Rule 23 Order filed
February 9, 2017.
Modified upon denial of
rehearing May 30, 2017.

2017 IL App (5th) 130513-U

NO. 5-13-0513

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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| KENT RENSHAW, | ) | Appeal from the |
| | ) | Circuit Court of |
| Petitioner-Appellant and | ) | Franklin County. |
| Cross-Appellee, | ) | |
| | ) | |
| v. | ) | No. 12-MR-21 |
| | ) | |
| ERIC DIRNBECK and | ) | |
| DAVE DOBILL, as County Clerk of | ) | |
| Franklin County, | ) | |
| | ) | Honorable |
| Respondents-Appellees and | ) | John Speroni, |
| Cross-Appellants. | ) | Judge, presiding. |

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JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Cates concurred in the judgment.

**ORDER**

¶ 1 *Held*: Based on *Tuthill v. Rendelman*, 387 Ill. 321, 56 N.E.2d 375 (1944), and *Pullen v. Mulligan*, 138 Ill. 2d 21, 561 N.E.2d 585 (1990), summary judgments against Renshaw and in favor of Dirnbeck and Dobill are reversed and cause remanded.

¶ 2 Petitioner-cross-appellee, Kent Renshaw (Renshaw), a Democratic primary candidate for circuit judge in the Second Judicial District, filed this action in the circuit court of Franklin County, seeking a recount of the primary election of March 2012 in which respondent Eric Dirnbeck (Dirnbeck) was declared the winner by 42 votes. The

Second Judicial Circuit is comprised of Franklin County and 11 other counties. Renshaw was the winner in all counties, except Franklin. Renshaw challenged the validity of votes only in Franklin County. A discovery recount was conducted in 8 precincts out of the county's 35 precincts. After the recount, respondent Dave Dobill (Dobill), County Clerk of Franklin County, filed a motion for summary judgment in which he asserted there was not a reasonable likelihood the election results would change. Dirnbeck adopted Dobill's motion for summary judgment. Thereafter, Renshaw filed his own motion for summary judgment. After a hearing on the cross-motions for summary judgment, the circuit court granted respondents' motion for summary judgment and denied Renshaw's. Renshaw filed a timely notice of appeal. Dirnbeck and Dobill cross-appealed. Renshaw filed a motion to strike the cross-appeals. This court denies the motion to strike.

¶ 3 Renshaw raises the following issues: (1) whether strict compliance with all provisions of the Election Code (10 ILCS 5/1-1 *et seq.* (West 2012)) is a prerequisite for a vote to count in this election; (2) whether the trial court erred by allowing the votes of individuals who voted in the precinct in which they resided, but whose address was different from their registered address; (3) whether the trial court erred in finding voter applications completed pursuant to section 1A-16 of the Election Code (10 ILCS 5/1A-16 (West 2012)) properly registered the voter; and (4) whether the trial court erred in finding petitioner failed to establish a reasonable likelihood a recount would change the election result. Dirnbeck cross-appeals, arguing: (1) he should have been permitted to file a counterpetition in the other 11 counties in the Second Judicial Circuit; (2) the case should have been dismissed following the general election; (3) the State Board of Elections and

the county clerks of the remaining 11 counties in the Second Judicial Circuit are necessary parties to this election contest; (4) extrapolation, if used, should be applied not only to Franklin County, but also the 11 other counties in the Second Judicial Circuit; (5) assuming *arguendo* a recount is ordered, it should include all 12 counties comprising the Second Judicial Circuit, not just Franklin County; and (6) Renshaw failed to properly name Dirnbeck as a party to his petition. Dobill also cross-appeals, arguing the trial court erred in allowing Renshaw to conduct discovery depositions pursuant to Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013) or, in the alternative, failing to require Renshaw to post a security. For the following reasons, we affirm in part, reverse in part, and remand with directions.

¶ 4 After the initial filing of this order, each of the parties filed a timely petition to reconsider this court's ruling. Upon our review of the petitions for rehearing filed by Renshaw, Dirnbeck, and Dobill, we modify in part certain rulings made in our initial order. With the exception of those modifications, the petitions for rehearing of Renshaw, Dirnbeck, and Dave Dobill as County Clerk of Franklin County are denied.

¶ 5 BACKGROUND

¶ 6 Five candidates competed in the March 20, 2012, Democratic primary election in which the winner would be declared the Democratic nominee for circuit judge of the Second Judicial Circuit. Because there was no Republican candidate in the general election, whoever won the Democratic primary was virtually assured to be the next circuit judge in the Second Judicial Circuit. On April 20, 2012, the Illinois State Board of Elections certified Dirnbeck as the winner of the Democratic primary by a vote of

4064 to 4022, over Renshaw. The other candidates Parrish, Swofford, and Newcomb received votes of 3367, 1231, and 1479 respectively.

¶ 7 Renshaw filed a petition to contest election, challenging the validity of votes in Franklin County only, as Renshaw was the winner in the other 11 counties which comprise the Second Judicial District. A discovery recount was conducted on May 3, 2012, in eight precincts in Franklin County pursuant to section 22-9.1 of the Election Code (10 ILCS 5/22-9.1 (West 2012)). On November 28, 2012, Renshaw filed a second amended petition to contest election results. Using the results of the discovery recount, Renshaw alleged numerous unqualified and invalid votes were cast in all eight of the precincts recounted. Renshaw further alleged that when the votes challenged were extrapolated to all 35 precincts in Franklin County, a net gain in votes to Renshaw sufficient to change the outcome of the election would result and he would be declared the Democratic nominee for circuit judge.

¶ 8 Dobill filed a motion for summary judgment on the issue of reasonable likelihood the results of the election would change. He later filed supplements to the motion. Dirnbeck adopted Dobill's motion for summary judgment, including the two supplements, along with a statement of standards of disenfranchisement. Renshaw filed a combined motion for judgment on the pleadings and motion for partial summary judgment and a response to Dobill's motion for summary judgment, including the supplements.

¶ 9 The trial court conducted a hearing on the cross-motions for summary judgment, which was limited to only those voters in the eight precincts subject to the discovery

recount. The trial court set forth legal standards governing the validity of votes in particular groups. Once a voter was categorized in a particular group, the trial court ruled as a matter of law whether that vote was valid.

¶ 10 The parties agreed that ballots not initialed by an election judge were invalid. There were two uninitialed ballots cast for Dirnbeck and one uninitialed ballot cast for Renshaw. The trial court ruled the three uninitialed ballots resulted in a net gain of one vote for Renshaw. The trial court ordered the net gain from the uninitialed ballots was not subject to extrapolation and one vote would be directly added to Renshaw's total after extrapolating the other votes.

¶ 11 The trial court grouped contested voters into seven groups, Group A through Group G. Group A consists of voters who moved from their permanent residence to a new residence outside the precinct and failed to update their addresses on their voter registration card. There are 20 members in Group A whose votes were invalidated.

