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**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2015-CA-000305-MR

CHARLES HARDIN, M.D.

APPELLANT

v. APPEAL FROM MAGOFFIN CIRCUIT COURT  
HONORABLE JOHN DAVID PRESTON, JUDGE  
ACTION NO. 14-CI-00371

JOHN MONTGOMERY;  
MAGOFFIN COUNTY BOARD OF ELECTIONS;  
RENEE ARNETT-SHEPHERD, MAGOFFIN  
COUNTY CLERK; CARSON MONTGOMERY;  
SUSIE SALYER, IN HER OFFICIAL CAPACITY  
AS MEMBER OF THE MAGOFFIN COUNTY  
BOARD OF ELECTIONS; AND JUSTIN WILLIAMS,  
IN HIS OFFICIAL CAPACITY AS  
MEMBER OF THE MAGOFFIN COUNTY  
BOARD OF ELECTIONS

APPELLEES

AND

NO. 2015-CA-000328-MR

MAGOFFIN COUNTY BOARD OF ELECTIONS;  
RENEE ARNETT SHEPHERD, MAGOFFIN  
COUNTY CLERK; CARSON MONTGOMERY;  
SUSIE SALYER, IN HER OFFICIAL CAPACITY  
AS MEMBER OF THE MAGOFFIN COUNTY



BEFORE: D. LAMBERT, MAZE, AND THOMPSON, JUDGES.

MAZE, JUDGE: This appeal and cross-appeals arise from an election contest filed by John Montgomery against Charles Hardin, M.D. and the Magoffin County Board of Elections and its members, Magoffin County Clerk Renee Arnett-Shepherd, Carson Montgomery, Susie Salyer, and Justin Williams in their official capacities (the Board) in relation to the 2014 general election for the office of Magoffin County Judge Executive. The trial court found the Board violated election laws and Hardin, or those at his direction, engaged in fraud and intimidation. It voided the election results and declared the office vacant. Hardin and the Board appeal arguing the election contest petition was fatally defective and there was no substantial evidence to support the trial court's conclusion that the election must be voided. Montgomery cross-appeals arguing the trial court erred when it declared the office vacant because it should have declared him the winner. We conclude that the trial court's factual findings were supported by substantial evidence and the applicable law, and that the trial court's remedy was appropriate in this case. Hence, we affirm in the appeal and the cross-appeals.

**I. Procedural History**

In 2014, Hardin, the incumbent Magoffin County Judge Executive, a Democrat, and Montgomery, a Republican, opposed each other in the general

election. Montgomery received 2,899 votes cast at the polls compared to Hardin's 2,490 votes. Hardin received 791 absentee votes, while Montgomery received 354. Thus, by obtaining more than 2-1 advantage in absentee ballots, Hardin was re-elected by a 28-vote margin based upon the total vote.

On December 4, 2014, Montgomery filed this election contest pursuant to KRS<sup>1</sup> 120.155. Montgomery alleged the Board violated the absentee voting statutes by providing absentee ballot applications to ineligible voters, counting ballots of a deceased voter, and various other irregularities and illegalities. Against Hardin, he asserted allegations of vote buying.

Hardin moved to dismiss the petition, or alternatively, that allegations of vote buying be dismissed on the basis that no particular improper voter was identified. The motion was denied and extensive discovery commenced. During the discovery process, it was revealed that the allegedly-deceased voter was alive at the time of the election. A bench trial was commenced on February 2, 2015, on the remaining allegations and concluded on February 8, 2015.

The trial court entered its findings of fact, conclusions of law, and judgment on February 19, 2015. The trial court found that there were significant violations of the Corrupt Practices Act, KRS 120.015, *et seq.* However, the court found insufficient evidence to conclude that these violations alone affected the outcome of the voting on Election Day. On the other hand, the trial court found significant deviations from the statutorily-required procedures regarding accepting

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<sup>1</sup> Kentucky Revised Statutes.

and counting absentee ballots. Based on the totality of the circumstances, the trial court found that the November 4, 2014, general election was the result of fraud, bribery, and misconduct, and that neither contestant could be judged to have been fairly elected. Consequently, the trial court found that the results of the election for Magoffin County Judge-Executive must be set aside and the office be deemed vacant. This appeal and cross-appeal followed.

## **II. Sufficiency of the Petition and Timeliness of Trial**

As an initial matter, we first address the sufficiency of the petition and the contention that the trial court did not timely set the contest for trial. There is no dispute that Montgomery timely filed his petition within thirty days of the election. KRS 120.155. However, the statute requires that the petition must “state the grounds of the contest relied on, and no other grounds shall afterwards be relied upon.” *Id.* Further, KRS 120.165(2) provides for an expedited procedure with the contestant completing proof within thirty days of the service of summons unless the court finds cause to grant a reasonable extension.

In *Hogg v. Caudill*, 254 Ky. 409, 71 S.W.2d 1020, 1021-22 (1934), the Court held that “where the ground was the casting of ineligible votes the pleader must name in his pleading the persons whose votes he questions and the ground upon which he bases his objection as well as the facts which rendered them ineligible[.]” However, in *Napier v. Nopolis*, 318 S.W.2d 875 (Ky. 1958), the Court clarified that the voter’s names are not required to be pled if the election is contested upon the ground of a violation of the Corrupt Practices Act or the attack

is upon an entire class of voters such as absentee voters. “Obviously, the names of individual voters are unimportant when an entire class of voters—absentee ballots in that case—was questioned or nullified because of the failure of county officials to comply with the law ... safeguarding the integrity of absentee voting.” *Id.* at 879. Here, a violation of the Corrupt Practices Act was alleged as well as the Board’s and election officials’ failure to comply with election laws regarding a class of voters. We conclude the trial court did not err in denying the motion to dismiss.

