

## Litigating a Close Election

*Joshua Cole for Delegate v. Virginia State Board of Elections*  
 (Claude M. Hilton, 1:17-cv-1295)  
 and *Lecky v. Virginia State Board of Elections*  
 (T.S. Ellis III, 1:17-cv-1336) (E.D. Va.)

In an election that would narrowly determine which party controlled the state legislature, a district judge denied a motion to order the counting of absentee ballots that were delivered late, allegedly because of postal-service error. A second district judge declined to enjoin certification of a close election after it had been discovered that hundreds of voters were given ballots for a different district.

*Subject:* Voting irregularities. *Topics:* Election errors; absentee ballots; enjoining certification; intervention; presiding remotely.

On the day after the November 7, 2017, general election in Virginia, control of the commonwealth’s house of delegates would depend on resolution of four races too close to call, including the race for district 28’s delegate.<sup>1</sup>

### *Suit by the Candidate*

One week after the election, a delegate campaign for district 28 filed a federal complaint in the Eastern District of Virginia’s Alexandria courthouse seeking the counting of fifty-five absentee ballots that were delivered to Stafford County’s registrar on the day after the election because of alleged errors by the postal service.<sup>2</sup> With its complaint, the campaign filed an emergency injunction motion.<sup>3</sup> The commonwealth’s Republican Party moved to intervene on the following day in opposition to the complaint.<sup>4</sup>

At a November 17 hearing, Judge Claude M. Hilton granted intervention over the campaign’s objection.<sup>5</sup> Judge Hilton also denied the campaign relief.<sup>6</sup>

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1. See Fenit Nirappil, *Democratic Victories Could Upend Control of Virginia House*, Wash. Post, Nov. 8, 2017, at A7; see also Fenit Nirappil, *Undecided Races Leave Control of Va. House in Limbo*, Wash. Post, Nov. 9, 2017, at B1.

2. Complaint, *Joshua Cole for Delegate v. Va. State Bd. of Elections*, No. 1:17-cv-1295 (E.D. Va. Nov. 14, 2017), D.E. 1; see Graham Moomaw, *Democratic Caucus Files Suit Over Absentee Ballots*, Richmond Times Dispatch, Nov. 16, 2017, at 1B; Laura Vozzella, *Democrats Sue Over Uncounted Va. Ballots*, Wash. Post, Nov. 16, 2017, at B1 (“By a 2-to-1 vote, Stafford’s electoral board agreed on Tuesday not to count them.”).

3. Emergency Injunction Motion, *Joshua Cole for Delegate*, No. 1:17-cv-1295 (E.D. Va. Nov. 14, 2017), D.E. 2; Emergency-Injunction-Motion Brief, *id.* (Nov. 14, 2017), D.E. 3.

4. Intervention Motion, *id.* (Nov. 15, 2017), D.E. 11; Intervention Brief, *id.* (Nov. 15, 2017), D.E. 12; Opposition Brief, *id.* (Nov. 16, 2017), D.E. 14; see Jeff Branscome, *Thomas Pushes Back on Vote Suit*, Fredericksburg Free Lance-Star, Nov. 17, 2017, at 1A.

5. Transcript at 4–5, *Joshua Cole for Delegate*, No. 1:17-cv-1295 (E.D. Va. Nov. 17, 2017, filed Dec. 5, 2017), D.E. 26 [hereinafter *Joshua Cole for Delegate* Transcript]; Order, *id.* (Nov. 17, 2017), D.E. 21 [hereinafter *Joshua Cole for Delegate* Order]; Minutes, *id.* (Nov. 17, 2017), D.E. 18.

6. *Joshua Cole for Delegate* Transcript, *supra* note 5, at 42–43; *Joshua Cole for Delegate*

All right. Well, I find that there's no constitutional implications involved here. The evidence is that these 55 ballots were received the day after the election. And, in accordance with Virginia law—which Virginia has every right to establish the rules and regulations for an election, these ballots were late, and the decision was not to count them. And I find nothing at all wrong about that.

...

And it's not my business to be involved in writing the state's rules and regulations. Certainly I don't find anything improper here. And there's no harm.<sup>7</sup>

Judge Hilton approved a voluntary dismissal of the case on December 7.<sup>8</sup>

### *Suit by Voters*

Observing that “the current margin is only 82 votes,” three voters filed a federal complaint in the Eastern District on November 21 alleging that they were two of many voters who were improperly given ballots for district 88 instead of district 28.<sup>9</sup> With their complaint, they filed an emergency motion for a temporary restraining order and a preliminary injunction against certification of election results for the district.<sup>10</sup>

As evidence developed, it became clear that several hundred voters had been assigned to the wrong district; 147 of them voted.<sup>11</sup> Determining why the voters were misassigned was hampered by the intervening death of the registrar who committed the error.<sup>12</sup>

Judge T.S. Ellis III, who was away from the courthouse, set the case for a telephonic hearing on the afternoon of November 22, granting news media and the public an opportunity to listen to the hearing in his courtroom.<sup>13</sup> At the hearing, Judge Ellis granted a motion by the leading candidate's party to intervene, and Judge Ellis denied the plaintiffs immediate relief.<sup>14</sup> On the one hand, the plaintiffs had not shown a clear likelihood of merits success; on the

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Order, *supra* note 5; see Rachel Weiner & Laura Vozzella, *Va. Judge Won't Count Absentee Votes*, Wash. Post, Nov. 18, 2017, at B1.