¶ 12 Group B consists of voters who moved from their permanent residence to a new residence inside the same precinct in which they were registered to vote and failed to update their addresses on their voter registration card. The trial court ruled those voters valid even if their current registration card did not reflect their current address, so long as they moved within the same precinct. There are 26 members in Group B whose votes Renshaw seeks to invalidate.

¶ 13 Group C consists of voters whose address changed based upon implementation of a 911 telephone system and had failed to submit an affidavit pursuant to section 3-1(iii) of the Election Code (10 ILCS 5/3-1(iii) (West 2012)). There are 16 voters in Group C

whose addresses changed due to implementation of the 911 system. Accordingly, the addresses on their voter registration cards were different than the addresses at which they actually resided. The trial court deemed these 16 votes valid, but Renshaw seeks to invalidate them.

¶ 14 Group D consists of voters with incomplete addresses, specifically voters whose registration card did not reflect their permanent abode as of the date of the election due to lack of specificity. Votes were ruled valid so long as the voter continued to reside in the same precinct. There are seven members in Group D whose votes were deemed valid, but Renshaw insists are invalid. For example, one of these voters is Jack E. Mills, a Franklin County resident who lives in Orient but uses a post office box instead of his physical address of 213 Jackson Street. While Mills voted in the proper precinct, Renshaw insists his vote should be invalidated because his voter registration contains a post office box rather than a physical address.

¶ 15 Group E consists of voters whose registration card did not reflect their permanent abode as of the date of the election for a variety of technical reasons, including no street address, transposition of house numbers, or a reversed designation of direction, such as north or south. Votes were ruled valid so long as there was no change in the voter's physical, permanent abode, and, accordingly, the voter's precinct remained the same. There are 12 voters in Group E whose votes were considered valid, but Renshaw seeks to invalidate them. For example, Renshaw seeks to invalidate the votes of James Bennett and Norma Bennett, a married couple who have lived at the same residence for 51 years.

Mr. and Mrs. Bennett's address is 113 *South* Sims, but voter rolls list them as residing at 113 *North* Sims.

¶ 16 Group F consists of voters who had their registration cards updated by the county clerk to reflect a change of address, but failed to sign an affidavit regarding such change. There are 44 members in Group F; however, 9 of the 44 were previously invalidated under Group A. Accordingly, there were 35 voters in this group whose votes were considered valid, but whom Renshaw seeks to invalidate.

¶ 17 Group G consists of voters who registered in an alternative way pursuant to section 1A-16 of the Election Code and did not have registration cards. There were 28 voters in Group G; however, 9 of the 28 were previously invalidated under Group A. Accordingly, there were 19 voters in this group whose votes were considered valid, but Renshaw challenges as invalid.

¶ 18 Based upon the foregoing analysis, the trial court invalidated a total of 20 votes in the eight precincts in which votes were recounted. The trial court then used the extrapolation method to determine the impact on each candidate. The trial court allocated the improperly cast ballots, minus the uninitialed ballots, between the candidates, and proportionally reduced their respective vote totals. The trial court then mathematically extrapolated the results to determine whether there was a reasonable likelihood the results of the election would change. The court then divided the votes cast in each precinct by the number of votes cast for each candidate to determine the proportional reduction for each candidate.

¶ 19 After determining the proportional reduction for each candidate, the proportional reduction rate for Renshaw was subtracted from the proportional reduction rate for Dirnbeck in order to determine the differential for each improperly cast ballot in the precinct. The number of improperly cast ballots in each precinct was then multiplied by the differential for the precinct. The result was an increase in votes for Renshaw. The totals for each of the eight precincts were added together in order to determine the overall increase in votes to Renshaw. The trial court then divided this number by 8, the number of precincts addressed in the cross-motions for summary judgment, and multiplied by 35, the total number of precincts in Franklin County. Once the improperly cast ballots were extrapolated to determine the impact in all 35 precincts, the trial court added one ballot to Renshaw's total. That ballot was the net increase from the uninitialed ballots.

¶ 20 For example, in Denning 3 precinct, a total of 77 votes were cast. Of these, 50 votes were cast in favor of Dirnbeck and 5 in favor of Renshaw. Two votes were invalidated. The rest of the votes were cast for other candidates. The trial court determined the rate of proportional reduction as .6494 for Dirnbeck and .0649 for Renshaw. The total proportional reduction for Dirnbeck was 1.298 and for Renshaw .1298. This resulted in a vote differential of .5845 in favor of Renshaw, and the increase in vote total based upon the differential was 1.169 in favor of Renshaw.

¶ 21 The results of the increase in vote total based on the differential in the other seven precincts in Franklin County subject to recount were as follows: (1) .58 in favor of Renshaw in the Northern precinct; (2) 1.37 in favor of Renshaw in Tyrone 2 precinct; (3) zero in favor of Renshaw in Tyrone 3 precinct; (4) .559 in favor of Renshaw in Six Mile

1 precinct; (5) 1.27 in favor of Renshaw in Tyrone 4 precinct; (6) .72 in favor of Renshaw in Goode 1 precinct; and (7) 1.599 in favor of Renshaw in Benton 5 precinct. Adding all eight of the precincts' increase in vote total resulted in a total of 7.267 votes improperly cast.

¶ 22 The trial court then divided 7.267 by eight to find an average of .908375 votes improperly cast per precinct. That number was then multiplied by 35 for a total of 31.793125, the impact of improperly cast ballots extrapolated across all 35 precincts. The trial court added one vote in favor of Renshaw, due to the net gain from uninitialed ballots, to arrive at a net gain of 32.793125 in favor of Renshaw. Because Dirnbeck was certified as having obtained 42 votes more than Renshaw, the trial court found there was not a reasonable likelihood the election results would change and entered summary judgment in favor of Dirnbeck and Dobill. Renshaw filed a timely notice of appeal. Dirnbeck and Dobill filed separate cross-appeals.

¶ 23 ANALYSIS

¶ 24 On appeal, the parties raise numerous issues. On behalf of Renshaw, counsel argues (1) that the trial court erred in determining that voters whose registrations did not comply with the registration statute should have their votes counted; (2) that the court erred in determining that section 17-10(a) of the Election Code (10 ILCS 5/17-10(a) (West 2012)) allowed the vote of individuals whose residence address on the date of the election was not the registration address; and (3) that various other voters were exempt from the provision of the registration statute. Based on these rulings, Renshaw argues the trial court erred in concluding that he did not establish a reasonable likelihood that a

recount would change the results of the election and granting summary judgment for Dirnbeck.

