SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3178-21

IN THE MATTER OF THE SOUTH HUNTERDON REGIONAL SCHOOL DISTRICT PUBLIC QUESTION, STEPHEN BERGENFELD, individually and in his official capacity as a West Amwell Township Committeeman, JAMES CALLY, individually and in his official capacity as a West Amwell Township Committeeman, GARY HOYER, individually and in his official capacity as a West Amwell Township Committeeman, JOHN DALE, individually and in his official capacity as a West Amwell Township Committeeman, MICHAEL SPILLE, KRISTINA SPILLE, JENNIFER BATCHELLOR, EVAN BATCHELLOR, JENNIFER ANDREOLI, JESSICA FENNIMORE, JENNIFER BERGENFELD, ROBERT J. BALAAM, JR., CATHERINE URBANSKI, CHESTER URBANSKI, EDWARD ADAMS, MARILEE ADAMS, CRAIG READING, and SHARON BLACK,

Plaintiff-Appellants/
Cross-Respondents,

v.

HUNTERDON COUNTY BOARD
OF ELECTIONS, HUNTERDON
COUNTY CLERK, and SOUTH
HUNTERDON REGIONAL
SCHOOL DISTRICT,

Defendants-Respondents/
Cross-Appellants.

Submitted January 31, 2023 – Decided February 23, 2023

Before Judges Sumners, Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. L-0004-22.

King Moench & Collins, LLP, attorneys for appellants/cross-respondents (Matthew Moench, of counsel and on the brief; Michael Collins and Tiffany Tagarelli, on the briefs).

Jardim, Meisner & Susser, PC, attorneys for respondent/cross-appellant South Hunterdon Regional School District (Scott D. Salmon, of counsel and on the briefs).

American Civil Liberties Union Foundation, attorneys for amicus curiae American Civil Liberties Union of New Jersey (Liza Weisberg, on the brief).

PER CURIAM

In this appeal from an election contest, plaintiffs challenge the results of a public referendum approving the issuance of $33.4 million in bonds. Specifically, plaintiffs appeal the trial court findings, allowing five contested ballots which the Board of Elections counted. Plaintiffs also challenge a trial court order declining jurisdiction over alleged campaign finance violations and partially dismissing the amended complaint with prejudice. On cross-appeal, defendant South Hunterdon Regional School District (the District), joined by amicus the American Civil Liberties Union (ACLU), challenges the trial court findings disallowing two contested ballots which the Board of Elections[1] discounted.

Because we discern no error on the part of the trial court with respect to the ballots, we affirm the trial court rulings regarding all contested ballots. Additionally, we affirm dismissal with prejudice of counts I-D, II, and III of the amended complaint.

Our scope of review of final determinations made by a trial court sitting in non-jury cases is limited. Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J.

[1] The Board of Elections took no position at the trial level and takes no position on appeal.

150, 169 (2011). "We do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]" In re Trust Created by Agreement Dated Dec. 20, 1961, ex. rel. Johnson, 194 N.J. 276, 284 (2008) (quoting Rova Farms Resort, Inc. v. Invest. Ins. Co., 65 N.J. 474, 484 (1974)). "While we defer to the trial court's factual findings so long as they are supported by sufficient, credible evidence in the record, our review of the trial court's legal conclusions is de novo." 30 River Court E. Urban Renewal Co. v. Capograsso, 383 N.J. Super. 470, 476, (App. Div. 2006) (citing Rova Farms, 65 N.J. at 483-84).

I.

We discern the following facts from the record developed during the trial, motion practice, and the record before us on appeal. In April 2021, the District voted to place a public question onto the ballot in the November 2021 General Election. The question posed a "Yes" or "No" question to residents regarding a $33.4 million bond referendum. Plaintiffs alleged after the District voted to place the referendum on the ballot, individuals representing the District

misappropriated public funds in a concerted campaign to influence public opinion in support of the referendum.

Plaintiffs alleged the District retained Key Communicators Group, a public relations entity who was not a party to the trial proceedings or this appeal, to influence undecided voters through a series of targeted advertisements, including a postcard campaign, door to door canvassing, social media posts, and lawn sign deployments. Plaintiffs alleged the District did not provide neutral information about the referendum, but rather mobilized voters by providing limited information only in support of the referendum.

