedings without raising these issues.

3. KRS 120.055 and KRS 120.095

Appellants also contend that Faulkner's declaratory judgment was improper because her action should have been brought as an election contest under KRS 120.055 and an action for a recount under KRS 120.095.

KRS 120.055 ("Procedure for contest of primary election") provides, in relevant part, as follows:

> Any candidate or slate of candidates for nomination to office at a primary election . . . **may contest the right of the successful candidate or slate of candidates, and of any other candidate or slate of candidates for nomination to the office, to the nomination**, by filing a petition in the Circuit Court within ten (10) days from the day of the primary election, stating the specific grounds relied upon for the contest, and causing a summons to be issued, returnable in seven (7) days. **In the case of candidates or slates of candidates for offices for the state at large, the petition shall be filed in the Franklin Circuit Court; in the case of other candidates it shall be filed in the Circuit Court of the county in which the contestee resides.**

(emphasis added).

KRS 120.095 ("Recount of primary election") provides as follows:

> (1) Any candidate . . . **may request a recount of the ballots** by filing a petition with the same court that contest petitions are required to be filed with, within ten (10) days after the day of the primary election, or, if the candidate or slate of candidates is qualified to bring a contest proceeding under KRS 120.055, by including a request for a recount in his petition instituting the contest proceedings. Any candidate or slate of candidates that is a contestee in a contest proceeding under KRS 120.055 **may request a recount** in his answer filed in the contest proceeding, but in that case the answer shall be filed within five (5) days after the service of process on the petition. When a request for a

> recount is made, the State Board of Elections or the county board of elections, whichever would issue the certificate of nomination, shall be made a party defendant. The party requesting the recount shall execute a bond with approved surety for the costs of the recount, in an amount to be fixed by the Circuit Judge. . . . On the day fixed, the court shall proceed to recount the ballots if their integrity is satisfactorily shown and shall complete the recount as soon as practicable, and file and enter of record the results thereof, and direct the state board or county board, whichever would issue the certificate of nomination, to issue a certificate to the party entitled thereto as shown by the recount.
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> . . . .
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> (3) If a proceeding for recount is asked and prosecuted in a contest proceeding, it shall not await the preparation or trial of the contest in the Circuit Court or in the Court of Appeals. The action of the courts shall be final, concluding the parties as to the question of a recount of the ballots, and certificates shall then be issued to the parties entitled thereto.

(emphasis added).

We are persuaded that neither of these statutes is applicable to the present circumstances. Faulkner did not contest the integrity of the election with allegations of vote fraud, illegal voters, voting by disqualified persons, vote buying, illegal electioneering, voter intimidation, or other election malfeasance which typically forms the basis of a challenge to the validity of an election. Neither did Faulkner seek a recount of the primary election vote. After the recanvass, she accepted the validity of all votes cast in the election and argued only that, because of the unique and unfortunate circumstance of Alvarez's untimely death and despite her third-place finish, she was entitled to a certificate of nomination placing her name on the 2018 general election ballot. KRS 120.055 and KRS 120.095 pertain to the legitimacy of the election itself and the accuracy of the vote count; they do not address situations in which the

death of a successful candidate is the relevant issue. Appellants' application of election contest and recount statutes to an election which is not marred by any allegation of wrongful conduct or inaccuracy of the vote count is misplaced.[7]

For those reasons, we conclude that the Franklin Circuit Court had jurisdiction over the subject matter of this case—a declaratory judgment action under KRS 418.040. Moreover, a correct reading of *Noble's* application of KRS 118.176 and a correct interpretation of KRS 120.055 and KRS 120.095 do not support the dismissal of this proceeding upon procedural grounds.

III. KRS CHAPTER 118A DOES NOT ELEVATE THE THIRD-PLACE PRIMARY VOTE-GETTER TO SECOND PLACE UPON THE DEATH OF EITHER THE FIRST-PLACE OR SECOND-PLACE WINNERS

Appellants next contend that the Franklin Circuit Court erred by concluding that the statutory procedures provided by KRS Chapter 118A elevate the third-place finisher in a judicial primary election to second-place if either of the two candidates getting more votes dies prior to the certification of the primary election results. We begin our analysis of the argument with this critically significant point:

> The right to hold a primary election for the nomination of candidates for office, the right of such nominee to have his name appear on the ballot under the device and as the candidate of his party, the right of an opposing candidate to the one declared to be successful by the boards of election commissioners empowered to compare the returns of the primary election and to grant certificates of nomination to contest such nomination, are all

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[7] Another anomaly that would arise from the application of KRS 120.055 and KRS 120.095 to this situation is the fact that there is no election "contestee" here. KRS 120.055 requires that an election contest be filed "in the county in which the contestee resides."

