

IN THE SUPREME COURT OF PENNSYLVANIA

No. 29 WAP 2020

IN RE: 2,349 BALLOTS IN THE 2020 GENERAL ELECTION

Appeal of Allegheny County Board of Elections

**RESPONSE OF RESPONDENT-INTERVENORS
THE PENNSYLVANIA DEMOCRATIC PARTY AND JAMES BREWSTER
IN OPPOSITION TO EMERGENCY APPLICATION FOR REARGUMENT**

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RESPONSE IN OPPOSITION TO APPLICATION FOR REARGUMENT

The Pennsylvania Democratic Party and James Brewster (collectively, the “Pennsylvania Democratic Party Respondents”) file this Response in Opposition to the Application of Nicole Zicarelli (“Zicarelli”) for Reargument (the “Application”).

I. INTRODUCTION

With its November 23, 2020 decision, this Court considered whether the Election Code requires a county board of elections to disqualify mail-in or absentee ballots as submitted by qualified electors, who signed the declaration on their ballot’s outer envelope and included their name and address but did not write in the date.¹ No fraud or irregularity was alleged with respect to any of the ballots at issue.

Justice Wecht concurred with the Opinion Announcing the Judgment of the Court but issued a separate opinion in which he expressed reservations regarding the provision of the Election Code directing that a voter is to handwrite a date on the declaration portion of the outer envelope that encloses their ballot. Justice Wecht agreed that voters who had not provided a handwritten date should not be disenfranchised in this election, but noted that, in future, he believed that the dating

¹ The case was submitted to the Court on November 20, 2020 and the Court issued its decision on November 23, 2020.

provision should be treated as mandatory. He stated: “However, under the circumstances in which the issue has arisen, I would apply my interpretation only prospectively.” *In re Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, No. 29 WAP 2020, at 3, 2020 WL 6866423 (Pa. Nov. 23, 2020) (Wecht, J., concurring in part and dissenting in part; Dougherty, J. concurring in part and dissenting in part). Justice Wecht observed that 2020 has been “tumultuous” and that, in advance of the 2020 General Election, neither the Commonwealth Court nor this Court had had the opportunity to review the new provisions of the Election Code. He specifically recognized the lack of clear information regarding the Code’s requirements and that even diligent electors might not have been “adequately informed as to what was required to avoid the consequence of disqualification in this case.” Justice Wecht thus concluded, citing *Appeal of Zentner*, 626 A.2d 146 (Pa. 1993), that “it would be unfair to punish voters for the incidents of systemic growing pains.” *Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, Op. of Wecht, J. at 20.

With her Application for Reargument, Zicarelli continues her efforts to disenfranchise the affected voters who had no opportunity to participate or be heard in this matter. Seizing on Justice Wecht’s consideration of the unique circumstances and issues of interpretation of new Election Code provision and relying on the Court’s denial of allowance of appeal on November 23, 2020, in *In*

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WAL 2020, she asks the Court for the opportunity to reargue the question that this Court has now resolved. Her Application should be denied.

II. ARGUMENT

A. Zicarelli's Effort To Imbue Meaning Into The Court's Denial Of Allocatur Must Be Rejected

Within only a few days, over the past week, this Court has been presented with a number of requests for review of a variety of decisions arising from the 2020 General Election and questions involving interpretation of various provisions of the Election Code. The Court elected to accept some of the questions presented for review. It denied others, including *In Re: Allegheny County Provisional Ballots in the 2020 General Election*, No. 338 WAL 2020. Zicarelli relies on the Court's denial of allocatur in that case to argue that this Court is somehow obligated to follow the decision of a single judge of the Commonwealth Court, even though this Court chose not to grant a discretionary appeal of that decision². Appl. at 2.

However, this Court has made clear that the denial of allocatur "does not constitute or imply an endorsement by the Supreme Court of the position taken by

² Further, the Commonwealth Court's decision in *Allegheny County Provisional Ballots in the 2020 General Election* addressed 25 P.S. § 3050(a.4) related to provisional ballots and did not address 25 P.S. § 3146.6(a) and 25 P.S. § 3150.16(a) related to absentee ballots and mail-in ballots, which is at issue in this matter.

the Superior Court or the Commonwealth Court; it is, instead, a discretionary order, and of no precedential value.” *Vaccone v. Syken*, 587 Pa. 380, 383 n. 2, 889 A.2d 1103, 1106 n. 2 (2006); Darlington et al., *Pennsylvania Appellate Practice*, § 1114:8.³ Thus, Zicarelli’s efforts to imbue the denial of allocatur in one of the Election Code cases presented to this Court must be rejected.

