IN THE COURT OF APPEALS OF TENNESSEE

WAYNE LEE and C. EDDIE SHOFFNER	:	CLAIBORNE CHANCERY CA No. 03A01-9512-CH-00430
Plaintiffs-Appellants	:	
vs.	:	
ROBERT TUTTLE, JAMES K. LOOPE, ELEANOR Y. BREEDING, STEWART COLLINGSWORTH, BETTY MANNING, BILLY RAY CHEEK, and BRUCE SEAL	:	HON. BILLY J. WHITE CHANCELLOR
Defendants-Appellees	:	REVERSED AND REMANDED

MICHAEL G. HATMAKER, OF JACKSBORO, TENNESSEE, FOR APPELLANT WAYNE LEE

MARK C. TRAVIS, WITH WIMBERLY & LAWSON, OF MORRISTOWN, TENNESSEE, FOR APPELLANT C. EDDIE SHOFFNER

A. BENJAMIN STRAND, JR., WITH STRAND AND GODDARD, OF DANDRIDGE, TENNESSEE, FOR APPELLEES BILLY RAY CHEEK AND BRUCE SEAL

O P I N I O N

Sanders, Sp.J.

The Plaintiffs have appealed from a decree at the close of their proof dismissing their complaint in an election contest. We reverse and remand.

In a general election held in Claiborne County on August 4, 1994, the Plaintiff-Appellant, Wayne Lee, was a candidate for the office of circuit court clerk. The Defendant-Appellee, Billy Ray Cheek, was also a candidate for circuit court clerk and, according to the election returns, received approximately 79 more votes than Plaintiff Lee. In the same election, Plaintiff-Appellant C. Eddie Shoffner was a candidate for the office of sheriff of Claiborne County and Defendant-Appellee Bruce Seal was also a candidate for the office of sheriff of Claiborne County and, according to the election returns, received approximately 169 votes more than Plaintiff Shoffner.

Defendants-Appellees, Robert Tuttle, James K. Loope, Eleanor Y. Breeding, and Stewart Collingsworth were the election commissioners for Claiborne County and Defendant Betty Manning was registrar at large for the county.

On August 9, 1994, the Plaintiffs filed an election contest of the August 4 election in the chancery court for Claiborne County pursuant to T.C.A. § 2-17-101, et seq., against the Defendants named above. In their complaint, they alleged, in addition to the facts stated above, that in excess of 8,200 people cast ballots in the election and of this total more than 2,500 votes were cast on paper ballots by virtue of "early" or "absentee" voting. There was also a heavy write-in vote cast on paper ballots in addition to the "early" and "absentee" ballots. They alleged the counting of the paper

ballots occurred in the office of the election commission in the afternoon of August 4 and continued for some 30 hours until the afternoon of August 5, with personnel leaving the counting room to use the bathroom or stopping briefly to eat. The judges, registrars, and vote counters, suffered from mental fatigue, body fatigue, eye fatigue and loss of concentration and these circumstances cast doubt upon the accuracy, reliability, and credibility of the results in the contested races for circuit court clerk and sheriff. They alleged there was a large number of votes marked on the tally sheets which were arbitrarily added to or subtracted from in order to make all tally sheets reflect the same number of votes. They also alleged the judges arbitrarily and wrongfully voided ballots where an "X" was marked at the name of a candidate if his name was also written on the line designated for "write-in" votes. They alleged there was a power outage during the night at which time there were ballots on a table to be counted but it was unknown whether or not the ballots were ever counted. Plaintiffs also alleged there were discrepancies in the official records as to the number of votes cast in the election and those actually cast in the races for sheriff and circuit court clerk. They alleged an official record reflects 7,180 votes were cast in the election but the number of votes cast for the office of sheriff and circuit court clerk each exceeded that number.

As pertinent, the Plaintiffs asked the court to order a recount of the votes cast for the offices of circuit court clerk and sheriff in the August 4 general election and declare the one receiving the most votes for each respective office to be elected to that office.