¶ 25 Dirnbeck, in response to Renshaw's positions, argues (1) that strict compliance with the particular section of the Election Code was not required; (2) that taking the position of strict compliance would infringe on a fundamental constitutional right; (3) that the provisions of the Election Code were directory, as opposed to mandatory, and that the primary case in support of Renshaw's position, *Tuthill v. Rendelman*, 387 Ill. 321, 56 N.E.2d 375 (1944), is not relevant to the factual situation at hand; (4) that the case of *Pullen v. Mulligan*, 138 Ill. 2d 21, 561 N.E.2d 585 (1990), was the appropriate and relevant authority; and (5) that the circuit court appropriately found that Renshaw did not establish a reasonable likelihood that a recount would change the election result.

¶ 26 Dirnbeck's cross-appeal took the following positions: (1) that he should have been granted leave to file a counterpetition in the other 11 counties of the Second Judicial Circuit; (2) that the cause should have been dismissed after the general election; (3) that extrapolation by the circuit court should be applied to Franklin County and the other 11 counties of the circuit and that a recount, if ordered, should include all 12 counties; and (4) that, accordingly, the State Board of Elections and county clerks of the other 11 counties are necessary parties.

¶ 27 Dobill took the position that the circuit court did not err in rejecting strict compliance with provisions of the Election Code, particularly relevant sections of article 4 and the other statutory provisions, allowing receipt and counting of the contested voters' ballots and that the trial court did not err in ruling that Renshaw did not establish a

reasonable likelihood that a recount would change the election results, generally relying on *Pullen*, as opposed to *Tuthill*. Dobill also raised the issue on cross-appeal as to whether the circuit court erred in denying his objection to Renshaw's request for depositions and a request by Dobill that Renshaw post a security bond for costs.

¶ 28 We begin by examining the trial court's determination of whether certain votes were valid or invalid. The various findings and orders of the circuit court culminating in its order granting summary judgment stem from its conclusions regarding whether certain provisions of the Election Code were mandatory or directory. The relevant supreme court cases which offer us guidance are, as noted by the parties, *Tuthill* and *Pullen.*

¶ 29 *Tuthill* was an election contest for the position of county judge of Union County. In that contest, Tuthill defeated Rendelman by a vote of 3316 to 3288, a spread of 28 votes. Numerous votes were at issue in the subsequent litigation. Due to the provisions of the relatively new permanent registration statute, Rendelman contended that a number of the voters whose ballots were cast were not qualified because they had not registered according to the Permanent Registration Act (Act). The circuit court concluded that the applicable provisions of the Act were directory, not mandatory, and Rendelman assigned this ruling as error resulting in the trial court's refusal to deduct from Tuthill's total certain votes.

¶ 30 Initially the *Tuthill* court set the framework for its analysis:

> "The right of franchise is the one act of sovereignty open to all qualified American citizens, and courts should be at least as jealous to safeguard that right as the General Assembly in passing the act. The rule stated in *Sibley v. Staiger*,

347 Ill. 288, we believe to be the safe one to adhere to. That rule is: 'While it is a rule that mistakes or omissions of the officers in charge of an election will not defeat the plainly expressed will of the voters, yet the rule does not apply where the officers have failed to perform mandatory duties of a precautionary character which safeguard the votes of the electors.' Although proper application and construction of such statute may result in the loss of franchise to a voter in some instances, by far the greater good is to be derived from construing the language of a statute in accordance with its plain meaning and intent." *Tuthill*, 387 Ill. at 329-30, 56 N.E.2d at 381.

¶ 31 Ultimately, the court concluded that the provision relating to registration was mandatory rather than directory. It analogized this relatively new Act to a provision of the City Election Act as follows:

"As hereinbefore observed, this Permanent Registration Act, as applicable to counties of under 500,000 population, is a new act, and the question whether its provisions are to be considered mandatory or directory has not been heretofore passed upon. Consideration of that question has arisen under a registration law applicable under the City Election Act. Section 10 of the Permanent Registration Act provides that: 'No person shall be registered, unless he applies in person to a registration officer, *** and executes the affidavit of registration. The registration officer shall require each applicant for registration to read or have read to him the affidavit of registration before permitting him to execute the affidavit.' Section 1 of the act provides: 'Except as hereinafter provided, it shall be unlawful for any

person *** to vote at any primary, general or special election *** unless such person is at the time of such election a registered voter under the provisions of this Act.' It is clear from these and other like provisions of the act, that it was the intention of the General Assembly to make mandatory those provisions prescribing the acts necessary to be performed by the voter." *Tuthill*, 387 Ill. at 349-50, 56 N.E.2d at 389.

¶ 32 In explanation, the court stated:

"A right to vote is not an inalienable right. It is a conditional right, conditioned upon many things, among which are not only the requirement that he be properly registered as a voter, but that he appear at the proper hours for voting and that he vote only in his own precinct, and the like. [Citation.] The general rule in determining whether a statute is mandatory or advisory is as follows: 'Where the terms of a statute are peremptory and exclusive, where no discretion is reposed or where penalties are provided for its violation, the provisions of the act must be regarded as mandatory.' (*Clark v. Quick*, 377 Ill. 424; *Siedschlag v. May*, 363 Ill. 538; *Allen v. Fuller*, 332 Ill. 304; *People v. Bushu*, 288 Ill. 277; *Behrensmeyer v. Kreitz*, 135 Ill. 591.) It is clear that no discretion is reposed in the voter by the language of the Permanent Registration Act as to the necessity for his registration in the manner required by the act. It was the evident intention of the General Assembly to put teeth into the Permanent Registration Act and to prevent frauds arising out of illegal or indifferent registration.

As hereinbefore stated, the rule governing the action of election officials having to do with the counting, care and preservation of ballots is as stated in *Sibley v. Staiger*, 347 Ill. 288, citing *Allen v. Fuller*, 332 Ill. 304, and *People v. Bushu*, 288 Ill. 277: 'While it is a rule that mistakes or omissions of the officers in charge of an election will not defeat the plainly expressed will of the voters, yet the rule does not apply where the officers have failed to perform mandatory duties of a precautionary character which safeguard the votes of the electors.' Reasons for considering, as mandatory or directory, duties resting upon registration officials do not lie in quite the same category. After ballots are marked and cast, it is generally impossible to determine who voted them. In fact, such is the purpose of the statute requiring secrecy of the ballot. That situation does not exist so far as registration is concerned, but the statute gives opportunity for correction of registrations. We are, therefore, of the opinion that mistakes made by election officials as to registration do not fall into the same category as mistakes affecting the precautionary character of duties to safeguard the votes of electors. The law presumes that officials will do their duty and if mistakes are made in registration, opportunities to correct them are afforded by the statute. So far as the voter is concerned, however, if he would exercise the privilege of voting, the provisions of the statute concerning what he shall do to register are in our opinion mandatory. *People ex rel. Grinnell v. Hoffman*, 116 Ill. 587." *Tuthill*, 387 Ill. at 350-51, 56 N.E.2d at 390.

