

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2020AP1761-OA

O'Bright v. Lynch

IN RE THE PETITION OF LORI O'BRIGHT as CLERK FOR OUTAGAMIE COUNTY
and BETH HAUSER as CLERK FOR CALUMET COUNTY,
Petitioners,

v.

KAMI LYNCH as CLERK FOR THE CITY OF APPLETON, SALLY KENNEY as CLERK FOR THE CITY OF KAUKAUNA, CHARLES PLUGER as CLERK FOR THE TOWN OF BOVINA, CYNTHIA SIERACKI as CLERK FOR THE TOWN OF BUCHANAN, AMY OLSON as CLERK FOR THE TOWN OF CENTER, LORI KLEVESAHL as CLERK FOR THE TOWN OF CICERO, BONNIE FISHER as CLERK FOR THE TOWN OF ELLINGTON, COLLEEN LAHA as CLERK FOR THE TOWN OF FREEDOM, ANGIE CAIN as CLERK FOR THE TOWN OF GRAND CHUTE, LYN M. NEUENFELDT as CLERK FOR THE TOWN OF HORTONIA, DEBRA VANDER HEIDEN as CLERK FOR THE TOWN OF KAUKAUNA, LORI KLEVESAHL as CLERK FOR THE TOWN OF MAINE, LYNETTE GITTER as CLERK FOR THE TOWN OF MAPLE CREEK, JENNIFER ANDERSON as CLERK FOR THE TOWN OF ONEIDA, DARLENE SCHULTZ as CLERK FOR THE TOWN OF OSBORN, DARLENE SCHULTZ as CLERK FOR THE TOWN OF SEYMOUR, CORY SWEDBERG as CLERK FOR THE TOWN OF VANDENBROEK, BARBARA SCHUH as CLERK FOR THE VILLAGE OF BLACK CREEK, RACQUEL SHAMPO-GIESE as CLERK FOR THE VILLAGE OF COMBINED LOCKS, JANE BOOTH as CLERK FOR THE VILLAGE OF HORTONVILLE, DANIELLE BLOCK as CLERK FOR THE VILLAGE OF KIMBERLY, LINDA HOES as CLERK FOR THE VILLAGE OF NICHOLS, LAURIE SWEENEY as CLERK FOR THE VILLAGE OF SHIOCTON, JENNIFER WEYENBERG as CLERK FOR THE VILLAGE OF HARRISON and the WISCONSIN ELECTIONS COMMISSION,
Respondents.

**KAMI LYNCH as CLERK FOR THE CITY OF APPLETON'S RESPONSE TO
OUTAGAMIE COUNTY AND CALUMET COUNTY'S EMERGENCY
PETITION FOR ORIGINAL JURISDICTION AND DECLARATORY
JUDGMENT**

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TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES.....	4
INTRODUCTION.....	5
STATEMENT OF RELEVANT FACTS, LEGAL ISSUES AND STANDARD OF REVIEW	5
ARGUMENT	6
A. A ballot containing a deficient timing mark that can be easily corrected so that the ballot may be properly counted is not “defective” under § 5.85(3), Wis. Stat.	6
B. A ballot requiring a simple corrective measure to allow for its proper counting, whether before or after being cast, is not a ballot defect as that term is used in § 5.85(3), Wis. Stat.	8
C. If the Court determines that a ballot with a timing mark deficiency is defective, regardless of any available corrective measures, and that duplication of the ballot is the sole remedy, then respondents join petitioners in requesting relief allowing for sufficient time necessary to duplicate all ballots with the timing mark deficiency.	9
CONCLUSION	10

TABLE OF AUTHORITIES

Page(s)

Cases

State v. Matasek, 2014 WI 27, 353 Wis. 2d 601, 846 N.W.2d
811.....7

Statutes

Wis. Stat. § 5.85(3) 6, 7, 8, 10

I. INTRODUCTION

Respondents concur with the emergency action seeking a declaratory judgment to resolve an ongoing dispute whether correcting a ballot's timing mark deficiency is permissible to allow an originally cast ballot to be properly counted in a timely fashion. Respondents also concur with Petitioner that any order issued by this Court should be applicable to all Respondents to ensure that the process for counting ballots is consistent across Outagamie and Calumet Counties.

II. STATEMENT OF RELEVANT FACTS, LEGAL ISSUES AND STANDARD OF REVIEW

The Respondents generally concur with, and stipulate to, the material facts, legal issues and standard of review as presented by the Petitioners.

III. ARGUMENT

A. A BALLOT CONTAINING A DEFICIENT TIMING MARK THAT CAN BE EASILY CORRECTED SO THAT THE BALLOT MAY BE PROPERLY COUNTED IS NOT “DEFECTIVE” UNDER § 5.85(3), WIS. STAT.

The Affidavit of Jeffrey King confirms that fifty ballots with the deficient timing mark were initially rejected by the voting machine. *See Pet. Exhibit F, ¶6*. Therefore, Petitioner argues that the ballots must be considered “defective” under § 5.85(3) Wis. Stat. based on Petitioner’s strict reading of this section. *See Pet. Memo at p.8*. Petitioners however fail to give weight to every word appearing in § 5.85(3), Wis. Stat. which requires the making of a duplicate ballot: “[I]f any ballot is damaged or defective so that it cannot be *properly* counted by the automatic tabulating equipment . . .” (emphasis supplied). The Legislature’s inclusion of the word “properly” must be taken into consideration and given appropriate weight. As previously noted by this Court, “We read statutes to avoid surplusage. We are to assume that the legislature used all the words in a statute for a reason. ‘[E]very word appearing in a statute should

