

No. 2-06CV-385

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

---

WILLIE RAY; JAMILLAH JOHNSON; GLORIA MEEKS; REBECCA MINNEWEATHER;  
REUBEN ROBINSON, EDDIE JACKSON; and THE TEXAS DEMOCRATIC PARTY,  
*Plaintiffs,*

v.

STATE OF TEXAS, a State of the United States;  
GREG ABBOTT, Attorney General of the State of Texas;  
and PHIL WILSON, Secretary of State for the State of Texas,  
*Defendants.*

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**DEFENDANTS' ADDENDUM TO SUPPLEMENTAL APPENDIX**

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Defendants Greg Abbott, Attorney General of the State of Texas and Phil Wilson, Secretary of State for the State of Texas, file this Addendum to Supplemental Appendix to Defendants' Reply in Support of Motion for Summary Judgment to supplement with Exhibits 21-A, 22-A, and 23-A, which were inadvertently omitted:

**Addendum Citations in Full**

**21-A**

*Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 877 P.2d277 (Ariz. 1994).

**22-A**

*Fair v. Hernandez*, 138 Cal.App.3d 578 (Cal. 1982).

**23-A**

*Frese v. Camferdam*, 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec.643 (Ill. 1979).

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877 P.2d 277

179 Ariz. 178, 877 P.2d 277, 92 Ed. Law Rep. 1000  
(Cite as: 179 Ariz. 178, 877 P.2d 277)

Page 1

**H**Miller v. Picacho Elementary School Dist. No. 33  
Ariz., 1994.

Supreme Court of Arizona, In Banc.

Linda Lou MILLER, Ray Franklin Miller, George  
Luther Tallent, Margaret Lucille Tallent, Leonor F.  
Martan, Emil Keith Martan, Anita Rose Martan,  
Ronald Francis Pugliese, Kathleen Miller Parmeter,  
Cathleen Harris, Murrel Harris, Virginia Frances  
Beard, Plaintiffs/Appellees,

v.

PICACHO ELEMENTARY SCHOOL DISTRICT  
NO. 33, Superintendent Robert C. Noe, Governing  
Board President Abel Garza, Defendants/Appel-  
lants.

No. CV-93-0190-PR.

June 28, 1994.

Voters in Elementary School District contested results of school district's budget override election. The Superior Court, Pinal County, Franklin D. Coxon, J., found violation of absentee ballot statute and set aside election. Appeal was taken. The Court of Appeals, 175 Ariz. 454, 857 P.2d 1308, confirmed election. Review was granted. The Supreme Court, Martone, J., held that hand delivery of absentee ballots, as opposed to mailing of ballots as required by election statute, was more than mere technical irregularity and invalidated balloting, even absent showing of fraud.

Court of Appeals opinion vacated; trial court judgment reinstated.

West Headnotes

**[1] Elections 144 ↪ 10**

144 Elections

144I Right of Suffrage and Regulation Thereof  
in General144k8 Statutory Provisions Conferring or  
Defining Right

144k10 k. Construction and Operation.  
Most Cited Cases  
Election statutes are mandatory, not "advisory."  
A.R.S. § 16-542, subd. B.

**[2] Elections 144 ↪ 10**

144 Elections

144I Right of Suffrage and Regulation Thereof  
in General144k8 Statutory Provisions Conferring or  
Defining Right

144k10 k. Construction and Operation.  
Most Cited Cases

If election statute expressly provides that noncompliance invalidates vote, then vote is invalid; if statute does not have such provision, noncompliance may or may not invalidate vote depending on its effect. A.R.S. § 16-542, subd. B.

**[3] Elections 144 ↪ 227(8)**

144 Elections

144VIII Conduct of Election

144k227 Effect of Irregularities or Defects

144k227(8) k. Voting by Ballot. Most  
Cited Cases

Hand delivery of absentee ballots, as opposed to mailing of ballots as required by election statute, was more than mere technical irregularity and invalidated balloting even absent showing of fraud; district employees with pecuniary interest in passage of budget override delivered ballots to electors who had not asked for ballots, which changed result of election, even if electors voted their conscience, as ballots would never had been cast but for hand delivery. A.R.S. § 16-542, subd. B.

\*\*277 \*178 Linda Lou Miller, et al., in pro. per.

Gilberto V. Figueroa, Pinal County Atty. by Linda L. Harant, Deputy County Atty., Florence, for defendants/appellants.

OPINION

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EXHIBIT

21-A

877 P.2d 277  
 179 Ariz. 178, 877 P.2d 277, 92 Ed. Law Rep. 1000  
 (Cite as: 179 Ariz. 178, 877 P.2d 277)

Page 2

MARTONE, Justice.

In this case we hold that absentee ballots procured in violation of our absentee ballot law are invalid, and if the ballots affect the outcome, the election must be set aside.

### I. Background

Voters in Picacho Elementary School District No. 33 contest the results of the school district's February 1992 budget override election. They allege that the district superintendent and other district employees were closely involved with the distribution and collection of absentee ballots in violation of A.R.S. § 16-542(B). They seek to invalidate all 41 absentee ballots and the election they affected.

After a bench trial, the superior court found that the district had violated A.R.S. § 16-542(B), which requires that absentee ballots be mailed to electors who ask for them and that only electors may possess ballots. None of the 41 absentee ballots were mailed. District employees personally delivered ballots to voters' homes. Judgment of Apr. 15, 1992, at 1. Before tabulating the absentee ballots, there were 60 *yes* votes and 87 *no* votes. The 41 absentee ballots favoring the override changed the result to 101 *yes* votes and 87 *no* votes. The \*\*278 \*179 court, therefore, found that they "made a difference" in the election and voided them. *Id.* at 2. The court then set aside the election.

