

Cause No. 2023-00932

CHRIS DANIEL

*

IN THE DISTRICT COURT

*

vs

*

190th JUDICIAL DISTRICT

*

MARILYN BURGESS

*

HARRIS COUNTY, TEXAS

ORDER GRANTING SUMMARY JUDGMENT

In August this court ordered that papers filed in the fourteen cases brought by Guest & Gray were to be filed under the above captioned style and cause number instead of individual filings in each of the fourteen cases.¹ This Order Granting Summary Judgment applies to all fourteen cases.²

On September 28, 2023 the court heard the Motions for Summary Judgment filed by Defendants/Contestees (“Defendants”) in the fourteen election contests. The margins of victory in these elections ranged from 3,078 votes to 34,742.

The court has considered the pleadings, arguments, declarations and other exhibits, and the law. For the reasons stated below, the court *grants* the motions for summary judgment. The court renders judgment for the defendants and *declares* that the canvassed result in each of these fourteen election contests is the *true outcome*.

¹ The court’s “Order Regarding Filing of Pleadings in Single Case,” signed on August 21, 2023, said: “The court orders that pleadings for any of the cases where the Guest and Gray law firm represents the contestant should be filed in cause number 2023-00932, *Daniel v. Burgess*, and that all pleadings filed in that case will be deemed filed in the case to which they are applicable, notwithstanding that the actual filing is only in cause number 2023-00932.”

² The fourteen cases are: Adams v. Williams; Archer v. Horwitz; Bain v. Sepolio; Buss v. Fleischer; Copeland v. Payne; Daniel v. Burgess; Dexter v. Draper; Fraga v. Weems; Goldberg v. Ramirez; Montgomery v. Andrews; Scott v. Wyatt; Simons v. Walker; Staley v Singh; and Stanart v. Hudspeth.

I. THE LAW.

The following sections of the Texas Election Code delineate this court's authority (all emphasis added):

§ 221.003. SCOPE OF INQUIRY.

(a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome *because*:

- (1) illegal votes were counted; or
- (2) an election officer or other person officially involved in the administration of the election:
 - (A) prevented eligible voters from voting;
 - (B) failed to count legal votes; or
 - (C) engaged in other fraud or illegal conduct or made a mistake.

§ 221.012. TRIBUNAL'S ACTION ON CONTEST.

- (a) If the tribunal hearing an election contest *can ascertain the true outcome* of the election, the tribunal shall declare the outcome.
- (b) The tribunal shall declare the election void if it *cannot ascertain the true outcome* of the election.

Plaintiffs' case may be fairly summarized and grouped into two distinct contentions:³

- (1) the Harris County Elections Administration Office ("EAO") and Clifford Tatum (head of the EAO), in violation of section 221.003, constructively "prevented eligible voters from voting," engaged in "illegal conduct," and made "mistakes"; and
- (2) because of this conduct, this court cannot "ascertain the true outcome" of the November 8, 2022 election pursuant to section 221.012(b).

Therefore, Plaintiffs argue, pursuant to section 221.012(b) the court should declare the election void as to the fourteen cases and order a *new election* for the contested offices. Plaintiffs do not ask the court to declare a *different outcome* under section 221.012(a).

³ Plaintiffs do not contend pursuant to section 221.003 that "(1) illegal votes were counted" or that any election official "(B) failed to count legal votes," or that anyone "(C) engaged in other fraud"; and there is no evidence that any of these things happened.

II. PLAINTIFFS' FACTUAL CONTENTIONS.

Factually *Plaintiffs* contend that:

- (1) the EAO chose to supply polling locations with amounts of ballot paper that proved inadequate, which caused ballot shortages and long lines on Election Day;
- (2) many polls didn't open on time at 7:00 a.m., and some didn't open until 11:00 a.m.;
- (3) some voting machines malfunctioned, causing even more delay;⁴ and
- (4) all of this caused voters to leave their chosen polling places and not to vote elsewhere, in numbers sufficient to exceed the vote margins in the contested races.

Defendants seek summary judgment on the ground that there is no evidence to support these contentions.⁵

The court holds that the evidence concerning *factual contentions one through three* above is legally sufficient, and therefore the court respectfully **denies** summary judgment as to those contentions.

III. CONTENTION FOUR.

Defendants also challenge contention four. They stress the undisputed fact that on Election Day in Harris County there was countywide voting at 782 polling locations, and voters who left one location without voting were free to return to that location later and also free to vote at any of the other 781 countywide locations. *Defendants* also point out that there is no evidence showing that *sufficient numbers of voters* actually did not vote at

⁴ Plaintiffs argue that the EAO's conduct amounted to a "constructive closing" of the polls. In their Response to the *Defendants'* No-Evidence Motion for Summary Judgment, they argue that voters who could not vote at the time and place they chose "were disenfranchised and prevented from voting, because they experienced impediments due to violations of law and mistakes which could have been prevented, and were not experienced by the rest of the electorate." They assert that the EAO did not: adequately prepare, allocate, distribute, and deliver supplies; prepare election judges for emergencies; maintain chain of custody of records; provide adequate assistance; and ensure that all voting locations accepted all qualified voters. "Contestants have provided more than a scintilla of evidence that the true outcome of the election is unknowable because of the *material impact* these actions had on the election (emphasis added)." Plaintiffs' Response at pages 18, 24-25, and 30.

⁵ Plaintiffs object that *Defendants'* motions do not adequately point out the elements of their cause of action, as Rule 166a(i) requires. The court respectfully disagrees, and the objection is **overruled**.

other times or places on Election Day. Defendants assert that plaintiffs have produced no evidence that the conduct alleged makes the true outcome unascertainable.

For this court to sustain these election contests because mistakes by election officials constructively prevented voters from voting, as stated in contentions one through three, there must be proof that the EAO's mistakes *resulted at least in numbers of uncast votes that exceed the margins of victory* in the canvassed results.

This does *not* mean that a contestant must *name or identify* voters in a suit brought under § 221.012(b). But there must be evidence that would justify a judicial finding that the number of votes not cast because of the EAO's conduct at least exceeded the margins of victory as declared in the final canvass.

IV. DECISION.

The court **sustains** the Defendants' arguments as to contention four and **grants** summary judgment on that element of Plaintiffs' case. The court **holds** that the evidence in the record is legally insufficient to support a finding that the EAO's conduct actually impacted enough votes to make the true outcome unascertainable in any of the fourteen cases.

Some courts have said the person contesting an election must show that the illegal conduct or mistakes had a "material impact." The election code itself speaks in terms of whether the court can or cannot "ascertain the true outcome." The "material impact" case law and the election code's "ascertain the true outcome" language mean essentially the same thing.

The court has examined the summary judgment record and **holds** there is no evidence to support a finding that the mistakes of the EAO had a "material impact" on the outcome of these elections or that the "true outcome" cannot be ascertained.

The court renders **judgment** that the election contests in the fourteen cases are **denied**, and the court **declares** that the canvassed results are the **true outcomes** in the fourteen cases.

SIGNED: November 9, 2023

/s/ David Peeples
DAVID PEEPLES, Judge Presiding