Defendants Cheek and Seal, in their answer, as pertinent, denied the Plaintiffs were entitled to the relief they sought. They also, as an affirmative defense, said: "Plaintiffs have failed to set out the exact number of votes that are in dispute and therefore this cause of action must fail."

Defendants Loope, Breeding, Tuttle, Collingsworth, and Manning, for answer, generally denied the Plaintiffs were entitled to the relief they sought, but qualified their answer as follows: "The defendants aver they are not opposed to a recount of the ballots cast in the August 4, 1994 general election for the offices of Claiborne County Circuit Court Clerk and Claiborne County Sheriff with expenses paid by the plaintiffs. The defendants are agreeable with the recount due to the rumors, innuendo, allegations of fraud and misrepresentation alleged in the Complaint and in the community to clarify the results and tabulation."

Upon the trial of the case, the Plaintiffs called three witnesses who testified concerning the irregularities in the tallying of the votes counted and the rejection of certain types of ballots. Ms. Misty Cope testified she was one of the four registrars who tallied the votes as the judges called out the names of the candidates who received votes for the respective offices being voted on in the August 4 general election. She testified they started counting votes about two o'clock in the afternoon on August 4 and didn't finish until late in the afternoon on August 5. She testified the room in which they were working was very small, hot, smoke-filled, and uncomfortable. The conditions caused her eyes to burn and

gave her a headache. She wanted to leave but was under the impression it would invalidate the election if she did. Attached as Appendix "A" are excerpts of the pertinent parts of Ms. Cope's testimony. Based on objections by Defendants' counsel, Ms. Cope was not permitted to testify as to her estimation of the number of mistakes made (votes added to or subtracted from) in the tally sheets. The following question and answer, however, illustrate the tone of her testimony:

"Q. Ms. Cope, do you have any idea as to whether or not the tallies are correct?

"A. I would say they are incorrect. If they were to be re-counted I would say it would be a different total to ours as it stands."

Mr. Mayford (Rocky) Manning testified he served as one of the three judges in the election on August 4. He testified the working conditions where they were counting the ballots on August 4 and 5 were hot, crowded, smoky, and there was considerable dissension by some of the judges relating to the counting of the ballots. They were engaged in processing the ballots for some 30-odd hours, from about 9:30 a.m. on August 4 until about 5:30 p.m. on August 5. He testified that during the counting process one of the judges would call out the names of the candidates being voted for on each ballot to the registrars or ladies tallying the votes, while the other two judges observed the ballots being counted. He also testified that on any ballot where an "X" was marked in the box opposite the printed name of a candidate and if the candidate's name was also written on the line below the name, the ballot was "Rejected, thrown out, not counted." He testified he thought these votes should be counted. He

stated, "Well, if they [the voters] marked and they also wrote the same name in, that was clear to me. That was an attempt to vote for the same person." There were nine voting districts and it was Mr. Manning's estimate that Mr. Lee and Mr. Shoffner each had approximately 20 ballots rejected in each of the districts.

The record showed there was a power failure at about 4:00 a.m. on August 5 in the room where the ballots were being counted and at that time there were numerous ballots on the table to be counted. The power failure lasted approximately 45 minutes and Mr. Manning testified that after it was over he could not verify whether or not the ballots were counted.

Mr. Manning was queried at length on cross-examination as to his knowledge of who should have received the most votes. His testimony was he did not know the exact number of votes involved and he could not state with certainty who should have won or lost in the election.

Mr. J. Steve Brogan testified he was one of the three judges who worked in the counting of the ballots. His testimony was the same as Mr. Manning's concerning the rejection of ballots where the ballot was marked with an "X" opposite the candidate's name and if the candidate's name was also written in, the ballot would not be counted. He testified there was a disagreement among the judges as to whether or not such ballots should be counted. He said Mr. Rowee, one of the judges "that had worked in the election before said that, in the past, that that [ballot] constituted two votes" and that was why the ballots were rejected. He

testified the judges "didn't have anything to do with the tally sheets" and he had no knowledge of errors made in the tally sheets.