The Court of Appeals reversed in a 2-1 decision. *Miller v. Picacho Elementary Sch. Dist.*, 175 Ariz. 454, 857 P.2d 1308 (App.1993). It held that improperly delivered ballots would not be voided absent a showing of actual fraud. Although the court recognized that the district violated the mailing requirement for the 41 absentee ballots, and school staff members encouraged some electors to vote for the override, it nevertheless determined that this affected, at most, only one voter. *Id.* at 456, 857 P.2d at 1310. As a result, the court confirmed the election. *Id.* at 457, 857 P.2d at 1311. The dissent was of the view that as long as ballots procured in viola-

tion of the law "affected the results of the override," *id.* at 458, 857 P.2d at 1312, actual fraud need not be shown.

We granted review because the integrity of the electoral process is an issue of statewide importance. Rule 23(c)(4), Ariz.R.Civ.App.P.

### II. Analysis

A.R.S. § 15-402(B) governs absentee voting in school elections and provides that the county school superintendent shall prescribe uniform rules for absentee voting in substantially the same manner as provided in Title 16 governing elections, A.R.S. § 16-542. Nothing in the record shows whether the superintendent adopted uniform rules under § 15-402(B). We therefore accept the parties' assumption that A.R.S. § 16-542 applies.

A.R.S. § 16-542(B), as amended January 1, 1992 and thus applicable to this election,<sup>FN1</sup> requires that "[t]he recorder or other officer in charge of elections shall mail postage prepaid to the requesting elector the absentee ballot ... Only the elector may be in possession of that elector's unvoted absentee ballot, either at his place of residence or at a location where he is temporarily residing while absent from his precinct."

FN1. A.R.S. § 16-542(C), replacing § 16-542(B), became effective January 1, 1994, and now broadly states that "[o]nly the elector may be in possession of that elector's unvoted absentee ballot." The residence limiting language has been deleted.

The parties do not quarrel with the trial court's findings of fact. They agree that the statute applies and was violated. They differ over the significance of the violation and the rule applicable to testing its significance. Each rely on *Findley v. Sorenson*, 35 Ariz. 265, 276 P. 843 (1929), but draw very different conclusions from it. *Findley*, therefore, bears detailed scrutiny.

877 P.2d 277  
 179 Ariz. 178, 877 P.2d 277, 92 Ed. Law Rep. 1000  
 (Cite as: 179 Ariz. 178, 877 P.2d 277)

Page 3

*Findley* involved a challenge to the election of a write-in candidate as trustee for a school district. Its unstated assumption was that the alleged irregularities would have violated the general election laws of Arizona, but not the special laws applicable to school district elections. *Id.* at 268-69, 276 P. at 844. The court did not state how the two differed, but it must have mattered or else the court would not have held that the general election laws did not apply and the special election laws did. Nevertheless, because the allegations did not show noncompliance with the special election laws, the court turned to the common law. But it chose a rule governing the effect of noncompliance with a statute, as though there were non-compliance.

[G]eneral statutes directing the mode of proceeding by election officers are deemed advisory, so that strict compliance with their provisions is not indispensable to the validity of the proceedings themselves, and [that] honest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain.

*Id.* at 269, 276 P. at 844.

The court also adopted a rule of construction "that in counting the ballots, the determination of the intent of the voter is the question of primary importance." *Id.* at 270, 276 P. at 844. Intent was to "be gathered from the ballot itself, read in the light of the surrounding circumstances of a public character, and not by extrinsic evidence contradicting the face of the ballot." *Id.*, 276 P. at 845. But this rule was "always subject to statutory mandates." *Id.*

\*\*279 \*180 After stating these "rules," the court then acknowledged that none of the alleged irregularities violated school election laws. For example, the court upheld ballots upon which election officers wrote the name of a write-in candidate because "[t]here is no express prohibition in the school election law against such conduct." *Id.* at 271, 276 P. at 845. The court upheld contested bal-

lots that "did not contain a cross at the right of the name of either candidate" because "the school election law does not expressly require that a mark be placed after the name of the candidate." *Id.* at 272-73, 276 P. at 845. The only ballots the court actually invalidated were those "cast for an entirely different office," which, of course, implicated no statute at all.

It can thus be seen that (1) *Findley* is confusing and (2) whatever it means, the instant case is nothing like *Findley*. This is a case in which a statute was expressly violated. We deal with the *Findley* dicta, quoted above, as follows.

[1][2] Contrary to *Findley*, election statutes are mandatory, not "advisory," or else they would not be law at all. If a statute expressly provides that non-compliance invalidates the vote, then the vote is invalid. If the statute does not have such a provision, non-compliance may or may not invalidate the vote depending on its effect. In the context of this case, "affect the result, or at least render it uncertain," *id.* at 269, 276 P. at 844, means ballots procured in violation of a non-technical statute in sufficient numbers to alter the outcome of the election.

[3] This is not a case of mere technical violation or one of dotting one's "i's" and crossing one's "t's." At first blush, mailing versus hand delivery may seem unimportant. But in the context of absentee voting, it is very important. Under the Arizona Constitution, voting is to be by secret ballot. Ariz. Const. art. VII, § 1. Section 16-542(B) advances this constitutional goal by setting forth procedural safeguards to prevent undue influence, fraud, ballot tampering, and voter intimidation. Here, the dangers were the very ones the statute was designed to prevent. District employees with a pecuniary interest in the override's passage delivered ballots to electors whom they knew. Although these electors did not ask for ballots, school employees urged them to vote and even encouraged them to vote for the override. District employees went to the homes of the electors and stood beside them as they voted. Even if the elector voted his or her conscience, the

877 P.2d 277  
179 Ariz. 178, 877 P.2d 277, 92 Ed. Law Rep. 1000  
(Cite as: 179 Ariz. 178, 877 P.2d 277)

Page 4

ballots still would never have been cast but for the procedures adopted by the district. Thus, testimony that the vote reflected the voter's intent is irrelevant. These tactics achieved the desired result-they turned the election around. These were substantive irregularities.

\* We therefore hold that a showing of fraud is not a necessary condition to invalidate absentee balloting. It is sufficient that an express non-technical statute was violated, and ballots cast in violation of the statute affected the election. We therefore vacate the opinion of the court of appeals and reinstate the judgment of the trial court setting aside the election.