On December 27, 2021, plaintiffs filed a filed a three-count verified complaint in support of petition for election contest pursuant to N.J.S.A. 19:29-1. Count I asserted an election contest. Count II sought a declaratory judgment. Count III alleged violations of the New Jersey Civil Rights Act, N.J.S.A. 10:6-2. The election contest was based on the following allegations: illegal votes accepted as to fifteen specific voters; legal votes rejected as to one specific voter; illegal votes accepted as to one specific ballot; and illegal use of taxpayer monies by the District.

On January 27, 2022, following oral argument on the District's motion to dismiss, the trial court partially granted the District's motion to dismiss without

prejudice. On February 15, 2022, plaintiffs filed an amended complaint containing the same allegations, and adding a new claim alleging violations of the New Jersey Campaign Contributions and Expenditures Reporting Act (the Reporting Act), N.J.S.A. 19:44-1. On March 4, 2022, following oral argument on the District's second motion to dismiss, the trial court dismissed count I-D, along with counts II and III with prejudice. The trial court declined to exercise jurisdiction over plaintiffs' Reporting Act claims.

On May 10, 2022, trial commenced on the remaining election challenge counts, I-A, illegal votes accepted, I-B, one legal vote rejected,[2] and I-C, illegal vote accepted as to one vote-by-mail ballot.

The trial court heard arguments about a ballot which both parties refer to only as the "VBM"[3] ballot. The VBM ballot contained a shaded oval in favor of the referendum, a "Yes" vote, and was also marked with an "X" over the shaded "Yes" oval. Plaintiffs contested the validity of the VBM ballot, arguing the "X" indicated an intent to cancel the ballot. The District disagreed, arguing the plain text of N.J.S.A. 19:15-27 allows a voter to mark a ballot and indicate their vote with an "X," plus sign, or check mark.

---

[2] Not being appealed.

[3] Presumably, "vote-by-mail."

Relying on N.J.S.A. 19:15-27, which expressly permits such markings, and case law, In re Mallon, 232 N.J. Super. 249, 262 (App. Div. 1989) and In re Sadlon, 88 N.J. Super. 37, 40 (App. Div. 1965), disfavoring speculation as to the voter's intent and favoring liberal construction so as not to disenfranchise voters for technical reasons, the trial court determined the VBM ballot was properly counted.

The court also heard testimony from four individuals, Olivia Peluso, Jacob Mercer-Pontier, Aiden Joseph Donnelly, and Lisa Levine, whose ballots plaintiffs sought to invalidate based on domicile. The court made extensive factual findings about these individuals, upholding the BOE decision to count all four votes.

The court determined Peluso was a New Jersey resident. Despite graduating in 2020 from California Polytechnic State University, living in California, and signing a one-year lease in San Luis Obispo, it found Peluso made frequent repeated visits back to her home in Lambertville and spent considerable time there as well. Since 2016 she has always voted in New Jersey, her banking statements demonstrate her Lambertville billing address, and she pays New Jersey resident taxes and California non-resident taxes.

The court also found Mercer-Pontier is a New Jersey resident. Despite living in London for seven years, it found he files New Jersey tax returns, frequently comes back to New Jersey, has a New Jersey driver's license, and opened a bank account within the last year reflecting a New Jersey home address.

The court found Donnelly is domiciled in New Jersey, despite living in Boston temporarily while attending Berklee College of Music in 2020. The court found, similarly to Peluso, Donnelly is only temporarily out-of-state for collegiate purposes, but has never voted outside of New Jersey or as a Massachusetts resident.

Finally, the court found Rackin is a New Jersey resident. It found Rackin was a 2019 graduate of the University of Connecticut, and lived in Stockton, New Jersey during the summer and holidays during his schooling. After college, Rackin lived in Montreal for work, and came back to New Jersey in 2021 after getting laid off. Afterwards, Rackin signed a one-year lease in Manhattan when he obtained a new job in New York, and when his lease expired at the end of 2021, he moved to Peru and has not returned to New Jersey. Rackin's mother testified because he can work remotely at his new job, Rackin had been

traveling, but prior to accepting his current job, he had been living at her home in Stockton.