contribute to the construction of the statute....” *State v. Matasek*, 2014 WI 27, ¶ 18, 353 Wis. 2d 601, 612, 846 N.W.2d 811, 816. A ballot is not “damaged or defective” if it can be *properly* counted by the automatic tabulating equipment. As Mr. King’s affidavit sets forth, while the representative sample of fifty test ballots with the deficient timing mark was initially rejected by the tabulating equipment, after the timing mark was corrected, all fifty ballots were *properly* counted. *See Pet. Exhibit F*, ¶6. In addition, this correction procedure was found to be acceptable and accurate by the manufacturer of the voting machine. Mr. Dvorak “recommends a solution of using an ES&S ballot marking pen or other black ballpoint pen to fill in the damaged timing mark.” Mr. Dvorak further avers that, “[b]ased upon [his] knowledge and experience, the filling in of the timing [sic] on the affected ballots with an ES&S ballot marking pen or other black ballpoint pen will not affect any of the selections made by the voter.” *Pet. Exhibit E*, ¶9.

Petitioner’s strict reading of § 5.85(3), Wis. Stat. fails to allow for reasonable corrective measures that will otherwise allow an

original ballot to be counted. For example, if Petitioner’s strict reading is applied, a rejected ballot with a folded corner would be deemed “damaged or defective” and require duplication instead of simply unfolding the corner and reinserting the ballot. Respondents assert a ballot is not damaged or defective under § 5.85(3), Wis. Stat. when using the simple remedy, as described by Mr. King and Mr. Dvorak, will allow the voter’s original ballot to be properly counted by the tabulating equipment.

B. A BALLOT REQUIRING A SIMPLE CORRECTIVE MEASURE TO ALLOW FOR ITS PROPER COUNTING, WHETHER BEFORE OR AFTER BEING CAST, IS NOT A BALLOT DEFECT AS THAT TERM IS USED IN § 5.85(3), WIS. STAT.

In the matter before this Court, the Petitioners argue that the ballots with the timing mark deficiency were defective before ever being voted. According to the voting machine manufacturer, the deficient timing mark can be corrected and “will not affect any of the selections made by the voter.” *See Pet. Exhibit E, ¶9*. In other words, had the timing mark issue been discovered sooner, requested ballots

could have been corrected prior to being mailed to voters since the correction does not affect voter selections. A corrective measure that may be implemented either before or after votes are cast on a ballot should be permissible if the measure does not interfere with actual votes cast and enables the original ballot to be properly counted. Whether the timing mark had been corrected prior to mailing, or if it is corrected after a ballot is returned, the result is the same—the ballot will be accepted and properly counted. *See Id. and Petitioner’s Exhibit F, ¶6.* When a simple corrective measure does not interfere with votes cast on a ballot, but allows tabulating equipment to count that ballot, the ballot should not be deemed defective.

C. IF THE COURT DETERMINES THAT A BALLOT WITH A TIMING MARK DEFICIENCY IS DEFECTIVE, REGARDLESS OF ANY AVAILABLE CORRECTIVE MEASURES, AND THAT DUPLICATION OF THE BALLOT IS THE SOLE REMEDY, THEN RESPONDENTS JOIN PETITIONERS IN REQUESTING RELIEF ALLOWING FOR SUFFICIENT TIME NECESSARY TO DUPLICATE ALL BALLOTS WITH THE TIMING MARK DEFICIENCY.

The Outagamie County Clerk outlined the ballot duplication process and noted that it will take approximately four minutes for two workers to complete. *See Pet. ¶17 and Exhibit B, Affidavit of Lori O'Bright.* The Respondent City of Appleton is one of the most affected municipalities. *See Id.* If it is deemed not permissible to correct the timing mark deficiency to allow the original ballot to be counted by the tabulating equipment, then the Respondent joins the Petitioner and requests any relief deemed appropriate by the Court to allow adequate time for all votes cast to be counted.

IV. CONCLUSION

Based upon the above arguments, Respondents respectfully request this Court take original jurisdiction of this case and issue a declaratory judgment permitting Respondents to carefully fill in any deficient timing marks thereby enabling each original ballot an opportunity to be properly counted by tabulating equipment on Election Day and reserving the duplication process under § 5.85(3), Wis. Stat. to those ballots still rejected after such corrective measures are taken. Respondents concur with Petitioner that any order of this

Court should be applicable to all named Respondents in order to ensure consistent administration of the election throughout Outagamie and Calumet Counties. If this Court does not authorize Respondents to fill in the deficient timing marks, then relief is sought to allow sufficient time for all Respondents to process duplicate ballots so that all votes cast prior to the deadline are counted.

Respectfully submitted this 27th day of October, 2020.

CITY OF APPLETON – CITY ATTORNEY’S OFFICE
Defendant-Respondent

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CERTIFICATION

I hereby certify that this response was produced with a with a proportional serif font. The length of this response is 1,932 words using word processing software (Microsoft Word). The word count is all-inclusive of all words in the response, including the text of all such sections' headings and footnotes.

Dated this 27th day of October 2020.

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CERTIFICATION OF ELECTRONIC COPY

We hereby certify that we have submitted an electronic copy of this Response to Outagamie County and Calumet County's Emergency Petition for Original Jurisdiction and Declaratory Judgment which complies with the requirements of Wis. Stat. § 809.19(12).

We further certify that the electronic Response to Outagamie County and Calumet County's Emergency Petition for Original Jurisdiction and Declaratory Judgment is identical in content and format to the printed form of the Response to Outagamie County and Calumet County's Emergency Petition for Original Jurisdiction and Declaratory Judgment.

A copy of this certification has been served with the paper copies of this Response to Outagamie County and Calumet County's Emergency Petition for Original Jurisdiction and Declaratory Judgment and filed with the Supreme Court and served on all opposing parties.

Dated this 27th day of October, 2020.

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