At the conclusion of Plaintiffs' proof, counsel for Defendants moved the court to dismiss the Plaintiffs' complaint. The basis of Defendants' motion was the holding of our supreme court in **Forbes v. Bell**, 816 S.W.2d 716 (Tenn.1991). In reliance on **Forbes**, the Defendants argued: "They [Plaintiffs] have got to be able to show the exact votes and that, essentially, those number [sic] of votes added to their result would be more than were cast for my clients. It has to be done with mathematical certainty." (Emphasis ours.)

The chancellor granted the motion and dismissed the complaint. In sustaining the motion, the court, as pertinent, said: "You're [Plaintiffs] not entitled to a re-count because the election is closed. .... The evidence is just not here to go to a re-count with the expectation that the result would be different. I think the results would be different but would not change the outcome." The court also said: "The burden in this case is that the court must be at least convinced by a preponderance of the evidence that, if re-counted, the outcome would be different. I, frankly, am not at all convinced of that, based on the evidence today."

The judgment which was entered states: "Plaintiffs had failed to establish a prima facie case by failing to show with any mathematical certainty that any irregularity in the election held on August 4, 1994, would have affected the outcome of the election."

The Plaintiffs have appealed, saying the court was in error. We must agree, and reverse for the reasons hereinafter stated.

We first consider the insistence of the Appellees and the holding of the chancellor that Plaintiffs in an election contest, seeking a recount of the ballots cast in order to determine which candidate received the most votes and is entitled to be declared the winner, are bound by the same rules as applied by the court in **Forbes v. Bell**, 816 S.W.2d 716. The Appellees' reliance on **Forbes** is misplaced. In the **Forbes** case, the court said, at 719:

> Under Tennessee law, there are two grounds upon which an election contest may be predicated. See generally **Southall v. Billings**, 213 Tenn. 280, 375 S.W.2d 844, 848 (1963). The contestant may assert that the election is valid and that if the outcome is properly determined by the court, it will be apparent that the contestant rather than the contestee actually won the election. The proper relief in this event is a judgment declaring the contestant to be the winner. Alternatively, the contestant may claim that the election was null and void for some valid reason or reasons. The proper relief in that case is to order a new election.

The case at bar falls into the first category of the two classes of cases. The Plaintiffs do not contest the validity of the election. They say the election was valid "and if the outcome is properly determined by the court [by a recount] it will be apparent that the contestant[s] rather than the contestee[s] actually won the election." In the **Forbes** case, the contestant fell into the second category in that she was claiming "the election was null and void for some valid reason or reasons" and contestant alleged she should be declared the winner of the election. The **Forbes** court said, at 719:

> In this case, Forbes has failed to make the allegations necessary to support a claim that she should be declared the winner. She states in her complaint only that "the wholesale disregard of the election laws of the State have resulted in irregularities which have rendered at least 300 absentee ballots in Hickman County and 561 absentee ballots in Williamson County illegal and that but for said irregularities that Forbes, and not the incumbent ("Bell"), is the winner."

The **Forbes** court quoted from **Shoaf v. Bringle**, 192 Tenn. 695, 241 S.W.2d 832 (1951):

> "In making these allegations it [is] necessary that the contestant specifically point out each and every vote that was fraudulently or illegally cast on behalf of the contestant and against him and that the total of these votes when taken from the contestee and added to him would give him a majority."
>
> **Shoaf**, 241 S.W.2d at 833. See also **Blackwood v. Hollingsworth**, 195 Tenn. 427, 260 S.W.2d 164, 166 (1953), in which this court, relying on **Shoaf v. Bringle**, noted that to sustain a claim of this sort, "the contestant must specifically point out the alleged illegal votes cast for the contestee."

Id. 719.