We also conclude the trial court did not err in permitting the parties additional time to conduct discovery. Montgomery advanced numerous allegations upon which he based his claims. Given the importance of the matter, we cannot fault the trial court for permitting additional discovery time. The goal of an expedited resolution cannot be attained at the expense of a result based on anything but a full and fair opportunity of the parties to present their case. Moreover, this case was tried in a fast-track fashion within two months after the election contest was filed. Consequently, we find no reason to set aside Montgomery’s challenge to the outcome of the election based upon the trial court’s grant of additional time.

### **III. Evidence of Election Misconduct**

We now turn to the substantive matters surrounding this election contest. The trial court heard evidence over four days from 37 witnesses. The trial court also reviewed the voter assistance forms, and the absentee ballot applications. The trial court extensively summarized the evidence in its findings of fact, and that

factual summary is not in dispute. Consequently, we will not repeat the details of that evidence except where relevant to the outcome of this appeal.

In cases which are tried without the intervention of a jury, the trial court's findings of fact should not be reversed unless they are determined to be clearly erroneous. In making such consideration the appellate court must keep in mind that the trial court had the opportunity to hear the evidence and observe the witnesses, so as to judge their credibility, and therefore, it is in the best position to make findings of fact. CR<sup>2</sup> 52.01. *See also Bealart v. Mitchell*, 585 S.W.2d 417, 418 (Ky. App. 1979). On the other hand, the trial court's conclusions of law are subject to *de novo* review. *McClendon v. Hodges*, 272 S.W.3d 188, 190 (Ky. 2008).

#### ***A. Conduct of Voting on Election Day***

Montgomery's challenge to the election focused on two general areas: violations of the Corrupt Practices Act during the in-person voting on Election Day; and irregularities involving the absentee vote. With regard to the former, the trial court heard allegations of vote buying and vote hauling. The Corrupt Practices Act was enacted to "preserve the purity of elections[.]" *Humbert v. Heyburn*, 240 Ky. 405, 42 S.W.2d 538, 541(1931). The Act prohibits any candidate from expending, paying, promising a thing of value "to any person in consideration of the vote or financial or moral support of that person." KRS 121.055. Successful candidates who engage in such conduct cannot reap the

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<sup>2</sup> Kentucky Rules of Civil Procedure.

benefit of their wrongdoing and, upon proper findings, a court may set aside the election. KRS 120.015.

In the current case, there was circumstantial evidence of at least four persons who appeared to have been paid for their votes. In addition, there was testimony concerning a long-standing practice of providing gravel and road work at county expense to supporters of the incumbent Judge-Executive.

The trial court found that gravel was placed illegally on private property on at least four or five occasions in a short period of time prior to the election. The court further found that the gravel was provided by employees of the Magoffin County Fiscal Court, acting under the direct supervision of Judge-Executive Hardin. Furthermore, the gravel and road work was provided specifically to persons who supported Hardin.

While the testimony on these matters was circumstantial and disputed, we find substantial evidence to support the trial court's conclusions that the violations occurred. However, the trial court did not address whether the vote buying or the provision of gravel directly influenced any votes or affected the outcome of the election. We conclude that the violations of the Corrupt Practices Act, standing alone, were not sufficient to set aside the election.

The trial court also heard evidence concerning irregularities in the conduct of voting at the Flat Fork precinct. Most notably, there was evidence that, on at least 12 occasions, the Democratic election judge provided assistance to voters without being asked and without the Republican judge being present for the



voting. In addition, a number of entries in the precinct roster did not include entries stating the type of identification provided by the voter, as required by KRS 117.227.

Montgomery's expert testified that the signatures of 43 voters at the Flat Fork precinct did not match the signatures of their voter registration cards. However, the Board's expert disputed this assessment. Finally, there was testimony that the election officials at the Flat Fork precinct may have improperly interfered with the observations by the Republican challenger and investigators from the Attorney General's office.

The trial court found that, while there were irregularities in the voting at the Flat Fork precinct, they were insufficient to cause the entirety of the vote in that precinct to be disregarded. We again find substantial evidence to support this conclusion. While the accusations of irregularities at the Flat Fork precinct are serious, there was insufficient proof to establish that they caused a significant effect on the outcome of the voting at that precinct.

### ***B. Absentee Voting***

The central issues in this case concerned the conduct of absentee voting and the counting of those absentee votes. The significance of the absentee voting in this case cannot be understated. Montgomery received approximately 54% of the machine vote, while Hardin received approximately 46%. There were 1,145 absentee votes cast in the County Judge Executive's race. The absentee vote represented 18% of the total vote. Hardin received 69% of the absentee vote, with

Montgomery receiving the remaining 31%. This substantial absentee margin turned the outcome of the election in Hardin's favor.

The total absentee vote in Magoffin County was greater than the combined absentee votes in neighboring Floyd and Pike Counties, even though each of those counties have substantially greater populations. Magoffin County also had more absentee votes than any other county in eastern Kentucky. The absentee vote totals in Magoffin County for the 2014 general election represented a substantial increase over the absentee vote totals for the 2012 general election, when the absentee vote represented only 5% of the total vote.

On the other hand, the absentee vote totals in Magoffin County for 2014 were consistent with those reported for prior off-year elections in 2010 and 2006. In addition, there was testimony that Magoffin County has many union members who work outside the county, thus possibly explaining the high number of absentee votes. Furthermore, there was testimony attributing the large voter turnout to strong interest in a number of races, the United States Senate race, the School Board race, the County Judge-Executive race and other county races, and a contested mayor's race in the city of Salyersville.

The trial court found that the number of absentee votes cast in Magoffin County in the election was abnormally high. The court indicated that the percentage of absentee votes cast in the County Judge-Executive race was so disproportionate to the machine vote as to cast suspicion on the integrity of the

absentee vote. Although the evidence on these points was conflicting, we find that the trial court's conclusions were supported by substantial evidence.