> creatures of the statute enacted by the Legislature upon that subject.

Brumleve v. Cronan, 197 S.W. 498, 501 (Ky. 1917). *Wilhoit v. Liles*, 189 S.W.2d 851, 853 (Ky. 1945) is also worth noting: "The right to a recount or to contest a primary election and the procedure to be followed are purely statutory." Our review of the issues in this case is limited by the express language invoked by the legislature to resolve issues of judicial primary elections, the certification of the election by the county board the following Friday, and the death of a top-two candidate during the intervening two-and-a-half days between election and certification of results. Because these are issues of law, our review is *de novo*. *Bob Hook Chevrolet Isuzu, Inc. v. Comm., Transp. Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998).

KRS Chapter 118A provides the statutory scheme for non-partisan judicial primary elections. KRS 118A.190 provides as follows:

> **Certificates of nomination for a judicial office shall be issued to the two (2) candidates receiving the highest number of votes**, except that if more than two (2) candidates are found to have received the highest and an equal number of votes for the same office or if two (2) or more candidates are found to have received the second highest and an equal number of votes for the same office, the election shall be determined by lot in the manner the board directs, in the presence of not less than three (3) other persons.

(emphasis added). Pursuant to this provision, the primary election candidate with the third-highest number of votes does not qualify for a position on the general election ballot. The statute recognizes and provides for one and only one exception: when there is a tie vote among two or more candidates for

second place. It makes no provision for disposition in the event of the death of one of the top two finishers. KRS 118A.190 sets the initial starting point for our analysis. Its command that "certificates of nomination for a judicial office *shall* be issued to the two candidates receiving the highest number of votes" is controlling unless countermanded by other statutory provisions contained within KRS Chapter 118A.

In support of Faulkner's ascendency to a place on the general election ballot, the circuit court relied principally upon KRS 118A.150(6) and KRS 118A.150(7). We begin, however, by noting that KRS 118A.190(1-3) define the relevant certification procedures referred to in KRS 118A.150(6) and KRS 118A.150(7) as follows:

> (1) The State Board of Elections shall issue certificates of nomination or election for all primary and regular elections as provided in this section.
>
> (2) Following a primary or regular election, the board of elections of each county shall make out duplicate certificates of the total number of votes received by each candidate, by circuit or district, and numbered division thereof if divisions exist. **The certificate of the total number of votes shall be certified to the Secretary of State's Office not later than 12 noon, prevailing time, on the Friday following the primary or regular election. . . .**
>
> (3) **The State Board of Elections shall meet to count and tabulate the votes received by the different candidates as certified to the Secretary of State no later than the third Monday after the primary or regular election.** When the board certifies the results of a primary or regular election, the right to contest the election or primary shall not be impaired. A majority of the members of the board shall constitute a quorum and may act. **The board shall prepare the certificates of nomination or election in the office of the board, from the returns made**. . . .

(emphasis added).

Incorporating the above certification procedures, KRS 118A.150(6) provides as follows:

> **If *after* the certification of candidates who will appear on the ballot, any candidate whose name appears on the ballot shall withdraw or die, neither the precinct election officers nor the county board of elections shall tabulate or record the votes cast for the candidate**; and, in a primary election, if there are only one (1) or two (2) remaining candidates on the ballot for that office, following the withdrawal or death of the other candidate or candidates, neither the precinct election officers nor the county board of elections shall tabulate or record the votes for the remaining candidate or candidates, and the officer with whom the remaining candidate or candidates has filed his or her nomination papers shall immediately issue and file in his or her office a certificate of nomination for that remaining candidate or candidates and send a copy to the remaining candidate or candidates.

(emphasis added).

The flaw in the Faulkner and the circuit court's reliance upon KRS 118A.150(6) is found in the first clause of the statute: "If *after the certification* of candidates who will appear on the ballot . . . ." By its plain language, KRS 118A.150(6) applies only when the death of a candidate occurs "*after* the certification." Here, Alvarez, the successful candidate, died on the Wednesday after the Tuesday primary, but two days *before* the certification of the primary results by the county board, which would occur on the following Friday. KRS 118A.150(6) has no application during that interim period. By its plain language, KRS 118A.150(6) provides no guidance for the rare circumstance of a death occurring after the election but before election officials have completed their certification procedures.

