

IN THE INDIANA COURT OF APPEALS
CAUSE NO: 18A02-0804-CV-375

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| JIM MANSFIELD and |) | |
| STATE ex rel. MANSFIELD, |) | |
| |) | Appeal from the Delaware |
| Appellants |) | Circuit Court |
| (Petitioners/Relators below) |) | |
| |) | |
| vs. |) | Trial Court Cause No: |
| |) | 18C05-0712-MI-150 |
| SHARON MCSHURLEY and |) | |
| DELAWARE COUNTY, INDIANA |) | The Honorable Joel Roberts, |
| ELECTION BOARD, |) | Special Judge |
| |) | |
| Appellees, |) | |
| (Respondents Below) |) | |

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STATEMENT OF THE ISSUES

- I. Whether the trial court erred by dismissing Mansfield's Verified Petition for an Election Contest as untimely where he was unable to initiate the action within fourteen (14) days of election day.
- II. Whether the trial court erred by dismissing Mansfield's Amended Complaint in *Quo Warranto* where he alleged a mistake in the distribution of ballots resulted in the candidate with fewer votes holding the office of Mayor of Muncie, Indiana.
- III. Whether the trial court erred by dismissing the Amended Complaint in *Quo Warranto* on the basis that the facts were not pled with sufficient particularity pursuant to Ind. Trial Rule 9(B).
- IV. Alternatively, whether Indiana's election contest statute violates the Open Courts and Privileges and Immunities clauses of the Indiana Constitution where it is unavailable to a candidate who has initially been certified as the winner of an election, which result is reversed following a recount.

STATEMENT OF THE CASE

On December 27, 2007, Jim Mansfield filed a Verified Petition for an Election Contest (the "Contest Petition"), naming Sharon McShurley and the Delaware County Election Board as defendants. (Appellants' App. 19-20).¹ Mansfield was the Democratic candidate for Mayor for the City of Muncie, Indiana in the election held on November 6, 2007; McShurley was his Republican opponent in that election. (App. 19, Contest Petition ¶ 1). Mansfield alleged in the Contest Petition that during a recount conducted after the election, it was discovered that a mistake in the distribution of ballots made it impossible to determine the candidate who received the highest number of votes in the

¹ References to (App. ___) hereafter are to the Appellants' Appendix.

election. (App. 19, Contest Petition ¶¶ 4-6). Specifically, the Contest Petition alleged that a Republican-appointed clerk had failed to initial nineteen (19) absentee ballots in a single election precinct (Precinct 46), and as a result, these nineteen (19) ballots were not counted during the recount. (App. 20, Contest Petition ¶¶ 7-9). Eighteen (18) of these uncounted ballots were cast for Mansfield; only one (1) of these ballots was cast for McShurley. (App. 20, Contest Petition ¶ 7). These nineteen (19) uncounted ballots changed the results of the election. Mansfield, who had originally been certified as the election winner, was ultimately determined after the recount to have 6,108 votes and McShurley was found to have received 6,121 votes, a margin of thirteen (13) votes. (App. 69).

On January 2, 2008, McShurley filed a motion to dismiss the Contest Petition pursuant to Ind. Trial Rule 12(B)(1) and (6), claiming that it was not timely filed under Indiana's contest statutes, Ind. Code §3-12-8-1, *et seq.*, and that the trial court lacked jurisdiction to hear it. (App. 3). On January 17, 2008, Mansfield filed a response in opposition to the motion to dismiss. (App. 6). McShurley filed an amended motion to dismiss on January 22, 2008, to which Mansfield responded on January 28, 2008. (App. 24-45).

On January 11, 2008, the Delaware County Election Board responded to the Contest Petition, stating that the Board had found Mansfield's claim in the petition to be true, that "several voters had been disenfranchised and their votes not counted, due to

errors in the Delaware County Election Room, and that the voters in no way made any mistakes or errors and that the voters cast their ballots believing that their votes would count in the November 2007 General Election.” (App. 21).

On February 4, 2008, the trial court denied McShurley’s motion to dismiss based upon Ind. Trial Rule 12(B)(1), but granted the motion on the basis of Ind. Trial Rule 12(B)(6). (App. 15-18). The trial court concluded that the Contest Petition was untimely because it had not been filed within fourteen (14) days after the date of the election, and as such, that it failed to state a claim upon which relief could be granted. *Id.*

On February 13, 2008, Mansfield filed an Amended Information and Complaint in *Quo Warranto* (the “*Quo Warranto* Complaint”). (App. 46-48). In this Complaint, Mansfield alleged that during the recount it was discovered that “the nineteen (19) ballots in Delaware County Precinct 46 had been distributed to voters without the initials of a Republican appointed member of the election board or their designated representative in violation of I.C. 3-11-4-19.” (App. 47, *Quo Warranto* Complaint ¶ 6). Mansfield further alleged that the “nineteen ballots distributed to absentee voters in precinct 46 were either distributed by mistake or were knowingly or intentionally and fraudulently distributed without proper initials,” and that the ballots were not counted, resulting in McShurley being declared the winner of the election despite Mansfield having received the most votes cast by voters in the election. (App. 47, *Quo Warranto* Complaint ¶¶ 7-10). Mansfield requested that the trial court order a special election in Precinct 46 or fashion

some other appropriate remedy. (App. 47, *Quo Warranto* Complaint ¶ 12).

On March 4, 2008, McShurley filed a motion to dismiss the *Quo Warranto* Complaint pursuant to Ind. Trial Rule 12(B)(6), claiming that Mansfield lacked a basis for asserting a claim in *quo warranto*. (App. 50-92). Without hearing from Mansfield, who had not yet responded to this latest motion to dismiss, the trial court granted the motion on March 24, 2008. (App. 11-14). The trial court concluded that a *quo warranto* action cannot be maintained on the basis of a “mistake” in the distribution of improperly initialed ballots, because to “conclude otherwise would result in the Court ignoring the express statutory directive contained in IC 3-12-1-13 as well as case law construing this statutory provision.” (App. 13). The trial court further concluded that the *Quo Warranto* Complaint’s allegation of fraud or mistake had not been pled with sufficient particularity pursuant to Ind. Trial Rule 9(B). (App. 13-14).

Mansfield timely filed a Notice of Appeal on April 22, 2008. (App. 93-95).

STATEMENT OF FACTS

Jim Mansfield was the Democratic candidate for Mayor of Muncie, Indiana in the election held on November 6, 2007. (App. 19, 46; Contest Petition ¶ 1; *Quo Warranto* Complaint ¶¶ 1-2). McShurley was the Republican nominee for Mayor of Muncie. *Id.* Mansfield was issued a certificate of election for that office on November 23, 2007. (App. 46, 49; *Quo Warranto* Complaint ¶ 1 and Ex. A). All absentee ballots in the election were voted on ballot cards, and following the canvass of ballots, all such ballots

were sealed as required by Ind. Code §§ 3-12-3-10 and 3-10-1-31.1. (App. 46, *Quo Warranto* Complaint ¶ 3).

On November 26, 2007, the chairwoman of the Delaware County Republican Party filed a recount petition in the Delaware Circuit Court No. 3, and a recount was conducted and concluded on December 20, 2007. (App. 19, 46; Contest Petition ¶ 5; *Quo Warranto* Complaint ¶ 4). After the filing of the recount petition, the ballots in precinct 46, along with all other election ballots, machines, poll books and materials, were impounded by the court in accordance with the provisions of Ind. Code § 3-12-6-19. (App. 47; *Quo Warranto* Complaint ¶ 5).