FELDMAN, C.J., MOELLER, V.C.J., and  
CORCORAN and ZLAKET, JJ., concur.  
Ariz., 1994.

Miller v. Picacho Elementary School Dist. No. 33  
179 Ariz. 178, 877 P.2d 277, 92 Ed. Law Rep. 1000

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138 Cal.App.3d 578  
 138 Cal.App.3d 578, 188 Cal.Rptr. 45  
 (Cite as: 138 Cal.App.3d 578)

Page 1

▶  
 Matter of Hernandez  
 Cal.App.4.Dist.

LUTHER T. FAIR, Plaintiff and Appellant,  
 v.

RALPH HERNANDEZ, Defendant and Respondent.

Civ. No. 27752.

Court of Appeal, Fourth District, Division 2, California.

Dec 23, 1982.

#### SUMMARY

The trial court, on remand by the Court of Appeal for further proceedings in an election contest, permitted a write-in candidate for a city council position to attack certain ballots which had previously been confirmed for his opponent, a runoff candidate. After the election, the write-in candidate had been declared the winner, and the runoff candidate's challenge at trial had not eliminated that margin of victory. On the prior appeal, certain ballots for the write-in candidate had been disallowed, thereby giving the runoff candidate a greater number of votes in the election. However, the write-in candidate had not had an opportunity to pursue his defenses and contentions at the initial trial, since the trial court had ruled that he had more votes in the election. After the trial court, on remand, deducted the ballots challenged by the write-in candidate, it once again entered judgment confirming the write-in candidate's election. (Superior Court of San Bernardino County, No. 190338, Patrick Joseph Morris, Judge.)

The Court of Appeal affirmed. The court held that the trial court had authority on remand to rule on the ballots previously confirmed for the runoff candidate, since the prior appellate ruling specifically noted that because the trial court had not required the write-in candidate to proceed with his case, he had not affirmatively pursued defenses and conten-

tions raised below and he should have had the opportunity to do so. Thus, the court held that the earlier finding of fact by the trial court confirming the votes for the runoff candidate did not preclude the write-in candidate's challenge to those ballots on remand. The court also held that Elec. Code, § 1013, providing for the return of absentee voter ballots "by mail or in person," means that the ballots must be returned personally by the voter without the use of another person or agent. Thus, the court held that the trial court properly determined that absentee ballots delivered to the city clerk by a campaign worker for the runoff candidate violated § 1013. (Opinion by Trotter, J., with Kaufman, Acting P. J., and McDaniel, J., concurring.)

#### HEADNOTES

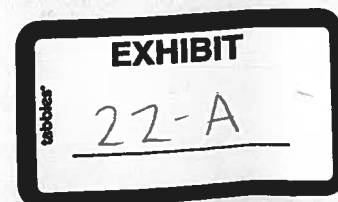
Classified to California Digest of Official Reports

(1) Elections § 21--Contest--Evidence--Authority to Rule on Ballots Following Appeal.

In an election contest in which certain ballots were confirmed to the defeated city council runoff candidate prior to an appellate ruling eliminating the successful write-in candidate's margin of victory, the trial court on remand had authority to rule on those ballots after permitting the write-in candidate to go forward with his defense, which consisted of an attack on those previously confirmed ballots. The appellate ruling remanding the matter specifically noted that because the trial court had not required the write-in candidate to proceed with his case, he had not affirmatively pursued defenses and contentions raised below, and he should have had the opportunity to do so. Moreover, the write-in candidate could not have cross-appealed from the trial court's earlier finding of fact confirming those ballots, as the judgment was in his favor. Thus, the earlier finding of fact did not preclude the challenge to the ballots on remand.

(2) Elections § 11--Ballots--Absentee Ballots--

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138 Cal.App.3d 578  
 138 Cal.App.3d 578, 188 Cal.Rptr. 45  
 (Cite as: 138 Cal.App.3d 578)

Page 2

-Delivery to City Clerk--By Campaign Worker. Elec. Code, § 1013, providing for the return of absentee voter ballots "by mail or in person," means that the ballots must be returned personally by the voter without the use of another person or agent. Accordingly, the use of a campaign worker to deliver absentee ballots in a city council election to the city clerk was sufficient to sustain challenges to those ballots, since such delivery by a third party was improper under § 1013. The rule requiring personal delivery clearly serves the paramount purpose of preserving the secrecy, uniformity, and integrity of the voting process.

[See Cal.Jur.3d, Elections, § 154; Am.Jur.2d, Elections, § 250.]

#### COUNSEL

Allard, Shelton & O'Connor and Gary C. Wunderlin for Plaintiff and Appellant.

Garza & Jure, Florentino Garza, Horvitz & Greines, Kent L. Richland and Alan G. Martin for Defendant and Respondent. \*580 TROTTER, J.

#### Facts

The present case is an election contest for the Third Ward seat on the Common Council of the City of San Bernardino. This marks the second time that the case has been before us. Briefly, Fair was one of two runoff candidates on the printed ballot for the seat. Hernandez was a legally qualified write-in candidate.

After the election, Hernandez was declared the winner. Fair filed an election contest. After proceedings before a special master, the trial court determined that Hernandez received 756 uncontested votes, Fair received 773 uncontested votes, and 76 votes were contested. The trial court ruled on the contested votes after taking extensive evidence, and finally determined that Hernandez received 796 votes and Fair received 794 votes. The court entered judgment confirming Hernandez's election.

Fair appealed, challenging the trial court's determinations on 36 of the contested ballots. On that ap-

peal we determined that the trial court had erroneously allowed 5 contested ballots for Hernandez, and that Hernandez's total was therefore reduced to 791. (See *Fair v. Hernandez* (1981) 116 Cal.App.3d 868, 875-877, 878 [172 Cal.Rptr. 379].)

However, in controlling the order of proof, the trial court did not require Hernandez to go forward unless, after Fair concluded his presentation, Fair had more votes than Hernandez. Since the trial court had ruled that Hernandez had more votes, Hernandez had not had an opportunity to pursue the defenses and contentions he had raised below. Accordingly, we reversed and remanded the cause for further proceedings to allow Hernandez to go forward with his defense. (*Id.*, at p. 880.)