¶ 33 After further analysis of the factual situation, the supreme court ordered the judgment of the circuit court reversed and remanded with directions to enter a judgment declaring Tuthill the duly elected Union County judge.

¶ 34 Some 46 years later, our supreme court decided the case of *Pullen v. Mulligan*. The appellant, Penny Pullen, filed an election contest arising from the primary election for Republican nominee for representative in the General Assembly. Rosemary Mulligan was declared the nominee and certified by the State Board of Elections based on 7431 votes for Mulligan and 7400 for Pullen, a spread of 31 votes. The circuit court, after recount, determined that each candidate received 7387 votes and directed the State Board of Elections to conduct a lottery to determine the nominee. Mulligan won the coin toss and the circuit court entered an order declaring Mulligan the winner.

¶ 35 The supreme court in *Pullen* considered the nature of statutory requirements in the election process, specifically whether a particular statutory requirement is mandatory or directory. Initially, the court considered the statutory requirement that election judges initial each ballot before placing it in the ballot box and noted that while *Tuthill* and *Morandi v. Heiman*, 23 Ill. 2d 365, 178 N.E.2d 314 (1961), had construed this requirement as mandatory, a later case, *Craig v. Peterson*, 39 Ill. 2d 191, 233 N.E.2d 345 (1968), held the requirement directory. The court concluded, applying the rationale of *Craig*, that a requirement that deprived a qualified voter of the right to have their vote counted without fault on the part of the voter was constitutionally suspect; however, if such requirement contributed to the integrity of the electoral process, the contrary would prevail. As to this initial question, the court concluded that mandatory application of the

initialing requirement would disenfranchise voters who had complied with the applicable law, but that such a requirement being deemed mandatory would not contribute to the integrity of the electoral process.

¶ 36 The court similarly approached the question of ballots lacking precinct numbers, noting that while earlier cases of the court had given the applicable statutory section a mandatory construction, a more recent case, *Hester v. Kamykowski*, 13 Ill. 2d 481, 150 N.E.2d 196 (1958), overruled the prior decision and concluded that any errors which interfered with the voter's choice would not void the ballot. *Pullen*, 138 Ill. 2d at 56, 561 N.E.2d at 600. The court similarly treated ballots with the incorrect precinct designation, distinguishing two cases holding those ballots invalid (*Boland v. City of LaSalle*, 370 Ill. 387, 19 N.E.2d 177 (1938), and *Thornton v. Gardner*, 30 Ill. 2d 234, 195 N.E.2d 723 (1964)). Such determination was based on factual differences in *Pullen*, as opposed to these cases. The court noted that there was no evidence any voter had cast a ballot in the wrong precinct. *Pullen*, 138 Ill. 2d at 59, 60, 561 N.E.2d at 601, 602.

¶ 37 The court made the following distinction between these various scenarios:

> "In *Boland* and *Thornton*, the evidence established that voters improperly went to the wrong polling place to cast their ballots. The error was therefore attributable to the fault of the voter, and the voters, basically, disfranchised themselves. In *Hester*, on the other hand, the court repeatedly stated that ignorance, inadvertence or mistake on the part of the election officials should not be permitted to disfranchise an election district or to defeat the will of the electorate. (*Hester*, 13 Ill. 2d at 487-88.) Accordingly, the court held that irregularities in the form of the

ballot, which occur because of the honest mistake of election officials, will not, by themselves, invalidate the election. Other decisions have likewise expressed a reluctance to construe statutory requirements so as to deprive fully qualified voters of their right to have their votes counted, simply because of a mistake on the part of election officials. *Craig v. Peterson* (1968), 39 Ill. 2d 191, 196; *Boland v. City of LaSalle* (1938), 370 Ill. 387, 391.

At the same time, courts have not hesitated to invalidate the ballots of voters who were not qualified to vote in the election in question (*Tuthill v. Rendelman* (1944), 387 Ill. 321, 346; *Boland v. City of LaSalle* (1938), 370 Ill. 387; *Thornton v. Gardner* (1964), 30 Ill. 2d 234), or who knowingly violated election laws (*Boland v. City of LaSalle* (1938), 370 Ill. 387 (invalidating ballot on which voter wrote obscenity))." *Pullen*, 138 Ill. 2d at 61, 561 N.E.2d at 602.

¶ 38 Applying these distinctions, the court held that the trial court properly counted ballots with the incorrect precinct number, noting that the evidence did not indicate that they were not cast in the precinct where the voter resided, but reached the opposite conclusion as to those ballots bearing the incorrect township designation.

¶ 39 The next issue confronted in *Pullen* was the question of ballot applications which lacked a voter signature. In its consideration of this issue, the court indicated that the language of a given statute is the most reliable indicator of legislative intent as to the statute being mandatory or directory.

"Thus, where a statute imposes duties upon election officials and by express language provides that the omission to perform the same shall render the election

void, courts are bound to construe those provisions as mandatory. But if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as directory. [Citations.] Technical compliance with each and every provision of the Election Code is not required to sustain a ballot." *Pullen*, 138 Ill. 2d at 65, 561 N.E.2d at 604.

Applying this standard, the court held that the failure to sign an affidavit in an application for a ballot would not invalidate that ballot.

¶ 40 Later, when the court considered the question of automatic tabulation of votes versus a hand recount, the court stated:

"Where a statute directs that an act shall be done in a particular manner and states that failure to perform the act in the manner stated will render the affected ballot void, this court must give the statute a mandatory construction. Where the effect of failure to comply with a particular statutory requirement is not specified, however, courts must consider the nature and object of the statutory provision and the consequences which would result from construing it one way or another. [Citation.]" *Pullen*, 138 Ill. 2d at 78, 561 N.E.2d at 610.

The court ultimately concluded that in five specific categories, the voter's ballot would be counted. Those situations were: uninitialed absentee ballots, ballots without precinct numbers, ballots bearing the wrong precinct designation, ballots numbered by an election judge to correspond with the voter's application number, and ballots cast by voters who

failed to sign the application form. The court, however, determined that the trial court improperly counted ballots bearing the designation of a township outside the legislative district. The court then remanded the case to the circuit court for a visual inspection of ballots not counted by automatic tabulating equipment. Based on a report of the circuit court to the supreme court, the court determined the legal vote and declared Pullen the winner by six votes.

¶ 41 *Pullen* clearly explained the criteria to be used by a court to determine whether a particular act mandated by the Election Code might be either mandatory or directory. The initial consideration focused on the statutory language, noting that if certain acts were not performed, the resulting ballot would be void. The court noted that those sections deemed mandatory focused on the integrity of the electoral process itself, specifically the qualifications of a citizen to participate in the particular vote and whether the statute indicated that failure to comply with a particular requirement would invalidate the vote cast. In *Pullen*, there was not a question of unqualified voters. In contrast, the court considered generally the result of human errors of election officials in relation to a statutory section as directory and declined to invalidate those resulting votes which violated the technical requirements of the Act. Qualification to vote, integrity of the electoral process, and a clearly expressed legislative intent concerning mandatory or directory nature of the statutory section were the determining factors in disposition of the *Pullen* case. We have examined the authorities cited by all parties and conclude that those authorities generally fall into these two categories.

