Supreme Court of Pennsylvania

Court of Common Pleas
Civil Cover Sheet

Westmoreland County

For Prothonotary Use Only:	
Docket No: 4152 of 2020	

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SECTION A

Commencement of Action:
☐ Complaint ☐ Writ of Summons ☑ Petition
☐ Transfer from Another Jurisdiction ☐ Declaration of Taking

Lead Plaintiff's Name:	Lead Defendant's Name:
Nicole Ziccarelli	Westmoreland County Board of Elections
Are money damages requested? ☐ Yes ☑ No	Dollar Amount Requested: (check one) ☐ within arbitration limits ☐ outside arbitration limits
Is this a *Class Action Suit*? ☐ Yes ☑ No	**Is this an *MDJ Appeal*?** ☐ Yes ☑ No

Name of Plaintiff/Appellant's Attorney: Matthew Haverstick, James G. Gorman III

☐ **Check here if you have no attorney (are a Self-Represented [Pro Se] Litigant)**

SECTION B

Nature of the Case: Place an "X" to the left of the **ONE** case category that most accurately describes your ***PRIMARY CASE.*** If you are making more than one type of claim, check the one that you consider most important.

TORT *(do not include Mass Tort)*
- ☐ Intentional
- ☐ Malicious Prosecution
- ☐ Motor Vehicle
- ☐ Nuisance
- ☐ Premises Liability
- ☐ Product Liability *(does not include mass tort)*
- ☐ Slander/Libel/ Defamation
- ☐ Other:

MASS TORT
- ☐ Asbestos
- ☐ Tobacco
- ☐ Toxic Tort - DES
- ☐ Toxic Tort - Implant
- ☐ Toxic Waste
- ☐ Other:

PROFESSIONAL LIABLITY
- ☐ Dental
- ☐ Legal
- ☐ Medical
- ☐ Other Professional:

CONTRACT *(do not include Judgments)*
- ☐ Buyer Plaintiff
- ☐ Debt Collection: Credit Card
- ☐ Debt Collection: Other
- ☐ Employment Dispute: Discrimination
- ☐ Employment Dispute: Other
- ☐ Other:

REAL PROPERTY
- ☐ Ejectment
- ☐ Eminent Domain/Condemnation
- ☐ Ground Rent
- ☐ Landlord/Tenant Dispute
- ☐ Mortgage Foreclosure: Residential
- ☐ Mortgage Foreclosure: Commercial
- ☐ Partition
- ☐ Quiet Title
- ☐ Other:

CIVIL APPEALS
Administrative Agencies
- ☐ Board of Assessment
- ☑ Board of Elections
- ☐ Dept. of Transportation
- ☐ Statutory Appeal: Other
- ☐ Zoning Board
- ☐ Other:

MISCELLANEOUS
- ☐ Common Law/Statutory Arbitration
- ☐ Declaratory Judgment
- ☐ Mandamus
- ☐ Non-Domestic Relations Restraining Order
- ☐ Quo Warranto
- ☐ Replevin
- ☐ Other:

Updated 1/1/2011

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY

IN RE: 2020 General Election Provisional Ballot Challenges.	*No.* 4152 of 2020

PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL

Nicole Ziccarelli, candidate for the Senate of Pennsylvania from the 45th Senatorial District, hereby appeals from the decision of the Westmoreland County Board of Elections (the "Board") to reverse the Board's determination as to two classes of provisional ballot challenges: (1) "poll book signature" challenges and (2) secrecy envelope challenges, and in support thereof, avers as follows:

INTRODUCTION

1. This appeal concerns whether or not the Board appropriately upheld challenges made to the following two classes of provisional ballots submitted as part of the November 3, 2020 General Election: (1) "poll book signature" ballots and (2) ballots lacking secrecy envelopes.

JURISDICTION AND VENUE

2. The Court has jurisdiction over this statutory appeal and venue is proper in this Court pursuant to Section 3157 of the Election Code. *See* 25 P.S. § 3157.

PARTIES

3. Petitioner Nicole Ziccarelli is the Republican candidate for Senate from the 45th Senatorial District, which encompasses parts of Allegheny and Westmoreland Counties.

4. The Board is a local governmental agency generally responsible for overseeing the conduct of all elections in Westmoreland County, including, *inter alia*, making determinations as to challenged provisional ballots. *See id.* at § 2642 (detailing the powers and duties of the county boards of elections); *see id.* at § 3050 (detailing provisional ballot challenges).