Nevertheless, we agree with the Board that the number and proportion of absentee votes do not justify invading the sanctity of the ballot box without other evidence of irregularities affecting those votes. At trial, the evidence focused on three areas of concern: Irregularities in the applications for absentee voting; irregularities in the conduct of in-house absentee voting prior to Election Day; and deviations from the statutory procedures for counting the absentee votes. We shall discuss the relevant evidence supporting the trial court's findings on each of these matters.

*1. Absentee Ballot Applications*

As previously noted, the trial court examined the absentee ballot applications. Of the 1,145 absentee ballot applications, 910, or 79% of them, left a blank field for the Social Security number of the voter. 463 of the applications, or 40% of them, left a blank field for the voter's telephone number. 354 of the applications, or 31%, did not state the place where the voter was planning to be on Election Day. Eight applications were missing the name of the person who made the request for an absentee ballot.

KRS 117.085(2) sets out the requirements for an absentee ballot application:

The clerk shall type the name of the voter permitted to vote by absentee ballot on the application form for that person's use and no other. The absentee ballot

application form shall be in the form prescribed by the State Board of Elections, shall bear the seal of the county clerk, and shall contain the following information: name, residential address, precinct, party affiliation, statement of the reason the person cannot vote in person on election day, statement of where the voter shall be on election day, statement of compliance with residency requirements for voting in the precinct, and the voter's mailing address for an absentee ballot. The form shall be verified and signed by the voter. A notice of the actual penalty provisions in KRS 117.995(2) and (5) shall be printed on the application.

The absentee ballot application form prescribed by the State Board of Elections includes fields for the applicant's Social Security number and telephone number. However, KRS 117.085(2) does not specifically require this information for a valid application. Furthermore, the Magoffin County Clerk testified that the State Board of Elections is phasing out these fields due to privacy concerns. The Social Security numbers and telephone numbers are important to confirm the identity of the absentee voter applicant. The information is also necessary to complete the form prescribed by the State Board of Elections. Nevertheless, the absence of this information alone does not warrant invalidating those applications.

On the other hand, the blank field for where the voter will be on Election Day raises a greater concern. Failure to provide this information ignores the plain requirement of our election laws. Moreover, KRS 117.085(2) specifically requires this information because it serves as the basis for exercising the privilege to vote absentee. Similarly, KRS 117.085(1) permits only the voter, or the spouse, parents, or children of the voter, to request an absentee voter application. The

failure to identify the person who requested the application makes it difficult to determine whether the application was provided to a proper party. The absence of this required information constitutes a serious deviation from the statutory procedures regarding applications for absentee ballots.

In addition, the trial court found that there were irregularities concerning 59 of the envelopes of the absentee ballot applications. Montgomery's expert also stated that seven signatures on the inner-envelope flap of the absentee ballot contained significant characteristic differences from the signatures on the corresponding absentee ballot application forms, and ten voter signatures on the absentee ballot application forms contained significant differences from their corresponding signatures on the mail-in absentee ballots. The Board's expert disputed this assessment.

As with the discrepancies in the precinct registers, the trial court could not find that any particular signatures on the absentee ballots were definitely forged. However, the trial court noted that these issues reflected on the overall compliance with the statutory procedures for accepting absentee ballot applications, and could be considered in determining the appropriate remedy. We shall address that conclusion later in this opinion.

## *2. In-House Absentee Voting*

The second matter concerns the conduct of the in-house absentee voting. In-house voting must be conducted in the county clerk's office or place designated by the Board and approved by the State Board at least twelve days

before the election. KRS 117.085(1)(c). The area in which votes are cast is to be of sufficient size and location to permit secret voting and the county clerk and staff are prohibited from providing voter assistance other than as provided for in KRS 117.255. 31 KAR<sup>3</sup> 4:040(4). KRS 117.085(1)(h) provides that members of the Board or its designees may serve as precinct officers for absentee voting but states that in their absence, “the county clerk or deputy county clerks shall supervise the absentee voting.”

On Friday, October 17, 2014, three days prior to the date when absentee in-house voting was to commence, the Republican member of the Board of Elections resigned. Nevertheless, absentee balloting commenced on Monday, October 20, 2014 without a Republican Board member. However, prior to the appointment of a Republican member, the other Board members were present as well as Deputy Clerk Larry Shepherd and Republican challenger, Garlena Workman. The Magoffin County Republican Party nominated Justin Williams to serve as the Republican member of the Board, and he was appointed on October 23. Williams began serving on October 24, 2014, and was present for absentee in-house voting the remainder of the time.

The trial court found that the Board violated KRS 117.085(1)(h) during the first three days of absentee in-house voting because a Republican member of the Board was not present. However, the statute does not require each member of the Board to be present, but states that, that in their absence, “the

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<sup>3</sup> Kentucky Administrative Regulations.

county clerk or deputy county clerks shall supervise the absentee voting.” There was testimony that the Deputy Clerk Larry Shepherd, Democratic election officer Susie Salyer, and Republican challenger Garelana Workman were present each day of in-house voting. County Clerk Shepherd, Republican member Williams, and Democratic challenger Jerry Helton were present for most of the rest of the in-house voting process. Given this evidence, we disagree with the trial court’s finding that the Board and the County Clerk amounted to a substantial violation of KRS 117.085(1)(h).

There was also testimony regarding the in-house voting process and absentee voter assistance. KRS 117.255(3) provides that:

Upon making and filing the oath with the precinct clerk, the voter requiring assistance shall retire to the voting machine or ballot completion area with the precinct judges, and one (1) of the judges shall, in the presence of the other judge and the voter, operate the machine or complete the ballot as the voter directs. A voter requiring assistance in voting may, if he prefers, be assisted by a person of his own choice who is not an election officer, except that the voter's employer, an agent of the voter's employer, or an officer or agent of the voter's union shall not assist a voter.

The trial court found that the County Clerk and the Board violated this section by allowing Larry Shepherd and Suzie Salyer to assist at least four voters with no other judge present. In addition, there was testimony that the directions of some of the voters requiring assistance could be heard outside of the ballot completion area. These violations were not so widespread as to invalidate the

entire process, but they do reflect on the overall compliance with the statutory procedures for absentee voting.

