STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
APPEAL NO. 24AP1233

TAMMY GONFIANTINI,

Appellant,

District: IV
Appeal No. 2024AP001233
Circuit Court Case No. 2024CV000407
Three-Judge Appeal

v.

ROCK COUNTY BOARD OF CANVASSERS,
REGEINA STEVENS and LISA TOLLEFSON,

Respondents.

BRIEF OF APPELLANT

On Appeal from the Circuit Court for Rock County,
The Honorable Jeffrey S. Kuglitsch, Presiding

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Statement of the Issues

Issue One: Whether, under the circumstances of this case, the requirement that the clerk initial or endorse three absentee ballots was directory or mandatory.

The circuit court ruled that the requirement was merely directory and dismissed the case.

Issue Two: Whether the circuit court should have set aside the board of canvass's assumption that the three defective absentee ballots were the result of "clerk's error" because the board did not make a finding based on substantial evidence.

The circuit court relied on, and did not overturn, the board of canvass assumption that the unendorsed ballots were a "clerk error."

Statement on Oral Argument and Publication

Gonfiantini does not request oral argument. Gonfiantini does request publication because this case involves interpretation of Wisconsin statutes and other important issues of Wisconsin election law that are likely to recur.

Statement of the Case

Tammy Green Gonfiantini, candidate for Rock County Supervisor District 13 in the April 2nd, 2024 election, filed a Complaint and Notice of Appeal of Recount (Appeal to Circuit Court under Wis. Stat. § 9.01(6)) on April 16, 2024 against the Rock County Board of Canvassers ("Board"), with Regenia Stevens, candidate for Rock County Supervisor District 13 ("Stevens"), and Lisa Tollefson, Rock County Clerk ("Clerk"), as notice parties. R.4. The Board, Clerk, and Stevens moved to dismiss. R.25, R.26. Following briefing on the motion to dismiss, the circuit court, the Honorable Jeffrey S. Kuglitsch presiding, decided the motion in favor of the Board, Clerk, and Stevens, at an oral ruling on May 22, 2024. R.44. The circuit court then entered an order dismissing the case, with prejudice, for failure to state a claim upon which relief can be granted. R.37. Gonfiantini timely appealed. R.38.

Statement of Facts

This case involves an election for the position of Rock County Supervisor for District 13. R.4, Compl. ¶¶ 1-2. The election was held on April 2nd of 2024. *Id.* Tammy Green Gonfiantini and Regenia Stevens ran for the position. *Id.* After the canvass of the election, Stevens was leading Gonfiantini by three votes, accordingly Gonfiantini timely demanded a recount. R. 4, Compl. ¶ 5. The Board of Canvassers of Rock County convened on April 12, 2024 to conduct the recount. *Id.* ¶ 4, 6. During the recount, Gonfiantini challenged three absentee ballots on the grounds that these three absentee ballots were not initiated or endorsed by the clerk and that portion of the ballot had been left blank. *Id.* ¶ 7. All three of these challenged unendorsed ballots were votes for Stevens. *Id.* ¶ 8. The Board of Canvassers denied the challenges to all three of these unendorsed ballots, giving the reason that the voter should not lose their vote due to a clerk's error. *Id.* ¶¶ 9, 10. After the April

12, 2024 recount, Stevens was leading Gonfiantini by two votes. *Id.* ¶ 6. The reason for this change in the lead from three votes to two votes was that one absentee ballot was challenged due to the fact that Regenia Stevens witnessed the ballot, and this challenge was upheld. R.44, Tr. 12:2-6.

During the recount, Gonfiantini challenged three absentee ballots, all of three of which were voted for Stevens. R.44, Tr. 3:12-15. The three ballots were challenged as being defective because they were not endorsed by the clerk as required by Wisconsin law. R.44, Tr. 3:14-18, 19:10-11. Gonfiantini's challenge to these three defective absentee ballots was denied on the grounds that a voter should not be disenfranchised due to the clerk's error. R.44, Tr. 3:19-24. This is called the "will of the electorate" rule, codified at Wis. Stat. § 5.01(1). Because Stevens's margin of victory over Gonfiantini was only two votes, these three defective absentee ballots decided the election.