We also note that KRS 118A.150(6) contains no provision that would enable the candidate receiving the third-highest number of votes to ascend to second-place upon the death of either the more successful candidates. The circuit court improvised what it apparently deemed to be a good solution to a vexing problem, but it did so by presuming a legislative intention that cannot be derived from the language of statute. Nowhere in the statute has the General Assembly authorized the ascension to the general election ballot of a primary candidate who received fewer votes than two other candidates.

KRS 118.150(7), again referring to the above certification procedures, provides as follows:

> **If, *after the certification of candidates* who will appear on the ballot, any candidate whose name appears on the ballot shall** withdraw pursuant to KRS 118.212 or **die, the county clerk shall provide notices to the precinct election officers who shall see that a notice is conspicuously displayed at the polling place advising voters of the change, and that votes for the candidate shall not be tabulated or recorded.** If the county clerk learns of the death or withdrawal at least five (5) days prior to the election and provides the notices required by this subsection and the precinct officers fail to post the notices at the polling place, the officers shall be guilty of a violation, subject to a fine of not less than ten dollars ($10) nor more than two hundred fifty dollars ($250).

(emphasis added).

By its plain text, KRS 118.150(7) applies only *after* the certification of candidates to appear on the general election ballot, and only upon the death of a candidate already certified to appear on that ballot. However elegant the circuit court's solution might be, we are not at liberty to apply the statute under circumstances clearly excluded by its plain language. The statute

cannot be applied to events which occur *before* the certification procedures are complete, nor may the circuit court read into the statute a requirement for reclassifying Faulkner as a top-two finisher. There is no language in the statute whatsoever authorizing that result.

The circuit court assigned significance to the fact that Faulkner demanded a recanvass of the votes pursuant to KRS 117.305 and 31 KAR 4:070 § 3(3). The recanvass of the election has no impact on the above analysis. The recanvass did not change the fact that KRS 118A.150(6) and KRS 118A.150(7) by their plain language can be applied only *after* the certification procedures are completed.

The statutes anticipate and provide solutions when the death of a candidate occurs before the election or when the death occurs after the certification of the results. Intended or not, the statutes leave a gap when the death occurs during the two-and-a-half-day interval between those dates, as happened here. It is likely that the General Assembly did not anticipate the exceedingly rare and unfortunate circumstance we face here and so it created no exception to accommodate the result improvised by the Franklin Circuit Court upon the occurrence of such an untimely death. With no applicable exception, we are left with the mandate of KRS 118A.190 directing certificates of nomination only to the two candidates receiving the highest number of votes in the primary election; that directive excludes Faulkner.

It is not the prerogative of the judiciary to fill what we perceive as a gap in the state's election procedures by manufacturing a process to permit the

third-highest primary vote-getter to ascend to the general election ballot. "The courts of this Commonwealth have long recognized that the judicial branch has no inherent power to pass on the validity of elections or the eligibility of *candidates*, but only has such power as given by the General Assembly or possessed at common law through a quo warranto proceeding." *Stephenson v. Woodward*, 182 S.W.3d 162, 167 (Ky. 2005) (quoting *Noble*, 686 S.W.2d at 460 (Ky. 1985) (emphasis added)). "We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used." *Beckham v. Board of Educ. of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994). "[I]t is neither the duty nor the prerogative of the judiciary to breathe into the statute that which the Legislature has not put there." *Commonwealth v. Gaitherwright*, 70 S.W.3d 411, 413 (Ky. 2002). Nevertheless, the circuit court's opinion and order in this case does exactly that.

Similarly, with respect to another legislatively-created cause of action, the Kentucky Whistleblower Act, we said in *Pennyrile Allied Community Services, Inc. v. Rogers*:

> While some may doubt the prudence of a law that allows such an action, it is not the role of the judiciary to pass upon the wisdom of a statute. Our constitutional authority is to ascertain the meaning of the statute, based not upon what the legislature may have intended to say, but upon the meaning of what it did say.

459 S.W.3d 339, 344 (Ky. 2015).

We interpret statutes so as not to produce an absurd or unreasonable result. "The courts should reject a construction that is unreasonable and

absurd, in preference for one that is reasonable, rational, sensible and intelligent[.]" *Jackson v. Commonwealth*, 530 S.W.3d 925, 927 (Ky. App. 2017) (citations omitted). Under the circuit court's resolution, if the first or second place primary vote-getter died early Friday following the Tuesday primary election, the third-place finisher would ascend to the general election ballot, whereas if that same death occurred later that Friday evening, the third-place finisher would not ascend to the general election ballot. In our view, this produces an unreasonable result that the legislature could not reasonably have intended. There is no rational basis to fill the legislative gap by manufacturing a right for the third-place candidate to ascend to the general election ballot.