### 3. *Absentee Vote Counting*

And finally, the trial court found significant violations regarding the procedure for counting absentee ballots. KRS 117.087(3) provides that the counting of the ballots is to begin at 10 a.m. on Election Day. The mailed ballots are to be removed from their boxes individually and examined to determine whether the outer and the detachable flap are in order. *Id.* The signature on the detachable flap is then compared with that on the registration card. Unsigned ballots are rejected. *Id.* If there is no challenge after the name of the voter is read aloud, the flap is removed and the inner envelope placed in a ballot box. *Id.* Subsection 5 of the statute provides that after the inner envelope is placed in the box, “the box shall be thoroughly shaken to redistribute the absentee ballots in the box.” The ballots are removed, counted, and the total combined with the absentee ballots removed from the voting machine. *Id.*

The testimony established that the Board spread the absentee ballots on a table and organized them by precinct instead of removing them from the ballot box individually as required by KRS 117.087(3). Furthermore, Clerk Shepherd did not personally compare each outer envelope and detachable flap with the corresponding registration card. The ballots contained in a brown envelope inside a white envelope were removed and placed on the table. The white envelopes were arranged by precinct and the Board members compared the white



envelope signatures to the signatures on the voter registration cards and absentee voter applications. After signatures were matched, the group voted on any questioned ballots. Eleven ballots were rejected for various reasons. Three had mismatched signatures; others were missing signatures; and two voters died before the election.

After the white envelopes were opened, the inner brown envelopes were removed and placed in the center of the table and the white envelopes returned to the ballot box. The Board members each checked their pile of brown envelopes to make sure they were signed and then removed the flaps which contained the signatures. The brown envelopes and flaps were placed in separate piles before returning the flaps to the ballot box. The Board shuffled the brown envelopes together on the table. The brown envelopes were distributed among the Board members, who then opened them and placed them in piles. Each Board member handed their pile of ballots to the clerk who put them through a feeder for the voting machine to tabulate the result.

The trial court found that the Board violated the requirements of KRS 117.087 by failing to count the ballots one at a time, by distributing the ballots among the various officials present, and by failing to shake the box to redistribute the absentee ballots. The Board does not challenge the trial court's findings of fact and findings or conclusions of law on these points. Rather, the only issue concerns whether the totality of the evidence supported the trial court's decision to set aside the election.

#### IV. Sufficiency of the Evidence Showing Lack of Substantial Compliance

KRS 120.155 provides that a candidate receiving “not less than twenty-five percent (25%) of the number of votes cast for the successful candidate for the office, may contest the election of the successful candidate, by filing a petition in the Circuit Court where the contestee resides[.]” KRS 120.165(4) authorizes the Court to void the election “[i]f it appears from an inspection of the whole record that there has been such fraud, intimidation, bribery or violence in the conduct of the election that neither contestant nor contestee can be judged to have been fairly elected[.]” In such cases, the Court not only has the authority to void an election result but has the duty to do so where there are such “frauds and irregularities in the election that it cannot be told who was elected.” *Stewart v. Wurts*, 143 Ky. 39, 135 S.W. 434, 439 (1911).

However, when the voters have cast their ballots, the votes counted and the victor declared, the election is not “lightly set aside.” *Id.* The evidentiary bar is high for a successful election challenge. The contestant has the burden of proof to show misconduct to such an extent that it cannot be reasonably determined who was elected. *Skain v. Milward*, 138 Ky. 200, 127 S.W. 773, 778 (1910). Mere speculation or suspicion is not sufficient to meet this burden. *Stewart*, 135 S.W. at 439.

As previously noted, the trial court found substantial evidence regarding violations of the Corrupt Practices Act and other misconduct relating to the voting on Election Day. The evidence of vote buying and vote hauling is

particularly disturbing considering the history of such misconduct in Magoffin County. The Attorney General's office was monitoring the election based upon this history. Even though the evidence of vote buying was limited to a few particular instances, the open conduct of those instances suggests a far more pervasive practice.

Similarly, there was substantial evidence of irregularities during the voting on Election Day, particularly at the Flat Fork precinct. The officials at the precinct repeatedly failed to note what type of identification was provided by voters. The trial court also accepted Montgomery's proof showing significant discrepancies in the signatures of voters at the Flat Fork precinct. In addition, there were repeated violations of procedures for providing assistance to voters. And finally, an election official at the Flat Fork precinct actually attempted to intimidate the Republican observer and an investigator from the office of the Attorney General.

The practices outlined by the trial court are deeply disturbing and illustrate the precise reasons why the Corrupt Practices Act was adopted. Such conduct of an election is simply unacceptable. However, we agree with the trial court that Montgomery failed to show that this misconduct alone affected the outcome or the integrity of the election.

The problems with the absentee voting go far deeper. The abnormally high number and unusual proportion of absentee vote raise suspicions from the outset. The statutory violations involving the absentee voting process in Magoffin

County range from merely technical to significant. While the regulations and procedure prescribed in the absentee voting law should be followed by the officers, substantial compliance is sufficient if the proper ends are reached. *Jarboe v. Smith*, 350 S.W.2d 490, 492 (Ky. 1961). Taken separately, we might be inclined to find that the Board substantially complied with the statutory requirements. But viewed together, they present a highly troubling picture of the Board's non-compliance with the statutory process.

The most concerning matters involve the Clerk's violations of the statutory requirements for accepting absentee ballot applications. Most significantly, the Clerk failed to identify the person requesting the absentee ballot, as required by KRS 117.085(1), and the Clerk failed to require each applicant to state where he or she would be on Election Day, as required by KRS 117.085(2). These are mandatory requirements of our election law. The right to vote by absentee ballot is a special privilege granted by the legislature, exercisable only under special and specified conditions to insure the secrecy of the ballot and the fairness of voting by persons in this class. *Ragan v. Burnett*, 305 S.W.2d 759, 760 (Ky. 1957).