The court found each of the ballot contests for these four individuals failed because the individuals had sufficient contacts with New Jersey for domiciliary purposes.

The court also heard testimony from Jane and Paul Wolkenstein, whose ballots had been disqualified by the BOE for failure to timely update their address. The Wolkensteins testified they moved from Mountain Lakes in Morris County to Lambertville in Hunterdon County in August 2021. They further testified they attempted to change their address through the postal office when they moved to Lambertville but were not able to successfully change their address.

The court relied on Rutgers Univ. Student Assembly v. Middlesex Cnty. Bd. of Elections, 446 N.J. Super. 221 (App. Div. 2016) to disallow the Wolkenstein ballots. It compared N.J.S.A. 19:31-11, the advance registration requirement, with N.J.S.A. 19:31-6(b). Reading from In re Nov. 2, 2010, General Election for Off. of the Mayor in the Borough of S. Amboy, 423 N.J. Super. 190 (App. Div. 2011), the court found N.J.S.A. 19:31-11 controlling regarding advance voter registration and re-registration protocols. It found the

Wolkensteins plainly failed to abide by the registration and re-registration requirements after moving from Mountain Lakes to Lambertville.

II.

The trial court properly found a statutory basis to count the VBM ballot pursuant to N.J.S.A. 19:15-27. The statute provides:

> To vote upon the public questions printed on the ballot the voter shall indicate his choice by marking a cross x, plus + or check in ink or pencil in the square at the left of either the word "Yes" or "No" of each public question.
>
> [Ibid.]

In addition to this authority, we also note N.J.S.A. 19:16-4 provides:

> No ballot which shall have, either on its face or back, any mark, sign, erasure, designation or device whatsoever, other than is permitted by this Title, by which such ballot can be distinguished from another ballot, shall be declared null and void, unless the district board canvassing such ballots, or the county board, judge of the Superior Court or other judge or officer conducting the recount thereof, shall be satisfied that the placing of the mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish the ballot.

The VBM ballot bore two markings which were both lawful marks pursuant N.J.S.A. 19:15-27 and N.J.S.A. 19:16-4. Plaintiffs' contention the marks are ambiguous or evince an intent to cancel the vote lack merit. We are

satisfied the trial court reasoned, pursuant to the correct standard of law, the ballot was properly counted as it contained two legal markings consistent with any metric in Title Nineteen. The presence of the "X" over the shaded oval, absent some other marking evincing an intent to cancel the affirmative vote, was duplicative and the ballot properly counted.

Plaintiffs' election contests, alleging five illegal votes were counted, likewise fail. We note the following well-settled principles which guide our discussion:

> Free and fair elections are the foundation on which our democracy rests. The right to vote, and to have one's vote counted, is both cherished and fundamental to our way of life. We rely on our election laws and on the fair conduct of elections to ensure that the people may be heard through the ballot and that their will, as expressed through their votes, may be effectuated.
>
> [In re Contest of the Nov. 8, 2005 General Election for the Off. of Mayor of Twp. of Parsippany-Troy Hills, 192 N.J. 546, 549 (2007).]

Moreover,

> Courts do not have a roving commission to investigate, root out, and then remediate all election irregularities. Our role is to proceed vigilantly under the legislative mandate of Title Nineteen, no more and no less. If we perform that task, the public interest will be favored. Election laws "should not be construed so as to deprive voters of their franchise or so as to render an election void for technical reasons."

> [Nordstrom, 424 N.J. Super. at 105 (quoting Kilmurray v. Gilfert, 10 N.J. 435, 440 (1952)).]

We affirm the domiciliary rulings substantially for the reasons stated in the trial court's findings on the record. The trial court based its factual findings on testimony, and our review is therefore deferential. Rova Farms, 65 N.J. at 484. Voter residency is to be construed broadly and flexibly. In re Kriso, 276 N.J. Super. 337, 341 (App. Div. 1994). Pursuant to N.J.S.A. 19:4-1, "residence" is equated with "domicile," State v. Benny, 20 N.J. 238, 252 (1955), and the requirement of domicile is construed broadly and flexibly.