Further trial was held in which Hernandez attacked 11 ballots which had previously been counted for Fair. The court sustained the challenges to the 11 ballots and deducted those ballots from Fair's total. The final count was thus 791 for Hernandez and 783 for Fair. Once again, the court entered judgment confirming Hernandez's election. Fair appeals.

#### Issues

The objection raised by Hernandez to the 11 ballots was that the 11 absentee ballots had been delivered to the city clerk by Fair's campaign worker, and that this delivery violated Elections Code section 1013. The trial court found that \*581 the delivery did violate section 1013, and invalidated those ballots. Fair argues that (1) these ballots had already been confirmed to Fair at the first phase of the trial, and that therefore the trial court was without authority to deduct those votes, and (2) the delivery by the campaign worker did not violate section 1013.

#### Discussion

1. *Authority of the Trial Court to Rule on the Ballots*

(1) Fair contends that, at the conclusion of the first

138 Cal.App.3d 578  
 138 Cal.App.3d 578, 188 Cal.Rptr. 45  
 (Cite as: 138 Cal.App.3d 578)

Page 3

phase of the trial, the court ruled that the 11 ballots "were properly cast," and that, since this particular finding was not challenged in the first appeal, the court was without power to rule that the ballots should be rejected.

Fair is incorrect. The last time this case was here, we specifically noted that, because the trial court had not required Hernandez to proceed with his case, "[a]s a result Hernandez has not affirmatively pursued defenses and contentions raised below, and he should have the opportunity to do so." (*Fair v. Hernandez, supra.*, 116 Cal.App.3d 868, 880.) The issue of the personal delivery of the ballots is just such an issue as had been reserved to Hernandez and it was proper for him to pursue it on remand.

A review of the prior record in this case shows that the primary issue to which the court addressed its findings in the first phase of the trial was whether the 11 ballots were timely received by the city clerk. Moreover, contrary to Fair's contention, Hernandez could not have cross-appealed from the finding of fact, as the judgment was in his favor. (*Muchenberger v. City of Santa Monica* (1929) 206 Cal. 635, 646 [275 P. 803]; *Gosney v. State of California* (1970) 10 Cal.App.3d 921, 928 [89 Cal.Rptr. 390].) The earlier finding of fact did not preclude Hernandez's challenge to the 11 ballots.

## 2. Delivery of the Ballots by a Third Party

(2) Fair next contends that, even though one of Fair's campaign workers delivered the ballots to the city clerk, this method of delivery did not violate section 1013.

We begin our analysis with the code section itself. Section 1013 provides: "After marking the ballot, the absent voter may return it to the official from whom it came *by mail or in person*, or may return it to any member of a precinct board at any polling place within the jurisdiction. The ballot must, however, be received by either the official or the precinct board before the close of the polls on election day. \*582

"The official shall establish procedures to insure the secrecy of any ballot returned to a precinct polling place." (Italics supplied.)

Hernandez argued below that this section means that the ballots must be returned personally by the voter without the use of another person or agent.

We agree. Although this interpretation is not completely free of difficulties, a common sense approach to the reading of the statute requires this result. First of all, it is clearly the purpose of the statute to preserve the secrecy, uniformity, and integrity of the voting process. (See *McFarland v. Spengler* (1926) 199 Cal. 147, 152 [248 P.521].) Requiring personal delivery of the absentee ballot by the voter avoids potential problems affecting the secrecy, uniformity and integrity of the absent voter's franchise. As Justice Kaufman pointed out when this case was last before us, "[P]reservation of the integrity of the election process is far more important in the long run than the resolution of any one particular election." (*Fair v. Hernandez, supra.*, 116 Cal.App.3d 868, 881, conc. opn. of Kaufman, J.) This important policy is admirably served by the interpretation we have placed on the statute.

Such authorities as are available on the subject support the conclusion that personal delivery is required. The Attorney General in 1979 issued an opinion on this very question, stating that section 1013 required the absent voter to return the ballot personally or by mail. The Attorney General noted that section 1017 provides under special circumstances for delivery of an absentee ballot by an authorized representative. The Attorney General then stated that, "From a comparison of the language of section 1013 with section 1017, if the Legislature intended to include delivery by an authorized representative in section 1013 it is reasonable to conclude it would have done so." (62 Ops.Cal.Atty.Gen. 439, 443 (1979).)

*Beatie v. Davila* (1982) 132 Cal.App.3d 424 [183 Cal.Rptr. 179], cited by Fair in support of his con-

138 Cal.App.3d 578  
138 Cal.App.3d 578, 188 Cal.Rptr. 45  
(Cite as: 138 Cal.App.3d 578)

Page 4

tention that third party delivery is proper, actually supports the opposite rule. *Beatie* involved the question whether an absent voter may use a third party to return the ballot by mail. The *Beatie* court asked the question, "Why would the Legislature require the voter to deliver his absentee ballot personally to the elections official and yet allow him to utilize a third party for mailing it to the official? We think the answer to the question is clear. The Legislature recognized the impossibility of policing the act of mailing by the absentee voter ...." (*Id.*, at p. 429.) Thus, for practical reasons, delivery by mail might be made by a third party, but implicit in the argument and in the statute is the requirement that delivery "in person" means personal delivery, since personal delivery can be policed. \*583

Moreover, the integrity and secrecy of the process are such important interests that ballots may be voided even though it is not shown that the ballots were actually tampered with. (See *Garrison v. Rourke* (1948) 32 Cal.2d 430, 443 [196 P.2d 884], overruled on another point in *Keane v. Smith* (1971) 4 Cal.3d 932, 939 [95 Cal.Rptr. 197, 485 P.2d 261].)

Reason and authority both support the judgment of the trial court that delivery by a third party to the city clerk was improper under the statute. The rule requiring personal delivery clearly serves the paramount purpose of preserving the secrecy, uniformity, and integrity of the voting process.