During the recount, in addressing Delaware County precinct 46, it was discovered that nineteen (19) absentee ballots were distributed to voters without the initials of a Republican appointed member of the election board or their designated representative, in violation of Ind. Code § 3-11-4-19. (App. 19-20, 47; Contest Petition ¶¶ 6-7; *Quo Warranto* Complaint ¶ 6). These ballots were accepted and counted on election day, but during the course of the recount were deemed defective ballots and were not counted. (App. 20, 47; Contest Petition ¶ 7; *Quo Warranto* Complaint ¶ 8). Of the nineteen (19) defective ballots, eighteen (18) were cast for Mansfield and one (1) was cast for McShurley. (App. 20, 47; Contest Petition ¶ 7; *Quo Warranto* Complaint ¶ 8). The nineteen ballots were distributed to voters without the proper initials of the Republican-appointed election official either by mistake, or knowingly or intentionally and

fraudulently. (App. 19-20, 47; Contest Petition ¶ 4, 8; *Quo Warranto* Complaint ¶ 7).

As a result of the reduction in vote totals caused by the exclusion of these absentee ballots, McShurley was declared the winner in the election recount by a margin of thirteen (13) votes. (App. 47; *Quo Warranto* Complaint ¶ 9).

SUMMARY OF THE ARGUMENT

Nineteen voters in the Muncie mayoral election were disenfranchised because of mistakes made by election officials in the distribution of absentee ballots in a single election precinct. This disenfranchisement altered the results of the election, resulting in the certification of McShurley following a recount, even though she received fewer votes than Mansfield on election day. Since learning of this error, Mansfield has diligently pursued an appropriate remedy – a special election in the affected precinct.

Mansfield first filed a Verified Petition for an Election Contest (the “Contest Petition”) on December 27, 2007, seven days after the certification of McShurley following the recount. The trial court dismissed this petition as untimely because it was not filed within fourteen (14) days of election day. But Mansfield was not capable of filing a *verified* petition within that time period because the error – the missing election official initials – was not discovered until the recount, after the running of the fourteen (14) days, and because as the winning candidate on election day, he was not statutorily eligible to file a contest petition. The Supreme Court has recognized that “diligent and faultless” contestors should not be denied their statutory remedy through strict application

of the contest statutes. *State ex rel. Arredondo v. Lake Circuit Court*, 271 Ind. 176, 391 N.E.2d 597 (1979); *see also, Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004). The trial court improperly denied Mansfield access to the contest procedures by dismissing his petition.

Mansfield amended his complaint following dismissal to state an Amended Information and Complaint in *Quo Warranto* (the "*Quo Warranto* Complaint"), alleging that a mistake in the distribution of ballots had resulted in the invalidation of nineteen (19) votes, which in turn resulted in the candidate with the fewest number of votes being certified as the election winner and becoming mayor. The trial court dismissed this petition on essentially two grounds: (1) that an action for *quo warranto* could not be maintained because the recount commission had properly excluded the nineteen (19) ballots from the vote totals based upon Ind. Code § 3-12-1-13; and (2) because Mansfield's allegations of mistake and fraud in the distribution of ballots had not been pled with sufficient particularity under Ind. Trial Rule 9(B).

The trial court's analysis was erroneous because the issue raised by the *Quo Warranto* Complaint was not whether the recount commission properly excluded the ballots of the nineteen (19) voters. Mansfield concedes that the ballots could not be counted under existing law in the recount. But, the *Quo Warranto* Complaint raises the substantial and unanswered question as to whether the mistake by election officials in the distribution of ballots, which resulted in these nineteen (19) voters being disenfranchised,

through no fault of their own, caused the candidate with the support of fewer votes to be seated as mayor of Muncie. Moreover, the pleading requirements of Ind. Trial Rule 9(B) are wholly inapplicable to an allegation of mistake in the distribution of ballots. But even if this rule were applicable, the allegations of the *Quo Warranto* Complaint were sufficient to meet its requirements.

Finally, to the extent that Mansfield is denied access to the courts and to a potential remedy for this error in the distribution of ballots, such a denial violates the Privileges and Immunities Clause and the Open Courts Clause of the Indiana Constitution, Article 1, Sections 12 and 23. As applied by the trial court, the contest statute places an impossible condition on Mansfield's access to the courts by requiring him to file a contest petition during a period when it would be impossible for him to learn of the mistake in ballot distribution, and it treats him differently than other similarly-situated candidates who are permitted to file a contest petition.

ARGUMENT

A. Standard of Review

A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it. *General Cas. Ins. Co. v. Bright*, 885 N.E.2d 56, 57 (Ind. Ct. App. 2008). Such motions are disfavored because they undermine the policy of deciding claims on their merits. *Citizens Action Coalition of Indiana, Inc. v. Indiana Statewide Assn. of Rural Elec. Cooperatives, Inc.*, 693 N.E.2d 1324, 1327 (Ind. Ct. App.

1998). Therefore, this Court reviews *de novo* the grant or denial of a motion to dismiss pursuant to Ind. Trial Rule 12(B)(6). *General Cas. Ins. Co.*, 885 N.E.2d at 58. The pleadings are viewed in a light most favorable to the nonmoving party, with every reasonable inference construed in the nonmovant's favor. *Id.* Indeed, "a court is required to take as true all allegations upon the face of the complaint." *Meyers v. Meyers*, 861 N.E.2d 704, 705 (Ind. 2007). A complaint may not be dismissed for failure to state a claim unless it is clear on the face of the complaint that the complaining party is not entitled to relief. *General Cas. Ins. Co.*, 885 N.E.2d at 58.

B. The trial court erred by dismissing Mansfield's Verified Petition for an Election Contest as untimely.

1. **Mansfield could not file a verified Election Contest within fourteen (14) days of the date of election.**

The trial court interpreted the election contest statute to require Mansfield to file a contest by no later than fourteen (14) days after the November 6 election day. (App. 17). The election contest statute generally requires a contest action to be filed no later than noon fourteen (14) days (by candidates) or seventeen (17) days (by county chairmen) after election day. Ind. Code § 3-12-8-5. Because Mansfield filed the Contest Petition on December 27, only seven (7) days after the certification of McShurley as the election winner following the recount, but more than fourteen (14) days after the November 6 election, the trial court dismissed the petition. (App. 17).

Under the trial court's application of the contest statute, Mansfield would have

been required to file the Contest Petition by no later than noon on November 20, fourteen (14) days after the November 6 election. But Mansfield was not capable of filing a *verified* contest petition by that date for at least two reasons.

First, as of noon, November 20, Mansfield was the presumptive winner of the election, having received more votes on election day than McShurley. Mansfield was certified as the winner of the election by the Delaware County clerk three (3) days later, on November 23. Furthermore, the recount petition filed by the Delaware County Republican Party chairwoman was not filed until November 26, six (6) days after Mansfield's purported deadline for filing an election contest petition.² There was simply no reason for Mansfield to have filed an election contest by November 20, as he had won the election and he had no reason to believe, at that time, that there had been mistakes in the distribution of ballots that ultimately cost him the election.

Moreover, as the winner of the election, Mansfield lacked standing under the contest statute to file a contest petition as of November 20. Ind. Code § 3-12-8-1(b) provides that "Any candidate for nomination or election to a local or school board office may contest the nomination or election of a candidate who is declared nominated or elected to the office." (Emphasis added). As of November 20, McShurley had not been

² Kay Whitehead, the Republican Party Chairwoman, waited almost three weeks after election day to file the recount petition, on the last possible day to do so under the recount statute. Ind. Code § 3-12-6-2(b) (requiring county chairman to file recount petition no later than noon seventeen days after election day). Whitehead was able to wait twenty (20) days to file the petition because the seventeenth day fell on a Friday holiday.

declared “elected to the office” of mayor. McShurley was first declared “elected to the office” on December 20, when the recount commission certified her as the winner.

Therefore, Mansfield could not have pursued an election contest as of November 20.

State ex rel. McCormick v. Superior Court of Knox County, 229 Ind. 118, 95 N.E.2d 829, 831 (1951) (contest statute makes no provision for candidate who first receives election certificate to file action).

