

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2022-SC-0366

DAVID FISCHER, *et al.*

MOVANTS

ON APPEAL FROM CAMPBELL CIRCUIT COURT
CASE NO. 22-CI-00387

v.

ON APPEAL FROM KENTUCKY COURT OF APPEALS
CASE NOS. 2022-CA-0788 & 2022-CA-0789

JAMES LUERSEN, *et al.*

RESPONDENTS

CAMPBELL COUNTY CLERK AND CAMPBELL COUNTY BOARD OF
ELECTIONS' RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

Respondents, James Luersen, in his official capacity as Campbell County Clerk; and, James Luersen, Jack Snodgrass, James Schroer and Kenneth Fecher, designee of Sheriff Michael Jansen, in their official capacities as members of the Campbell County Board of Elections (collectively "BOE Respondents"), by and through counsel, and pursuant to CR 76.20, respectfully ask this Court to decline discretionary review of the Court of Appeals' August 26, 2022 Opinion. The Court of Appeals wisely cautioned that courts "must not whittle away the elevated standard for setting aside election results," and correctly concluded that the trial court improperly set aside the entire May 2022 primary election based solely on 19 *potentially* electioneered votes.

I. STATEMENT OF MATERIAL FACTS

Respondent Brian Painter (collectively referred to along with his campaign, Painter for Commissioner Committee, as "Painter"), a Republican, is the incumbent Campbell County Commissioner from the First District. His term expires at the end of 2022, and he filed to run for re-election in November 2022. But first, he faced a primary

challenge from Movant David Fischer (collectively referred to along with his campaign, David Fischer for Campbell County Commissioner, as “Fischer”) for the Republican nomination.

In preparation for the May 17, 2022 primary election, the Campbell County Board of Elections conducted training for its poll workers on May 2, 3 and 4. (R. 192, ¶ 3) Each day’s training was split into three sessions, the earliest of which began at 10:00 a.m. and the latest of which began at 6:00 p.m., in the Fiscal Court’s Chambers on the first floor of the Campbell County Administration Building at 1098 Monmouth Street in Newport, Kentucky. (See R. 192 - 193, ¶¶ 3 - 4) Every poll worker was required to sign up for one session at whichever time fit into his or her personal schedule. However, each session was usually limited to about 25 individuals.

For at least the last 25 years, Campbell County has observed a tradition in which candidates for public office - regardless of which office they were running for, and regardless of their party affiliations - are allowed to enter the room in which poll worker training will occur for the purpose of greeting poll workers who arrive early for their training sessions. All candidates who choose to participate in this tradition are required to leave before the training sessions begin. And, upon leaving the training room, the candidates are allowed to leave campaign material, such as brochures and pens, on tables in the room. It is then left completely to the personal discretion of each poll worker to decide whether to review the campaign material or whether to ignore it. If a poll worker decides to review campaign material, he or she may review the material from some campaigns and not others - a matter that is also completely up to him or her.

Painter was among the candidates for office who chose to participate in this tradition on May 2, 3 and 4, 2022. When he left the training room prior to the beginning

of the training sessions, Painter placed pens and literature bearing his name on a table in the training room. There has been no allegation or suggestion that the pens and literature were available to any member of the public outside of the poll worker training room.

Early in-person voting began in Campbell County on May 4, 2022, the final day of poll worker training sessions. (See R. 193, ¶ 5) While the training sessions occurred on the first floor of the Campbell County Administration Building, early in-person voting was available on the second floor of the building in the Campbell County Clerk's Office. (R. 192 - 193, ¶¶ 3 - 4) Thus, poll workers attending the training session had the option to go upstairs to cast their votes before or after their training sessions on May 4. (R. 193, ¶ 6)

On May 4, 2022, 34 total Republicans voted in the Elections Office of the Campbell County Clerk. Of those 34 total Republican voters, 19 were poll workers. (Id.) No poll workers were required to vote on May 4, 2022. (Id.)

In total, Painter received 4,180 votes in the May 17, 2022 primary election; of those votes, 151 were cast under the absentee provisions of KRS 117.085 and 293 votes were cast during the early voting period. (R. 324; see also R. 193) Fischer received 4,074 votes in the primary election; of those votes, 96 were cast absentee and 219 votes were cast during the early voting period. (Id.) Thus, in total, Painter received 106 more votes than Fischer.