Without this required information, the Clerk failed to ensure that all applicants were eligible to vote absentee. Substantial compliance may be the saving grace in some cases where the violations do not touch on matters required under the statute. But, given the overall amount of irregularities involved in this case, substantial compliance seems non-existent.

The other lapses, such as the failure to list Social Security numbers and phone numbers, are not mandatory requirements affecting the validity of the absentee ballot applications. However, they indicate a lack of care on the part of the Clerk in confirming the identity and eligibility of absentee voter applicants. The trial court also accepted the testimony by Montgomery's handwriting expert pointing out the discrepancies in the signatures of 59 applicants. When viewed together with all of the evidence, we agree with the trial court that the Board and the Clerk failed to substantially comply with the statutory requirements for the issuing absentee ballots.

The irregularities in the conduct of in-house absentee voting were comparatively minor and cannot be shown to have directly affected the outcome of the election. The deviations from the statutory procedure for counting the absentee ballots were far more significant. Most notably, the Board violated the provisions of KRS 117.087(3) by failing to count the ballots one at a time, by attempting to randomize the ballots by shuffling them on the table, and by distributing the ballots among the various officials present.

The irregularities in the absentee vote counting were somewhat ameliorated by the efforts of Republican member Williams. Williams, a local pastor, had spoken out prior to his appointment against the practice of vote buying and selling. He volunteered to serve as the Republican member of the Board when the vacancy arose shortly before the election. Furthermore, we emphasize that Williams took extraordinary steps following his appointment to encourage and

ensure fairness in the conduct of the election. In spite of his efforts, we must conclude that the Board failed to substantially comply with the statutory requirements for counting the absentee ballots.

#### V. **Sufficiency of the Evidence to Set Aside the Election**

This brings us to the question concerning the appropriate remedy. The Board, Hardin, and the dissent in this appeal argue that the evidence of irregularities, fraud, and misconduct was insufficient to justify the extraordinary remedy of setting aside the election. We strongly disagree. As our Supreme Court stated in *McClendon v. Hodges*,

Though Kentucky courts are reluctant to declare an election void, our case law has long established that this extreme remedy is nonetheless necessary when it is impossible to fairly discern a winner. “The established rule is that where, after giving the evidence of fraud (or irregularities) its fullest effect, and fraudulent or illegal votes may be eliminated, and *the result of the election be fairly ascertained from votes which were regular or untainted*, the court should not go to the extreme of declaring the election void.” *Beauchamp v. Willis*, 300 Ky. 630, 189 S.W.2d 938, 941 (1945) (*emphasis added*). Even when evidence of fraud is limited to only a portion of the electorate or to specific precincts, it may nonetheless be necessary to set aside the entire election. In *Campbell v. Combs*, where the evidence established irregularity and fraud in four precincts, the entire election was voided: “[W]e concur in the conclusion that the returns [of the entire election] must be disregarded because there was such a large proportion of illegal ballots cast it is impossible to determine just how many there were to be charged up against the contestees.” 273 Ky. 404, 116 S.W.2d 955, 958 (1938).

*McClendon*, 272 S.W.3d at 191-192. (Footnote omitted).

Viewing the evidence in its entirety, we agree with the trial court that there were repeated violations of the Corrupt Practices Act, as well as misconduct during the voting on Election Day. Moreover, the cumulative effect of the departures by the officers from the clear mandates of the statute is such that we must hold they disfranchised the legal voters or those who cast valid absentee ballots. *Pickard v. Jones*, 243 S.W.2d 46, 50 (Ky. 1951). Given the close margin of Hardin's victory, it is impossible to determine whether either contestant can be judged to have been fairly elected. Therefore, we agree with the trial court that the results of the election must be set aside.

In his cross-appeal, Montgomery argues that the trial court should have only set aside the absentee ballots and judged him to be the winner of the election based only upon the machine count. But while there were substantial deviations from the statutory procedures regarding absentee voting, it is not clear that these irregularities affected the entire class of absentee votes. Invalidating all of the absentee votes would necessarily void many valid ballots and would change the outcome of the election. *McClendon*, 272 S.W.3d at 192. Similarly, there was significant evidence of fraud and other irregularities affecting the voting on Election Day. Although those matters did not directly affect the outcome of the election, they are relevant to determine the appropriate remedy.

We are mindful that elections represent the will of the people and courts should not lightly intervene to determine a particular outcome. Given the specific circumstances of this case, we conclude that the trial court properly set

aside the entire election instead of simply striking the absentee votes and declaring Montgomery to be the winner. We are not sure which candidate won the election, but we know who lost – the voters of Magoffin County who were entitled to confidence in the fairness and integrity of their election. We hope that requiring an entirely new election will restore their faith.

Accordingly, we affirm the judgment of the Magoffin Circuit Court which set aside the results of the November 4, 2014, election for Magoffin County Judge-Executive and declared the office to be vacant.

D. LAMBERT, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE  
OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent.

Affirming the trial court is an injustice not only to elected Magoffin County Judge Executive Hardin but to the voters of Magoffin County who elected Hardin. The evidence is woefully short of that required to warrant judicial intervention and voiding this election.

The electoral process is the core of our government and a court should abhor intervening. However, as recognized by the General Assembly, there are instances when it cannot be said that the result of an election accurately reflects the choice of the citizens. In such cases, the Court not only has the authority to void an election result but has the duty to do so where there are such “frauds and irregularities in the election that it cannot be told who was elected.” *Stewart v. Wurts*, 143 Ky. 39,



135 S.W. 434, 439 (Ky. 1911). The seriousness of our task was emphasized in

*Skain v. Milward*, 138 Ky. 200, 127 S.W. 773, 778-79 (1910):

[Elections] are the means provided by law for the expression of the will of the people. To set them aside unnecessarily would be to destroy that confidence in them which is essential. If often set aside they would be less attended; for the voters would await the next chance, and the election, instead of settling things, would be only the starting point for new controversies. Elections must be free and equal; but they cannot be free and equal unless supported by public confidence. When once the notion prevails that confidence may not be placed in the stability of elections, their power and usefulness is destroyed.