7. *Joshua Cole for Delegate* Transcript, *supra* note 5, at 42–43.

8. Order, *Joshua Cole for Delegate*, No. 1:17-cv-1295 (E.D. Va. Dec. 7, 2017), D.E. 27; see Notice, *id.* (Dec. 4, 2017), D.E. 25.

9. Complaint, *Lecky v. Va. State Bd. of Elections*, No. 1:17-cv-1336 (E.D. Va. Nov. 21, 2017), D.E. 1; *Lecky v. Va. State Bd. of Elections*, 285 F. Supp. 3d 908, 912–13 (E.D. Va. 2018).

10. Motion, *Lecky*, No. 1:17-cv-1336 (E.D. Va. Nov. 21, 2017), D.E. 2; *Lecky*, 285 F. Supp. 3d at 912–13.

11. *Lecky*, 285 F. Supp. 3d at 912; see Laura Vozzella, *Va. House Still in Limbo 3 Weeks After Elections*, Wash. Post, Nov. 27, 2017, at B1; Laura Vozzella & Rachel Weiner, *Judge Won't Block Certification of Va. Elections*, Wash. Post, Nov. 23, 2017, at B1.

12. See Vozzella, *supra* note 11; see also *Lecky*, 285 F. Supp. 3d at 911–12 (describing the assignment of voters to legislative districts).

13. Order, *Lecky*, No. 1:17-cv-1336 (E.D. Va. Nov. 22, 2017), D.E. 24.

14. Show-Cause Order, *id.* (Nov. 29, 2017), D.E. 31 [hereinafter *Lecky* Show-Cause Order]; *Lecky*, 285 F. Supp. 3d at 913; see Intervention Motion, *Lecky*, No. 1:17-cv-1336 (E.D. Va. Nov. 22, 2017), D.E. 3; see Vozzella & Weiner, *supra* note 11.

other hand, there was a potential state remedy for misdistribution of ballots.<sup>15</sup> The district 28 election results were certified on November 28,<sup>16</sup> and Judge Ellis issued an order on November 29 to show cause why the case should not be dismissed as moot.<sup>17</sup>

On December 6, the plaintiffs filed an amended complaint and a motion for a preliminary injunction ordering a new election for the district.<sup>18</sup> They filed a notice that counsel “seeks to present argument . . . before Friday, December 22, 2017.”<sup>19</sup> On December 8, Judge Ellis informed the parties that he would hear the motion, “[t]o accommodate the Court’s schedule,” on January 5, 2018.<sup>20</sup>

At the hearing, in response to the plaintiff’s argument that “the only remedy left to cure the constitutional harm is a new election,” Judge Ellis observed, “This losing candidate could have instituted proceedings to have the General Assembly address this issue.”<sup>21</sup> After not receiving complete, prompt, and candid information about coordination between the voter plaintiffs and the candidate, Judge Ellis moved on: “Never mind. It’s not material to my decision tonight, but remember in the future if I ask a question, answer it directly. We don’t have time to play lawyers’ games. Proceed.”<sup>22</sup>

At the conclusion of the hearing, Judge Ellis decided not to enjoin the swearing in of the Republican victor,<sup>23</sup> and Judge Ellis issued an opinion explaining the result six days later.<sup>24</sup>

Plaintiffs have not made the requisite clear showing that the assignment of voters to the incorrect house districts and the distribution of ballots associated with those incorrect house districts amount to the kind of broad gauged unfairness necessary to state a due process claim. Rather, the allegations in the amended complaint attribute these election irregularities largely to innocent human or mechanical error in entering the addresses assigned to each precinct, and at most, negligence on the part of election officials in failing to correct those errors.<sup>25</sup>

The court of appeals denied the plaintiffs injunctive relief on January 10.<sup>26</sup> The plaintiffs dismissed the case voluntarily in February.<sup>27</sup>

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15. *Lecky Show-Cause Order*, *supra* note 14, at 2.

16. *See* Laura Vozzella, *Board Certifies Va. Vote Results*, Wash. Post, Nov. 28, 2017, at B1.

17. *Lecky Show-Cause Order*, *supra* note 14; *Lecky*, 285 F. Supp. 3d at 913.

