

CAUSE NO. 2022-79328

ERIN ELIZABETH LUNCEFORD,	§	IN THE DISTRICT COURT
	§	
Contestant,	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
TAMIKA “TAMI” CRAFT,	§	
	§	
Contestee.	§	164TH JUDICIAL DISTRICT

**CONTESTEE TAMIKA CRAFT’S
NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE PEEPLES:

Pursuant to Texas Rule of Civil Procedure 166a(i), Contestee, Tamika Craft, files this No-Evidence Motion for Summary Judgment, seeking dismissal of Contestant, Erin Elizabeth Lunceford’s, Election Contest as a matter of law and respectfully shows the Court as follows:

I. INTRODUCTION

Unhappy with the demonstrable will of the Harris County Electorate, and having no evidence that would warrant a different result, Contestant has opted for the “kitchen sink” approach to her election contest. She has pleaded manifold “examples” of supposed irregularities, shrouded in both conclusory language and specious interpretation of the Texas Election Code. A cursory reading reveals the objective of her droning allegations: obscure the abject lack of competent evidence.

This Court should reject Contestant’s strategy of obfuscation in short shrift. She has no evidence, will never have any evidence, and no-evidence summary judgment is therefore proper.

II. THE NO-EVIDENCE SUMMARY JUDGMENT STANDARDS IN THE CONTEXT OF THIS ELECTION CONTEST

No-evidence summary judgment is proper under Rule 166a(i) where there is no evidence of one or more essential elements of a claim on which the non-movant bears the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *see Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004). No evidence exists when the non-movant has failed to produce no more than a scintilla of probative evidence to raise a fact issue on the challenged elements. *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750–51 (Tex. 2003). Evidence is no more than a scintilla if it is “so weak as to do no more than create a mere surmise or suspicion” of a fact. *See id.*

The Texas courts have identified various forms of purported evidence that are legally insufficient and, as such, cannot defeat summary judgment. Although Contestant’s evidence and theories continue to evolve on an almost weekly basis, Contestee nonetheless anticipates that most, if not all, of Contestant’s evidence will fall into these categories, thus warranting summary judgment. Examples include:

- Speculation constitutes no evidence, *see Pink v. Goodyear Tire & Rubber Co.*, 324 S.W.3d 290, 297 (Tex. App.—Beaumont 2010, pet. dismissed) (“A party may not avoid a no-evidence summary judgment by presenting speculation.”);
- Conclusory affidavit or other written testimony constitutes no evidence, *see Paragon Gen. Contractors, Inc. v. Larco Constr., Inc.*, 227 S.W.3d 876, 883 (Tex. App.—Dallas 2007, no pet.) (“Conclusory affidavits do not raise fact issues.”);
- Unreliable or speculative expert testimony constitutes no evidence, *see Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997),
- Conclusory expert testimony constitutes no evidence, *see Viaso Transp. Sols., LLC v. Ancortex, Inc.*, No. 02-21-00262-CV, 2022 WL 1259059, at *4 (Tex. App.—Fort Worth Apr. 28, 2022, no pet.) (mem. op.).

Contestant’s anticipated evidence becomes even shakier when considering the uniquely steep burdens in this election contest. “[A]ccess to the ballot lies at the very heart of a constitutional

republic.” *In re Francis*, 186 S.W.3d 534, 542 (Tex. 2006). As such, courts interpret the Texas Election Code liberally in various ways in favor of ballot access and to avoid disenfranchisement of the voter. *See, e.g., In re Watkins*, 465 S.W.3d 657, 660 (Tex. App.—Austin 2014, no pet.); *Honts v. Shaw*, 975 S.W.2d 816, 822 (Tex. App.—Austin 1998, no pet.); *Deffebach v. Chapel Hill Indep. Sch. Dist.*, 650 S.W.2d 510, 512 (Tex. App.—Tyler 1983, no writ) (internal citations and quotation marks omitted).

Moreover, it is well settled that the clear-and-convincing standard of evidence will govern the trial of this election contest. The First Court of Appeals has succinctly articulated how “heavy” this burden is:

The contestant’s burden is a heavy one and the declared results of an election will be upheld in all cases except where there is clear and convincing evidence of an erroneous result. The clear and convincing standard requires more proof than the preponderance of the evidence standard in ordinary civil cases, but less than the reasonable doubt standard in criminal cases. This standard is the degree of proof that will produce in the mind of the trier of fact a “firm belief or conviction” as to the truth of the allegations sought to be proved.

Price v. Lewis, 45 S.W.3d 215, 218 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (citations omitted). It is against this backdrop that Contestee now asks this Court to grant no-evidence summary judgment on this meritless election contest.

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III. ARGUMENTS & AUTHORITIES

A. This Court Should Dismiss Contestant's Only Pleaded "Cause of Action" Because No Evidence Supports Any Essential Element of This Cause of Action.