Argument

I. The requirement that absentee ballots be endorsed by the clerk is mandatory, not directory, and this defect may be challenged at a recount.

The circuit court erred when it decided that the provision of Wisconsin law requiring absentee ballots to be endorsed by the clerk was directory rather than mandatory. R.44, Tr. 20:14-19. The standard of review for a motion to dismiss for failure to state a claim upon which relief may be granted is *de novo*. *Bank of New York Mellon v. Klomsten*, 2018 WI App 25, ¶ 21, 381 Wis. 2d 218, 911 N.W.2d 364.

A. A failure of a clerk to endorse an absentee ballot is not a *de minimis* defect and such ballots therefore should be discarded to prevent the potential for fraud.

The board of canvassers decided Gonfiantini's challenge to the three defective ballots incorrectly because Wisconsin case law states that, "even under the 'will of the electorate' rule votes will be discarded despite the apparent good faith of the electors if noncompliance with the election law is not *de minimis*." *Logic v. Board of Canvassers*, 2004 WI App 219, ¶ 7, 277 Wis. 2d 421, 689 N.W.2d 692. The *Logic* case then gave an example of a defect which was not *de minimis*: "requirement that absentee ballots bear either the name or the initials of the town clerk is to prevent possible fraud; thus, absentee ballots without either the town clerk's name or initials may not be counted." *Logic v. Board of Canvassers*, 2004 WI App 219, ¶ 7 (citing *Gradinjan v. Boho*, 29 Wis. 2d 674, 682-83, 139 N.W.2d 557 (1966)). The Board, Clerk, and Stevens in this case argued before the circuit court that the Wisconsin statutes had changed since the *Gradinjan* case was decided, however, the lack of a clerk's endorsement on an absentee ballot, as required by Wis. Stat. § 6.87(1), is not a *de minimis* defect, under the statutes in effect for the April 2024 election. The 2024 version of Wis. Stat. § 6.87(1) states in relevant part,

"Upon proper request made within the period prescribed in s. 6.86, the municipal clerk or a deputy clerk authorized by the municipal clerk shall write on the official ballot, in the space for official endorsement, the clerk's initials and official title." Wis. Stat. § 6.87(1).

The Board, Clerk, and Stevens argued in their motion to dismiss before the circuit court that *Logic's* citation to *Gradinjan* for the proposition that absentee ballots lacking the clerk's name or initials should not be counted was decided under an earlier wording of the statutes which included the language, "if the ballot does not contain the name or initials of the clerk of the issuing town, city, village or county... such vote shall not be accepted or counted." *Id*. (citing Wis. Stat. § 11.62 (1963-65)). It was on the basis of this language that the *Gradinjan* court stated: "The conclusion is inescapable that the legislature has expressly by explicit and clear language provided that an absentee ballot not containing the name or initials of the issuing municipal clerk shall not be counted." *Gradinjan v. Boho*, 29 Wis. 2d 674, 683, 139 N.W.2d 557 (1966).

The Board, Clerk, and Stevens argued that the statutory language had changed by the time *Logic* was decided and did not state as explicitly that absentee ballots not containing the initials or name of the clerk could not be counted. Therefore, the Board, Clerk, and Stevens argued that one could no longer challenge an unendorsed absentee ballot. The circuit court agreed and decided that *Logic* does not support the proposition that an absentee ballot lacking the clerk's initials or endorsement may be successfully challenged at a recount. R.44, Tr. 18:10-19:12. The circuit court ruled in favor of the Board, Clerk, and Stevens, stating: "In my opinion, [*Logic*] does not uphold *Gradinjan* for the preposition that ballots must still bear the initials of the town clerk. I sure don't read it that way. So the Court agrees with the County's argument that the legislature must expressly and in clear language make the statutory provision mandatory." R.44, Tr. 18:19-25.

The problem with the circuit court's ruling is that it would draw a "bright line" rule rendering most of Wisconsin's election statutes directory. The undersigned believes that *Logic* did not mean to draw a "bright line" rule. Rather, *Logic* was meant to provide an analytical framework for deciding which Wisconsin election statutes were directory and which were mandatory. Although the Wis. Stat. § 11.62 (1963-65) language is no longer in the statutes, the *Logic* case was decided *after* that statute was changed, and there is still ample proof in the current version of the statutes to establish that the clerk's initials requirement is mandatory. This is made clear in the statutes and confirmed in the *Logic* case.