The trial court's findings and conclusions were supported by substantial evidence, including finding each person maintained sufficient contacts with their home state of New Jersey. In some instances that included maintaining home addresses as evidenced by bank statements and drivers' licenses, in others they returned to New Jersey annually or more frequently. In all cases, where the individual had sojourned, even where they expressed personal misgivings about their intent to remain in New Jersey in the future, their present permanent residence as reflected by the documentary evidence demonstrated a permanent New Jersey address.

The trial court also favorably considered the individuals' concern with local matters to vote in a school board election as further evidence of New Jersey roots. To the extent we have not addressed them here, plaintiffs' arguments on this point do not warrant further discussion. R. 2:11-3(e)(1)(A).

We next address the District and ACLU's contention the trial court improperly discounted the two Wolkenstein ballots. Relying on Friends of Jim Usry for Mayor Campaign v. Matthews for Mayor Campaign, 187 N.J. Super. 176 (App. Div. 1982), the District argues the Wolkenstein's ballots should be counted because they believed they had registered to vote in good faith. The District asserts the good faith reliance and mistake on the part of the Wolkensteins should not deprive them of their franchise to vote in this case, where they lived in the district on election day. The District does not frame the issue as a Constitutional challenge, but rather as one of a good faith mistake.

The ACLU advances a facial challenge to N.J.S.A. 19:31-11(a) to -11(c), alleging the statute disparately discriminates against voters who move intra-county as opposed to inter-county.

We note Friends of Jim Usry is inapposite, because the board of elections in that case allowed votes to be counted despite failures by residents to change their address as contemplated by N.J.S.A. 19:31-11. Thus, the issue in Friends

of Jim Usry was whether the trial court properly determined it should not expunge votes to disenfranchise voters. Friends of Jim Usry, 187 N.J. Super. at 179. Here, the trial court upheld the board of elections decision to not count the Wolkenstein ballots considering their failure to register pursuant to N.J.S.A. 19:31-6. The District and ACLU urge this court to ignore more recent and relevant holdings in Rutgers Univ. Student Assembly, 446 N.J. Super. at 236, and In re Nov. 2, 2010 Gen Election, 423 N.J. Super. 202-05, to credit the Wolkenstein votes. Doing so contravenes the advance registration and re-registration requirements of N.J.S.A. 19:31-6.

We need not reach the constitutionality arguments levied against N.J.S.A. 19:31-11, which we note has been amended since trial. Rather, we note the court made factual findings regarding the Wolkensteins' failure to re-register in a timely manner pursuant to N.J.S.A. 19:31-6. That procedure provides voters who move must update their registration at least twenty-one days prior to an election. New Jersey courts have held upheld this advance registration requirement as imposing a minimal, nondiscriminatory burden to ensure public confidence against voter fraud. See Rutgers Univ. Student Assembly, 446 N.J. Super. at 236. The trial court found the Wolkensteins attempted to update their

registration through the U.S. Postal Service when they moved, which is not a method currently sanctioned by our statutory framework, N.J.S.A. 19:31-6.

Finally, we address plaintiffs' challenge to the trial court decision declining to exercise jurisdiction to consider their Reporting Act grievances. "A trial court's determination of whether an agency has primary jurisdiction over a claim is not provided any deference on appeal." Nordstrom, 424 N.J. Super. at 96 (citing Smerling v. Harrah's Entm't, Inc., 389 N.J. Super. 181, 186, (App.Div.2006)).

Plaintiffs argue the trial court erred in dismissing count I-D of the amended verified complaint, alleging illegal expenditures, and electioneering to steer the electorate to a "Yes" vote. Plaintiffs revive on appeal their arguments to the trial court, namely the court may retain jurisdiction to hear Reporting Act violations through N.J.S.A. 19:29-1(h).