In her live petition, Contestant has pleaded a single "Cause of Action" as follows:

V.
CAUSE OF ACTION

53. Section 221 of the Texas Election Code sets forth the general parameters of an election contest:

Sec. 221.003. SCOPE OF INQUIRY. (a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome because:

- (1) illegal votes were counted; or
- (2) an election officer or other person officially involved in the administration of the election:
 - (A) prevented eligible voters from voting;
 - (B) failed to count legal votes; or
 - (C) engaged in other fraud or illegal conduct or made a mistake.
- (b) In this title, "illegal vote" means a vote that is not legally countable.
- (c) This section does not limit a provision of this code or another statute expanding the scope of inquiry in an election contest.

CONTESTANT'S 1ST AMEND. PET., § V at 24–25 ¶ 53.

Here, there is no evidence:

- (1) That the outcome of the contested election, as shown by the final canvass, is not the true outcome;
- (2) That illegal votes were counted;
- (3) That an election officer or other person officially involved in the administration of the election prevented eligible voters from voting;
- (4) That an election officer or other person officially involved in the administration of the election failed to count legal votes;

- (5) That an election officer or other person officially involved in the administration of the election engaged in other fraud or illegal conduct; and
- (6) That an election officer or other person officially involved in the administration of the election made a mistake.

Additionally, there is no evidence that any alleged irregularities enumerated above, which are not conceded, had any material effect on the outcome of the subject election. Similarly, there is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election. *See Price v. Lewis*, 45 S.W.3d 215, 218 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

No material fact issues remain. Accordingly, the Court should grant summary judgment and dismiss the election contest.

B. This Court Should Dismiss All of Contestant’s Claims, Causes of Action, and Theories of Relief Contained Within the “Conclusion” Section of Contestant’s Live Petition Because There is No Evidence Supporting Any Essential Elements of Them.

In her “Conclusion,” Contestant alleges as follows:

<p>58. For all of the foregoing reasons, Contestant asks the Court to:</p> <ol style="list-style-type: none">(i) after a trial on the merits, sustain this Election Contest;(ii) after subtracting all illegal votes that were cast and counted, and after adding all legal votes that were cast but not counted, and after consideration of all of the actions of EA Tatum and all other election officials which occurred before, during, and after the General Election, declare that the true outcome of the election cannot be ascertained;(iii) void the November 8, 2022 General Election conducted in Harris County, Texas, for the 189th Judicial District Court; and

CONTESTANT’S 1ST AMEND. PET., § VI at 27 ¶ 58.

There is no evidence of any essential element of these claims, causes of action, and theories of relief. More specifically, there is no evidence:

- (1) that the true outcome of the election cannot be ascertained;
- (2) that “all illegal votes that were cast and counted” in fact exist and that any such votes had any material effect on the election outcome;
- (3) that “all legal votes that were cast but not counted” in fact exist and that any such votes had any material effect on the election outcome;
- (4) that the number of allegedly illegally unascertained votes exceeds the undisputed margin of victory in the subject election;
- (5) that the number of allegedly illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election, *see* TEX. ELEC. CODE § 221.009(b);
- (6) There is no evidence that “all of the actions of EA Tatum and all other election officials which occurred before, during, and after the General Election” were illegal or otherwise improper, and that any such nonspecific conduct had any material effect on the election outcome.

No material fact issues remain. Therefore, the Court should grant summary judgment and dismiss the election contest.

C. This Court Should Dismiss All Claims, Causes of Action, and Theories of Relief Arising Out of the Remaining Twenty “Examples” Enumerated in Contestant’s Election Contest.

In Section IV of her live petition, Contestant devotes almost twenty pages to laying out an avalanche of purported “facts” about election irregularities, compartmentalized into twenty “examples.” Out of caution, Contestee addresses these “examples” below *seriatim*, to the extent they form the basis of, or are in themselves, claims, causes of action, and/or theories of relief. Contestee otherwise incorporates by reference here fully her briefing in sections III.A and III.B, *supra*.

1. There is no evidence of “Example One”: “Issuing Second Ballots To Voters Who Experienced Problems With Scanning Page Two (2) Of Their Ballots.”

In Example One, Contestant asserts that the Elections Administrator (“EA”) violated the proper procedures for scanning ballots. There is no evidence (1) that violations of the Election

Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

2. There is no evidence of “Example Two”: “Issuing Second Ballots To Voters Who Experienced Smudges Or Other Legibility Problems With Scanning Their Ballots.”

In Example Two, Contestant asserts that the EA violated the proper procedures for scanning ballots, specifically regarding ballots with allegedly legibility problems. There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

3. There is no evidence of “Example Three”: “Not Supplying Paper To Polling Places.”

In Example Three, Contestant asserts that the EA failed to supply certain polling locations with a sufficient amount of ballot paper in violation of the Texas Election Code Sections 51.004, 51.010 and 51.011. There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

4. There is no evidence of “Example Four”: “Agreeing To A Court Order To Permit Voting For An Extra Hour On Election Day.”

In Example Four, Contestant asserts that the EA wrongly agreed to a November 8, 2022 temporary restraining order issued by the sitting Ancillary Judge in Harris County after an evidentiary hearing that kept polling locations open for additional time to vote. She claims there was no “factual or legal basis” to keep the polls open. On this flawed premise, she then leaps to the conclusion that all later-cast ballots were illegal, should not have been counted and canvassed, and thus all such “illegal” votes should be subtracted from the final count—which, she contends, would have the net effect of increasing her final vote count relating to Contestee’s.