Our review of KRS Chapter 118A discloses no circumstance in which the General Assembly has allowed a third-place primary election candidate, who was by this means disqualified from appearing on the general election ballot, to occupy such a place on the ballot upon the elimination, by death or otherwise, of one of two successful primary election candidates. However desirable one might regard that solution to the death or other elimination of a primary election winner, it is not a solution authorized by Chapter 118A, and we are not at liberty to legislate that provision into the Chapter. The circuit court erred by doing so.

Our construction of KRS Chapter 118A is reinforced by the well-established doctrine that in the general election context, the death or other disqualification of a first-place finisher after the election does not entitle the second-place finisher to ascend to the office he was unable to obtain through

the ballot box. For example, under similar circumstances our predecessor Court stated in *Howes v. Perry*, 17 S.W. 575, 575 (Ky. 1891):

> It is a principle of free elections by the people, firmly fixed and understood, that no person is or can be regarded duly elected to an office unless, when only two persons are voted for, he receives a majority of the votes cast for them, or receives a plurality in case there are more than two voted for. Any other rule would be subversive of the fundamental idea of elections by the people under our form of government, which is that only that person shall be entitled to hold an elective office who appears from the record of votes cast to have been the choice of a majority or plurality of those voting in such election. . . . And such is the well–settled rule . . . where it is made the duty of the comparing board to give certificates of election to those who have respectively received the highest number of votes for any office within the gift of the particular county.

Similarly, *Morgan v. Adams*, 63 S.W.2d 479, 480 (Ky. 1933), states as follows:

> It is a well-settled rule that one receiving less than a plurality of legal votes cannot be declared elected . . . . The candidate for an office who has not received a plurality of the legal votes cast is not entitled to the office, although the candidate who received a plurality of the legal votes is, for any reason, ineligible.

Likewise, *Bogie v. Hill*, 151 S.W.2d 765, 768 (Ky. 1941) states:

> "the great weight of American authority, and, as we think, upon the soundest consideration, is, that although the majority vote for a disqualified person, the votes so cast are not illegal, and therefore to be treated as naught; but the result is, if the ineligible candidate cannot take the office, the electors have failed to make a choice. In truth, there has been no election at all, and the minority candidate has no right to the office."

151 S.W.2d 765, 768 (Ky. 1941) (quoting *Sublett v. Bedwell*, 47 Miss. 266, 12 Am. Rep. 338 (1872)). And finally, *Stephenson v. Woodward* states as follows:

> Kentucky courts have long recognized the principle that votes cast for an unqualified candidate are not in and of themselves void. Stephenson did, in fact, receive the most votes in this election. However, the fact that she has been disqualified does not render

> Woodward the winner nor grant her a right to the office. Rather, the effect of the disqualification of a candidate subsequent to the election is that no election has occurred and the true and legitimate will of the people has not yet been expressed.

182 S.W.3d 162, 173–74 (Ky. 2005).

While these cases may specifically refer to the principle that the second-place finisher in a general election may not ascend to the office if his opponent dies or is otherwise disqualified following the election, that same principle is effortlessly incorporated into the situation here. The judicial primary election rules do not provide for a third-place finisher to appear on the general election ballot, and so if one of the top two finishers should be disqualified prior to the vote certification, by the same force of reasoning applied in *Howes*, *Morgan*, *Bogie*, and *Stephenson* that the second-place finisher is not entitled to ascend to the office, a third-place finisher in a judicial election should likewise not be permitted to ascend to the ballot without a specific legislative enactment authorizing it. "Any other rule would be subversive of the fundamental idea of elections by the people under our form of government, which is that only that person shall be entitled to hold an elective office who appears from the record of votes cast to have been the choice of a majority or plurality of those voting in such election." *Howes*, 17 S.W. at 575.[8]

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[8] The circuit court stated that "these cases do not control the present dispute because they were decided long before the creation of KRS 118A in 1976." That analysis is not entirely accurate because the cases cite their underpinning, in part, as being Section 6 of the Kentucky Constitution, which provides for free and open elections. The enactment of KRS Chapter 118A had no effect on this constitutional provision and, it follows, the cited cases which are based upon it.

IV. CONCLUSION

For the foregoing reasons, we reversed the judgment of the Franklin Circuit Court.

All sitting. Minton, C.J.; Hughes, Keller, and VanMeter, JJ., concur. Cunningham and Wright, JJ., dissent.

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