#### Disposition

The judgment confirming Hernandez's election is affirmed.

Kaufman, Acting P. J., and McDaniel, J., concurred. \*584  
Cal.App.4.Dist.  
Fair v. Hernandez  
138 Cal.App.3d 578, 188 Cal.Rptr. 45

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394 N.E.2d 845  
 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643  
 (Cite as: 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643)

Page 1

▷  
 Frese v. Camferdam  
 Ill.App. 3 Dist., 1979.

Appellate Court of Illinois, Third District.  
 Glen FRESE, Plaintiff-Appellee, Cross-Appellant,  
 v.  
 Jean CAMFERDAM, Defendant-Appellant, Cross-Appellee,  
 Ludwig Einess and Michael Fennelly, Intervenor-Appellants, Cross-Appellees.  
 No. 78-214.

Sept. 5, 1979.

Action was brought contesting an election. The Circuit Court, Rock Island County, L. E. Ellison, J., entered judgment in favor of plaintiff and defendant appealed. The Appellate Court, Barry, J., held that: (1) where absentee ballots were not returned by mail or personally to clerk's office, such ballots were properly invalidated; (2) trial court properly apportioned illegal absentee vote on precinct wide basis; (3) where the number of legal absentee ballots could be easily ascertained, because the number of illegal ballots could be ascertained with certainty, rejection of all absentee ballots would result in an unnecessary disenfranchisement of voters and apportionment of illegal ballots was proper; and (4) trial court did not abuse its discretion in denying petition for intervention of absentee voters.

Judgment affirmed.

West Headnotes

[1] Elections 144 ↪216.1

144 Elections  
 144VIII Conduct of Election  
 144k215 Voting by Ballot  
 144k216.1 k. Absentee Ballots. Most Cited Cases  
 Where absentee ballots were not returned by mail or personally to clerk's office, such ballots were

properly invalidated despite fact that there was no evidence of fraud or tampering with such ballots. S.H.A. ch. 46, § 19-6.

[2] Elections 144 ↪216.1

144 Elections  
 144VIII Conduct of Election  
 144k215 Voting by Ballot  
 144k216.1 k. Absentee Ballots. Most Cited Cases  
 Unless an absentee ballot is mailed to office of issuing officer or personally delivered there by voter, delivery requirements of statute pertaining to absentee ballots are not met. S.H.A. ch. 46, § 19-6.

[3] Elections 144 ↪298(2)

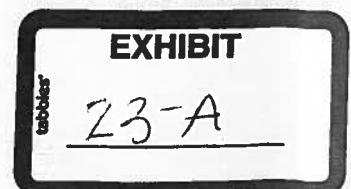
144 Elections  
 144X Contests  
 144k297 Scope of Inquiry and Powers of Court or Board  
 144k298 In General  
 144k298(2) k. Deduction or Apportionment of Illegal Ballots. Most Cited Cases  
 In an election contest, trial court properly apportioned illegal absentee votes on precinct wide basis.

[4] Elections 144 ↪227(8)

144 Elections  
 144VIII Conduct of Election  
 144k227 Effect of Irregularities or Defects  
 144k227(8) k. Voting by Ballot. Most Cited Cases  
 Where number of legal absentee ballots could be easily ascertained, because number of illegal ballots could be ascertained with certainty, rejection of all absentee ballots would result in unnecessary disenfranchisement of voters and apportionment of illegal ballot was proper.

[5] Elections 144 ↪279

144 Elections



394 N.E.2d 845  
 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643  
 (Cite as: 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643)

Page 2

## 144X Contests

## 144k279 k. Parties. Most Cited Cases

In an election contest involving validity of absentee ballots, trial court did not abuse its discretion in denying petition for intervention of absentee voters, where granting of such petition would undoubtedly have delayed beginning of trial and arguments which petitioners would have made were adequately advanced by person who were already a party to proceeding. S.H.A. ch. 110, §§ 26.1, 26.1(1)(b).

**\*69 \*\*846 \*\*\*644** Stuart R. Lefstein and Samuel S. McHard, Katz, McAndrews, Durkee & Telleen, Rock Island, for Camferdam, Ludwig Einess and Fennelly.

Franklin S. Wallace and Glenn F. Ruud, Rock Island, for Frese.

BARRY, Justice.

On April 5, 1977, an election was held for the office of assessor of South Moline Township, Rock Island County, Illinois. The defendant, Jean Camferdam, was subsequently certified as elected to this office. Her **\*70** opponent, Glen Frese, seeking to be declared the duly elected assessor, contested the election. Prior to trial, two absentee voters, Ludwig Einess and Michael Fennelly, endeavored to intervene in the suit, but their petition for intervention was denied. On January 30, 1978, the Circuit Court of Rock Island County entered judgment in favor of the plaintiff Frese, and declared him to be the winner of the election. It is from this judgment that Camferdam appeals. Einess and Fennelly appeal from the order denying their petition for intervention.

The pertinent facts are as follows. Prior to the election for the office of assessor of South Moline Township, Loween Geyer, incumbent township clerk and Republican candidate for that office in the April 5 election, appointed four "deputies" to assist her in delivering ballots to absentee voters and returning those same ballots to the township clerk's office. Her four appointees were Larry Burns, a Republican precinct committeeman, the incumbent

township supervisor, and candidate for that position on April 5; Jack Dy, Republican candidate for trustee; Eleanor Anderson; and defendant Camferdam. Geyer, her deputies and several other individuals who had not been so "deputized" delivered ballot applications and absentee ballots to the home or residence of thirty-six absentee voters prior to election day according to the stipulation entered into by the parties. After each ballot had been voted, it was personally delivered by the voter either to the clerk Geyer or one of her deputies, with two exceptions. These voted absentee ballots were eventually returned by Geyer or one of her appointed assistants to the township office and kept in an unlocked file cabinet in Larry Burn's office, where they remained until April 5. The result of the election was 1,634 votes for Camferdam, and 1,618 for Frese, a difference of sixteen votes.