The *Logic* decision included a discussion about directory versus mandatory portions of the voting statutes. In explaining the difference between directory and mandatory provisions of the voting statutes, the *Logic* court drew a comparison to the analysis of fundamental versus technical defects under the rules of civil procedure. *Logic*, 2004 WI App 219, ¶¶ 3-7. The *Logic* court explained that "even under the 'will of the electorate' rule votes will be discarded despite the apparent good faith of the electors if noncompliance with the election law is not *de minimis*." *Logic*, 2004 WI App 219, ¶ 7. *Logic* continued that, "[t]his is consistent with the 'fundamental defect'/'technical defect' analysis of irregularities in commencement of either an action or appeal." *Id*. The *Logic* court described the requirement of service on other candidates as "a core protection that is hardly *de minimis.*" *Id*.

Similarly, the endorsement of the clerk on an absentee ballot is also a "core protection" that is not *de minimis*. The reasons that the endorsement of the clerk on the absentee ballot is a core protection are clearly set forth in the Wisconsin statutes and in applicable case law. As stated in Wis. Stat. § 6.84(1), entitled "Legislative Policy":

> The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Wis. Stat. § 6.84(1). This makes it clear that "the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse." *Id.*

Wis. Stat. § 6.87(1), requiring the endorsement of the clerk, is one such careful regulation. The current Wis. Stat. § 6.87(1) requirement of the clerk's endorsement on absentee ballots serves a very clear and precise function in preventing the potential for fraud and abuse: it limits the number of "live" absentee ballots in existence. The requirement of the clerk's endorsement on every absentee ballot ensures that there is not a limitless universe of absentee ballots floating around and that only one "live" absentee ballot is created in response to each proper absentee ballot request. The *Logic* case also explained that the reason for the requirement is to "prevent possible fraud." *Id.*, ¶ 7 (citing *Gradinjan*, 29 Wis. 2d at 682-83). This reasoning is still good law and the current statutes explicitly state: "the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse." Wis. Stat. § 6.84(1). If this Court were to overrule *Logic* and find that unendorsed absentee ballots may be counted, it would dramatically increase the potential for fraud and abuse because it would make every unvoted ballot potentially "live." The requirement that each absentee ballot must be endorsed by the clerk is actually an important core protection, as discussed in *Logic*. *Logic*, 2004 WI App 219, ¶ 7.

Courts throughout the United States have recognized that absentee voting is particularly vulnerable to fraud and abuse. The United States Supreme Court has recognized that absentee voting is particularly susceptible to fraud and abuse. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 195-96 & n.12 (2008) (discussing examples "in recent years" of "fraudulent voting . . . perpetrated using

absentee ballots and not in-person fraud . . . demonstrat[ing] that not only is the risk of voter fraud real but that it could affect the outcome of a close election"). The Seventh Circuit Court of Appeals has found that, "Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting." *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (citing John C. Fortier & Norman J. Ornstein, *Symposium: The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. & Reform 483 (2003)). The Fifth Circuit Court of Appeals has recognized that "mail-in voting" is "far more vulnerable to fraud" than other forms of voting. *Veasey v. Abbott*, 830 F.3d 216, 263 (5th Cir. 2016) (en banc) (stating that "mail-in voting . . . is far more vulnerable to fraud, particularly among the elderly" and that the law at issue in that case "does nothing to address the far more prevalent issue of fraudulent absentee ballots"). The Fifth Circuit case *Texas Democratic Party v. Abbott* noted in the concurrence that "courts have repeatedly found that mail-in ballots are particularly susceptible to fraud." *Texas Democratic Party v. Abbott*, 961 F.3d 389, 414 (5th Cir. 2020) (Ho, J., concurring). Here we must again recall the voice of our own Wisconsin legislature stating that, "The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent ***the potential for fraud or abuse.***" Wis. Stat. § 6.84(1) (emphasis supplied).