Second, Mansfield had no way of knowing that a poll worker had failed to initial the nineteen (19) absentee ballots prior to initiation of the recount proceeding on November 26, after the November 20 deadline. The ballots and election materials were sealed, in accordance with the election code following their tabulation in the precinct on election day. Ind. Code § 3-12-3-10. The ballots remained sealed during the entire period in which an election contest or recount could be filed. *See* Ind. Code § 3-10-1-31.1. After the recount petition was filed, the ballots were impounded in accordance with Ind. Code § 3-12-6-19, and were only then reviewed as part of the recount process. Thus, Mansfield could not have alleged a mistake in the distribution of ballots, as set forth in the Contest Petition, at any time prior to noon, November 20.

This is particularly true because the contest statute requires that the contest petition be verified. Ind. Code § 3-12-8-5(a). Mansfield could not have sworn under oath as of November 20 that a mistake in the distribution of ballots had occurred without risking a perjury charge. *Smith v. King*, 716 N.E.2d 963, 966 (Ind. Ct. App. 1999), *trans. denied*,

(essential purpose of a verification is that the statements be made under penalty of perjury). Even if Mansfield had been permitted to file a contest petition as the winner of the election, he simply could not have done so because there can be no such thing as a “defensive” contest petition, filed merely to protect against all possible eventualities during a recount. In order to be effective against all possibilities revealed during a recount, a “defensive” contest petition would have to include verified allegations that a “mistake occurred in the programming of an electronic voting system,” that an “electronic voting system malfunctioned,” and that a “deliberate act or series of actions occurred” making it impossible to determine “which candidate received the highest number of votes.” *See* Ind. Code § 3-12-8-2 (listing all grounds for a contest). Evidence supporting any of these grounds for a contest *might* come to light during a recount proceeding. The General Assembly, in requiring verification of such allegations, could not have intended candidates to make such broad, unsupported allegations merely as a means of self-protection. *Maynard v. State*, 859 N.E.2d 1272, 1274 (Ind. Ct. App. 2007), *trans. denied* (legislature is presumed to have intended language to be applied logically and not bring about an absurd result).

2. Because Mansfield was both “diligent and faultless” in the pursuit of a contest action, the contest statute must be interpreted to provide him with a remedy.

For over a century, the Supreme Court has recognized that statutes providing for the contesting of elections “should be liberally construed in order that the will of the

people in the choice of public officers may not be defeated by any merely formal or technical objections.” *Pabey v. Pastrick*, 816 N.E.2d 1138, 1148 (Ind. 2004); *Tombaugh v. Grogg*, 146 Ind. 99, 103, 44 N.E. 994, 995 (1896); *Hadley v. Gutridge*, 58 Ind. 302 (1877). To this end, the Supreme Court has recognized that courts have “the inherent power to protect the sovereign people” from fraud or unlawfulness, *Pabey v. Pastrick*, 816 N.E.2d 1138, 1140-41 (Ind. 2004) (quoting *State ex rel. Nicely v. Wildey*, 209 Ind. 1, 197 N.E. 844, 847 (1935)), and that “diligent and faultless” contestors should not be denied their statutory remedy through strict application of the contest statutes. *State ex rel. Arredondo v. Lake Circuit Court*, 271 Ind. 176, 391 N.E.2d 597 (1979); *see also, Hatcher v. Barnes*, 597 N.E.2d 974 (Ind. Ct. App. 1992) (holding that a candidate could challenge an election based upon fraud, even though the election contest statute at that time did not provide such an option). Although recognizing that it has the “inherent power” to protect voters, and that the statutory contest procedures are cumulative of this power, *Nicely*, 197 N.E. at 847, the Supreme Court has also stated that the legislature “‘may set up machinery for the conduct of elections’ and we prefer to exercise our authority within the constraints of the Indiana Election Contest Statute.” *Pabey*, 816 N.E.2d at 1148 (quoting *Nicely*, 197 N.E. at 847)).

In *State ex rel. Arredondo*, the Supreme Court considered whether a trial court’s failure to conduct a hearing on an election contest action within twenty (20) days deprived the court of further jurisdiction and required dismissal of the action. A hearing

could not be held within twenty (20) days because the contestor's motion for change of judge had been granted, and a new judge could not qualify in time. The contest statute provided that: "the court . . . shall fix such hearing for a time within twenty (20) days after the filing of the certificate of such recount commissioners." 391 N.E.2d at 598 (quoting Ind. Code § 3-1-28-6 (Burns 1972) (emphasis added)).

In concluding that dismissal of the contest petition would be unjust under the circumstances, the Court reasoned:

If . . . the trial court either deliberately re-schedules the hearing beyond the limit or is forced to do so because of extraordinary circumstances beyond its control, a diligent and faultless contestor would forever be denied his statutory remedy. Our laws must provide a degree of flexibility to account for such situations. There can be no justification for closing the judicial doors to a bona fide litigant when the circumstances causing the delay are completely beyond his control.

Id. at 599. The Court further reasoned that the intent of the legislature had be considered in determining whether its direction to hold a contest hearing within twenty (20) days was mandatory or directory, even though the statutory language used the term "shall" to describe the time for hearing. *Id.* In concluding that it was directory, the Court noted the broad purpose of the recount and contest statutes, which is to "achieve . . . a full and fair litigation of election disputes in an expeditious manner." *Id.*

Interpreting "shall" or "must" as directory rather than mandatory, as the Supreme Court did in *Arredondo*, is consistent with long-standing precedent which holds that such terms are "directory when the statute fails to specify adverse consequences, the provision

does not go to the essence of the statutory purpose, and a mandatory construction would thwart the legislative purpose.” *Parmeter v. Cass County Dept. of Child Services*, 878 N.E.2d 444, 448 (Ind. Ct. App. 2007); *see also, Hancock County Rural Elec. Membership Corp. v. City of Greenfield*, 494 N.E.2d 1294, 1295-97 (Ind. 1986) and *Romine v. Gagle*, 782 N.E.2d 369, 379 (Ind. Ct. App. 2003), *trans. denied*. Concluding that such terms are directory is particularly appropriate when construing statutes involving elections and the qualifications of public officers, as such construction “should be liberal in promoting the choice of the people.” *Shetler v. Durham*, 881 N.E.2d 720, 722 (Ind. Ct. App. 2008) (quoting *Albaugh v. State ex rel. Titsworth*, 145 Ind. 356, 44 N.E. 355 (1896)).

The Supreme Court applied the *Arredondo* rule again in *Pabey*. 816 N.E.2d at 1143-44. In *Pabey*, a special judge had been appointed to hear the contest, and there were delays attendant to that appointment. The hearing was not held prior to the twenty (20) day statutory deadline. The trial court found, and the Supreme Court agreed, that the circumstances warranted holding the hearing outside this period, and there was “lack of any compelling indication that Pabey was less than diligent in moving the case forward.” *Id.*

Like *Arredondo* and *Pabey*, the circumstances here compel the conclusion that Ind. Code § 3-12-8-5 should be interpreted as directory rather than mandatory in its admonition that a candidate “must” file a contest petition within fourteen (14) days after election day. As set forth above, Mansfield was incapable of filing an election contest prior to the

expiration of fourteen (14) days from the election. Furthermore, he acted diligently to file the contest petition on December 27, seven (7) calendar days after the recount commission's certification of McShurley as the election winner, and because of the intervening holidays and weekend, only three (3) business days after the recount commission's certification of McShurley.