The case of **Blackwood v. Hollingsworth**, 195 Tenn. 427, 260 S.W.2d 164 (1953) cited by the **Forbes** court was an election contest similar to the case at bar, in which the contestant did not challenge the validity of the election, as in the **Forbes** case or **Shoaf v. Bringle**, supra, 241 S.W.2d 833. The contestant alleged a number of ballots cast for her had been counted for the contestee, as a result of which the contestee received a plurality of the votes. She alleged if the votes cast for her had been counted for her instead of the contestee, she would have been elected. She asked the court to determine who was elected to the office. The contestee, Blackwood, filed a demurrer in the county court on the grounds the allegations of the petition were not specific. The court sustained the demurrer and Miss Hollingsworth, the

contestant, appealed to the circuit court. The circuit court overruled the demurrer and on recount determined Miss Hollingsworth received the plurality of the votes and Blackwood appealed. The supreme court, upon sustaining the circuit court, distinguished **Blackwood** from the **Shoaf** case, saying:

> In considering whether the allegations of the petition were sufficient to withstand demurrer, this case must not be confused with one in which it is sought to overcome the official returns by alleging that illegal votes are included therein in a number sufficient to reverse the result when the official returns are purged of such votes. In that situation, as held in **Shoaf v. Bringle**, 192 Tenn. 695, 241 S.W.2d 832, the contestant must specifically point out the allegedly illegal votes cast for the contestee. Otherwise, there would be no basis upon which to determine for whom those illegal votes were cast. In the instant case the contest is based upon the allegation that more than several hundred legal votes cast for the contestant were fraudulently called by the election officials and credited to the contestee. Once a ballot is placed in the box there is no way of ascertaining the identity of the person who cast it. Therefore, to require the contestant to allege in her petition the identity of the voter whose ballot was fraudulently called for the contestee, though cast for contestant, would be to require of the contestant that which is impossible. But if the proof be sufficient to justify the Court in going behind the official returns and sufficient to conclude that an unauthorized approach to the ballots in the box has been sufficiently guarded against, then the recount of these ballots establishes the truth or falsity of the charge made as to miscalling ballots.
>
> Upon the hearing, if there be proof that ballots cast for the contestant in a particular precinct were called for contestee, or proof of other irregularities indicating the same result, the Court would be justified in going behind the returns and recounting the votes in that precinct, assuming likewise satisfactory proof that there had been no tampering with these ballots in the meantime. Such are the allegations of this petition. The demurrer was, therefore, properly overruled.

The next insistence of the Appellees is that since the passage of the Public Acts of 1972, Chapter 740, now codified at T.C.A. § 2-17-101, et seq., which repealed T.C.A. § 2-1901, et seq., our courts no longer have jurisdiction to order a recount in an election contest case and any case decided by our courts prior

to the 1972 statute relating to an election contest is no longer viable in such cases "because those statutory provisions [§ 2-17-101, et seq.] rewrote the common law and changed the remedies available in an election contest."

We cannot agree with Appellees' contention. A review of T.C.A. § 2-27-101, et seq., and 2-1901 reveals the only material changes in the two statutes relate to jurisdiction over cases, broadening the jurisdiction of the courts and clarifying standing to contest elections. T.C.A. § 2-17-112(a)(4) specifically sets out what the judgment in the case at bar should be if the Appellants prevail in their insistence. It provides as follows: "(4) Declaring a person duly elected if it appears that such person received or would have received the highest number of votes had the ballots intended for such person and illegally rejected been received."

Appellees also insist the court is prohibited from ordering a recount under the provisions of T.C.A. § 2-8-101(b). Again, we cannot agree. T.C.A. § 2-8-101(a) provides the election commission shall meet on the first Monday after the election to compare the returns on the tally sheets and certify the results. Paragraph (b) of the same section states: "The commission may not recount any paper ballots, including absentee ballots." Paragraph (c) provides a penalty for any commission which fails to timely certify the election by the deadline. The Appellees, in their brief, fail to show how the statute which states the election commission shall "compare the returns on the tally sheets" but shall "not recount the paper ballots" in certifying the election, has any bearing on the jurisdiction of the trial court to order a recount. We fail to see any merit in this contention. The

holding of our supreme court in the case of **Hatcher v. Bell**, 521 S.W.2d 799 (Tenn.1974), which involved an election contest addressing the jurisdiction of the court, speaking through Justice Cooper, said, at 801:

> The thrust of appellant's argument is that a suit, to be an election contest, must in some manner assail "the validity or integrity of the election process, and that the plaintiff make some claim to the office."
>
> There is no question but that a suit which attempts to go behind the election returns, to recount the votes or otherwise assail the manner and form of the election is an election contest. See **State v. Dunn**, 496 S.W.2d 480 (Tenn.1973); **State v. Sensing**, 188 Tenn. 684, 222 S.W.2d 13 (1949). But an election contest is not limited to an attack on the integrity of the election process, nor is it limited to an attack by a candidate who makes claim to the office.

The court further said, at 803:

> The election contest statute gives to the unsuccessful candidate the right to contest the validity of the election by suit filed within ten days of the election, without limitation to any specific ground or grounds of contest.

The Appellants, in their brief, state: "These defendants did have a real concern in regards to the manner in which the ballot boxes were protected." This was not an issue on the trial of the case and there is nothing in the record bearing on this issue. If appropriate, it may become an issue on remand but cannot be considered on this appeal.

The Appellees also argue in their complaint that the Plaintiffs asked for and received a restraining order enjoining the election commissioners from certifying the election. They further argue the complaint was therefore premature and should be dismissed. They also say the complaint is barred by the statute of limitations. We find this argument without foundation. T.C.A. § 2-17-105 provides: "The complaint contesting an election under

§ 2-17-101 shall be filed within ten (10) days after the elction." The election was held on August 4, 1994. The complaint was filed on August 9, well within the statutory period. Also, the question of the statute of limitations is raised for the first time on appeal, which cannot be done. **Hobson v. First State Bank**, 801 S.W.2d 807, 813 (Tenn.App.1990).

This brings us to the statement of the court in his memorandum opinion sustaining the motion to dismiss that he was not convinced by a preponderance of the evidence "that if re-counted, the outcome would be different." In considering this holding by the court we deem it appropriate to also consider the further holding of the court in his memorandum opinion in overruling the Plaintiffs' motion for a new trial and motion for reconsideration.

In his second memorandum opinion, the court repeated his statement in the first memorandum: "You're [Plaintiffs] not entitled to a recount because the election is closed." The court further said: "Obviously, the election probably would change a vote or two or ten or <u>two or three hundred</u> maybe. .... I have to be convinced by a preponderance of the evidence that the outcome would be different, and the evidence in this case did not meet that standard." (Emphasis ours.)

We find the chancellor was in error in holding the Plaintiffs were "not entitled to a recount because the election is closed." The court did not give the basis for his holding, nor have we found anything in the record to support such a holding. The election was held on August 4 and the voting poles closed that day. The Plaintiffs filed their complaint asking for a recount on August 9. T.C.A. § 2-17-105 provides the complaint contesting an

election shall be filed within ten (10) days after the election. The complaint was therefore timely filed.

Also, we cannot agree with the holding of the chancellor that the Plaintiffs failed to prove their case by a preponderance of the evidence. The Plaintiffs offered uncontradicted proof that when the votes were being counted the registrars, while tallying the votes, arbitrarily, on an indeterminate number of times, marked the tally sheets to show votes cast that in reality were not cast. They also, on an indeterminate number of times, arbitrarily failed to mark the tally sheets for votes that, in fact, were cast. The Plaintiffs also offered uncontested evidence the judges of the election rejected an undetermined number of ballots for both the contestants and the contestees where the voters properly marked the ballots with an "X" but had also written the candidate's name in the line below the name printed on the ballot. Generally, in election contest cases:

> If the contestant's proof tends to impeach the returns, the contestee must introduce evidence in rebuttal. Furthermore, where it is shown that at an election district there were irregularities committed that render the result doubtful, it is incumbent on the one who claims the benefit of the vote of that district to purge the illegal, from the legal, votes. If ballots have been rejected and the contestant or elector is interested in having them excluded, the burden of proof is on him to establish that they were properly rejected....