In its opinion declaring Frese to be the winner of the election by 16 votes, the trial court made numerous findings. The court first held that the manner of delivery and return of the absentee ballots as heretofore described was contrary to the applicable provision of the Illinois Election Code (Ill.Rev.Stat.1975, ch. 46, par. 19-6) and as a consequence thirty-nine absentee ballots were to be voided. As an additional ground for voiding these ballots, the court found **\*\*847 \*\*\*645** that some of the applications for these ballots were not timely filed. The trial court also voided an additional four ballots for late or no registration, and four ballots for improper signature on the application and ballot envelope. The apportionment of these forty-seven invalid ballots resulted in a deduction of 38.9 votes from Camferdam's total, and 6.733 from Frese's total. The result of this apportionment was that Frese won the election by a 16.167 vote margin.

[1] The first issue raised by the defendant Camferdam on appeal concerns the invalidation of the thirty-nine absentee ballots because of improper delivery and return. The controlling statutory provision is Section 19-6 of **\*71** the Election Code (Ill.Rev.Stat.1975, ch. 46, par. 19-6) which reads as

394 N.E.2d 845  
 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643  
 (Cite as: 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643)

Page 3

follows:

“Such absent voter shall make and subscribe to the certifications provided for in the application and on the return envelope for the ballot and such ballot or ballots shall be folded by such voter in the manner required to be folded before depositing the same in the ballot box, and be deposited in such envelope and the envelope securely sealed. Such officer shall then endorse his certificate upon the back of the envelope and the envelope shall be mailed by such voter, postage prepaid, to the officer issuing the ballot or, if more convenient, it may be delivered in person, but in any event it must be returned into the hands of the officer in sufficient time for the ballot or ballots to be delivered by such officer to the proper polling place before the closing of the polls, on the day of the election.”

As the trial court pointed out in its opinion, in the instant case absentee ballots were returned to the township office in one of three ways: They were either handed by the voters to Clerk Geyer herself at a place other than her office, who then personally delivered them to the township office; handed to one of her appointed “deputy” clerks who returned them to the office; or handed to a “nonofficer,” who either returned them to the office personally, or delivered them to Clerk Geyer or one of her deputies. Clearly none of these methods of return square with the statutory directives, which we will hereinafter discuss, that the ballot be returned in a sealed envelope either by mail or by personal delivery to the office of the clerk. However, whether or not strict compliance with Section 19-6 is required depends upon whether a mandatory or directory reading is to be given to that statute. The trial court gave the provisions of Section 19-6 a mandatory reading, and consequently found the return of the absentee ballots invalid.

In concluding that the absentee ballot return provisions of Section 19-6 of the Election Code were mandatory, the trial court was guided by the Illinois Supreme Court's decision in *Clark v. Quick* (1941),

377 Ill. 424, 36 N.E.2d 563. In *Clark*, the court was faced with the task of determining the validity of forty-six absentee ballots. As in the present case, the validity of the absentee ballots was attacked on the grounds that the return of the ballots was not in accord with the applicable statutory provision. The statute then in effect was Section 467 of the Absent Voters Law (Ill.Rev.Stat.1939, ch. 46, par. 467). The language of Section 467 of the Absent Voters Law pertaining to the method of return of absentee ballots was virtually the same as the language of the present Section 19-6 of the Election Code. The Supreme Court, in finding the absentee ballots void, held that the provisions requiring the voter to mail the envelope \*72 containing the ballot to the office issuing the ballot were mandatory and not directory. The court stated (377 Ill. at 430-431, 36 N.E.2d at 566): “It is the clear intention of the Absent Voter's Law that the legislature was willing and intended to commit the temporary custody of a ballot to the United States mails for delivery to the proper officials. It is equally clear that there was no intention that such custody should be committed, even temporarily, to any other person or agency.” (Emphasis added).

*Clark* has never been overruled. The defendant, however, contends that the case of \*\*848\*\*646 *Craig v. Peterson* (1968), 39 Ill.2d 191, 233 N.E.2d 345, to the extent it conflicts with *Clark*, is controlling. In *Craig*, the plaintiff contended that the absentee ballots returned from fourteen precincts should be invalidated because none of them contained the initials of an election judge, as required by Section 17-9 of the Election Code (Ill.Rev.Stat.1965, ch. 46, par. 17-9). The defendant argued that the statutory provision requiring initialing was directory rather than mandatory, and thus the ballots should not be declared void. The court agreed with the defendant, and made the following statement on the subject of mandatory versus directory requirements: “(I)t is \* \* \* apparent that in construing statutory provisions regulating elections the courts generally have tended to hold directory those requirements as to which the legislature has

394 N.E.2d 845  
 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643  
 (Cite as: 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643)

Page 4

not clearly indicated a contrary intention, particularly where such requirements do not contribute substantially to the integrity of the election process.”(39 Ill.2d at 196, 233 N.E.2d at 348).

It is the defendant's contention that Section 19-9 of the Election Code (Ill.Rev.Stat.1975, ch. 46, par. 19-9), which provides for the rejection of absentee ballots under certain specific circumstances, is the “contrary intention” of the legislature referred to in Craig, and consequently Section 19-6 is directory only. She argues that the legislature, by specifying the conditions under which absentee ballots are to be rejected in Section 19-9, has manifested an intention that all other irregularities such as a failure to comply with the return provisions of Section 19-6 are not to result in an invalidation of the ballots. Defendant further argues that Section 19-6 is directory because the absentee ballot return requirements found therein, in the words of Craig, “do not contribute substantially to the integrity of the election process.”According to her analysis, the integrity of the election process is endangered only when there is proof that ballot tampering has occurred. Therefore, she takes the position that the improper return of absentee ballots does not endanger the integrity of the election process absent proof that such improper return resulted in a tampering of the ballots. She concludes because Section 19-9 of the Election Code provides that ballots that are tampered with are to be rejected, a mandatory reading of Section 19-9 and concomitant rejection of ballots improperly returned \*73 but untampered with does not “contribute substantially to the integrity of the election process.”