The circuit court based its ruling on the mandatory versus directory issue on the fact that the defective nature of the absentee ballots in this matter was not one of the specific defects set forth in Wis. Stat. § 6.88(3)(b) or Wis. Stat. § 6.84(2). R.44, Tr. 19:7-20:19. The problem with the circuit court's ruling is that the *Logic* decision was not a "bright line" rule, instead it taught an analytical framework for identifying directory versus mandatory portions of the voting statutes, drawing on the jurisprudential framework for differentiating fundamental and technical defects under the rules of civil procedure. *Logic*, 2004 WI App 219, ¶¶ 3-7. The *Logic* court explicitly cited to *Gradinjan* for the proposition that the "requirement that absentee ballots bear either the name or the initials of the town clerk is to prevent possible

fraud; thus, absentee ballots without either the town clerk's name or initials may not be counted." *Logic*, 2004 WI App 219, ¶ 7 (citing *Gradinjan*, 29 Wis. 2d at 682-83). Furthermore, when *Logic* was decided, the relevant statutes had already been recreated and read much as they do today, so the concept that *Logic* was referencing an outdated version of the statutes is unconvincing.

It must be presumed that the *Logic* court knew that the statutes had been revised since the deciding of *Gradinjan*. "[A]s a general proposition, every person, sophisticated or otherwise, is presumed to know the law." *Tri-State Mechanical, Inc. v. Northland College*, 2004 WI App 100, ¶ 10, 273 Wis. 2d 471, 681 N.W.2d 302 (citing *Putnam v. Time Warner Cable*, 2002 WI 108, ¶ 13 n.4, 255 Wis. 2d 447, 649 N.W.2d 626). This rule that "every person, sophisticated or otherwise, is presumed to know the law" most certainly must include the courts of this state. Therefore, it is presumed that the *Logic* court knew that the statutory language had been rewritten from the time of *Gradinjan* when the *Logic* court stated the rule that absentee ballots without the clerk's name or initials may not be counted. Thus the *Logic* decision brings the rule that "absentee ballots without either the town clerk's name or initials may not be counted" into the new statutes.

There is language in the "new" election statutes that the *Logic* court certainly could have relied on to come to the decision that the language prohibiting unendorsed absentee ballots from being counted was "explicit" as required by *Gradinjan*. First, the "new" election statutes contained a section titled "Legislative Policy" which did not exist under the version of the statutes in force when *Gradinjan* was decided. That section clearly determines that absentee voting is a privilege and not a right and that it is recognized to be vulnerable to fraud and abuse:

> LEGISLATIVE POLICY. The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Wis. Stat. § 6.84(1) (2003-04). This legislative policy section, Section 6.84, first appeared in the 1985-86 statutes. Furthermore, the 2003-04 statutes included clear language that mandated that when voting in person it was the responsibility of the elector, not the clerk, to ensure that the ballot had been properly initialed. Wis. Stat. § 6.80(2)(d) (2003-04). This is consistent with the wording of the current statutes, which read: "If an elector receives a ballot which is not initialed by 2 inspectors, or is defective in any other way, ***the elector shall return it to the inspectors***. If the initials are missing, the inspectors shall supply the missing initials. If the ballot is defective, they shall destroy it and issue another ballot to the elector." Wis. Stat. § 6.80(2)(d) (emphasis supplied). This statute informs us that a ballot that is not initialed is a defective ballot because it states "a ballot which is not initialed by two inspectors, or is defective in any other way" meaning that a ballot which is not initialed by two inspectors, is defective.

The statutory importance of having the ballots initialed is mirrored in the absentee voting statute. Turning to the procedures for absentee voting, the very first step that the clerk takes upon receiving a proper and timely request for an absentee ballot is to endorse it in the space for official endorsement. "Upon proper request made within the period prescribed in s. 6.86, the municipal clerk or a deputy clerk authorized by the municipal clerk shall write on the official ballot, in the space for official endorsement, the clerk's initials and official title." Wis. Stat. § 6.87(1). This language was the same in the 2003-04 version of the statutes.