II. PROCEDURAL HISTORY

Having lost the primary election, Fischer instituted an election contest pursuant to KRS 120.055 - KRS 120.150. (See generally R. 1 - 16) Following the exchange of numerous motions and the appointment of a special judge, the Court held a telephonic hearing on June 10, 2022 to address the pending procedural issues. Among other things, the trial court addressed Fischer's CR 41.01(1) Stipulation of Partial Dismissal Without Prejudice of Luersen and the Board of Elections. (R. 137 - 138) At the hearing, Painter made an oral

motion to join Luersen and the Board of Elections back into the matter as indispensable parties. (R. 284) The trial court granted Painter's motion over Fischer's objection. (*Id.*) The parties then collectively agreed to waive their rights to an evidentiary hearing and, per the Court's request, submit additional briefs regarding their respective positions. (06.10.22 Hrg. Audio)¹

The trial court entered its Findings of Fact and Conclusions of Law on June 27, 2022. (*See generally* R. 283 - 294) The trial court concluded that Painter's actions violated Kentucky's electioneering statute, specifically KRS 117.235(3)(b), but did *not* violate the Kentucky Corrupt Practices Act, KRS 121.055. (R. 289, ¶ 20) As a remedy, the trial court vacated Painter's victory in the May 17, 2022 primary election for Republican nominee for First District Campbell County Commissioner, and directed Luersen to "proceed accordingly" by placing Fischer on the ballot for the November general election as the Republican party candidate. (R. 294)

In light of the improper order directing them to invalidate the certified election results and name Fischer as the Republican nominee on the November 2022 ballot, the BOE Respondents appealed the court's judgment on June 30, 2022. (06.30.22 Notice of Appeal) Painter filed his notice of appeal the following day. (07.01.22 Notice of Appeal). The Clerk docketed the parties' appeals separately as 2022-CA-0788 and 2022-CA-0789, respectively, but the cases were later consolidated. (07.28.22 COA Order, p. 4)

Prior to submitting briefs with the Court of Appeals, Fischer filed numerous motions, including motions to dismiss the appeals for failure to post a supersedeas bond. (*Id.* at p. 1) The BOE Respondents opposed the motion, arguing that they were not required

¹ The trial court ordered that the record on appeal be supplemented with the videotape of the hearing.

to post a supersedeas bond because 1) they were exempt from doing so pursuant to KRS 454.190 and CR 81A, and 2) the trial court did not award a monetary judgment necessitating the posting of such a bond. (*Id.* at p. 3 - 4) In the alternative, BOE Respondents sought leave to execute any bond deemed necessary by the Court KRS 120.075, which permits "a supersedeas bond [to be] executed in the Circuit Court . . . within such other time as the Court of Appeals may, for cause shown, permit." The Court of Appeals passed on Fischers' motions to dismiss and, instead, directed the trial court to conduct a hearing and set a supersedeas bond. (07.28.22 Order at p. 3 - 4)

The trial court held a telephonic hearing on August 3, 2022 to set the supersedeas bond. (08.04.22 Order, p. 1) As to the BOE Respondents, the trial court ruled that the Campbell County Clerk's statutory bond, which has already been posted for the proper execution of the duties of his office by himself and others, was sufficient surety to satisfy the bond requirements of KRS 120.075. (*Id.* at 2) Following this determination, the parties filed their briefs on the merits of the appeal.

On August 26, 2022, the Court of Appeals rendered its published Opinion reversing the trial court's judgment and concluding that Painter is entitled to be the Republican nominee for the Campbell County Commissioner general election. (08.26.22 COA Opinion, p. 3) In its Opinion, the Court observed that "Kentucky courts have been reluctant to void an entire election where there was no sufficient evidence of prejudice or manipulation, which would support such the drastic measure [as] voter disenfranchisement." (*Id.* at p. 14) Here, the Court ruled that "the circuit court's holding is based on mere speculation and illusory evidence, which do not meet the elevated standard for voiding a primary under KRS 120.065." (*Id.* at p. 17) Thus, the Court ultimately held that "the facts of this case do not warrant judicial intervention voiding the entire

Republican primary for Campbell County Commissioner” and reversed the trial court’s judgment. (*Id.* at p. 18) Fischer’s motion for discretionary review followed.