¶ 42 Given the criteria expressed by our supreme court, we consider the case at bar.

¶ 43 In particular, we examine aspects of the statutory scheme enacted by the General Assembly to determine whether those aspects of the statute dealing with registration are mandatory or directory as indicated by the language of the statute. Initially, we note that the first paragraph of section 4-1 of the Election Code reads as follows:

> "Except as provided in this Article 4, it is unlawful for any person residing in a county containing a population of less than 500,000, to vote at any election at which any officers are to be nominated or elected, or at any election at which any questions of public policy are to be voted on, unless such person is at the time of such election a registered voter under the provisions of this Article 4." 10 ILCS 5/4-1 (West 2012).

We note also the general provision as to residency requirement (10 ILCS 5/4-2 (West 2012)) indicates that no person shall be entitled to be registered unless that person complies with the applicable residency requirements. The first sentence of section 3-2 reads:

> "A permanent abode is necessary to constitute a residence within the meaning of Section 3-1." 10 ILCS 5/3-2(a) (West 2012).

The specific requirements of registration are found in section 4-8. The specifics that are relevant to the case at bar are:

> "Residence. The name and number of the street, avenue, or other location of the dwelling, including the apartment, unit or room number, if any, and in the case of a mobile home the lot number, and such additional clear and definite description as may be necessary to determine the exact location of the dwelling of

the applicant. Where the location cannot be determined by street and number, then the section, congressional township and range number may be used, or such other description as may be necessary, including post-office mailing address. In the case of a homeless individual, the individual's voting residence that is his or her mailing address shall be included on his or her registration record card." 10 ILCS 5/4-8 (West 2012).

In our consideration of the intent of the legislature in enacting these registration requirements, we note the affidavit of registration in the above section:

"AFFIDAVIT OF REGISTRATION

STATE OF ILLINOIS

COUNTY OF ……

I hereby swear (or affirm) that I am a citizen of the United States; that on the date of the next election I shall have resided in the State of Illinois and in the election precinct in which I reside 30 days and that I intend that this location shall be my residence; that I am fully qualified to vote, and that the above statements are true." 10 ILCS 5/4-8 (West 2012).

Further, the legislature indicated in section 7-43(f):

"No person shall be entitled to vote at a primary unless he is registered under the provisions of Articles 4, 5 or 6 of this Act, when his registration is required by any of said Articles to entitle him to vote at the election with reference to which the primary is held." 10 ILCS 5/7-43(f) (West 2012). (Article 4 applies to Franklin County.)

¶ 44 We conclude, based on *Tuthill* and *Pullen*, that the registration requirements in the statute are mandatory, not directory. They go to the basic question of the qualification of a voter to cast his or her vote and, accordingly, touch upon the integrity of the electoral process. We also note that the statutory mandate as to registration failure indicates a legislative intent that appropriate registration is mandatory. The consequences of failure to properly register would be to disqualify a citizen to cast a vote. While clearly other aspects of the Election Code have been deemed directory, and human error of various election officials has been held not to invalidate an elector's vote, *Tuthill* clearly indicated that registration requirements in the Act are mandatory. They go to the integrity of the electoral process. Failure to adhere to the registration requirements results in inability of a citizen to cast a ballot. The legislative intent is clear on that consequence.

¶ 45 The effect of our determination of the mandatory versus directory question in this case is extensive. Virtually all of the circuit court's determinations, listed above, are affected by this initial determination. This includes the determination of eligibility of votes to be counted, extrapolation, counterclaims, the question of the 11 other counties in the Second Judicial Circuit, and the constitutional arguments made by counsel on appeal. There is no indication, after review of the record in this case, that counsel for the parties would take the same or similar position as to all of these questions after the circuit court on remand applied the proper standard to determine whether a ballot should be counted.

¶ 46 We realize, however, that some of the issues raised by the parties are likely to be raised again upon remand. Accordingly, we make the following rulings on those issues for the benefit of the parties and the circuit court in subsequent proceedings. Our rulings,

however, should not be considered to preclude issues the parties may raise that are not ruled upon by this court. Nor should the circuit court on remand consider it is precluded from ruling on any new issues the parties may raise.

¶ 47 As we affirm in part, reverse in part, and remand to the circuit court, we next deal with those issues which, in our opinion, are likely to be raised upon remand. We will consider and rule upon those issues in the manner in which and the categories by which they were raised by the parties. Accordingly, we first deal with the circuit court's rulings as to various groups of voters at issue.

¶ 48 GROUP A

¶ 49 As stated above, the circuit court indicated that voters who had moved their permanent residence to a new abode but were outside the precinct and had failed to update their voter registration would be invalidated. Renshaw argues that pursuant to section 4-1 of the Election Code (10 ILCS 5/4-1 (West 2012)), it would be unlawful for a person not appropriately registered to cast a ballot in their former precinct. This is the first of many situations in which the parties disagree as to the appropriate controlling precedent, Dirnbeck arguing that the standards in *Pullen* would apply and Renshaw arguing that the mandates in *Tuthill* would control. We conclude that the mandatory requirements of *Tuthill* apply in this particular situation. The court explained that registration is only effective if executed in the manner required by law. In the particular case of the voters of Group A, compliance with that requirement was within the power and was the responsibility of those particular voters. The *Tuthill* opinion indicates that those situations which are the result of mistakes made by election officials are different

than those situations created by the failure of a voter to take the necessary action to make the registration valid. *Tuthill*, 387 Ill. at 351, 56 N.E.2d at 390. Accordingly, we affirm the decision of the circuit invalidating the votes of those individuals in Group A.

¶ 50 GROUP B

¶ 51 Group B were those who moved from a permanent residence to a new residence but remained within the same precinct. As with those voters in Group A, they failed to update their voter registration. In contrast to those voters in Group A, the circuit court ruled that those voters were valid. Those voters, however, suffer from the same infirmity in their registration as those voters in Group A. They failed to make current voter registration cards with information as to their address. In the context of the tension between our two controlling supreme court cases, *Tuthill* and *Pullen*, the situation of Group B voters is similar to those in Group A. They were required by statute to have a valid registration and the invalidity of their registration was not the result of an election official or some mistake by a governmental entity such as a county office. The failure to have a currently valid registration was within the power of the individual voters in Group B. Given the mandatory guidelines in *Tuthill*, and absent the saving factors indicated in *Pullen*, we reverse the finding of the circuit court as to the voters in Group B. The contrasting factual difference with Group A, that the Group B voters still resided in the same precinct, is a distinction which does not affect a difference with those voters of Group A. The circuit court's determination that the Group B voters were valid is, accordingly, reversed.