18. Preliminary-Injunction Motion, *Lecky*, No. 1:17-cv-1336 (E.D. Va. Dec. 6, 2017), D.E. 36; Amended Complaint, *id.* (Dec. 6, 2017), D.E. 35; *Lecky*, 285 F. Supp. 3d at 913–14; *see* Laura Vozzella, *Democrats Seek New Va. Election*, Wash. Post, Dec. 8, 2017, at B1.

19. Notice, *Lecky*, No. 1:17-cv-1336 (E.D. Va. Dec. 6, 2017), D.E. 38.

20. Order, *id.* (Dec. 8, 2017), D.E. 63.

21. Transcript at 11–12, *id.* (Jan. 5, 2018, filed Jan. 8, 2018), D.E. 110.

22. *Id.* at 12–13.

23. *Id.* at 71; Minutes, *id.* (Jan. 5, 2018), D.E. 107; *see* Fenit Nirappil & Rachel Weiner, *No New Vote in Disputed Va. Race*, Wash. Post, Jan. 6, 2018, at B1.

24. *Lecky v. Va. State Bd. of Elections*, 285 F. Supp. 3d 908 (E.D. Va. 2018).

25. *Id.* at 916.

26. Order, *Lecky v. Va. State Bd. of Elections*, No. 18-1020 (4th Cir. Jan. 10, 2018), D.E. 34; *see* Rachel Weiner, *Federal Court Won’t Block Swearing-In*, Wash. Post, Jan. 11, 2018, at

*Control*

Control of the legislature was decided by the results in district 94. Before a recount, the Republican incumbent was ten votes ahead,<sup>28</sup> but after the recount the Democratic challenger led by one vote.<sup>29</sup> A panel of three state judges decided that an ambiguous ballot should be counted in the Republican's favor, resulting in a tie vote.<sup>30</sup> In a random draw, the Republican incumbent won,<sup>31</sup> and the Republican Party controlled the house by a margin of fifty-one to forty-nine.<sup>32</sup>

Later, the *Washington Post* determined that statewide approximately 6,000 voters had been assigned to the wrong delegate district, including nearly 2,600 who actually voted, among whom were more than two dozen actual voters left out of the district 94 race.<sup>33</sup>

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B4.

27. Order, *Lecky*, No. 1:17-cv-1336 (E.D. Va. Feb. 15, 2018), D.E. 134; Order, *Lecky*, No. 18-1020 (4th Cir. Feb. 9, 2018), D.E. 51; see Rachel Weiner, *4 Democrats Challenge Court Ruling Favoring GOP in Disputed House Race*, Wash. Post, Jan. 8, 2018, at B3 (reporting on appeal).

28. See Fenit Nirappil, *A Battle Over 10 Votes Builds Political Tension*, Wash. Post, Dec. 7, 2017, at B1.

29. See Gregory S. Schneider, *One Vote Shifts Power in the Virginia Legislature*, Wash. Post, Dec. 20, 2017, at A1.

30. See Trip Gabriel, *One-Vote Victory in Virginia Becomes Tie*, N.Y. Times, Dec. 21, 2017, at A23; Jim Morrison, Fenit Nirappil & Gregory S. Schneider, *Control of Virginia House Comes Down to a Coin Toss*, Wash. Post, Dec. 21, 2017, at A1; Laura Vozzella, *He Could've Settled Va.'s Last Tied Election*, Wash. Post, Jan. 1, 2018, at B1.

31. See Laura Vozzella, *Drawing Settles Tied Va. Contest*, Wash. Post, Jan. 5, 2018, at B1; see also Trip Gabriel, *Another Twist in Tied Virginia Political Race: Drawing to Pick a Winner Is Postponed*, N.Y. Times, Dec. 27, 2017, at A14; Fenit Nirappil, *Majority in House Hinges on Drawing After Republican Wins Last of Recounts*, Wash. Post, Dec. 22, 2017, at B2; Jenna Portnoy, *Va. Will Rely on Film Canisters, and Chance to Settle a Key Race*, Wash. Post, Dec. 22, 2017, at B1; Laura Vozzella, *Luck Will Decide Va. House Race, but Delay Means GOP Holds the Cards*, Wash. Post, Jan. 4, 2018, at B1.

32. See Paul Schwartzman & Laura Vozzella, *Simonds Concedes, Rejects a Recount*, Wash. Post, Jan. 11, 2018, at B1.

33. Ted Mellnik, Reuben Fischer-Baum & Kim Soffen, *Thousands of Virginians May Have Voted in the Wrong State House Districts*, Wash. Post, Jan. 14, 2018, at C5; Laura Vozzella & Ted Mellnik, *Va. Race May Have Hinged on Mistakes*, Wash. Post, May 14, 2018, at A1.