III. THERE ARE NO SPECIAL REASONS TO GRANT DISCRETIONARY REVIEW

Under CR 76.20, a party asking the Kentucky Supreme Court to grant discretionary review must identify “special reasons” for granting the motion. Fischer has failed to do so. Because the Court of Appeals correctly ruled that judicial intervention voiding the entire Republican primary for Campbell County Commissioner was not warranted, and because Fischer has failed to provide any special reasons for this Court to grant his Motion, discretionary review should be denied.

A. THE COURT OF APPEALS’ DECISION IS CONSISTENT WITH KENTUCKY PRECEDENT

The crux of Fischer’s motion hinges upon his (and the trial court’s) misinterpretation and misapplication of one case - *Ellis v. Meeks*, 957 S.W.2d 213 (Ky. 1997). Because the Court of Appeals righted the misapplication of this case in its Opinion, there is no special reason for this Court to grant review.

Ellis and *Meeks* were candidates in the Democratic primary for the office of Louisville’s 11th Ward Alderman. *Meeks*, 957 S.W.2d at 214. On election day, *Meeks* visited ten of the fifteen precincts to deliver fried chicken lunches to precinct workers actively working the polls. *Id.* While delivering lunch, *Meeks* shook hands with voters and had conversations with numerous others present at the polling place. *Id.* Although he did not hand out campaign materials, the parties stipulated that the lunches intended for poll workers were placed in a location which made them accessible to the voters present at the polling location. *Id.* In total, *Meeks* was within the presence of more than nine (9) voters

at these polling places. *Id.* Meeks' presence and interactions with these nine voters was critical because Meeks won the election by a mere eight (8) votes. *Id.* at 213.

After Meeks' opponent learned of Meeks' actions at the polling locations, he filed an election contest pursuant to KRS 120.055. *Id.* at 214. This Court ultimately concluded that Meeks' actions violated both KRS 117.235 and KRS 121.055 (the Kentucky Corrupt Practices Act), negated his candidacy, voided the election results, and declared the Democratic nomination vacant. *Id.* at 217. In reaching the decision to impose these extreme remedies, this Court engaged in a layered analysis of Meeks' actions and the governing statutory provisions.

As a general premise, this Court directed that an election shall only be set aside "if improper electioneering affected the outcome of the case or could have resulted in something that changed the outcome or at least impaired the fairness of the election." *Meeks*, 957 S.W.2d at 217 (citing *Adams v. Wakefield*, 190 S.W.2d 701 (Ky. 1945), rev'd on other grounds, *Barger v. Ward*, 407 S.W.2d 397 (Ky. 1966)). Although Ellis could not prove that Meeks' conduct diverted votes to his favor, this Court voided the entire election and deemed the nomination vacant. This Court reasoned that Meeks' conduct violated Kentucky's anti-electioneering law and Corrupt Practices Act, creating an uneven playing field which, if left undisturbed, would have diminished voter confidence in the electoral and judicial processes. *Meeks*, 957 S.W.2d at 217. In setting aside the election, this Court gave great weight to its finding that "the outcome of the election was implicitly affected," and that "Meeks' conduct not only falls within the parameters of KRS 117.235 and 121.055, but is clearly the egregious behavior that was contemplated in [*Sims v. Atwell*, 556 S.W.2d 929, 931 (Ky. App. 1977)]." *Id.* (emphasis added).

Importantly, this Court looked to far more than just the KRS 117.235 electioneering violations in setting aside the Meeks' election. This Court also placed great weight on the "egregious nature" of the electioneering as well as Meeks' clear violation of the Kentucky Corrupt Practices Act - which explicitly provides for the setting aside of an election. *Meeks*, 957 S.W.2d at 217. While the Court clearly directed that "compliance with both KRS 117.235 and 121.055 is mandatory and strict compliance with these election laws is an absolute necessity," *id.* at 216, *Meeks* does not stand for the premise that a technical violation of KRS 117.235, without more, requires automatic invalidation of election results. The Court of Appeals cogently picked up on this important distinction when the trial court failed to do so.