In granting the motion to dismiss, the trial court relied on a line of cases holding that because the procedure for an election contest is purely statutory, one seeking relief under it must bring himself strictly within its terms, which terms are jurisdictional. *See, e.g., State ex rel. Young v. Noble Circuit Court*, 263 Ind. 353, 332 N.E.2d 99, 102 (1975); *Smith v. King*, 716 N.E.2d 963, 966 (Ind. Ct. App. 1999), *trans. denied*; *Briles v. Wurtsbaugh*, 530 N.E.2d 1187, 1188 (Ind. Ct. App. 1988). Yet, the Supreme Court has also held that the contest statutes are to be liberally construed. *Pabey*, 816 N.E.2d at 1148. And despite this line of decisions, of which the Supreme Court was undoubtedly aware, the court did not strictly interpret the contest statutes so as to deny a faultless contestor a statutory remedy in either *Arredondo* or *Pabey*.

The trial court distinguished *Arredondo* and *Pabey* because those cases dealt with the contest statute's instruction as to hearing date, rather than the portion of the statute dealing with the time for filing the petition itself. (App. 17). Instead, the trial court relied upon *State ex rel. Young v. Noble Circuit Court*, where the Supreme Court concluded that a recount petitioner's failure to name each of the other candidates as defendants in the

caption of the petition required dismissal for failure to state a claim, subject to the right to amend once. 332 N.E.2d at 358-60. The trial court erred by relying on *Young*, and by not following *Arredondo* and *Pabey*.

The facts here are more analogous to *Arredondo* and *Pabey* than they are to *Young*, which is easily distinguished. The petitioner in *Young* was *at fault* in not properly preparing the caption of the recount petition. The recount statutes as well as Supreme Court precedent, *Marra v. Clapp*, 255 Ind. 97, 262 N.E.2d 630 (1970), subsequently overruled by *Young*, required the petitioner to name the other candidates in the caption. In contrast, Mansfield bears no fault in not filing a contest action within fourteen (14) days of election day because he lacked standing to do so, lacked any knowledge of the defective ballots, and lacked the ability to obtain such knowledge because of the sealing and impoundment of ballots, as fully set forth above. It is also worth noting that the petitioner in *Young* was not harmed by the dismissal of his recount petition, as he was permitted to correct his error by filing a motion to amend his petition, which amendment related back to the original filing. 332 N.E.2d at 358-60. Mansfield, however, has been denied any access to a remedy.

The trial court also cited *State ex rel. McCormick v. Superior Court of Knox County*, 229 Ind. 118, 95 N.E.2d 829 (1951), for the proposition that Mansfield also had available to him the remedy of a *quo warranto* action, even though he was time- barred from filing a contest petition. But after the trial court dismissed the Contest Petition,

Mansfield filed the *Quo Warranto* Complaint, asserting just such a claim. The trial court subsequently dismissed that petition as well for failure to state a claim, leaving Mansfield without a remedy. The trial court erred by dismissing the Contest Petition.

C. The trial court erred by dismissing the *Quo Warranto* Complaint

Mansfield's *Quo Warranto* Complaint alleged essentially the same facts as the Contest Petition, but raised the claim under the common law remedy of *quo warranto*. The trial court dismissed the *Quo Warranto* Complaint pursuant to Ind. Trial Rule 12(B)(6) for two reasons. First, the trial court found that an action for *quo warranto* could not be maintained because the recount commission had properly excluded the nineteen (19) ballots from the vote totals based upon Ind. Code § 3-12-1-13. (App. 13). Second, the trial court found that Mansfield's allegations of mistake in the distribution of ballots had not been pled with sufficient particularity pursuant to Ind. Trial Rule 9(B). (App. 13-14).

1. **To the extent that Mansfield is barred from using the contest statute to pursue a remedy, an action for *quo warranto* is the appropriate method of challenging McShurley's right to office.**

An action for *quo warranto* has its origins as a "common law writ used to determine the right of an individual to hold public office or to challenge a public officer's attempt to exercise a right or privilege derived from the state." *Lake County Sheriff's Merit Bd. v. Buncich*, 869 N.E.2d 482, 484 (Ind. Ct. App. 2007). Indiana's election contest statute is cumulative of the right of *quo warranto* that exists under both common

law and statute. *State ex rel. Watson v. Pigg*, 221 Ind. 23, 46 N.E.2d 232, 234 (1943); *State ex rel. Nicely v. Wildey*, 209 Ind. 1, 197 N.E. 844, 847 (1935); *see also*, Ind. Code § 34-17-1-1 (codification of *quo warranto*). Even though the General Assembly has enacted the contest statute as the “preferred” mechanism to challenge election results, *Pabey*, 816 N.E.2d at 1148, an action for *quo warranto* remains available, particularly where the contest statute fails to provide an adequate remedy. *Id.*; *State ex rel. Watson*, 46 N.E.2d at 234.

The trial court’s conclusion that a *quo warranto* action could not be maintained under the facts alleged in the complaint was erroneous. The issue raised by the *Quo Warranto* Complaint was not whether the recount commission properly excluded the ballots of the nineteen (19) voters. Mansfield concedes that the absentee ballots could not be counted in the recount under existing law because they lacked the required initials of one of the two election officials charged with distributing absentee ballots. Ind. Code § 3-12-1-13; *Horseman v. Keller*, 841 N.E.2d 164 (Ind. 2006). But, the *Quo Warranto* Complaint raises the substantial and unanswered question as to whether this mistake by election officials in the distribution of ballots, which resulted in these nineteen (19) voters being disenfranchised, caused the candidate with the support of fewer eligible voters to be seated as mayor of Muncie, depriving the majority of voters of their chosen candidate.

There can be no question that if this case had been permitted to proceed under the contest statute, this error would be redressed by the remedy of a special election in

Precinct 46. *Gaddis v. McCullough*, 827 N.E.2d 66, 69 (Ind. Ct. App. 2005), *trans. denied* (remedy in contest proceeding is special election). The contest statute provides, in pertinent part: “If the court finds that: (1) a mistake in the printing or distribution of ballots used in the election . . . makes it impossible to determine which candidate received the highest number of votes, the court shall order that a special election be conducted” in the “precincts identified in the petition.” Ind. Code § 3-12-8-17(d) and (e).

The failure of an election official to properly initial an absentee ballot distributed to a voter is a “mistake” in the “distribution of ballots used in the election,” under the plain language of the statute.³ The same principle applies in a *quo warranto* action. *See State ex rel. Brown v. St. Joseph Circuit Court*, 229 Ind. 72, 95 N.E.2d 632, 634 (1950) (questions of fraud and illegal ballots are for election contests and *quo warranto* proceedings); *State ex rel. Bodine v. Elkhart County Election Bd.*, 466 N.E.2d 773, 776 (Ind. Ct. App. 1984), *trans. denied* (same); *Taylor v. Burton*, 157 Ind.App. 267, 299 N.E.2d 848, 852 (1973) (challenge claiming that ballots were not protected by election officials must be brought pursuant to contest action or *quo warranto*). Even prior to enactment of the contest statute, the Supreme Court recognized that improper preparation and distribution of ballots rendered an election invalid and voidable. *Current v. Luther*, 164 Ind. 252, 72 N.E. 556, 558 (1904). Our courts are loath to permit a mistake by election officials to disenfranchise the people, for “[q]uestions affecting the purity of

³ Ind. Code § 3-11-4-19(a) requires two election officials to place their initials on an absentee ballot prior to mailing it to the voter.

election are, in this country, of vital importance. Upon them hangs the experiment of self-government." *Parvin v. Wimberg*, 130 Ind. 561, 30 N.E. 790, 792 (1892). "Ignorance, inadvertance, mistake, or even intentional wrong, on the part of local officials, should not be permitted to disenfranchise the district." *Parvin*, 30 N.E. at 792.