DETERMINATION SOUGHT TO BE REVIEWED

5. Nicole Ziccarelli appeals from the Board's decision to uphold the challenges as to all of the "poll book signature" challenges and the Board's unequal treatment of secrecy envelope challenges.

FACTS AND PROCEDRUAL BACKGROUND

I. Provisional Ballot Process.

6. Under the Pennsylvania Election Code, at every primary and election each elector who appears to vote and who desires to vote shall first present to an election officer proof of identification. *See* 25 P.S. § 3050. The election officer shall examine the proof of identification presented by the elector and sign an affidavit stating that this has been done. *Id.*

7. When the elector is unable to produce proof of identification or the elector's proof of identification is challenged by the judge of elections, the voter is required to cast a provisional ballot. *Id.* As part of the November 3, 2020 general election and the widespread mail-in voting process in the Commonwealth, many voters were required to file provisional ballots if they failed to bring their previously requested mail-in ballot to the polling place.

8. When a voter is required to file a provisional ballot, the judge of elections must advise the voter how to complete the provisional process. Because a provisional ballot is not provided unless an "individual who claims to be properly registered and eligible to vote," appears at the polling place and that individual's registration cannot be determined, it falls upon the judge of election to advise the elector how to complete the provisional ballot that is being provided. 25 P.S. § 3050. Indeed, the Election Code requires that the affidavit signed by an elector casting a provisional ballot be signed by the Judge of Elections. *See id.* Therefore, for example, the judge of elections needs to inform the elector as to signature requirements, secrecy envelope requirements, and how to fill out the paper ballot. Moreover, the judge of elections is supposed to instruct the elector that he or she should not sign the "poll book," which is the book that an elector signs when casting a vote on a voting machine.

9. Notably, if a judge of elections does not advise the elector how to properly cast the provisional ballot, the judge of elections risks having the elector's vote rejected by the provisional board for, *inter alia*, not "containing a secrecy envelope." *See* 25 P.S. § 3050(a.4)(5)(ii).

10. Further, if a judge of elections advises a provisional ballot elector to sign the poll book, the judge voids the elector's vote because thereafter, without testimony, it becomes impossible to ascertain whether or not the elector cast a ballot on the voting machine as well as provisionally.

II. "Poll Book" Challenges.

11. During the statutory provisional ballot challenge proceedings in Westmoreland County, it was determined that at least 32 precincts were affected by instances where provisional ballot electors signed the poll book, thus declaring that those electors voted on the voting machines.

12. On Friday, November 13, 2020, the Board of Elections received testimony from electors who experienced the "poll book" signature issue. For the vast majority of these electors, the story was largely the same: the elector failed to bring their mail-in ballot to the polling location; the elector was required to cast a provisional ballot; the elector did not vote on a voting machine; and a voter was improperly told by an election official to sign the poll book. After receiving testimony from the electors, the Board of Elections moved to defer a determination as to these poll book signature challenges until Monday, November 16, 2020. 11/13/2020 Tr. at 6:4-7:19.

13. On Monday, November 16, 2020, the Board of Elections received additional testimony from provisional electors who experienced the poll book signature issue. Differing from the November 13, 2020 hearing, the testimony given on November 16, 2020 was sworn testimony. 11/16/2020 Tr. at 3:13-16. The Board of Elections also received 19 sworn affidavits from electors averring that an election official improperly caused them to sign the poll book even though they did not cast a vote on the voting machine. 11/16/2020 Tr. at 40:5-7, 45:14-16, 47:25, 54:23-25, 58:24-62:5.

14. After receiving testimony from the electors, the Board of Elections received positions from counsel representing Nicole Ziccarrelli and counsel representing Jim Brewster on how to approach the poll book signature challenges. Nicole Ziccarelli's counsel argued that: (1) any elector who provided reliable oral or written testimony illustrating that they were improperly caused sign the poll book as part of their provisional ballot should have their votes counted and the challenges as to those provisional ballots should be upheld; and (2) any challenges outside of category (1) should be summarily denied and those votes should not be counted. 11/16/2020 Tr. at 40:11-44:16. The reasoning for this position was that without testimony, there is no way to

"confirm" what occurred with an individual voter at the polling location in a way that satisfies the statutory burden under the Election Code to "confirm" a voter did not vote twice. *See id.*; *see also* 25 P.S. § 3050(a.4)(5)(i).