26 Am.Jur.2d, Elections, § 342 pp. 161, 162.

The proof of the contestants certainly tended to impeach the returns and the irregularities committed rendered the results doubtful. The contestants had therefore carried their burden of proof and the burden had shifted to the contestees, but instead of rebutting the proof, contestees moved for dismissal.

The decree of the trial court is reversed and the case is remanded for a trial on its merits. The cost of this appeal, together with the accrued cost in the trial court, is taxed to the Appellees.

_____
Clifford E. Sanders, Spec.J.

CONCUR:

_____
Herschel P. Franks, J.

_____
Don T. McMurray, J.

APPENDIX "A"

"Q. Now, as a registrar, if you would, describe to His Honor what a registrar does versus what a judge does, or was supposed to do, there.

"A. My job was to actually tally the votes. The judge told us who the vote had been cast for and we marked down who it was, tallied."

"Q. They would call it to the registrars? And then you would mark them on the tally sheets?

"A. Yes, that's right.

"Q. How many judges were there?

"A. Four, I believe.

"Q. How many registrars?

"A. Four.

"Q. Now, did you ever run into any problem or was there ever any occasion where when you were tallying it wouldn't match up with the other person doing the tallying?

"A. Yes.

"Q. And what would happen in those instances?

"A. Well, in the beginning, I think we made a couple of mistakes in the beginning. We went back and completely re-counted each ballot, to see where the mistake had been made. And then after the first several hundred ballots, we just attempted to, you know, figure out what had happened."

"Q. You said during the first part you would re-count?

"A. Yeah.

"Q. The judges would go re-count?

"A. Yeah. We went through each of the ballots. I mean, each ballot twice. We started over twice. And then after that, it was probably a hundred and fifty ballots or so that, you know, after the next mistake after that, we....

"Q. You stopped going back?

"A. Right. We didn't go back anymore.

"Q. And how many votes, or how many ballots would the judges call off before you would sit and verify your tallies?

"A. At each -- after five votes were cast we would each said [sic] 'tally'."

"Q. You talked a few minutes ago about when the tallies would not match up between you or some other registrar, could you provide us a little more detail on how you would reconcile that?

"A. We would just discuss between the persons who was [sic] tallying who had thought they had made the mistake, and we either added a vote or subtracted a vote.

"Q. Were there occasions that you or some other registrar would simply say 'I made a mistake' just in order to keep the count moving?

"A. Yes.

"Q. Did you do that?

"A. Yes."

"Q. Miss Cope, do you have any idea as to whether or not the tallies are correct?

"A. I would say they're incorrect. If they were to be re-counted I would say it would be a different total to ours, as it stands."

"Q. Can you state with certainty, Miss Cope, based on your experience over there, that Mr. Seal and Mr. Cheek were winners of their respective elections?

"A. I couldn't state with any certainty, no.

"Q. Could you say with any certainty whether or [sic] Mr. Lee and Mr. Shoffner --

"A. No.

"Q. -- were the winners of their respective elections?

"A. I couldn't say that either."

"Q. All right. ...[i]f a mistake was made, you would just agree and go on. Why did you not, at that time, make an objection to the procedure going on?

"A. Well, we'd been in there for thirty hours and I think we were all ready to leave. We could have re-counted each and every ballot again each time we made a mistake but, I mean, we could've been there two more weeks if we'd done that.

"Q. Could you take any one of these tally sheets, or the tally sheet itself, and show me, with any certainty, with certainty, the tallies there that were incorrect?

"A. No. Not by looking at the tallies, no."

"Q. ....

"A. I can't say with any certainty how many mistakes were made, but there were several mistakes, is all I can say.

"Q. And you cannot tell me where those mistakes were made in the race of Mr. Cheek, Mr. Lee over here, or Mr. Shoffner, and Mr. Seal's race?

"A. I can't say exactly where the mistakes were made but they were made in each of those races."

"Q. But you cannot say that a sufficient number of those mistakes would have changed the outcome of this election, can you?

"A. I don't know how many mistakes there were."