B. The Prospective Relief Provided, In The Circumstances Of This Case And In This Election, Is Appropriate

Justice Wecht correctly determined that, despite his concerns regarding the Election Code’s provision directing a handwritten date on the declaration, for purposes of this election, qualified voters must not be disenfranchised. Citing *Zentner*, Justice Wecht properly concluded that his interpretation of the Election Code should only apply prospectively.

In *Zentner*, electors brought actions to set aside the nomination petitions of candidates for council seats for filing untimely financial interest statements in accordance with Section 4(b) of the Ethics Act, which required the statement to be filed with the local governing authority on or before the last day for filing a petition to appear on the ballot. 533 Pa. at 566, 626 A.2d at 147. In considering whether a candidate’s failure to file the financial interests statement within the

³ See also *PPM Atlantic Renewable v. Fayette Cty. Zoning Hearing Bd.*, 623 Pa. 134, 139 n. 3, 81 A.3d 896, 899 n. 3 (2013) (Supreme Court order dismissing an improvidently granted appeal has the same effect as denial of allocatur and is of no precedential value).

prescribed time was “fatal to a candidacy,” the Court held that to “void the results of an election where all candidates were submitted to the voters, with late but nonetheless filed financial statements which left adequate time for study by the electorate, would be an unnecessary disenfranchisement.” *Id.* at 149. This Court thus held that its holding would only apply prospectively and not retroactively. *Id.*

For the same reason, as Justice Wecht explained in his opinion in this case, even diligent electors might not have been “adequately informed as to what was required to avoid the consequence of disqualification in this case.” *Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, Op. of Wecht, J. at 20. As he properly concluded, “it would be unfair to punish voters for the incidents of systemic growing pains.” *Id.* Zicarelli has offered no basis for reconsideration of this reasonable and correct conclusion.⁴

C. Zicarelli Fails To Address Zentner And Relies Instead On Inapposite Decisions That Do Not Involve The Disenfranchisement Of Voters

⁴ In seeking the relief of the post hoc invalidation of ballots that eligible voters have cast, Zicarelli’s proposed interpretation of the Election Code would raise serious federal constitutional concerns. *See Griffin v. Burns*, 570 F.2d 1065, 1075 (1st Cir. 1978) (finding the retroactive invalidation of ballots cast in an officially-endorsed manner amounted to a constitutional violation); *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 98 (2d Cir. 2006) (affirming injunction prohibiting Board from certifying elections without tallying certain absentee ballots when election officials “at least arguably [] misled voters”). If there is any ambiguity in the statute, it should be construed to avoid such constitutional questions. *See Commonwealth v. Veon*, 150 A.3d 435, 443 (Pa. 2016) (“[W]hen a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” (citation omitted)).

Instead of addressing the rationale in *Zentner*, on which Justice Wecht relied, Ziccarelli cites two inapposite cases to support her position that voters should be disenfranchised instead of being provided prospective relief. (Ziccarelli App. at 2-3) (citing *In re L.J.*, 622 Pa. 126, 79 A.3d 1073 (2013) and *Dana Holding Corporation v. Workers' Compensation Appeal Bd.*, --- Pa. ----, 232 A.3d 629 (2020)). Neither of those cases support Ziccarelli's demand for reargument.

In *In re L.J.*, this Court vacated a decision of the Superior Court and held that a minor criminal defendant was entitled to retrospective relief when the lower court inappropriately reviewed evidence beyond the record presented in a pretrial suppression hearing. 622 Pa. at 133, 79 A.3d at 1076. In doing so, the Court held that the Superior Court's reliance on a previous holding of this Court was "understandable but ultimately misplaced." 622 Pa. at 131, 79 A.3d at 1076. As a result, the limited retrospective relief that this Court afforded involved the clarification of a 30-year old standard for the scope of evidence on review. The Court's review of the appropriateness of retrospective relief, then, addressed a situation where: 1) this Court addressed the application of a longstanding previous ruling; and 2) all of the parties possibly affected by the Court's specific holding (the Appellant as a minor criminal defendant, and the Commonwealth) were present in the litigation.