15. Counsel representing Jim Brewster took no official stance on the foregoing position, however, counsel inquired as to whether or not elector email submissions should count under category (1) referenced above. 11/16/2020 Tr. at 48:1-8, 64:1-65:8. Nicole Ziccarelli's counsel argued that due to the unreliable and unverified nature of emails, emails should not be included in category (1). 11/16/2020 Tr. at 48:9-49:24.

16. The Board of Elections also took interest in the position described by Nicole Ziccarelli's counsel, however, after a lunch recess, the Board of Elections performed a complete about face and instead decided to uphold the challenges as to all of the poll book signature challenges including those with zero evidence verifying that an elector did not cast two votes at the polling location. *Compare* 11/16/2020 Tr. at 40:11-50:19 *with* 68:3-70:6.

III. Secrecy Envelope Challenges.

17. Separate and apart from the poll book signature challenges, on November 16, 2020, the Board of Election also upheld challenges to nine provisional ballots cast in Derry Township-Cokeville that did not contain secrecy envelopes even though under 25 P.S. § 3050(a.4)(5)(ii) missing a secrecy envelope is a fatal flaw that warrants rejection of the provisional ballot. 11/16/2020 Tr. at 12:23-17:6, 19:6-7, 26:25-27:11.

18. The Board of Election's November 16th determination as to the Derry Township-Cokeville ballots was in stark contrast to its determination on November 13, 2020, where the Board of Elections denied challenges on this same secrecy envelope issue for three provisional ballots cast in Lower Burrell 4th Ward 2nd Precinct. 11/13/2020 Tr. at 68:1-12. Of particular note,

based on a note purportedly left by the judge of elections on the cover of the Lower Burrell 4th Ward 2nd Precinct provisional ballot packet, the judge admitted he inadvertently created widespread errors regarding the secrecy envelope instructions. 11/13/2020 Tr. at 60:20-61:16; 11/16/2020 Tr. at 15:22-17:5. Nonetheless, the Lower Burrell 4th Ward 2nd Precinct challenges were denied and the Derry Township-Cokeville ballots were accepted. *Id.*

19. In other words, the Board of Elections applied inconsistent standards to provisional ballots that had the secrecy envelope issue. 11/13/2020 Tr.. at 68:1-12; 11/16/2020 Tr. at 15:22-17:6, 26:25-27:11.

20. The Board was made aware of its unequal treatment of the secrecy envelope challenges at the November 16, 2020 hearing and nonetheless issued its determination. 11/16/2020 Tr. at 15:22-17:6.

GROUNDS FOR APPEAL

I. The Board of Elections Derogated from Its Statutory Duties Under the Election Code by Failing to "Confirm" that the Poll Book Signature Provisional Ballot Electors Did Not Vote Twice.

21. Under Section 3050(a.4)(5)(i), "the county board of elections . . . shall count the [provisional] ballot if the county board of ***elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election***." 25 P.S. § 3050(a.4)(5)(i).[1] Here, as naturally follows, the Board of Elections is bound by the foregoing statutory duty.

22. When evaluating a poll book signature in the context of a provisional ballot, there is a strong presumption that the elector voted on the voting machine and that a subsequent provisional ballot should not count. This presumption is magnified here in that the provisional boards rejected 250 poll book signature ballots and the burden of proof is on the challenger in

[1] Emphasis is added throughout unless otherwise stated.

each instance to establish the truth of the averment in support of the challenge. *In re City of Wilkes-Barre Election Appeals*, 44 Pa. D & C 2d 535, 537 (Luzerne CCP 1967) (citing *Petrucci Appeal*, 28 Pa. D & C.2d 675 (Luzerne CCP 1965).

23. The only way to overcome this strong presumption and meet the burden of proof is through sworn or credible, testimonial evidence submitted by the elector (i.e. oral or written testimony) explaining that they only voted once, provisionally. Indeed, short of this, there are no other cognizable means to "confirm" that a voter did not vote twice as required by Section 3050.