Consequently, the evidentiary bar is high for a successful election challenge: The burden of proof upon the challenger is clear and convincing. I find authority for this elevated standard in early opinions. In *Skain*, the Court stated:

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

*Id.* at 778 (emphasis added). Mere speculation or suspicion will not justify requiring the voters to “undergo the labor, excitement and expense of another election unless *clearly convinced* that the results....were not fairly and legally attained.” *Stewart*, 135 S.W. at 439 (emphasis added). In *Hall v. Martin*, 183 Ky. 120, 208 S.W. 417, 419 (1919), the Court used even stronger terminology stating an election should not be voided unless the evidence points “*unerringly* to the

establishment of the invalidating facts.” (emphasis added). In a more recent case, the onerous burden on the challenger was recognized when the Court stated: “[I]t is only in the most *flagrant* kind of case that voters will be disfranchised for illegal acts of the election officials.” *Upton v. Knuckles*, 470 S.W.2d 822, 827 (Ky. 1971) (emphasis added).

While perfection is always the ideal, the election process is not immune from human error by election officials attempting to comply with our numerous and detailed election statutes. While some must be complied with to ensure the integrity and fairness of the process, others are not integral to that purpose.

Mandatory provisions are those which establish a condition precedent to voting and affect the fairness and integrity of the election process while a directory provision merely instructs what “ought to be followed” to accomplish a given end. *Varney v. Justice*, 86 Ky. 596, 600, 6 S.W. 457, 459 (1888). If that end is accomplished “without affecting the real merits of the case, then the statute is to be regarded as directory merely.” *Id.* As stated in *Skaggs v. Fyffe*, 266 Ky. 337, 98 S.W.2d 884, 886 (1936):

Provisions of election laws are all mandatory in the sense that they impose the duty of obedience on those who come within their purview, but it does not follow that every slight departure therefrom should vitiate the whole proceeding. If a statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, but does not declare or indicate that their performance is essential to the validity of the election, they will be regarded as directory if they do not affect the actual merits of the election.

As noted in *Jarboe v. Smith*, 350 S.W.2d 490, 493 (Ky. 1961), “[t]hrough all the cases relating to absentee voting, the theme of *substantial compliance* with statutory regulations is omnipresent.”

It is troublesome that some law I cite is given perfunctory mention in the majority opinion and some is given no mention at all. However, what is more disconcerting is the majority’s strained interpretation of the facts and the trial court’s findings, and its ultimate decision to uphold the trial court’s order voiding this election. The evidence presented is not as important as the evidence not presented.

The majority finds that the evidence of vote buying and vote hauling “particularly disturbing[.]” No doubt, vote buying is perhaps the oldest form of corruption within our political system and is expressly prohibited under the Corrupt Practices Act. KRS 121.055. However, mere suspicion that votes were bought to secure an election victory is insufficient to void an election. *Stewart*, 135 S.W. at 439. As stated long ago: “[T]here must be in such case some tangible, positive proof that it was corruptly used in violation of law, to justify a court in declaring the election void.” *Id.* The supporting evidence must show more than mere money or other thing of value was exchanged for a vote: the evidence must be “unimpeachable...that the contestees violated the act itself, or that, with their knowledge, consent, or procurement, the act was violated by others for them.” *Gross v. Cawood*, 270 Ky. 264, 109 S.W.2d 597, 598 (1937).

Here, as indicated by the majority, there was not even a scintilla of evidence Hardin violated the Corrupt Practices Act or the Act was violated with his knowledge, consent or procurement. Moreover, the only voter who tangentially testified he received money for his vote later contradicted his own testimony and testified he received money for reasons unrelated to voting.

Not a single witness testified that any offer was made to provide gravel and work in exchange for a vote for Hardin. The evidence only demonstrated gravel was placed near and, sometimes on, private property without any link to Hardin or evidence regarding how those property owners voted. The convincing evidence was the gravel and work performed were either incidental to necessary county road work or the result of privately contracted work by the owners.

The majority also suggests irregularities occurred at the Flat Fork precinct. Much of that evidence was offered by Montgomery's niece, Stephanie Montgomery, who testified she observed a poll worker assist ten to twenty voters who did not request assistance and that five to ten voters were assisted by a single poll worker. However, she could not identify the voters allegedly assisted and could not hear what was discussed. Stephanie also testified when she spoke to an investigator from the Attorney General's office monitoring the Flat Fork precinct, the sheriff attempted to interfere with her conversation and was intimidating. However, she did not report her concerns to election officials. Other than mere suspicions of a few Magoffin County residents, the record is completely silent regarding voter assistance or intimidation.

Election officials present at the precinct testified nothing unusual occurred. Greg Motley, an Attorney General's office investigator, monitored the Flat Fork precinct and testified nothing improper occurred at the precinct.

Clerk Shepherd testified the Flat Fork roster was unremarkable except some voter's signatures were missing Jeff Isaac's initials. However, because Isaac was the only clerk at the precinct who signed in voters, his initials were not necessary to identify the person who signed in voters. While a large number of voters were marked in Flat Fork as personal acquaintance, Isaac knew numerous voters in that precinct where he and his many family members also resided. Other precincts also had a large number of voters marked as personal acquaintances. As in many small Kentucky counties, in Magoffin County it is not unusual for election officials to personally know voters.

As the majority notes, Montgomery attempted to disprove the authenticity of voter signatures during the absentee voting and at the Election Day polls. Montgomery's handwriting expert, Thomas Vastrick, provided only marginally reliable evidence of forgeries. The other handwriting expert, Stephen Styler, testified that Vastrick's one-to-one comparison of signatures was an unreliable method and could not establish any forgeries. Even our case law teaches that comparison of a single signature with a challenged signature is not a reliable method to determine the authenticity of the signature. *Beauchamp v. Willis*, 300 Ky. 630, 636, 189 S.W.2d 938, 941 (1945).