Similarly, in *Dana Holding Corporation*, this Court held that workers who had preserved certain challenges to the Workers' Compensation Act in their appeals were entitled to retrospective relief on the basis of this Court's holding in *Protz v. Workers' Compensation Appeal Bd. (Derry Area School Dist.)* 629 Pa. 645, 161 A.3d (2017). In *Protz*, this Court had held that a 20-year old statutory provision in the Workers' Compensation Act (regarding nebulous standards for impairment rating evaluations) violated the Pennsylvania Constitution. 232 A.3d at 631. In *Dana Holdings Corp.*, this Court held that workers who had maintained challenges to their workers' compensation decisions on this basis at the time of the decision in *Protz* were entitled to the relief stated therein. *Id.* The Court's review of the appropriateness of prospective relief, as in *In Re L.J.*, addressed a situation where: 1) a longstanding statutory provision was invalidated; and 2) all of the parties possibly affected by this Court's specific holding (the claimant, the employer, and the WCAB) were present in the litigation.

Each of these three cases – *Zentner*, *In re L.J.* and *Dana Holdings Corp.*, share a common characteristic: this Court did not penalize individuals who acted without benefit of a ruling from the Court and did not have an opportunity to adjust their behavior accordingly. Zicarelli disregards the fact that she is not the only relevant actor here. The disenfranchisement of 2,349 voters is of critical importance here. As Justice Wecht noted, these voters were not apprised of the

consequences of omitting the date on their declaration. More importantly, with a new law, the Secretary of State was not in a position to design the declaration on the outer envelope with clear warnings to the voters, nor were the various boards of election certain as to whether to inform the voters under the SURE System that the ballots were being rejected, so that they would have the opportunity to vote with a provisional ballot.

Justice Wecht appropriately applied an election case in his analysis as to whether to make a ruling prospective, recognizing that elections involve more than a closed set of litigants. In contrast, Ziccarelli ignores the fact that elections first and foremost, must account for the voters of Pennsylvania and assure that the rights of those voters to cast a ballot is not disregarded in a cavalier manner. Thus, as Justice Wecht recognized, this situation presents the very type of case that should be applied prospectively.

In requesting reargument, Ziccarelli would have this Court require retrospective relief that would disenfranchise 2,349 voters, who received no clarification from the Secretary of State or the Allegheny County Board of Election as to the consequences of not filling out the date. These voters were also not notified of this litigation or given the opportunity to participate in this very fast

paced litigation.⁵ Justice Wecht’s decision to apply the concurring opinion he expressed only prospectively, was appropriate and consistent with the Court’s past practice.⁶

⁵ The Allegheny County Board of Elections conducted a special virtual meeting on these ballots on November 10, 2020. The Common Pleas court heard argument on appeal of the Board’s decision to canvass the ballots on November 17, 2020. The Commonwealth Court issued its decision on November 19, 2020. This Court granted a Petition for Allowance of Appeal on November 20, 2020 and issued its decision on November 23, 2020. This expedited schedule is not one that could involve 2,349 potential voter-litigants.

⁶ With respect to future elections, the Court might have an opportunity to consider the distinction between mandatory and directory instructions within the Election Code and distinctions involving matters addressing the General Assembly’s concerns relating to potential voter fraud. Further, this Court could consider the role of the individual boards of elections in considering evidence that may avoid disenfranchisement where the General Assembly’s concerns are otherwise satisfied, as with the use of scanning or time-stamping procedures to accurately assess the date on which a ballot arrived. *See, e.g., Appeal of McCracken*, 370 Pa. 562, 565, 88 A.2d 787, 788 (1952) (observing that county election boards have “plenary powers in the administration of the election code”); *see also Pennsylvania Democratic Party v. Boockvar*, --- Pa. ---, 238 A.3d 345, 356 (2020) (“[T]he Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice.”); *id.* at 373. (citing *Appeal of James*, 377 Pa. 405, 408, 105 A.2d 64, 66 (1954)) (“[Technicalities should not be used to make the right of the voter insecure.”); *Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, Op. of Wecht, J. at 20-21 (“It is my sincere hope that the General Assembly sees fit to refine and clarify the Election Code scrupulously in the light of lived experience. In particular, because this is the second time this Court has been called upon to address the declaration requirement, it seems clear that the General Assembly might clarify and streamline the form and function of the declaration, perhaps prescribing its form to advance clarity and uniformity across the Commonwealth.”).

III. CONCLUSION

For the foregoing reasons, the Pennsylvania Democratic Party Respondents ask this Court to deny Zicarelli's Application for Reargument.

Respectfully submitted,

By /s/ Clifford B. Levine

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Dated: November 24, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2020, I caused the foregoing to be electronically filed and to be served on counsel of record for Plaintiffs and Defendants listed on the docket via the Court's ECF system.

/s/ Clifford B. Levine