24. Ordinarily, under Pennsylvania law the testimony of a witness should be sworn. *See* 42 Pa.C.S. § 5901 ("Every witness, before giving any testimony shall take an oath in the usual or common form . . . ."). Petitioner acknowledges that Section 3050 states that the Pennsylvania Rules of Evidence do not strictly apply strictly, however, in this factually unique instance where the Board, and this Court, are required to "confirm" that an elector did not vote twice, in-person, telephonically, or sworn affidavit testimony provide the best indicia of confirmation. 25 P.S. § 3050.

25. Rather than adhere to the foregoing duty to confirm a voter did not vote twice, the Board of Elections unilaterally upheld challenges as to all 250 provisional ballots previously rejected due to this poll book signature issue. The Board of Elections issued this determination even though for the overwhelming majority of these ballots the Board had zero testimony, let alone sworn testimony, explaining what occurred at the polling place. Indeed, of the 250 only 23 electors submitted sworn testimony as to what occurred (with an additional 23 providing unsworn testimony).

26. Accordingly, the Board's ruling was an abuse of discretion and should be reversed. Only the 46 provisional ballots that are supported by testimony should be upheld. The

remaining 204 should be summarily denied because it is impossible to "confirm" that these electors did not vote twice at this appellate stage.

II. The Board of Elections Violated Federal and State Equal Protection Laws and the Free and Equal Elections Clause of the Pennsylvania Constitution by Applying Inconsistent Standards to Provisional Ballots Lacking Secrecy Envelopes

27. As explained above, the Board of Election's November 16th determination as to the nine Derry Township-Cokeville provisional ballots that lacked secrecy envelopes is in stark contrast to its November 13, 2020 determination on this same issue for three provisional ballots cast in Lower Burrell 4th Ward 2nd Precinct. The Board of Elections upheld the challenges for Derry Township-Cokeville and denied the challenges as to Lower Burrell 4th Ward 2nd Precinct. Despite the Board of Elections' arguments to the contrary, the only cognizable difference between the challenges is that they were heard on different days.

28. In view of the foregoing, the Board of Elections has unequally treated provisional ballots lacking secrecy envelopes in violation of Equal Protection laws and the Free and Equal Elections Clause of the Pennsylvania Constitution.

29. Pursuant to the Fourteenth Amendment, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

30. The right of qualified electors to vote in a state election is recognized as a fundamental right under the equal protection clause of the Fourteenth Amendment. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 665 (1966). This fundamental right to vote is cherished in our nation because it "is preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). The right to vote extends to all phases of the voting process, from being permitted to place one's vote in the ballot box, *Ex parte Yarbrough*, 110 U.S.

651 (1884), to having that vote actually counted. *United States v. Mosley*, 238 U.S. 383, 386 (1915). Thus, the right to vote applies equally to the "initial allocation of the franchise" as well as "the manner of its exercise." *Bush v. Gore*, 531 U.S. 98, 104 (2000). Once the right to vote is granted, a state may not draw distinctions between voters that are inconsistent with the guarantees of the Fourteenth Amendment's equal protection clause. *Harper*, 383 U.S. at 663, 666.

31. Here, on November 13, 2020, despite receiving in-person testimony from two electors in Lower Burrell 4th Ward, 2nd Precinct, stating that their election judge committed error as to their secrecy envelopes (11/13/2020 Tr. at 7:23-10:25), the Board of Elections denied challenges to Jane Fiedor, Aleen Placius, and Zachary Huston's provisional ballots due to a lack of secrecy envelope. 11/13/2020 Tr. at 66:18-68:5.

32. The foregoing occurred even after the Board was made aware of a note left by the elections judge that admitted the errors and that there were other provisional ballots that were not denied in that precinct on a similar secrecy envelope issue. 11/13/2020 Tr. at 7:23-10:25, 61:9-64:13, 66:3-5.

33. Then, on November 16, 2020, the Board of Elections upheld challenges to nine Derry Township-Cokeville provisional ballots lacking secrecy envelopes even though only a subset of those ballots were bolstered by testimony. The Board of Elections based its decision on the fact that the Derry Township-Cokeville provisional ballots were backed by testimony yet failed to realize that Lower Burrell 4th Ward, 2nd Precinct was also backed both by testimony and a note from the election judge.

34. Accordingly, the Lower Burrell 4th Ward, 2nd Precinct and Derry Township-Cokeville provisional ballots as to this secrecy envelope issue have been treated unequally in violation of Equal Protection because there is no cognizable reason for the disparate treatment.