We disagree with this contention, finding the following passage from Clark applicable and determinative of the issue before us:

“There is nothing in the record before us to indicate that any of them (the forty-six absentee ballots) were actually tampered with by any unauthorized person, but it is entirely obvious that the opportunity to do so was present. It is the entire theory of our ballot law, as expressed in all of

the cases, that once a ballot has been marked by a voter in secret, from that time on it shall not be subject to any opportunity for any other person to mar, change or erase it. It will be found in all of the cases that the question for consideration by the court is not whether the ballot has been tampered with, but whether or not an unauthorized person has had an opportunity to do so. If the opportunity has been present the presumption seems to follow that it has been used.”(377 Ill. at 430, 36 N.E.2d at 566).

See Talbott v. Thompson (1932), 350 Ill. 86, 182 N.E. 784.

In the instant case, as in Clark, there is no evidence of any fraud or tampering with the absentee ballots. However, the method of return employed certainly presented opportunities for tampering. The absentee ballots were not returned by mail or personally by the voters to the clerk's office, but rather handed by the voters to individuals who in fact were all candidates of one political party in the election. When the ballots were returned, they were not securely kept in the township clerk's office, but instead kept until the day of the election in an open filing cabinet in Larry Burn's unlocked office. There is also testimony that prior to the election blank ballots were kept in an unlocked storeroom of the township office, \*\*849 \*\*\*647 and in fact on one occasion were available on a table in a recreation room of the township office to which a great many people had access. The sanctity of the voted ballot and the integrity of the entire election process demands that under these circumstances where the opportunity for tampering was obviously present the absentee ballots be declared invalid.

[2] Among the absentee ballots the trial court declared invalid for improper delivery were those delivered personally to Loween Geyer at a place other than her office. It is true that nowhere in Section 19-6 does there appear a requirement that the ballot, if not mailed, must be returned to the Office of the clerk or issuing officer. In fact, the statute might suggest that personal delivery to the issuing officer,

394 N.E.2d 845  
 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643  
 (Cite as: 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643)

Page 5

wherever that person may be found, is sufficient return. However, in other contexts, the Illinois Supreme Court has held that the receipt of a document by a public official at a place other than his office is of no legal effect. In *\*74Brelsford v. Community High School* (1927), 328 Ill. 27, 159 N.E. 237, the petitioners sought to file a petition to contest an election. Finding the circuit clerk's office locked, the petitioner's attorney went to the clerk's residence and left the petition and filing fee with the clerk's daughter, a deputy clerk. Even though the daughter placed a file mark on the petition, and the petition was taken to the clerk's office several days later, the Supreme Court held that the procedure did not square with the statutory requirement of "filing \* \* \* in the circuit court" (Ill.Rev.Stat.1927, ch. 46, par. 130). The court stated: "The filing of any document required to be filed in the office of the clerk necessarily implies the delivery of it to the clerk and also requires its delivery in the office of the clerk. The words in the statute \* \* \* mean not only placing the written statement in the possession of the individual who holds the office of clerk of the court, but that it shall come into his official custody for preservation in his office \* \* \*. It is not filed until it is in his office, where the files, papers, and records of the court are required to be preserved." (328 Ill. at 33, 159 N.E. at 239. See *Daniels v. Cavner* (1949), 404 Ill. 372, 88 N.E.2d 823). Similarly we are of the opinion that unless an absentee ballot is mailed to the office of the issuing officer, or personally delivered there by the absentee voter, the delivery requirements of Section 19-6 are not met. This result is mandated not only by our overriding concern to keep intact the integrity of the entire election process, and to eliminate the increased opportunity for tampering presented when delivery of an absentee ballot is made at a place other than the office of the issuing officer, but is also suggested by the recent changes made in Section 19-6 by the General Assembly, which are effective December 1, 1980. As a result of Public Act 80-1469, par. 2, Section 19-6 will require that the voted ballot be mailed "to the Election authority issuing the ballot or, if more convenient, it may be

delivered in person, \* \* \*." (Emphasis added). Obviously personal delivery of an absentee ballot to an entity such as a Board of Election Commissioners can only be accomplished at the office of that authority. Because it is unlikely that the legislature intended different methods for delivery of absentee ballots depending upon the nature of the "election authority," we believe that delivery by mail or in person to the Office of the issuing officer, and no other place, is required by the present statute.

Our reliance on Clark manifests our rejection of defendant's contention that Craig is controlling. We do not accept the argument that because Section 19-9 specifies the grounds for rejection of absentee ballots, all other departures from the statutory provisions governing the application, issuance, delivery, and return of absentee ballots are condoned. Were that so, then any divergence from the statutory requirements of the Election Code pertaining to absentee ballots not \*75 tantamount to the actual fraud or tampering prohibited by Section 19-9 would be permissible. The integrity of the election process does not allow such an interpretation, nor is it the intent of the legislature that the pertinent sections of the Election Code be given such a construction. \*\*850 \*\*\*648 In 1941, the Illinois Supreme Court declared the absentee ballot return provisions of Section 467 to be mandatory. Had the legislature intended the provisions of that statute to be directory they would have subsequently acted to change the Clark holding. It has not done so. In the absence of a contrary manifestation by the legislature, the holding of Clark is binding upon this court. The absentee ballot return provisions of Section 19-6 of the Election Code are mandatory. Because we so hold, we do not address the issue of the authority of Clerk Geyer to appoint "deputy" clerks, as Section 19-6 is quite clear that the absentee ballots be returned by mail or in person to the clerk's office, and there is no provision for the utilization of deputies, assistants, or nominees in that statute. We similarly find no need to address the issue of the propriety of invalidating the absentee ballots on the grounds of late applications.