Again, I point out the evidence that was not presented. Not a single voter whose signature was questioned by Vastrick was called to testify and substantiate any claim that voter signatures were forged. Instead, two witnesses called to testify on other matters verified they made their questioned signatures.

The majority recognizes the weakness in Montgomery's allegations of intentional wrongdoing and that alone, none of his allegations would warrant voiding the election. Instead, it focuses on the actions of the election officials in the absentee voting process. The majority begins with the proposition that the high number and unusual proportion of absentee votes "raise suspicions from the outset." The evidence demonstrates the majority's suspicions are wrong.

Kimball Grant Jevidon, a political strategist and not a statistician, testified that the absentee balloting results in Hardin's favor were higher than he expected when compared with Election Day results and further that the number of ballots was higher in Magoffin County than in neighboring counties. However, as noted by the majority, Magoffin County has historically had a high number of absentees attributable to union workers who traditionally vote democratic and are outside the County on Election Day. The high voter turnout was attributable to local and national races of significant interest. The testimony established that any number of variables could account for the minimal absentee vote increase from the most recent prior elections including the significance of the 2014 Magoffin County races and current number of union members. Indeed, the difference in the rate of absentee voting was only slightly increased from the most recent County elections:

2006: 1,031 absentee ballots;  
2010: 1,066 absentee ballots;  
and  
2014: 1,145 absentee ballots.

These plausible explanations negate even a suspicion that there was a nefarious force behind those voters exercising the privilege to vote absentee. *Arnett v. Hensley*, 425 S.W.2d 546, 553 (Ky. 1968).

Having concluded that none of Montgomery's allegations alone would support the voiding of this election, the majority turns its attention to the conduct of the election officials when issuing absentee ballots and during in-house absentee voting and deviations from the statutory procedures when counting the absentee ballots. Although having no evidence these officials acted in bad faith or that any absentee vote was not properly cast or counted, the majority nevertheless finds certain deviations from the statutory procedures so serious that the election cannot stand. While I agree there were minor deviations, I disagree that the failure to follow these directory provisions warrants voiding the election.

Magoffin County Clerk Renee Arnett Shepherd provided detailed testimony regarding the absentee ballot application process. The State Board of Elections' computer prints the ballot after the Clerk inserts all required data. Clerk Shepherd testified that the State Board of Elections' system permitted absentee ballot applications to be printed without social security numbers and, for privacy reasons, the use of social security numbers is being phased out. A telephone number is not

routinely used to identify a voter and there is no field for it on the application request.

I do not understand how the lack of such information on the application can in anyway indicate carelessness on the part of the Clerk as indicated by the majority. A social security number and telephone number is not required by KRS 117.085(2) or by the State Board of Elections' system. Montgomery's counsel stipulated at oral argument there is no evidence of a written or unwritten policy requiring such information.

The majority concludes the statutory requirement that the applicant state where he or she will be on Election Day is a mandatory directive. I disagree. Certainly, voter identification requirements are mandatory. A voter's verification why he cannot vote on Election Day is also a mandatory directive because it serves as the basis for exercising the privilege to vote absentee. However, a statement regarding a precise location is merely superfluous.

I believe the situation is analogous to that in *Skaggs*, 98 S.W.2d at 887, where the court reasoned:

If an erroneous address be given, it would be equivalent, for the purpose of the act, to no address. What difference would it make in accomplishing the purpose of the statute if the application gave a petitioner's wrong street address so long as he was a qualified voter in the territory affected?

Likewise, what difference does it make where the voter is located on Election Day as long as he or she meets the absentee voter requirements? In recognition of its



futility and meaningless to the fairness and integrity of absentee voting, as Clerk Shepherd testified, the State Board of Elections' system no longer requires this information in the required field for an absentee ballot.

The majority also finds fault with the clerk for not identifying the person who requested the application. KRS 117.085(1) states in part:

“All requests for an application for an absentee ballot may be transmitted by telephone, facsimile machine, by mail, by electronic mail, or in person.... The absentee ballot application may be requested by the voter or the spouse, parents, or children of the voter, but shall be restricted to the use of the voter.”

The statute's use of the term “may” is permissive language making it directory in nature. Moreover, if the identity of the person requesting the application was of significance, the legislature could have easily made it a requirement that the application request be made in person with proper identification. Instead, the request can be made by a variety of means, including telephone, mail or e-mail. Finally, KRS 117.085(2) does not require the clerk to include the name of the person who requested the application but only information pertaining to the voter. While I disagree that this is necessary information to be noted on the application, I again simply point out the evidence that was not presented. There was no evidence that anyone other than a qualified absentee voter voted by absentee ballot in the 2014 election.

The majority concludes there were no irregularities in the conduct of in-house absentee voting that affected the outcome of the election. I agree and

make no further comment. However, I strongly disagree with its conclusion that deviations from the statutory procedure for counting the absentee ballots are fatal to the election results. The evidence demonstrates there was substantial compliance with our election statutes.

The majority points out that the ballots were not counted individually, were shuffled on the table, and distributed among the various officials present. There was extensive testimony presented regarding the counting of the absentee ballots and the efforts of those present to ensure the integrity and fairness of the process.

The absentee ballots were counted by the Board of Elections members: Clerk Shepherd, Susie Salyer (Democratic member), Pastor Justin Williams (Republican member), Jerry Helton (the Democratic challenger), Garlena Workman (the Republican challenger), Lisa Montgomery (representing the Sheriff Carson Montgomery who was running for office).

Larry Shepherd (deputy clerk), Mr. Howard (representative for Paul Virgil), Mr. Minix (representative for his son) and Mr. Rudd (candidate for constable) observed.