¶ 52 GROUP C

¶ 53 The voters in Group C are in a different situation than those in Groups A and B. These were voters whose addresses were changed based on implementation of a 911 telephone system and who had not physically moved. In addition, the voters in Group C did not file the requisite affidavit required by the Election Code to update their registration. Accordingly, Group C voters are a mix of the situations considered by our supreme court in both *Tuthill* and *Pullen*. They had failed to update their registration by the required affidavit, an action which was their responsibility and under their control; however, the necessity to update their registration occurred not by any action of theirs, but by those of the county as part of their implementation of the 911 system, an action not under the control of these particular voters. In considering the situation, the circuit court ruled these voters could be valid given the core teaching of *Pullen* and the specific indication in *Pullen* that failure to file an affidavit would not invalidate the voter's ballot. *Pullen*, 138 Ill. 2d at 64-67, 561 N.E.2d at 604-05. We reverse the circuit court's determination as to the voters of Group C.

¶ 54 While the circuit court was correct in noting the change of addresses of the Group C voters was involuntary, as it was based on implementation of a 911 telephone system, the special provision recognizing their situation indicated that certain actions needed to be taken by them in order to maintain their ability to cast a vote. Specifically, pursuant to the Election Code (10 ILCS 5/3-1(iii) (West 2012)), a person who resided in and was registered to vote from a certain election district and whose address had changed pursuant to implementation of a 911 emergency telephone system was required to execute an

affidavit pursuant to section 17-10 of the Election Code, assuming that individual had not moved to another residence. The ability of those voters in Group C to cast a valid vote, therefore, was impacted both by *Tuthill* and *Pullen.* The change of address was clearly involuntary pursuant to implementation of the 911 telephone system, but a specific action was required of those voters at the time they cast their votes in order to maintain a valid registration. Failure to execute the affidavit during the voting process invalidated their ability to cast a valid vote.

¶ 55 GROUP D

¶ 56 The voters in Group D are electors whose registration indicated incomplete address information and, accordingly, their permanent abodes were not reflected due to lack of specificity. The circuit court indicated that it would consider their votes to be valid so long as the voters continued to have their permanent abode in the precinct.

¶ 57 Our disposition of the circuit court's ruling in this situation is mixed. Those voters whose registration indicated incomplete information of a nature that would make it unclear as to their permanent abode should be held invalid upon remand. That information and the failure to supply it in order to effect a valid registration was in the control of the individual voters and, thus, falls under the mandate required by *Tuthill*. In those situations, however, in which an elector indicated an alternative address, such as a post office box, we affirm that ruling of the circuit court. As noted above, the applicable statute allows for alternative addresses and there was no indication the alternative address was incomplete or in error (see 10 ILCS 5/4-8 above).

¶ 58 GROUP E

¶ 59 The voters in Group E were those whose registrations did not reflect their permanent abode as of the date of the election due to technical affirmatives that appeared to have been the result of error by the county clerk's office. The circuit court held those electors in Group E to have cast valid votes as long as there was no change in their permanent residence. It would appear that clerical errors were the cause of these voters' impaired registrations and, accordingly, the controlling authority would be *Pullen.* For these reasons, we affirm the rulings of the circuit court that these voters cast valid ballots based on our supreme court's ruling in *Pullen.*

¶ 60 GROUP F

¶ 61 A number of voters had their registrations updated by the county clerk to reflect their changes of address. The voters in this group, however, failed to sign an affidavit concerning this change. Some were invalidated as they were also members of Group A; however, those who were not jointly categorized in Group A were considered by the circuit court as appropriately registered voters and their votes were considered valid, again under the controlling authority of *Pullen*. This infirmity was one caused, in part, by the actions of the county clerk as opposed to a situation solely under the control of the individual voter. As in *Pullen*, the infirmity of an ineffective affidavit would not invalidate the voter's ballot. *Pullen*, 138 Ill. 2d at 64-67, 561 N.E.2d at 604-05. The action by the county clerk, as opposed to the inaction by the voter, distinguishes the validity of the votes here from those in Group C, where the voter was required to

complete an affidavit while at the polls. For these reasons, we affirm the rulings of the circuit court that these voters cast valid ballots.

¶ 62 GROUP G

¶ 63 Group G is a problematic category in that it consists of voters who attempted to register in a manner alternative to the statute (10 ILCS 5/1A-16) and who did not have registration cards. Those members of Group G who were not previously invalidated as a concurrent member of Group A were considered by the circuit court to be valid. The record is unclear, however, as to whether the voters in Group G did not have registration cards because their attempt to register under section 1A-16 of the Election Code was ineffective or if the failure to have registration cards was because of a failure of these voters to register properly. If the failure to have registration cards was a result in part of any error of the county clerk's office, their votes were appropriately considered valid. This is another situation of a differentiation and allocation based upon *Tuthill* and *Pullen.* Accordingly, we vacate the finding of validity of the Group G voters by the circuit court and remand for determination of the cause of lack of registration cards by the voters in Group G.

¶ 64 DIRNBECK CROSS-APPEAL

¶ 65 Cross-appellant Dirnbeck presents a number of arguments to this court which we will deal with in turn. Initially, Dirnbeck argues that the circuit court erred in denying him leave to file a counterpetition in the other counties of the Second Judicial Circuit. On appeal, he characterizes the suggested joinder of the remaining counties of the circuit

as a counterclaim, while Renshaw characterizes such an attempt as a third-party proceeding. In our view, the circuit court was correct in refusing Dirnbeck's request.

¶ 66 Dirnbeck cites the following from the Code of Civil Procedure defining a counterclaim:

> "Any claim by one or more defendants against one or more plaintiffs, or against one or more codefendants, whether in the nature of setoff, recoupment, cross claim or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief ***." 735 ILCS 5/2-608(a) (West 2012).

We note, however, the definition as cited by Renshaw of a third-party action:

> "§ 2-406. Bringing in new parties–Third-party proceedings. (a) If a complete determination of a controversy cannot be had without the presence of other parties, the court may direct them to be brought in. If a person, not a party, has an interest or title which the judgment may affect, the court, on application, shall direct such person to be made a party." 735 ILCS 5/2-406(a) (West 2012).

Comparing these two statutory definitions of these various actions, we conclude that Dirnbeck's request was, in fact, a third-party claim as opposed to a counterclaim. His allegations were not against a party already involved in this action, but rather other county clerks.