In dismissing the *Quo Warranto* Complaint, the trial court further relied on the Supreme Court's holding in *Pabey* that the phrase "votes cast in the election" used in Ind. Code § 3-12-8-2(5) and 3-12-8-6(a)(3)(E), refers to the votes "legally" cast in the election. *Pabey*, 816 N.E.2d at 1149. The trial court appears to have concluded from this that Mansfield cannot demonstrate that it is impossible to show who received the highest number of "legal" votes, because the nineteen (19) absentee ballots were not "legal" votes. (App. 12-13). The Court in *Pabey* was not construing the portions of the contest statute relating to mistakes in the distribution of ballots or the malfunction of election equipment, Ind. Code §§ 3-12-8-2 (2)-(4) and 3-12-8-6(a)(3)(B)-(D), but rather was dealing with the subsection addressing vote fraud. This is a significant distinction. *Pabey*, 816 N.E.2d at 1150 (fraudulent conduct ground stands in "stark contrast" to the first three grounds, which "encompass inadvertent human error or device malfunction"). Unlike the winning candidate in *Pabey*, who was seeking to avoid a special election even though his victory had been procured in large part through absentee ballot fraud, Mansfield is not seeking to have fraudulent votes counted, or even considered, in deciding whether the election results were sufficiently in doubt to require a special election. To the contrary, Mansfield is

contending that outcome determinative mistakes by election officials that have resulted in the disenfranchisement of a substantial number of *legitimate* voters should warrant a special election in the affected precincts.

This mistake in the distribution of ballots made it impossible to determine which candidate received the highest number of votes. By causing the invalidation of nineteen (19) absentee ballots, the result of the election changed, and this is "enough to warrant relief" as the number of invalid votes exceeded the margin of victory. *Id.* at 1150, n.4. Whereas Mansfield prevailed on election day, after the recount, he was deemed to have lost by thirteen (13) votes, all as a direct result of having lost eighteen (18) votes from this single mistake. The error raises a significant question as to whether the will of the people of Muncie has been thwarted, and the way to remedy this error is to permit the voters in the affected precinct to vote again through a special election, the remedy expressly provided for by the General Assembly. Ind. Code § 3-12-8-17. Even though this is the statutory remedy, the courts have the "inherent power" through a *quo warranto* action to protect the voters in the face of this mistake.

Finally, the Supreme Court has indicated an intent to make the remedy of *quo warranto* available to candidates like Mansfield who have been denied access to the contest statute in order to avoid the constitutional questions that necessarily arise through denial of equal access to the courts. In *State ex rel. McCormick v. Superior Court of Knox County*, 229 Ind. 118, 95 N.E.2d 829 (1951), the Supreme Court held that the remedy of

quo warranto was available to a candidate in the position of Mansfield – who was the initial winner of an election, but who lost following a recount – and as such, the Open Courts clause of the Indiana Constitution, Article 1, Section 12, had not been violated by the fact that the candidate lacked standing to file a contest action. *State ex rel. McCormick*, 95 N.E.2d at 832; *see also, State ex rel. Locks v. Peak*, 238 Ind. 468, 151 N.E.2d 809 (1958). Of course, this is consistent with the ordinary principal that courts avoid deciding constitutional questions if a non-constitutional claim is dispositive. *Nagy v. Evansville-Vanderburgh School Corp.*, 870 N.E.2d 12, 21 (Ind. Ct. App. 2007); *see also, State v. Pollard*, 886 N.E.2d 69, 71 (Ind. Ct. App. 2008) (statutes should be interpreted to avoid constitutional issues).

2. **Trial Rule 9(B) is not applicable to the type of mistake alleged in the *Quo Warranto* Complaint, and even if it were, the allegations were sufficiently pled.**

The trial court also dismissed the *Quo Warranto* Complaint based upon Ind. Trial Rule 9(B), which provides that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be specifically averred.” Although the trial court focused on the allegation of the complaint suggesting that the failure to distribute the ballots may have been done “knowingly, or intentionally and fraudulently” (App. 13-14), the primary allegation of the complaint was and always has been that a mistake was made. (App. 19, 47; Contest Petition ¶ 4; *Quo Warranto* Complaint ¶ 7). A mistake in the distribution of these absentee ballots is the minimum conclusion that one can draw from

the failure of the election official to include initials on them.

The rationale for requiring allegations of mistake to be pled with specificity “is a mystery,” see *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683 (7th Cir. 1992) (referring to Fed. R. Civ. P. 9(b)), and very few reported decisions in either the federal courts or Indiana have dismissed a complaint for failing to plead mistake with specificity.⁴ *Id.* As to the requirement that fraud be plead with specificity, the reasons are more certain, among them a need to safeguard defendants from “lightly made claims” involving moral turpitude, avoiding suits filed solely for their nuisance value, and providing defendants with sufficient information to enable them to prepare a defense. 5A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1296 (3rd Ed. 2004). These considerations are inapplicable here, and there is no reason to believe that the ballot distribution mistake alleged here fits within the pleading requirements of Ind. Trial Rule 9(B).⁵

Moreover, no reported decisions from Indiana courts indicate that a contest petition or an action in *quo warranto* has ever been dismissed on the basis of a lack of specificity in allegations of mistake or fraud in the petition itself. This is understandable given that the statutory language of the contest statute requires that a candidate plead nothing more

⁴ The Seventh Circuit has questioned whether the “mistake” portion of the Rule 9(b) is a “dead letter,” a question it left for another day. *Id.*

⁵ It is worth noting that McShurley never claimed that the *Quo Warranto* Complaint should be dismissed on the basis of Ind. Trial Rule 9(B); the trial court invoked this basis *sua sponte*.

than the precinct in which “a mistake was made in the printing or distribution of ballots” or in which “a mistake occurred in the programming of an electronic voting system.” Ind. Code § 3-12-8-6 (a) and (b). Even where there are allegations of fraud, the candidate need only identify the precinct or location of the fraudulent acts “to the extent known to the petitioner.” Ind. Code § 3-12-8-6(c).

Even if Ind. Trial Rule 9(B) were applicable here, a leading authority on the Federal Rules of Civil Procedure indicates that “a well-pleaded claim grounded on mistake should include averments of what was intended, what was done, and how the mistake came to be made.” 5A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1299. The *Quo Warranto* Complaint makes reference to each of these issues. The nineteen (19) absentee ballots should have included the initials of the Republican-appointed election official – this is what was intended. The ballots did not include the initials – this is what was done. And, the mistake came to be made when the election official did not include his or her initials on the ballot. All of this occurred in connection with the ballots in Precinct 46. (App. 47; *Quo Warranto* Complaint ¶¶ 6-9). The complaint was sufficiently pleaded, and the trial court erred by dismissing the *Quo Warranto* Complaint on this basis.

D. Denying Mansfield access to a remedy under both the contest statute and the common law right of *quo warranto* violates the Open Courts Clause and the Privileges and Immunities Clause of the Indiana Constitution.

1. The Open Courts Clause, Article 1, Section 12.

In denying Mansfield a remedy through either a contest or *quo warranto* action,

Mansfield has been deprived of his right to access the courts, as protected by the Open Courts Clause of the Indiana Constitution, Article 1, Section 12.⁶ The Supreme Court recently discussed this clause at length in *Smith v. Indiana Dept. of Correction*, 883 N.E.2d 802 (Ind. 2008), in which it held unconstitutional Indiana’s Three Strikes Law, which denied prisoners who had filed three frivolous lawsuits further access to courts. In *Smith*, the Court stated, “[t]he right to petition the courts is absolute,” and that the provision stating that “remedy by due course of law” is available to all means, “at a minimum, that to the extent the law provides a remedy for a wrong, the courts are available and accessible to grant relief.” *Id.* at 806-07. To the extent the substantive law recognizes an actionable wrong, the General Assembly may not deny access to the courts for the purpose of redressing the wrong. *Id.* Although the legislature may impose restrictions on the right; any “regulation which would virtually deny our citizens the right to resort to this court would necessarily be unreasonable.” *Id.* (quoting *Square D Co. v. O’Neal*, 225 Ind. 49, 72 N.E.2d 654, 657 (1947)).