The seriousness of the endorsement requirement is also evidenced by the strict way that election officials are disciplined if they intentionally fail to properly endorse a ballot or give an unendorsed ballot to an elector: **"**Any election official who intentionally fails to properly endorse a ballot or who intentionally gives an elector a ballot not properly endorsed shall be removed as an election official." Wis. Stat. § 7.37(5). This language was also the same under the 2003-04 statutes and the statutory section is labeled "Improper Conduct." It is telling that the only conduct set forth under the heading "Improper Conduct" relates to the failure to properly endorse ballots. This is one of the sections that the *Logic* court may have looked at in determining that there was an explicit statutory mandate that unendorsed absentee ballots not be counted.

Another section that the *Logic* court may have looked at in deciding that it was mandatory that unendorsed absentee ballots not be counted is found in the section on the tallying of votes. During the counting of the absentee votes, one of the very first steps that the inspectors take is to verify that each ballot has been properly endorsed by the issuing clerk. This is explained in the statute section titled "Voting and Recording the Absentee Ballot," which explains that, "[t]he inspectors shall take out the ballot without unfolding it or permitting it to be unfolded or examined. Unless the ballot is cast under s. 6.95, the inspectors shall verify that the ballot has been endorsed by the issuing clerk." Wis. Stat. § 6.88(3)(a)[1]. This mandate is echoed in the statute that governs tallies by a board of absentee ballot canvassers: "Unless the ballot is cast under s. 6.95, the board of absentee ballot canvassers shall verify that the ballot has been endorsed by the issuing clerk." Wis. Stat. § 7.52(3)[2]. It is clear that the endorsement requirement is listed in multiple places in the statutes

[1] The 2003-04 version of the statutes stated: "They shall then open the envelope containing the ballot in a manner so as not to deface or destroy the certification thereon. The inspectors shall take out the ballot without unfolding it or permitting it to be unfolded or examined. Unless the ballot is cast under s. 6.95, the inspectors shall verify that the ballot has been endorsed by the issuing clerk." Wis. Stat. § 6.88(3)(a) (2003-04).

[2] This statute section had not been created yet in the 2003-04 version of the statutes.

in effect at the time of the *Logic* decision, and at the time of the April 2024 Rock County Board election. A lack of a clerk's endorsement is not a *de minimis* defect, rather, the requirement is mandatory and is the proper basis for challenging a ballot at a recount under Wis. Stat. § 9.01(6).

B. Under Wisconsin law, parties have an absolute right to challenge absent electors.

The statutes also explicitly state that parties have the right to challenge the vote of an absent elector: "The vote of any absent elector may be challenged for cause and the inspectors of election shall have all the power and authority given them to hear and determine the legality of the ballot the same as if the ballot had been voted in person." Wis. Stat. § 6.93 ("Challenging the absent elector"). This statute was the same in the 2003-04 version of the statutes. The reason that Wis. Stat. § 6.93 is important to this analysis circles back to the beginning of this discussion. When an elector votes in person, it is the elector's responsibility to verify that the ballot is properly initialed. "If an elector receives a ballot which is not initialed by 2 inspectors, or is defective in any other way, ***the elector shall return it to the inspectors***." Wis. Stat. § 6.80(2)(d) (emphasis supplied). Thus, it is the elector's responsibility to ensure that the ballot is initialed or endorsed. The statutes then explicitly state that the vote of an absent elector may be challenged and "the inspectors of election shall have all the power and authority given them to hear and determine the legality of the ballot ***the same as if the ballot had been voted in person***." Wis. Stat. § 6.93 (emphasis supplied) (see also Wis. Stat. § 7.52(5)(a)[3] for similar language which applies to the special absentee ballot canvassing procedure). Because an in person ballot lacking the initials of the inspectors is defective, it

[3] The vote of any absent elector may be challenged by any elector for cause and the board of absentee ballot canvassers shall have all the power and authority given the inspectors to hear and determine the legality of the ballot the same as if the ballot had been voted in person. Wis. Stat. § 7.52(5) (a).

stands to reason that an absentee ballot missing the endorsement of the clerk would be a nullity as well.