¶ 67 We also note that there is no authority cited by Dirnbeck to allow the filing of a third-party action in an election contest. Dirnbeck cites *In re Contest of the Election for the Offices of Governor & Lieutenant Governor Held at the General Election on November 2, 1982*, 93 Ill. 2d 463, 491, 444 N.E.2d 170, 183 (1983):

> "These precincts naturally were chosen by petitioners because they were most likely to yield results favorable to them. An election contest, however, is not a one-way street. If the motion before us were denied, Thompson and Ryan would have the right to challenge the results in precincts likely to yield results favorable to them. These would undoubtedly offset some, if not all, of the votes petitioners claim they have gained."

An examination of this paragraph, in the context of the entire supreme court opinion, however, clearly indicates that the court, by using the word "offset," was focusing on a possible or intended result, not on the nature of a permitted pleading or the use of the word "offset" as a term of art. The circuit court appropriately denied Dirnbeck's request.

¶ 68 Dirnbeck, in a similar vein, argues that the State Board of Elections and the county clerks of the other counties of the Second Circuit are necessary parties to determine this election contest. His position essentially is an extension of his argument as to the propriety of allowing him to file a third-party action against the clerks in those 11 counties, while, in fact, neither Renshaw nor Dirnbeck challenged any aspect of the primary election in those counties by an appropriate pleading. Renshaw's challenge was limited to Franklin County. Accordingly, we conclude that the determination of the circuit court that the State Board of Elections and the county clerks of the other counties are not necessary parties to this particular lawsuit was correct.

¶ 69 Dirnbeck further argues, citing section 7-63 of the Election Code (10 ILCS 5/7-63 (West 2012)), that a contest concerning the result of a primary cannot be limited to one-twelfth of the electoral district, in this case one county out of a 12-county circuit.

His argument focuses on the first paragraph of the statute. We note, however, that the second paragraph of the statute refutes this position. That paragraph states:

> "If the contest relates to an office involving more than one county, the venue of the contest is (a) in the county in which the alleged grounds of the contest exist or (b) if grounds for the contest are alleged to exist in more than one county, then in any of those counties or in the county in which any defendant resides." 10 ILCS 5/7-63 (West 2012).

The challenge to the results of the primary election, challenged in one county out of the 12, was appropriately confined to the one county by the party filing the election contest. Dobill's position is similar to that of Dirnbeck as to the interpretation of section 7-63 and further argues that the legislative intent of the statute is to cover an entire electoral district. A careful reading of the statute negates that position. Further, a careful reading of *In re Contest* allows us to arrive at the same conclusion.

¶ 70 The next position of Dirnbeck's cross-appeal argues that this case should have been dismissed following the general election and that the circuit court erred in suppressing the result of that election for a period of time.

¶ 71 As background, Dirnbeck was the sole candidate on the ballot for circuit judge in November 2012. Subsequent to the election, however, he was not sworn in as a circuit judge until October 2013. It is his position that his uncontested general election certification by the State Board of Elections and his assumption of office rendered this particular appeal moot.

¶ 72 The essence of Dirnbeck's position is that the circuit court erred in suppressing the results in that it did not make a specific finding that there was a reasonable likelihood that the results of the election would change due to the instant action. Relying on *McDunn v. Williams*, 156 Ill. 2d 288, 620 N.E.2d 385 (1993), the circuit court found, in ruling on Renshaw's motion to suppress the results of the election, that the parties, Renshaw and Dirnbeck, were not at issue, that it was impossible under the circumstances for the circuit court to determine, on any reasonable basis, when a final resolution of this action might take place, and it was unlikely that it would occur before the November 2012 general election. On this basis, the circuit court did not make a finding of reasonable likelihood that the results of the election would change as a result of the election contest; on the other hand, the circuit court did not enter a finding that the results of the election would not change as a result of the election contest. Dirnbeck argues in his brief:

> "[T]he Trial Court, prior to entering an order suppressing the results of the general election, made no finding that there was a reasonable likelihood that the results of the election would change. Nor would such a finding be justified. No trial has begun and no evidence has been presented. Entry of an order suppressing the results of the general election was not justified here because there was no basis that would have supported a determination that there was a reasonable likelihood that a recount would have changed the results of the election."

As noted above, Dirnbeck admits no trial had begun and no evidence was of record. Contrary to Dirnbeck's position, the inability of the circuit court to make a finding based on any evidence in the record is accurate. As there was no evidence of record admitted

by Dirnbeck, the circuit court was unable to make a finding on the issue of reasonable likelihood that the results of the election would change due to this election contest.

¶ 73 Renshaw's position is that this case is distinguishable from that of *McDunn* in that in *McDunn*, the trial was in progress before the general election and, accordingly, the circuit court had a record upon which it could make a determination as to whether there was a reasonable likelihood of the plaintiff's success. Our reading of *McDunn* does not suggest that it is a requisite that such finding be made in order to preserve the status quo in such an election contest. As the instant case was in the pleading stage and the trial court had found that Renshaw had stated a cause of action, we find that the circuit court had an appropriate basis upon which to enter the suppression order given the circumstances of the case being in the pleading stage. We distinguish *Bettis v. Marsaglia*, 2014 IL 117050, 23 N.E.3d 351, upon the same reasoning. As the circuit court had no evidence before it, we decline to hold that the circuit court erred in making this ruling as it is not reasonable for us to hold that the failure of the court to rule in a vacuum would constitute error.

¶ 74 Dirnbeck next argues that extrapolation should have been applied not only to Franklin County, but also to the 11 other counties that constitute the Second Circuit. After accurately noting that there are few precedents to guide us in consideration of the extrapolation method, he cites *In re Contest*, 93 Ill. 2d 463, 444 N.E.2d 170 (1983), and specifically notes that our supreme court stated the following:

> "Petitioners, in their memorandum, have attempted to project the percentage of loss of vote by Thompson and Ryan in the precincts where

discovery proceedings were conducted to other precincts in each of the election jurisdictions challenged. The statute does not permit such a projection but requires that the petitioners allege the specific precincts wherein the mistake, fraud or irregularities relied upon were believed to have occurred." *In re Contest*, 93 Ill. 2d at 490, 444 N.E.2d at 182.

¶ 75 We note that in the instant case, the "specific precincts wherein the mistake, fraud or irregularities relied upon were believed to have occurred" were not only alleged, but were the subject of heated controversy. In the context of the instant case, the county in contest was Franklin County, and the extrapolation was limited to Franklin County. As noted above, consideration of the other 11 counties of the Second Judicial Circuit would not have been appropriate. We also note, on the topic of the other counties of the Second Circuit, that the circuit court appropriately ruled that third-party actions against those parties and their county clerks would not be appropriate.

¶ 76 Dirnbeck further argues, citing *In re Contest*, that the supreme court prohibited extrapolation. Our examination of *In re Contest* indicates otherwise, as stated in the quote below:

"Where it cannot be determined for whom unqualified voters voted, the number of votes cast by unqualified voters must be apportioned to the candidates in that proportion which the number of votes cast for each candidate bears to the total number of votes cast in the precinct. [Citation.]" *In re Contest*, 93 Ill. 2d at 488-89, 444 N.E.2d at 182.