Plaintiffs rely on a narrow passage – taken out of context from Nordstrom – in support of this proposition. They highlight dicta from Nordstrom where the court noted "N.J.S.A. 19:29-1(h), broadly interpreted, might support the maintenance of an election contest on the basis of a Reporting Act violation . . . ." Nordstrom, 424 N.J. Super. at 97 (citing In re the Democratic Primary Election June 3, 2003, 367 N.J. Super. at 285).

Plaintiffs miss the rest of the cited passage in Nordstrom, which further observed "the better policy is to adjudicate the violation through the procedures the Legislature has expressed in the Reporting Act," and held "while ELEC has primary jurisdiction over excess contribution claims under the Reporting Act, it enjoys exclusive jurisdiction over alleged reporting violations . . . ." Ibid.

Moreover, as the trial court noted, plaintiffs failed to state with particularity what expenditures were made and the causal nexus between those expenditures and the outcome of the election. We observe the panel in Nordstrom also rejected the dicta plaintiffs rely upon, having been "persuaded" that "[ELEC] enjoys exclusive jurisdiction over alleged reporting act violations . . . ." such as the one plaintiffs presented here.

Plaintiffs also rely upon Citizens to Protect Public Funds v. Bd. of Educ., 13 N.J. 172 (1953) for the blanket proposition a school district may not use public funds to advocate only one side of a public question, without presenting the other side of the debate. Although plaintiffs attempted to cloak their Reporting Act allegations under the veil of a Title Nineteen election contest, we are satisfied the trial court correctly declined jurisdiction after applying the

appropriate analysis of the Muise[4] factors. We agree with the trial court's findings on the Muise factors and affirm the dismissal.

We add, Citizens to Protect, decided prior to the enactment of the Reporting Act in 1973, is readily distinguishable from the present facts and procedural posture. In Citizens to Protect, the trial court dismissed the complaint alleging a school district used public funds to advance one side of a debate on a referendum by paying for, printing, and circulating an eighteen-page booklet about the bond program. Id. at 175. In reversing the dismissal, our Supreme Court commented that in seventeen of eighteen pages in the booklet under attack, the literature "fairly present[ed] the facts as to need and the advantages and disadvantages of the program, including the tax effect of its cost," and remarked "if it stopped there, none could fairly complain that the reasonable expenditure made for its preparation and distribution was without the scope of the implied power." Id. at 180. However, because the exhortation to "Vote YES" was repeated three times in the brochure, the Court found the school

[4] Muise v. GPU, Inc., 332 N.J. Super. 140 (App. Div. 2000).

board did not fairly afford opportunity to the opponents of the proposition, and therefore afforded the dissenters "just cause for complaint." [5] Id. at 180-81.

The complainants in Citizen to Protect stated articulable facts about expenditures sufficient to survive dismissal in an era that predated the ELEC enabling act. See Citizens to Protect, 13 N.J. at 175 ("Some $358.85 of this appropriation was spent by defendant . . . ."); see also L. 1973, c. 83 ("An act . . . establishing an Election Law Enforcement Commission . . . .").

Unlike Citizens to Protect, part of the remedy sought by plaintiffs requires a finding of Reporting Act violations. The Reporting Act did not exist at the time Citizens to Protect was decided, and the statute has vested jurisdiction for such claims with ELEC. See In re Election Law Enf't Comm'n, Advisory Op. No. 01-2008, 201 N.J. 254, 261-62 (2010) ("The Election Law Enforcement Commission has been charged by the Legislature with enforcing the provisions of the [Reporting Act]. . . ."). The record supports the trial court's finding that plaintiffs did not state particular facts regarding expenditures and a causal

[5] Concurring in the judgement, Justice Heher commented on the majority's "arbitrary differentiation at variance with the realities and the essential content." Primarily, Justice Heher expressed concern that "presentation of facts" was in the implied power of the school board, but not "arguments to persuade the voters." Citizens to Protect, 13 N.J. at 184.

impact on the outcome of the referendum, and the trial court properly declined to exercise jurisdiction of plaintiffs' Reporting Act claims.

Because counts II and III sought declaratory judgment contingent on plaintiffs' count I-D alleged Reporting Act violations, we also affirm the dismissal of those counts.

Affirmed.