The Court of Appeals' interpretation of *Meeks* - which rejects Fischer's "strict liability" mentality with respect to electioneering violations - is consistent with over a hundred years of election jurisprudence. As the Court of Appeals keenly observed, "[t]he electoral process is the core of our democratic government, and all courts should abhor superseding that process." (08.26.22 COA Opinion at p. 9) While the judiciary retains the authority to supersede that process by voiding an election, it only "has the duty to do so where there are such 'frauds and irregularities in the election that it cannot be told who was elected.'" *Id.* at p. 9 - 10 (quoting *Stewart v. Wurts*, 135 S.W. 434, 439 (1911)). Likewise, the Court of Appeals correctly observed that "the evidentiary bar is high for a successful election challenge." *Id.* at p. 10. Kentucky's appellate courts have long held:

The burden of proof is on the contestant to show such fraud, intimidation, bribery, or violence in the conduct of election that neither the contestant nor contestee can be adjudged to have been fairly elected. *These things are not presumed, but it must be affirmatively shown, not only that they existed, but that they affected the result to such an extent that it cannot be reasonably determined who was elected.*

Skain v. Milward, 127 S.W. 773, 778 (1910): (emphasis added). “Mere speculation or suspicion will not justify requiring the voters to undergo the labor, excitement, and expense of another election unless clearly convinced that the results . . . were not fairly and legally attained.” (08.26.22 COA Opinion at p. 11 (quoting *Stewart v. Wurts*, 135 S.W. 434, 439 (1911) (emphasis added)). Furthermore, application of this elevated standard prescribed by KRS 120.065 (not KRS 117.235) can be found in cases cited and relied upon by the Meeks Court. See e.g., *Adams*, *supra*.

Looking to this heightened standard, the Court of Appeals concluded that the circuit court's holding was based on “mere speculation and illusory evidence” which fails to meet the elevated standard for voiding a primary under KRS 120.065. (08.26.22 COA Opinion at p. 17) The record evidence demonstrates that Painter improperly electioneered on May 4, 2022 while in-person absentee occurred on a separate floor of the County Administration building. (See R. 192 - 193; R. 321) Similarly, the record evidence reflects that nineteen individuals who encountered Painter and his campaign materials at the County Administration building also voted in the Republican primary during in-person absentee voting hours. (*Id.*) However, what the record does *not* include is any evidence suggesting that these actions had any effect on the outcome of the election such that the results “were not fairly and legally attained.” (08.26.22 COA Opinion at p. 11, 16)

As the Court of Appeals correctly noted, “the circuit court vacated Painter’s victory based on the purported ripple effect of Painter’s conduct because Painter received the majority of in-person absentee votes whereas Fischer received many of his votes on primary day.” (*Id.*) The trial court expressed its skepticism and placed great weight on this “anomaly” when rendering its conclusions. (See R. 288 - 289) But this skepticism cannot - as a matter of law - stand to support the disenfranchisement of 4,180 Campbell County

voters caused by setting aside an election. This Court has explicitly warned that “our case law holds that a statistical anomaly in absentee voting is not alone sufficient grounds to set aside an election or to cast out of all the absentee ballots.” *Hardin v. Montgomery*, 495 S.W.3d 686, 697 (Ky. 2016). The “statistical anomaly” presented by the disparity between in-person and absentee votes is therefore insufficient to meet Fischer’s burden. The trial court’s findings premised upon such disparity were clearly erroneous.

In sum, the Court of Appeals’ reversal is not only consistent with this Court’s decision in *Meeks*, it rectifies the trial court’s erroneous interpretation of a century’s worth of Kentucky’s election jurisprudence. Thus, because the Court of Appeals correctly interpreted and applied this Court’s precedent, Fischer has failed to identify any special reasons for this Court to grant discretionary review. His motion should, therefore, be denied.