A facially constitutional law may be unconstitutional as applied to a particular plaintiff. *Martin v. Richey*, 711 N.E.2d 1273, 1279 (Ind. 1999). In *Martin*, the Supreme Court held that the two-year medical malpractice statute of limitations violates the Open

⁶ The Open Courts Clause provides that: “All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have a remedy by due course of law. Justice shall be administered freely, and without purchase; completely and without denial; speedily, and without delay.”

Courts Clause as applied to a plaintiff who is unable to discover the alleged malpractice of her physician prior to the running of the statute. *Id.* The Court reasoned that if Article 1, Section 12 has “any meaning at all” it must preclude application of the statute to a plaintiff “who has no meaningful opportunity to file an otherwise valid tort claim within the specified statutory period.” *Id.* at 1284. Such a statute would impose an “impossible condition” on a plaintiff’s access to the courts. *Id.*; see also, *City of Fort Wayne v. Cameron*, 267 Ind. 329, 370 N.E.2d 338, 340-41 (1979) (statute requiring claimant to file notice of tort claim within 60 days violated Open Courts Clause as applied to claimant who was mentally and physically incapacitated during this period).

Here, Mansfield has been denied a remedy through application of the requirement that a contest action be filed within fourteen (14) days of the election day, which under the facts of this case imposed an “impossible condition” on his access to the courts. Mansfield had no way of learning that there had been a mistake in the distribution of ballots prior to initiation of the recount, on November 26. During the period between election day until some time after November 26, the ballots at issue were either under seal or impounded, unavailable for review. Thus, Mansfield did not know, and could not have found out, that the nineteen (19) ballots lacked a set of initials that would render them void.

Standing alone, the trial court’s dismissal of the Contest Petition as untimely might not have been unconstitutional, under the authority of *State ex rel. McCormick*, 95 N.E.2d at 832. But the trial court went further and also denied Mansfield a remedy *via quo*

warranto. The denial of a remedy through the contest statute was acceptable in *State ex rel. McCormick* only because the concurrent remedy of *quo warranto* was available to the losing candidate. *Id.* Denying Mansfield access to both the contest statute and *quo warranto* has deprived him of the ability to obtain redress of the wrong arising from the blatant mistake of an election official. As such, the time limitation contained in the contest statute at Ind. Code § 3-12-8-5 is unconstitutional under Article 1, Section 12 as applied to Mansfield. Mansfield should have been given a reasonable period of time following the conclusion of the recount to file a petition for a contest, in accord with the decisions of *Martin* and *City of Fort Wayne*.

2. The Privileges and Immunities Clause, Article 1, Section 23.

The Privileges and Immunities Clause of the Indiana Constitution, Article 1, Section 23, provides that: “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” Article 1, Section 23 has been interpreted to impose two requirements upon statutes that grant unequal privileges and immunities to differing classes of people:

First, the disparate treatment accorded by the legislature must be reasonably related to the inherent characteristics that distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.

Manigault v. State, 881 N.E.2d 679, 689 (Ind. Ct. App. 2008); *see also, Collins v. Day*, 644 N.E.2d 72, 80 (1994). In determining whether a statute violates this provision, courts must exercise substantial deference to legislative discretion. *Id.*

The General Assembly has enacted a contest statute that, as interpreted by the trial court, denies candidates like Mansfield – who have initially been declared the winner, but who lose following a recount – the same right to access the statute as the candidate who has initially lost the election. The losing candidate, unlike the winning candidate, has standing under Ind. Code § 3-12-8-1(b) to file the contest action during the fourteen (14) day window provided by Ind. Code § 3-12-8-5.⁷

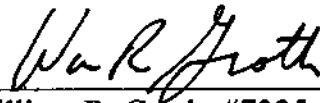
There is no rational reason for depriving candidates like Mansfield of this remedy, as there are no inherent characteristics that distinguish the candidate who has initially won the election from the candidate who has initially lost the election. Fraud, mistakes by election officials, equipment malfunctions, and ballot errors equally affect all candidates, and all should have the right to file a contest petition to address such matters. Application of the contest statute to deprive candidates like Mansfield of this remedy violates Article 1, Section 23. *See Martin v. Richey*, 711 N.E.2d at 1279 (holding that the two-year medical malpractice statute of limitations violated Article 1, Section 23 as applied to the plaintiff because it was not uniformly applicable to plaintiffs with a disease that had a long latency period).

⁷ The contest statutes formerly provided an open window following completion of the recount to file a contest petition, but this open period was eliminated in 1986 when the contest statute was recodified. The open period was enacted immediately following the Supreme Court's decision in *State ex rel. McCormick*. *See State ex rel. Locks v. Peak*, 238 Ind. 468, 151 N.E.2d 809 (1958) (quoting 1951 Ind. Acts, Chapter 87). The open period permitted a candidate who had initially won the election, but lost after a recount, a period of ten (10) days following issuance of the recount certificate to file a contest action.

CONCLUSION

The Appellant, Jim Mansfield, respectfully requests that the Court reverse the trial court's dismissal of the Verified Petition for Contest and/or reverse its dismissal of the Amended Information and Complaint in *Quo Warranto*, and that the Court remand this case to the trial court with directions to promptly order a special election in precinct 46.

Respectfully submitted,



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STATE OF INDIANA
COUNTY OF DELAWARE, SS:

IN THE DELAWARE CIRCUIT COURT NO. 5
CASE NO. 18C05-0712-MI-150

IN RE THE ELECTION 2007
CITY OF MUNCIE MAYOR ELECTION

JIM MANSFIELD,

v.

SHARON MCSHURLEY,
DELAWARE COUNTY, INDIANA
ELECTION BOARD

State ex rel. JIM MANSFIELD

v.

SHARON MCSHURLEY

**ORDER DISMISSING RELATOR'S AMENDED
INFORMATION AND COMPLAINT
IN QUO WARRANTO**

Relator, Jim Mansfield, filed his Amended Information And Complaint In Quo Warranto on February 13, 2008. Sharon McShirley filed her Motion To Dismiss Amended Information And Complaint In Quo Warranto on March 4, 2008.

The Relator, Jim Mansfield, has alleged, in pertinent part, in his Amended Information And Complaint In Quo Warranto:

1. That James Mansfield ("Mansfield") was the Democratic candidate for the Office of Mayor of Muncie, Indiana in the general election held in Delaware County, Indiana on November 6, 2007 ("the election") and was issued a certificate of election to that office on November 23, 2007. . .

2. Sharon McShurley ("McShurley") was the Republican candidate for Mayor of the City of Muncie.

...

4. That a recount proceeding was filed in the Delaware County Circuit Court No. 3 on November 26, 2007 and a recount was conducted and concluded on

December 20, 2007.

...

6. That during the recount, in addressing Delaware County precinct 46, it was discovered that nineteen (19) absentee ballots were distributed to voters without the initials of a Republican appointed member of the election board or their designated representative in violation of I.C. 3-11-4-19.
7. That the nineteen ballots distributed to absentee voters in precinct 46 were either distributed by mistake or were knowingly or intentionally and fraudulently distributed without proper initials.
8. Though no fault of the voters in precinct 46, the nineteen (19) ballots in precinct 46 were not counted by the recount commission by action taken on December 19, 2007, resulting in the loss of 18 votes for Mansfield and the loss of 1 vote for McShurley.
9. That due to the reduction in vote totals in precinct 46, McShurley was declared the winner in the election recount by a margin of thirteen votes, despite the fact that Mansfield received the most votes cast by voters in the election.
10. Having received the most number of votes in the election, Mansfield is thus the rightful holder of the office of the Mayor of Muncie, Indiana.