The same statute section continues, setting out the rule that any elector may challenge the vote of an absentee elector for cause, and such challenges shall be heard by the absentee ballot canvassers or the inspectors. *Id*. The Board, Clerk, and Stevens erroneously argued before the circuit court that because the recount statute contains a procedure to ensure that at the outset of the process the number of ballots is compared to the number of voters, and blank and unendorsed ballots are drawn out to square the number of ballots with the number of voters, that this means that participants in the recount are precluded from challenging unendorsed absentee ballots. R.25, Br. 2-3. This argument is incorrect. The statutes clearly state that, "In all contested election cases, the contesting parties have the right to have the ballots opened and to have all errors of the inspectors, either in counting or refusing to count any ballot, corrected by the board of canvassers or court deciding the contest." Wis. Stat. § 7.54. This statute makes it clear that errors in counting, or refusing to count, any ballot may be corrected.

As noted above, "The vote of any absent elector ***may be challenged for cause*** and the inspectors of election shall have all the power and authority given them to hear and determine the legality of the ballot the same as if the ballot had been voted in person." Wis. Stat. § 6.93 (emphasis supplied). Taken together, these statutes mandate that the aggrieved candidate has the right to challenge the votes of any absentee elector, and that challenge shall be decided by the board of canvassers or court. Wis. Stat. § 7.54.

C. The procedural recount mechanism for squaring the number of ballots with the number of votes does not preclude a later challenge to a defective absentee ballot.

The circuit court found that the procedural mechanism under Wis. Stat. § 9.01(1)(b)4. for squaring the number of ballots with the number of votes at the outset of the recount insulates all of the unendorsed absentee ballots from challenge. R.44, Tr. 20:20-21:9. However, the law does not state this. The law states that absentee ballots may be challenged for cause. Wis. Stat. § 6.93. The law also states that the parties have a right to have their challenges decided, including at a recount. Wis. Stat. § 7.54. Furthermore, there is well known Wisconsin case law where absentee ballots were challenged at the recount. *See e.g. Walter V. Lee vs. David Paulson*, 2001 WI App 19, ¶¶ 7-11, 241 Wis. 2d 38, 623 N.W.2d 577.

D. Wisconsin's rules of statutory interpretation cut against the circuit court's decision in this matter.

The Court's goal in interpreting statutes is to discern and give effect to the intent of the legislature. *Highland Manor Associates v. Bast*, 2003 WI 152, ¶ 9, 268 Wis. 2d 1, 672 N.W.2d 709. Statutory interpretation begins with the language of the statute, and each word should be looked at so as not to render any portion of the statute superfluous. *Id.* However, "courts must not look at a single, isolated sentence or portion of a sentence" instead of the relevant language of the entire statute. *Id.* (citing *Landis v. Physicians Insurance Co. of WI*, 2001 WI 86, ¶ 16, 245 Wis. 2d 1, 628 N.W.2d 893).

Furthermore, a statutory provision must be read in the context of the whole statute to avoid an unreasonable or absurd interpretation. *Id.; see also State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (statutes are to be interpreted in a way that avoids absurd results). Statutes relating to the same subject matter should be read together and harmonized when possible. *Id.* A cardinal rule in interpreting statutes is to favor an interpretation that will fulfill the

purpose of a statute over an interpretation that defeats the manifest objective of an act. *Id.* Thus, a court must ascertain the legislative intent from the language of the statute in relation to its context, history, scope, and objective, including the consequences of alternative interpretations. *Id.* "We must interpret statutes to avoid absurd results." *Miesen v. Dep't of Transp.*, 226 Wis. 2d 298, 308, 594 N.W.2d 821 (1999). To interpret the statutes in such a way that claims such as this one are dismissed at the motion to dismiss phase without any discovery, without looking at the ballots, and without any attempt whatsoever to determine how this situation came to pass would be an absurd result.

Interpreting the statutes as allowing one candidate to claim victory on the basis of three unendorsed absentee ballots would be an absurd result when the statutes stress over and over the importance of the clerk's endorsement on the absentee ballots and there is applicable, binding, case law which states that unendorsed absentee ballots are not to be counted.

E. Even if the provision of Wisconsin law requiring absentee ballots to be endorsed is directory rather than mandatory, it should be considered mandatory in this case because in this matter it would change or render doubtful the result of the election.