35. Moreover, the Pennsylvania Constitution states that under the Free and Equal Elections Clause "elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5. Here, the Board of Elections (a civil authority) unequally treated provisional ballots lacking secrecy envelopes. The Derry Township-Cokeville ballots were let in and the Lower Burrell 4th Ward 2nd Precinct ballots were left out. The Board of Elections proceeded in this fashion even when made aware of this disparate treatment on the record.

36. On this front, over the past three years, the Pennsylvania Supreme Court has repeatedly touted the importance of the Free and Equal Elections Clause. For example, in *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *17 (Pa. Sept. 17, 2020), the Supreme Court stated "we reiterate that the Free and Equal Elections Clause of the Pennsylvania Constitution requires that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government." *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *17 (Pa. Sept. 17, 2020) (internal citations omitted).

37. Similarly, in *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018), the Supreme Court stated "Article I, Section 5 guarantees our citizens an equal right, on par with every other citizen, to elect their representatives. Stated another way, the actual and

plain language of Section 5 mandates that all voters have an equal opportunity to translate their votes into representation. This interpretation is consistent with both the historical reasons for the inclusion of this provision in our Commonwealth's Constitution and the meaning we have ascribed to it through our case law." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018).

38. Succinctly, the Board of Election's disparate treatment of provisional ballots lacking secrecy envelopes is offensive to Equal Protection laws and the Free and Equal Elections clause of the Pennsylvania Constitution and relevant case law. The Board of Elections' determination should be reversed and all provisional ballots lacking secrecy envelopes should either all be counted or all be rejected.

WHEREFORE, Petitioner Nicole Ziccarelli respectfully requests that this Court issue an Order reversing the decisions of the Westmoreland County Board of Election and directing it to (1) deny the challenges as to all the provisional ballots wherein the elector affixed their signature to the poll book and did not provide any form of testimony confirming that the elector did not cast two votes; (2) uphold the challenges as to all the provisional ballots wherein the elector affixed their signature to the poll book and provided testimony that the elector was erroneously directed by election officials to sign the poll book; and (3) treat all defective provisional ballots lacking secrecy envelopes uniformly.

Respectfully submitted,

Dated: November 18, 2020

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Attorneys for Petitioner

VERIFICATION

I, James G. Gorman III hereby swear or affirm that I am counsel of record for Petitioner Nicole Ziccarelli in the within action, that the verification of said Petitioner could not be obtained within the time allowed for filing this Petition, and that the facts contained in the attached Petitioner are true and correct to the best of my knowledge.

This statement is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsifications to authorities.

Dated: November 18, 2020

James G. Gorman III

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Petition to be served on the following persons via hand-delivery on the date set forth below:

Westmoreland County Board of Elections
2 N Main Street, Suite 101
Greensburg, PA 15601

Melissa Guiddy, Esq.
County Solicitor – Westmoreland County
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Dated: November 18, 2020

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IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY

IN RE: 2020 General Election Provisional Ballot Challenges.	*No.* 4152 of 2020

ORDER

AND NOW, this ___ day of November, 2020, upon consideration of the Petition For Review In The Nature Of A Statutory Appeal filed by Nicole Ziccarelli, and any responses thereto, the Westmoreland County Board of Elections is hereby ORDERED to deny the challenges as to all the provisional ballots wherein the elector affixed their signature to the poll book and did not provide any form of testimony confirming that the elector did not cast two votes. The Westmoreland County Board of Elections is FUTHER ORDERED to uphold the challenges as to all the provisional ballots wherein the elector affixed their signature to the poll book and provided testimony that the elector was erroneously directed by election officials to sign the poll book. Finally, the Westmoreland County Board of Elections is FURTHER ORDERED to treat all defective provisional ballots lacking secrecy envelopes uniformly.

_____, J.

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY

IN RE: 2020 General Election Provisional Ballot Challenges.	*No.* 4152 of 2020

ORDER FOR HEARING

AND NOW, this ____ day of November, 2020, upon consideration of the Petition For Review In The Nature Of A Statutory Appeal filed by Nicole Ziccarelli, it is hereby ORDERED that a hearing is scheduled for the _____ day of November, 2020, at ____ o'clock _.m., in Courtroom ___ of the Westmoreland County Court of Common Pleas.

_____, J.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 18, 2020

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