394 N.E.2d 845  
 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643  
 (Cite as: 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643)

Page 6

[3] The second issue before us concerns the method used by the trial court in apportioning the invalid absentee votes between the candidates. The trial court held that where it could not be determined how a vote was cast, "ballots would be apportioned between the two candidates in a ratio of each candidates vote at a given Polling place to the total vote cast at that place with respect to the type of ballot cast, that is, paper or machine." (Emphasis added). The defendant contends that this method of apportionment was erroneous under *Smoda v. Gallagher* (1952), 412 Ill. 271, 106 N.E.2d 181. In *Smoda*, the Illinois Supreme Court held that under the Township Organization Act every town constitutes one election precinct (Ill.Rev.Stat.1951, ch. 139, par. 52), regardless of the number of polling places located within the township. Consequently, the apportionment of illegal ballots was to be done on a township wide basis. (This method of apportionment, if applied to the instant case, would result in Camferdam remaining the winner of the election.) Here the trial court, in apportioning the ballots, relied upon the case of *People ex rel. Schwartz v. Fagerholm* (1959), 17 Ill.2d 131, 161 N.E.2d 20, where the court held that where the county board or board of election commissioners has, pursuant to the Election Code (Ill.Rev.Stat.1957, ch. 46, pars. 11-2, -3) fixed election precincts, the township no longer comprises a single precinct.

As defendant Camferdam correctly points out, *Smoda*, because it deals with the apportionment of illegal votes cast in a township election, is directly on point. Furthermore, *Smoda* was never expressly overruled in *Fagerholm*. However, *Fagerholm* involved a referendum and not a township election and consequently did not regard *Smoda* as persuasive \*76 on the issue of vote apportionment. In *Fagerholm* the Supreme Court made it quite clear that "a township is a single election precinct Unless and until further election precincts are fixed \* \* \*." (17 Ill.2d at 140, 161 N.E.2d at 26). (Emphasis added). The record in the case at bar reveals that there are twenty-seven election precincts in South Moline Township. The presence of these precincts, appar-

ently created by the county board, distinguishes *Smoda* and makes the *Fagerholm* case applicable. We hold the trial court properly apportioned the illegal absentee votes on a "polling place" wide (I. e., precinct wide) basis, following the *Fagerholm* dictates.

[4] Plaintiff Frese urges this court to discard all absentee ballots instead of apportioning the forty-seven invalid ballots between the two candidates. We feel that the facts of this case do not require such action. In this case not all absentee ballots are to be invalidated. The only absentee ballots invalidated are the thirty-nine declared void because of improper return, four because of late or no registration, and four because of improper or lack of signature, totaling the forty-seven. In *Webb v. Benton Consolidated High School Dist. No. 103* (1970), 130 Ill.App.2d 824, 826, 264 N.E.2d 415, 418, the court stated: "Where the portion of votes containing illegal ballots can be identified with certainty, and proof of irregularities in voting are not such as to justify a disenfranchisement of all voters in \*\*851 \*\*\*649 that precinct, it is proper to apportion the illegal ballots and surcharge the votes in that precinct accordingly instead of excluding the entire vote." (Cf. *Drolet v. Stentz* (1967), 83 Ill.App.2d 202, 227 N.E.2d 114 (Vote of entire precinct voided where number of illegal ballots unascertainable).) In *Gibson v. Kankakee School District* (1975), 34 Ill.App.3d 948, 955, 341 N.E.2d 447, 452, we said: "The total vote of a precinct ought not be disenfranchised unless the proof of irregularities is so clear, and their character so serious or numerous, that The number of legal votes cannot be ascertained and separated from the illegal ones, in which case disenfranchisement of an entire precinct cannot be avoided." (Emphasis added). In the case at bar, the number of legal absentee votes can be easily ascertained, because only forty-seven votes are invalid. Rejection of all absentee votes would only result in an unnecessary disenfranchisement of voters. Apportionment of the forty-seven illegal ballots is proper here.

394 N.E.2d 845  
 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643  
 (Cite as: 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643)

Page 7

[5] The final issue raised on appeal concerns the trial court's denial of the petition by absentee voters Einess and Fennelly to intervene. The applicable statute is Section 26.1 of The Civil Practice Act (Ill.Rev.Stat. 1977, ch. 110, par. 26.1), which states that upon "timely" application anyone shall be permitted to intervene in an action, as a matter of right, upon certain grounds. The plaintiff Frese contends that timeliness is a matter of discretion for the trial court (See *Childress v. State Farm* (1968), 97 Ill.App.2d 112, 239 N.E.2d 492;\*77Moore v. McDaniel (1977), 48 Ill.App.3d 152, 5 Ill.Dec. 911, 362 N.E.2d 382). Defendant Camferdam, however, states that in situations where a petition for intervention is made prior to trial, as in the case at bar, courts have inevitably found the petition to be timely and have allowed the intervention. *Wheeling Trust & Savings Bank v. Village of Mt. Prospect* (1975), 29 Ill.App.3d 539, 331 N.E.2d 172.

In the instant case, the petition for intervention was filed on December 20, 1977, one day before the cause was set for trial. A case involving an election contest, more than any other type of case, requires swift disposition, and the granting of the petition to intervene would have undoubtedly delayed the beginning of the trial. The trial court, appreciative of the need for celerity in resolving the issues before it and in determining the winner of the election, denied the petition, and, in our opinion, rightfully so. Given the nature of the case, we find no abuse of discretion by its actions.

The decision of the trial court in denying the petition for intervention can also be defended on grounds unrelated to timeliness. One of the grounds for intervention as of right is "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." (Ill.Rev.Stat.1977, ch. 110, par. 26.1(1)(b)). As the defendant Camferdam points out, had Einess and Fennelly been allowed to intervene, they would have argued that their constitutional right to have their votes counted was being violated by the inval-

idation of their absentee votes. This very constitutional argument was posited by defendant Camferdam on appeal and although we decline to accept it, we deem it to be ably advanced and not to be "inadequate" for the purposes of Section 26.1(1)(b). Consequently, their petition for intervention was properly denied.

On the basis of the foregoing, the judgment of the Circuit Court of Rock Island County is affirmed.

Judgment affirmed.

ALLOY and SCOTT, JJ., concur.  
 Ill.App. 3 Dist., 1979.  
 Frese v. Camferdam  
 76 Ill.App.3d 68, 394 N.E.2d 845, 31 Ill.Dec. 643

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