¶ 77 Rather than prohibiting extrapolation generally, the supreme court, as noted in the above quoted portion of the opinion, did not issue a prohibition, but rather indicated the criteria to be used before the circuit court may apportion the votes. *In re Contest*, 93 Ill. 2d at 488-89, 444 N.E.2d at 182. Otherwise, section 23-23.2 states: "A court hearing an election contest pursuant to this Article or any other provision of the law shall grant a petition for a recount properly filed where, based on the facts alleged in such petition, there appears a reasonable likelihood the recount will change the results of the election." 10 ILCS 5/23-23.2 (West 2012). Therefore, apportionment is not automatic. The trial court held that Renshaw's second amended petition to contest election stated a cause of action. That petition set forth all of the information gleaned from the discovery recount. Renshaw's petition also set forth, in detail, the apportionment numbers and how the votes would change if the discovery information was extrapolated to the remaining precincts. Unlike *In re Contest*, where the pleading was insufficient to maintain a cause of action under the statute, Renshaw's pleading was deemed sufficient and the trial court denied the motions to dismiss Renshaw's petition.

¶ 78 Therefore, upon remand of this case, the circuit court should apply apportionment and extrapolation only if the criteria set forth in *In re Contest* are met. The guidelines for apportionment were not used by the trial court, and if the circuit court decides that apportionment is necessary to determine what is a reasonable likelihood, then the circuit court should use that formula described in *In re Contest*. Alternatively, where the vote totals are so close that Renshaw has demonstrated a reasonable likelihood that a recount

will change the results of the election, then the circuit court should order that recount pursuant to section 23-23.2 (10 ILCS 5/23-23.2 (West 2012)).

¶ 79 The last issue we deal with in our directions on remand concerns the allegation that Renshaw failed to properly name Dirnbeck as a party to his election contest petition. In his petition, Renshaw named "Dave Dobill, County Clerk of Franklin County, Respondent." Subsequent to his filing of the initial petition, Renshaw moved for leave to file an amended petition, inserting Dirnbeck's name as a respondent. This Dirnbeck contested and the circuit court denied the motion, finding that Dirnbeck was properly named as a party in the petition. In his argument, Dirnbeck relies on *Fleshner v. Copeland*, 13 Ill. 2d 72, 147 N.E.2d 329 (1958). In *Fleshner*, the executor of the estate in this will contest is not named in the caption of the complaint, but was named in its body. While the trial court granted the motion and dismissed the *Fleshner* petition, the supreme court reversed, noting that the executor was made a party by being named in the body of the complaint and was properly within the jurisdiction of the court. *Fleshner*, 13 Ill. 2d at 74-75, 147 N.E.2d at 331. In the instant case, Dirnbeck was named in the body of Renshaw's complaint as the winner of the primary, but not in the caption. He was a party to this action, as noted by Dirnbeck's activities through counsel and the rulings of the circuit court. We also note in this regard Dirnbeck's vigorous participation in this cause, both in the circuit court and in this court. His strenuous and skillful participation, in our view, constitutes a waiver of any defect in the pleading and, as noted by our supreme court, due to his inclusion in the body of the petition, he is properly a party before the court (see *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 645 N.E.2d 888 (1994)).

¶ 80 DOBILL CROSS-APPEAL

¶ 81 Dave Dobill, County Clerk of Franklin County and appellee-cross-appellant in this action, argues that the circuit court erred in allowing Renshaw to conduct depositions pursuant to Supreme Court Rule 191(b) and, upon allowing said depositions to be taken, failed to order Renshaw to post any security to pay for the costs of the depositions. We disagree with Dobill's position.

¶ 82 Rule 191(b) reads as follows:

> "(b) When Material Facts Are Not Obtainable by Affidavit. If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of documents so furnished, shall be considered with the affidavits in passing upon the motion." Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013).

While the statute cited by Dobill may be read to indicate a mandatory assessment of security for costs (10 ILCS 5/7-63 (West 2012)), our examination of the authority cited

by Dobill, *Carey v. Elrod*, 49 Ill. 2d 464, 275 N.E.2d 367 (1971), takes a contrary position. The court in *Carey* clearly indicates that the question of security for costs is a discretionary call for the trial court. The *Carey* court, in consideration of an extensive election contest in Cook County, determined that the applicable statute gives the circuit court the discretion to approve certain expenses and tax them as costs. *Carey*, 49 Ill. 2d at 475, 275 N.E.2d at 373.

¶ 83 As the imposition of costs, according to our supreme court, is a discretionary decision, the burden is upon the party seeking reimbursement of assessment and taxation of costs to bring the matter before the circuit court and obtain a ruling. While Dobill objected to the taking of the depositions in this case and the circuit court, in its discretion, allowed such discovery, the record does not indicate that Dobill pursued and obtained an adverse ruling on the specific questions of imposition of security for costs. Accordingly, the issue has been waived.

¶ 84 We further note that the policy behind the supreme court's rules governing discovery indicates a preference for liberal discovery so that all parties to litigation are able to reach informed conclusions as to trial or settlement and the means by which those actions are taken. We decline to criticize the circuit court in this complicated and involved litigation for allowing the parties to engage in discovery.

¶ 85 CONCLUSION

¶ 86 In conclusion, we commend counsel in the briefing and argument in this case and the trial court for its thorough and conscientious consideration and ruling in this matter. The factual scenario presented in this cause was involved and complicated, and counsel

presented the facts and the numerous arguments of the law in a clear, concise, and professional manner. We acknowledge, compliment, and appreciate their efforts and their professionalism. Based on the determinations made above, we reverse the grants of summary judgment in favor of Dirnbeck and against Renshaw and in favor of Dobill against Renshaw. We remand for further proceedings in the circuit court with directions as to the following issues:

a. Reconsideration by the circuit court of the categories of voters as determined above;

b. Utilization of these rulings in determining whether the review of the various categories allows the circuit court to determine whether there is a reasonable likelihood that a recount will change the results of the election; and, if the trial court determines that there is such a reasonable likelihood, then the trial court shall order said recount;

c. If the trial court determines that apportionment should be applied to determine whether there is a reasonable likelihood that a recount will change the results of the election, then the court shall use the appropriate means of extrapolation upon remand;

d. Any further issues raised by either of the parties in conformity with the findings and rulings in this order. Parenthetically we urge the circuit court on remand to closely consider the nature of the issues before it in the context of *Tuthill* and *Pullen*.

¶ 87 We remand this cause to the circuit court of Franklin County with directions for proceedings consistent with this order.

¶ 88 Affirmed in part and reversed in part; cause remanded.