B. THE COURT APPEALS HAD JURISDICTION TO HEAR THE BOE RESPONDENTS’ APPEAL

Although KRS 120.075 contemplates the filing of a supersedeas bond prior to appeal, the BOE Respondents’ failure to post a bond was not fatal to their appeal and did not divest the Court of Appeals of jurisdiction. First, Kentucky law generally exempts governmental units from bond requirements. See KRS 454.190; CR 81A. Second, a bond was not required because, in its final judgment, the trial court did not make any monetary award of costs, fees, or damages. (See R. 283 - 294) And third, the BOE Respondents were not required to post a supersedeas bond because, even if the trial court had awarded costs or fees, the monetary liability would not have been imposed against them, specifically. In short, because there is no financial obligation on behalf of the BOE Respondents as a result

of the election contest matter, the filing of a supersedeas bond is an inappropriate unnecessary and impractical use of government resources.

Nonetheless, KRS 120.075 provides in relevant part that “[a]ny party may appeal to the Court of Appeals from a judgment entered under KRS 120.065. The appeal shall be in accordance with the Rules of Civil Procedure, except that the notice of appeal shall be filed and a supersedeas bond executed in the Circuit Court, and the record shall be filed in the Court of Appeals, within ten (10) days after the entry of the judgment, *or within such other time as the Court of Appeals may, for cause shown, permit.*” (emphasis added). Notwithstanding the fact that the trial court rendered this a nonissue by accepting the Campbell County Clerk’s statutory bond - which has already been posted for the proper execution of the duties of his office by himself and others - as sufficient surety to satisfy any bond requirements imposed by KRS 120.075, (08.04.22 Order, p. 2), the Court of Appeals acted within its statutory discretion to allow additional time for this process to occur. KRS 120.075 is clear that the bond may be posted “*within such other time as the Court of Appeals may, for cause shown, permit.*” Simply because the Court of Appeals has, in prior cases, dismissed appeals for failure to post a bond does not mean it is obligated to act accordingly each time. Fischer, of course, has failed to cite to any case law stating that the Court of Appeals is obligated to act in such way.

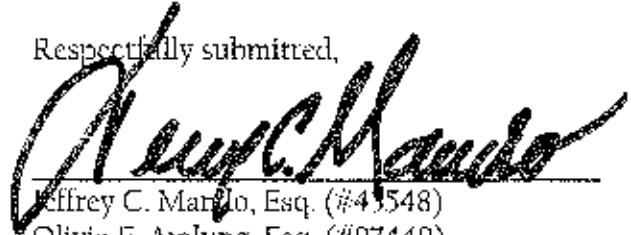
Because the Court of Appeals acted within its discretion to allow additional time to resolve the bond issue, Fischer has failed to identify any special reasons for this Court to grant discretionary review. His motion should, therefore, be denied.

IV. CONCLUSION

For all of these reasons, the BOE Respondents, James Luersen, in his official capacity as Campbell County Clerk; and, James Luersen, Jack Snodgrass, James Schroer

and Kenneth Fecher, designee of Sheriff Michael Jansen, in their official capacities as members of the Campbell County Board of Elections, respectfully request that the Court deny Fischer's Motion for Discretionary Review.

Respectfully submitted,



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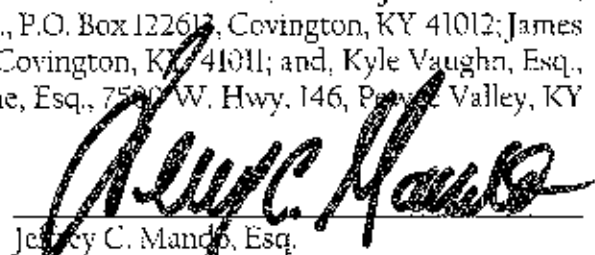
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Response to Fischer's Motion for Discretionary Review was served this the 6 day of September, 2022, upon the following: Ms. Kate Morgan, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Charles Cunningham, Judge, Jefferson Circuit Court, 700 W. Jefferson Street, Louisville, KY 40202; Steven J. Megerle, Esq., P.O. Box 122612, Covington, KY 41012; James W. Morgan, Jr., Esq., 128 E. Second Street, Covington, KY 41011; and, Kyle Vaughn, Esq., Carol Shureck Pettit, Esq., and Tess Fortune, Esq., 7500 W. Hwy. 146, Pigeon Valley, KY 40056.



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