The law does not favor motions to dismiss. Estate of Kitterman v. Pierson, 661 N.E.2d 1255 (Ind. Ct. App. 1996) *rehearing denied, transfer denied*. The facts alleged in the complaint must be taken as true and only where it appears that under no set of facts could the plaintiff be granted relief is dismissal of the complaint appropriate. Brenner v. Powers, 584 N.E.2d 569 (Ind. Ct. App. 1992) *rehearing denied, transfer denied*. The basic purpose of a motion to dismiss is to test the legal sufficiency of the complaint to state a redressable claim and, thus, a motion to dismiss is properly utilized to test the legal sufficiency of the complaint, or stated differently, to test the law of the claim, not the facts that support it. Anderson v. Anderson, 399 N.E.2d 391 (Ind. Ct. App. 1979).

A writ of *quo warranto* may be a vehicle to challenge an officeholder's right to office, even if there are also statutory remedies. State ex rel. Nicely v. Wildey, 209 Ind. 1, 197 N.E. 844 (1935). In Waymire v. Shay, 101 Ind. 36 (1885), the Indiana Supreme Court stated that an election is ultimately decided, not by the certificate of election, but by the ballots, and the eligible candidate who received the highest number is entitled to the office citing Dobyns v. Weadon, 50 Ind. 298 (1875). In the Dobyns case, the Indiana Supreme Court stated that the true *gravamen* of the case, whatever may be the ground of contest, is the "highest number of legal votes." In construing Indiana's Election Contest statutes, the Indiana Supreme Court

recently held that the word "votes" as used in the phrase "highest number of votes" as used in IC 3-12-8-2(5) and IC 3-12-8-6(a)(3)(E) means legal votes. Pabey v. Pastrick, 816 N.E.2d 1138 (Ind. 2004). As noted by Justice Boehm in his dissenting opinion in the Pabey case, the showing required in a *quo warranto* proceeding is essentially the same showing that the statute demands for an election contest: proof that Pabey (the person challenging the election results) received the greater number of legitimate votes. Pabey at 1156.

I.C. 3-12-1-13 provides that:

(a) This section applies only to absentee ballots.

(b) The whole ballot may not be counted unless the ballot is endorsed with the initials of:

- (1) the two (2) members of the absentee voter board in the office of the circuit court clerk under IC 3-11-4-19 or IC 3-11-10-26; or
- (2) the two (2) appointed members of the county election board (or their designated representatives) under IC 3-11-4-19.

The Indiana Supreme Court noted in Pabey v. Pastrick, 816 N.E.2d 1138 (Ind. 2004) that while election procedures are normally matters of legislative determination, the courts have inherent power to protect the sovereign people, and those who are candidates for office or claiming title to or rights in an office from fraud or unlawfulness.

The Realtor has alleged in his Amended Information And Complaint In Quo Warranto that the improperly initialed ballots in question distributed to precinct 46 were distributed by "mistake."

I.C. 3-12-1-13 clearly establishes that improperly initialed ballots may not be counted. An absentee ballot may not be recounted in situations where clerical error by an election officer rendered it invalid. Houseman v. Keller, 841 N.E.2d 164 (Ind. 2006). Consequently, the action of the recount commission in not counting the improperly initialed absentee ballots does not constitute unlawfulness. Furthermore, the Court does not find that an alleged "mistake" in distributing improperly initialed absentee ballots, as alleged by the Petitioner, presents a redressable claim, as matter of law, under the theory of *quo warranto* because to conclude otherwise would result in this Court ignoring the express statutory directive contained in IC 3-12-1-13 as well as the case law construing this statutory provision.


The Relator has also alleged, in the alternative, in his Amended Information And Complaint In Quo Warranto that the improperly initialed absentee ballots in question distributed to precinct 46 were distributed "knowingly or intentionally and fraudulently." (The Court would note that notwithstanding the Relator's assertion of fraud in his Amended Information, the Relator in his original Verified Petition For Election Contest only averred that a "mistake" was

made in the distribution of absentee ballots in question.) Sharon McShurley argues in her Motion To Dismiss that the Petitioner's Amended Information And Complaint In Quo Warranto does not give her notice of a plausible set of facts under which the Court could grant a special election as sought by the Petitioner. Ind. Trial Rule 9(B) provides that in all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be specifically averred. Malice, intent, knowledge, and other conditions may be averred generally. In order to allege fraud sufficiently, the pleadings must state the time, the place, the substance of the false representations, the facts misrepresented, and identification of what was procured by fraud. Abbott v. Bates, 670 N.E.2d 916 (Ind. Ct. App.1996) *rehearing denied*. A pleadings which fails to comply with the special requirements of T.R. 9(B) requiring that fraud be pled with particularity does not state a claim upon which relief can be granted. *Id.* The Relator in his Amended Information And Complaint In Quo Warranto has failed to aver who engaged in the alleged fraudulent conduct, when or where the fraudulent conduct occurred, or specifically how the failure to properly initial absentee ballots as required by IC 3-12-1-13 constituted a fraudulent act as opposed to a mistake or clerical error.

Consequently, notwithstanding the fact that motions to dismiss are disfavored in the law, the Court finds that the Petitioner's Amended Information And Complaint In Quo Warranto fails to state a claim upon which relief can be granted and should, therefore, be dismissed pursuant to Ind. Trial Rule 12(B)(6).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Amended Information And Complaint In Quo Warranto filed by Realtor, Jim Mansfield, is hereby dismissed.

Dated: MARCH 24, 2008




JOEL D. ROBERTS
SP. J., DELAWARE CIRCUIT COURT NO. 5

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was mailed to Mr. Quirk, Mr. Hunter, Mr. Brooks, Mr. Gilkison and the Delaware County, Indiana Election Board.

Dated: MAR 24 2008



CLERK/DELAWARE CIRCUIT COURT
Secretary

STATE OF INDIANA
COUNTY OF DELAWARE, SS:

IN THE DELAWARE CIRCUIT COURT NO. 5
CASE NO. 18C05-0712-MI-150

IN RE THE ELECTION 2007
CITY OF MUNCIE MAYOR ELECTION

JIM MANSFIELD,

v.

SHARON MCSHURLEY,
DELAWARE COUNTY, INDIANA
ELECTION BOARD.

**ORDER DISMISSING PETITIONER'S
VERIFIED PETITION FOR AN ELECTION CONTEST**

This case was called for hearing on January 30, 2008 on the Motion To Dismiss filed on behalf of Sharon McShurley on January 2, 2008, as amended on January 22, 2008, and the Responses thereto filed by the Petitioner on January 17, 2008 and January 28, 2008. Petitioner, Jim Mansfield, appeared by counsel, Michael P. Quirk and Joseph P. Hunter. Sharon McShurley appeared by counsel, David M. Brooks and Frank E. Gilkison. The Delaware County, Indiana Election Board did not appear. Following the hearing, the Court took this case under advisement.

For purposes of ruling on the pending Motion To Dismiss, the Court finds that the Petitioner filed a Verified Petition For An Election Contest on December 27, 2007. The Petitioner averred in his Petition that he was the Democrat candidate for the Mayor of Muncie, Indiana in the election held November 6, 2007 and that he desires to contest the election of Sharon McShurley to the office of Mayor of the City of Muncie. Although not specifically referenced in the Petitioner's Verified Petition For An Election Contest, it appears from the pleadings filed by the parties that the Petitioner was initially determined by the Delaware County Election Board to have received the majority of the votes cast in the election conducted on November 6, 2007 for the Office of Mayor of the City of Muncie, Indiana. Thereafter, Republican County Chairman, Kaye Whitehead, filed a timely Verified Petition For Recount in the Delaware Circuit Court No. 3. On December 20, 2007 the Recount Commission appointed by the Judge of the Delaware Circuit Court No. 3, filed its Certificate of Recount finding that Shirley McShurley had received the majority of the votes counted by the Recount Commission.