Pastor Williams's role in the absentee balloting process and his testimony is particularly persuasive. He is a local pastor who worked actively during the 2014 campaign to discourage vote buying and other corrupt practices in the election process. Pastor Williams and twenty other pastors caused a statement based on scripture to be printed in a local paper urging voters not to engage in vote

buying. He and the others present detailed the measures taken to solidify the integrity and fairness in the counting of the election results.

Pastor Williams began by explaining it was impossible to shake the ballots in the heavy oak box holding the absentee ballots that had to be wheeled from the clerk's office to the fiscal courtroom. The ballot box was secured by three locks, one for Pastor Williams, one for Salyer and another for Lisa Montgomery. Once the ballot box was moved to the fiscal courtroom, it remained in sight of all the ten people present in the fiscal courtroom.

The box was unlocked just before the counting began at 10 a.m. as required by KRS 117.087. The ballots, contained in a brown envelope inside a white envelope were removed from the box and placed on the table. To ensure secrecy, Clerk Shepherd set three or four envelopes aside, to save to open simultaneously with any last minute deliveries from the post office at 4 p.m.

The white envelopes were arranged by precinct. The Board of Elections members then compared the white envelope signatures to the signatures on the voter registration cards and absentee voter applications. After the signatures were all matched, the questioned ballots were accepted or rejected by the members as provided for in KRS 117.087. Eleven ballots were rejected for various reasons. Three had signatures that obviously did not match, others were missing signatures and two voters died before the election.

The Board of Elections members opened all the white envelopes at once, removed the brown envelopes from the white envelopes and put the brown

envelopes in the center of the table. The white envelopes were then returned to the ballot box. The Board of Elections members checked their pile of brown envelopes and after making sure they were signed, removed the flaps containing the signatures, put the brown envelopes in a pile and the flaps in a pile. The flaps were then returned to the ballot box. With only the brown and now anonymous envelopes on the table, the Board of Elections members shuffled the envelopes on the table.

After thoroughly shuffling the envelopes, the members opened the brown envelopes which were returned to the ballot box and the ballots placed in piles in front of each member. The Board of Elections members each handed their pile of ballots to the clerk who put them through a feeder for the voting machine to tabulate the result. The Board of Elections members agreed on the intent of the voter of any ballot that would not go through the machine and an identical ballot was printed for scanning. The original ballot was stapled together with the identical ballot. The ballots were scanned and returned to the ballot box.

All witnesses present during the counting testified the process was fair and substantially complied with the statutory requirements. It was simply impractical to shake the ballots in the heavy ballot box or for Clerk Shepherd to count the numerous ballots one-by-one to complete the counting by 6:00 p.m., when the polls closed. The method of dividing the ballots for counting had been taking place since at least 1994.

Pastor Williams testified the integrity of the vote was ensured by the participation of all members and confirmed that minor deviations from the statute were necessary because the ballots could not be shaken in the heavy solid wood ballot box and Clerk Shepherd could not possibly count the ballots individually before the polls closed. All present, including Pastor Williams who actively looked for any misconduct, testified that the counting was fair and no misconduct occurred.

The witnesses consistently testified that ballots could not be added or taken away or altered in any way during the counting process. Salyer testified that no one brought anything ballot sized into the fiscal courtroom, and no ballots were added or removed. Clerk Shepherd also testified that it was impossible to remove or add ballots. Pastor Williams testified he made sure that no one had any pens or pencils to fill in votes where a portion of a ballot was blank. Clerk Shepherd, Salyer and Pastor Williams testified everyone present could see the entire counting process.

While I admit some irregularities occurred, there is no evidence the election officials acted in bad faith or that the election was tainted by the failure to comply with KRS 117.087. Shaking ballots in the ballot box versus shuffling them on a table is inconsequential. Both methods ensure secrecy. Likewise, whether Clerk Shepherd individually counted each ballot or each member participated in the counting had no impact on the absentee voting results.

I submit that the deviations from the statute were necessary to timely count the ballots and the applicable provisions directory in nature. It seems absurd to me that this election is being voided because ballots were not shaken in a box and not individually counted by the Clerk.

Again, I point out the evidence that was not presented. There was absolutely no evidence that the counting process was unfair or that the ballots were not counted in good faith. Although the names of all absentee voters were known, there was no evidence that any absentee vote was not counted or any absentee was submitted when that voter did not vote. There was no evidence that the deviations from the statute affected the results of this election.

I summarize my conclusion with a return to my opening legal proposition that Montgomery failed to clearly and convincingly establish that fraud and irregularities were so pervasive it cannot be determined who was elected. *Stewart*, 135 S.W. at 439. I am not clearly convinced Magoffin County voters should “undergo the labor, excitement and expense of another election[.]” *Id.* Certainly the evidence does not point “unerringly the establishment of invalidating facts.” *Hall*, 208 S.W. at 419. There is no evidence that election officials engaged in flagrant conduct that warrants voiding this election. *Upton*, 470 S.W.2d at 827.

Contrary to the stated law, this election has been voided based on speculation and suspicions. Perhaps, the seeds of these suspicions are planted from what the majority considers a history of election misconduct in Magoffin County. I do not attempt to contradict the majority’s historical account. Regardless of the

sins of past candidates and election officials, we are required to decide the fate of this election based on the facts presented, or more importantly, those not presented. Not a single witness who could have been called from the absentee voting list was called to testify that he or she did not vote, was intimidated, or that there was fraud in the process. There was no evidence that any Board of Elections member or election official acted in bad faith. The evidence was that all duties were undertaken in good faith and in substantial compliance with the applicable laws and regulations.

I would reverse.

BRIEF AND ORAL ARGUMENT  
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Eldred E. Adams  
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BRIEF FOR APPELLEE/CROSS-  
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ORAL ARGUMENT FOR  
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BRIEF FOR APPELLEE/CROSS-  
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ORAL ARGUMENT FOR  
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