The circuit court erred by finding that the endorsement requirement was not mandatory under the facts of this case, when it would render doubtful the result of this specific county board supervisor election. Even if the requirement that absentee ballots be endorsed by the clerk is found to be directory, it is still fatal to the three absentee ballots in this case. The *Gradinjan* court explained the distinction between directory and mandatory election statutes:

> The difference between mandatory and directory provisions of election statutes lies in the consequence of nonobservance: An act done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid. Deviations from directory provisions of election statutes are usually termed 'irregularities,' and, as has been shown in the preceding subdivision, such irregularities do not vitiate an election. Statutes giving directions as to the mode and manner of conducting elections will be construed by the courts as directory, unless a noncompliance with their terms is expressly declared to be fatal, ***or will change or render doubtful the result***, as where the statute merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election.'

Gradinjan, 29 Wis. 2d at 681 (citing *Sommerfeld v. Board of Canvassers*, 269 Wis. 299, 69 N.W.2d 235 (1955); *Olson v. Lindberg*, 2 Wis. 2d 229, 235, 85 N.W.2d 775 (1957)) (emphasis supplied). Thus, by the express language of *Gradinjan*, *Sommerfeld*, and *Olson*, the non-compliance with a directory statute becomes mandatory when the non-compliance will "change" or "render doubtful" the result of an election. Here, that is exactly the situation. One candidate has two more votes than the other, however there are three defective ballots, all with the exact same defect, and all voted for one candidate. Put another way, the leading candidate is only leading because of three defective absentee ballots, all with the exact same defect. This is the epitome of a situation where the non-compliance has changed and rendered doubtful the result. Accordingly, even if for the sake of argument the lack of a clerk's endorsement could be considered "directory," in the situation at bar it becomes mandatory because of the circumstances in this particular case. Furthermore, this situation is likely to reoccur, sowing doubt in the results of future close elections where there are a number of unendorsed ballots that may be outcome determinative.

II. The circuit court should have set aside the board of canvass's assumption that the three defective absentee ballots were the result of "clerk's error" because the board did not make a finding based on substantial evidence.

The circuit court erred when it relied on the board of canvass's assumption that the three unendorsed ballots were a result of "clerk's error" because this was not supported by substantial evidence. R.44, Tr. 22:9-10. The circuit court relied on this statement and dismissed the case. The standard of review for a motion to dismiss for failure to state a claim upon which relief may be granted is *de novo*. *Bank of New York Mellon v. Klomsten*, 2018 WI App 25, ¶ 21, 381 Wis. 2d 218, 911 N.W.2d 364.

The circuit court took judicial notice of the recount minutes to decide that Gonfiantini had a fair opportunity to challenge the absentee ballots at the recount and had simply lost the challenge. The circuit court ruled:

> In the Court's opinion, the appellant had a chance to properly exercise their rights under 7.54 and 6.93. This was done. They were there. They properly objected. The board of canvass gave their reasons as to why those objections were not -- were denied. The board denied the objections because they believed the drawdown due to a poll worker error or a clerk error were not appropriate for drawdown. In this Court's view, while the appellant made proper objections, the board of canvass made a proper response.

R.44, Tr. 21:10-20. The problem with this ruling is that the board of canvass did not actually make a factual finding based on evidence or give any reasons at all for its statements regarding "clerk error." Gonfiantini objected to the three defective absentee ballots and the board of canvass simply assumed that it was a "clerks error" without any basis whatsoever. This is clear from the Minutes of the Recount, which simply stated, "Ballots are not drawn down due to a poll worker error" and "Ballots are not drawn down due to a clerk error." R.35, Minutes 9, 11. The minutes show that the board did not conduct any investigation and did not make any specific findings of what the clerk error was or even whether there was a clerk error at all. The language of the minutes repeats the supposed legal standard ("Ballots are not drawn down due to a clerk error") but without making a finding that there *was* a

clerk error. The board of canvass was required to make specific findings of fact, but failed to do so. Wis. Stat. § 9.01(5)(a) ("The board of canvassers or the chairperson or chairperson's designee shall make specific findings of fact with respect to any irregularity raised in the petition or discovered during the recount.")