In the Motion To Dismiss, and Amended Motion To Dismiss, filed on behalf of Sharon McShurley, she has moved to dismiss the Petitioner's Verified Petition For An Election Contest pursuant to Ind. Trial Rule 12(B)(1) contending that the Delaware Circuit Court lacks jurisdiction over the subject matter of Petitioner's Verified Petition For An Election Contest and Ind. Trial

Rule 12(B)(6) contending that the Petitioner's Verified Petition For An Election Contest fails to state a claim upon which relief can be granted. The basic purpose of a T.R. 12(B)(6) motion to dismiss is to test the legal sufficiency of the complaint, or, stated differently, to test the law of the claim, not the facts that support it. Anderson v. Anderson, 399 N.E.3d 391 (Ind. App. 1979).

I.C. 3-12-8-5 provides that a candidate who desires to contest an election ... must file a verified petition with the circuit court clerk of the county that contains the greatest percentage of the population of the election district no later than noon fourteen (14) days after election day.

The procedure for an election contest is purely statutory, and one seeking relief under the statute must bring himself strictly within its terms. Slinkard v. Hunter, 209 Ind.475, 478, 199 N.E. 560, 562 (1936), citing Martin v. Schulte, 204 Ind. 431, 182 N.E. 703 (1932). The requirements imposed by statute, including the time for filing, are jurisdictional. Briles v. Wurtsbaugh, 530 N.E.2d 1187 (Ind. App. 1988) citing Bodine v. Hiler, 463 N.E.2d 539 (Ind. App. 1984) and Marra v. Clapp, 255 Ind. 97, 262 N.E.2d 630 (1970).

The Petitioner contends that because the Certificate of Recount issued by the Recount Commission in the proceedings initiated in the Delaware Circuit Court No. 3 was not issued until more than fourteen (14) days after election day, the strict application of the filing requirements of I.C. 3-12-8-5 effectively precludes the Petitioner from pursuing a remedy under the election contest statutes. Nonetheless, it has been held that the concurrent remedy by information in the nature of *quo warranto*, as now codified at I.C. 34-17 1-1, does provide an adequate and complete review of the proceedings of a recount commission. McCormick v. Superior Court of Knox County, 229 Ind. 118, 95 N.E.2d 829 (1951).

Every action has three jurisdictional elements: 1) jurisdiction of the subject matter; 2) jurisdiction of the person; and 3) jurisdiction of the particular case. Carroll County Rural Elec. Membership Corp. v. Indiana Dep't of State Revenue, 733 N.E.2d 44 (Ind. Tax Ct. 2000).

The only relevant inquiry in determining whether any court has subject matter jurisdiction is to ask whether the kind of claim which the plaintiff advances falls within the general scope of the authority conferred upon such court by constitution or by statute. State ex rel. Young v. Noble Circuit Court, 263 Ind. 353, 332 N.E.2d 99 (1975). Jurisdiction over the particular case refers to the right, authority, and power to hear and determine a specific case within the class of cases over which the court has subject matter jurisdiction. Carroll County, 733 N.E.2d at 50. The appropriate means for a party to challenge a court's jurisdiction over a particular case is a motion under T.R. 12(B)(6). *Id.* at 50.


In the present case, the Court finds that the Delaware Circuit Court is a court of general jurisdiction. The Delaware Circuit Court No. 5 is one of the five divisions of the Delaware Circuit Court. I.C. 33-33-18-2. As stated earlier, I.C. 3-12-8-5 provides that a candidate who desires to contest an election must file a verified petition with the circuit court clerk of the county that contains the greatest percentage of the population of the election district. I.C. 3-12-8-8

provides that upon the filing of a petition for a contest, the circuit court clerk shall notify the circuit court judge. The circuit court judge is to then issue notice to be served on the contestee and all persons named in the petition to appear and answer the petition in the circuit court. The Court takes judicial notice that the City of Muncie is situated in Delaware County, Indiana. The Court finds that the Delaware Circuit Court has subject matter jurisdiction over an election contest filed under I.C. 3-12-8-1 *et seq* in that the claim advanced by a Petitioner under I.C. 3-12-8-1 *et seq* is within the general scope of authority conferred upon the Court. Consequently, the Court finds that it has subject matter jurisdiction over the Petitioner's Verified Petition For An Election Contest. The Motion of Sharon McShurley to dismiss the Petitioner's Verified Petition For An Election Contest under T.R. 12(B)(1) should, therefore, be denied.

As noted earlier, courts have consistently required strict compliance with the statutory requirements governing election contests in order to invoke the jurisdiction of the Court. (Although the Petitioner contends that the decision of the Indiana Supreme Court in Pabey v. Pastrick, 816 N.E. 2d 1138 (Ind. 2004) represents a relaxation of the line of cases cited herein requiring strict compliance with the statutory requirements governing an election contest, the Court finds that one of the two principal issues decided in the Pabey case, and in State ex rel. Arredondo v. Lake Circuit Court, 271 Ind. 176, 391 N.E.2d 597 (1979) cited as precedent in the Pabey case, was whether the failure of the trial court to hold a hearing within the statutorily prescribed time period divested the trial court of jurisdiction over the election contest proceedings.) State ex rel. Young v. Noble Circuit Court, 263 Ind. 353, 332 N.E.2d 99 (1975) involved a timely filed election recount petition where the caption of the petition failed to name each of the contestees as party defendants as required by the then existing statutes governing election recounts. The Indiana Supreme Court concluded the contestor's petition in that case for recount was not subject to dismissal for lack of subject matter jurisdiction and thereby overruled that portion of its prior decision in Marra v. Clapp, 255 Ind. 97, 262 N.E.2d 630 (1970) in which under similar circumstances the Indiana Supreme Court had concluded that dismissal for lack of subject matter jurisdiction was required. The Indiana Supreme Court in State ex rel. Young went on to conclude, consistent with the result in the Marra case, that while the defective petition for an election contest was not subject to dismissal due lack of subject matter jurisdiction, it was, nonetheless, subject to dismissal due to the failure of the petition to state a claim upon which relief can be granted pursuant to T.R. 12(B)(6). The Court finds that it lacks jurisdiction over this particular case due the Petitioner's failure to initiate these election contest proceedings within fourteen (14) days after the election day. Relying on the guidance provided by State ex rel. Young v. Noble Circuit Court, 263 Ind. 353, 332 N.E.2d 99 (1975) and Carroll County Rural Elec. Membership Corp. v. Indiana Dep't of State Revenue, 733 N.E.2d 44 (Ind. Tax Ct. 2000), the Court finds that the Petitioner has failed to state a claim upon which relief granted and that the Petitioner's Verified Petition For An Election Contest should be dismissed pursuant to T.R. 12(B)(6).

IT IS THEREFORE ORDERED, ADJUDGED DECREED that the Petitioner's Verified Petition For An Election Contest be and hereby is dismissed for failure to state a claim upon which relief can be granted pursuant to T.R. 12(B)(6).

Dated: February 4, 2008




JOEL D. ROBERTS
SP. J., DELAWARE CIRCUIT COURT NO. 5

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was mailed to Mr. Quirk, Mr. Hunter, Mr. Brooks, Mr. Gilkison, Mr. Murphy and the Delaware County, Indiana Election Board.

Dated: FEB 04 2008

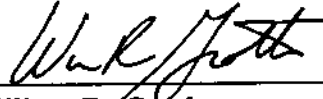


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William R. Groth

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served, via first class mail, postage prepaid, upon:

David M. Brooks
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Frank E. Gilkison
J. Philip Updike
BEASLEY & GILKISON
110 E. Charles Street
Muncie, IN 47305

on this 20th day of June, 2008.



William R. Groth

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