The board of canvass was required to make findings of fact based on substantial evidence, but the board of canvass did not base the statement about "clerk's error" on a finding of fact and did not base this statement on substantial evidence. In fact, the board of canvass did not base its statement on any evidence at all. This should have caused the circuit court to overturn the board of canvass's decision, not uphold it. Wis. Stat. § 9.01(8)(d) ("The court shall set aside the determination if it finds that the determination depends on any finding of fact that is not supported by substantial evidence.")

The Board, Clerk, and Stevens may argue that the board of canvass is presumptively correct, but this would be an incorrect argument because "[t]he board of canvassers ... shall keep complete minutes of all proceedings before the board of canvassers." Wis. Stat. § 9.01(5)(a). Accordingly, when the board of canvass failed to state any evidence at all upon which the board of canvass assumed that the three absentee ballots were due to "clerk's error," the circuit court should have overturned the board. Accordingly, the circuit court's determination was inaccurate when the circuit court stated that "while the appellant made proper objections, the board of canvass made a proper response." R.44, Tr. 21:18-22. This is because the board of canvass did not make a proper response when it assumed that the three defective absentee ballots were caused by clerk's error without any evidence at all, let alone "substantial" evidence as required by statute.

The circuit court also noted that, "[t]he appellant alleges that there's the potential for fraud in this matter. But there's no indication of any fraud. There's no even suggestion of any fraud." R.44, Tr. 21:21-24. The problem with this decision is that the circuit court simply assumed that "[t]hree unendorsed ballots were a simple clerk's error." R.44, Tr. 22:9-10. However, the board of canvass did not

conduct any investigation or fact finding on this issue to determine whether there was a "simple clerk's error" or whether there was evidence of fraud. The minutes reveal that no investigation and no fact finding took place. R.35, Minutes. The circuit court also did not conduct any fact finding because the case was dismissed at the motion to dismiss phase. Therefore, throughout the process, Gonfiantini has been denied any opportunity to discover why there were three unendorsed ballots that exactly matched the margin of victory.

There may be a completely innocent explanation for how the difference in votes on election night was three votes, and there were exactly three unendorsed ballots. But it was improper to dismiss the case at the motion to dismiss phase when the number of defective ballots to be exactly equal to the margin of victory, especially because Gonfiantini was denied the opportunity at the board of canvass to hear any evidence, let alone substantial evidence, of why this was the case. It would be verging on nearly statistically impossible, that the difference in the vote totals should be exactly the number of unendorsed absentee ballots, and that all three of those absentee ballots should be voted for the same candidate.

The circuit court should have allowed a careful review of all of the election materials with care to see whether there was fraud or simply an innocent mistake. Tammy Green Gonfiantini put a great deal of time and effort into running for the position of County Supervisor, and to dismiss this case at the motion to dismiss phase, without a close review of the election materials, without any discovery, and without any attempt to understand what happened, would be a disservice to Tammy Gonfiantiani, to the electorate, and to the reputation of the electoral system in Wisconsin.

Conclusion

According to the most straightforward reading of the law, the rule that the clerk must endorse every absentee ballot is mandatory and the three absentee ballots without the clerk's name or initials should not have been counted. Because the difference in votes between the Leading Candidate and the Aggrieved Candidate was two votes, and because there were three challenged unendorsed ballots, all of which were votes cast for Stevens, this mistake of law by the board of canvassers was outcome determinative. Furthermore, the board of canvass did not base their statement regarding "clerk error" on any evidence at all, let alone substantial evidence. Even if this Court is not of the opinion that the absentee ballot endorsement rule is mandatory in all cases, at a minimum, this case presents an unusual enough set of circumstances that it deserves a closer look to determine what happened. For the reasons stated herein, Gonfiantini respectfully requests that the Court reverse the order of the circuit court and remand the case to the circuit court for further proceedings.

Respectfully Submitted this 24th day of September, 2024.

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WIS. STAT. § 809.19(8g)(a) FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 6,499 words.

Signed: September 24, 2024.

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WIS. STAT. § 809.19(8g)(b) APPENDIX CERTIFICATION

CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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