There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election. Indeed, the opposite is true. As a matter of law, the extension of polling hours is expressly authorized by numerous statutes and regulations. This includes provisions of the Texas Election Code (e.g., sections 43.007, 63.011, and 65.057(a)(2),(b)), the Texas Administrative Code (e.g., 1 Tex. Admin. Code § 81.172(a)(7)), the Help America Vote Act (52 U.S.C. § 21082(c)), and the plain language of the Provisional Ballot Affidavit promulgated by the Texas Secretary of State.¹

Contestant will predictably respond that the underlying restraining order extending polling hours was eventually stayed by the Texas Supreme Court via a mandamus proceeding. The mandamus ruling, in its entirety, reads as follows:

The district court's temporary restraining order issued today in Cause No. 2022-73765, Texas Organizing Project v. Harris County, et al., is stayed. Voting should occur only as permitted by Texas Election Code Section 41.032. Later cast votes should be segregated.

In re State, No. 22-0997 (Nov. 8, 2022).²

As such, the supreme court did not rule or even intimate that any votes cast during the extended hours were illegal; the court simply required segregation of the later cast votes. In a subsequent, related mandamus proceeding, the supreme court similarly failed to rule that the later-cast votes were illegal. *See In re State*, No. 22-1044, 2022 WL 17101236, at *1 (Tex. Nov. 22, 2022). No amount of forthcoming “evidence” or argument by Contestant can change these rulings.

In advancing the claims in “Example Four,” Contestant therefore invites this Court (1) to legislate from the bench and, by unilateral judicial fiat, erase codified law; and (2) to usurp decisions by two courts, i.e., (a) to relitigate the underlying court order permitting extended voting,

¹ See <https://www.sos.state.tx.us/elections/forms/pol-sub/7-15f.pdf>

² See <https://search.txcourts.gov/Case.aspx?cn=22-0997&coa=cossup>

which was based on an evidentiary hearing, and (b) to engraft additional text onto the Texas Supreme Court's mandamus rulings. This Court should decline Contestant's invitation to abuse the court's discretion.

5. There is no evidence of "Example Five": "Picking Up Election Results From The Polls Rather Than Requiring Judges To Fulfill Requirements Under Law."

In Example Five, Contestant asserts that the EA violated section 125.063 of the Texas Election Code by allegedly directing Early Voting Judges "to not secure voting systems at their polling places on the close of early voting, November 4, 2022." There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

6. There is no evidence of "Example Six": "EA Tatum Violated His Duty to Select, Place And Allocate Alternate Presiding Judges and/or Other Election Officials (e.g., Clerks) To Serve At Each Early Voting Polling Location from the List Supplied by HCRP."

In Example Six, Contestant alleges the EA violated section 85.009 of the Texas Election Code by allegedly failing to provide equal representation for Republican volunteers to serve as presiding judges and/or other election officials. There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

7. There is no evidence of "Example Seven": "EA Tatum Has A Ministerial Duty To Reject The Selection, Placement, And Allocation Of Any Person Not Appearing On HCRP's List Unless And Until It Has First Been Determined That None Of The Remaining Names On The List Are Persons Meet All Applicable Eligibility Requirements."

In Example Seven, Contestant asserts that the EA violated section 85.009(b) of the Texas Election Code by "failing to contact each and every person on [the Harris County Republican Party]'s list of Republican volunteers," thus allegedly permitting individuals not on this list to

serve as alternate judges and election clerks. There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

8. There is no evidence of “Example Eight”: “Mail-in Ballots Were Not Handled Properly.”

In Example Eight, Contestant asserts that “that approximately 700 mail-in ballots were counted that should not have been counted due to the several violations of the requirements of the Texas Election Code.” There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

9. There is no evidence of “Example Nine”: “Double Voting Occurred.”

In Example Nine, Contestant asserts that double voting occurred in violation of section 64.012 of the Texas Election Code. There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

10. There is no evidence of “Example Ten”: “Mail-In Ballots.”

In Example Ten, Contestant asserts that certain mail-in ballots were improperly counted or not counted. There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

11. There is no evidence of “Example Eleven”: “Provisional Ballots During Early Voting and Election Day During non-Extended Hours.”

In Example Eleven, Contestant asserts that certain provisional ballots were improperly counted or not counted. There is no evidence (1) that violations of the Election Code occurred, and

(2) that any such violations, which are not conceded, materially affected the outcome of the election.

12. There is no evidence of “Example Twelve”: “Illegal Votes Were Cast And Counted Without An SOR.”

In Example Twelve, Contestant asserts that certain voters voted illegally by not filling out the required document in violation of the Texas Election Code Section 64.0011. There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

13. There is no evidence of “Example Thirteen”: “Illegal Votes Were Cast And Counted Without An Appropriate Registration Address.”

In Example Thirteen, Contestant asserts that illegally registered voters voted in violation of Texas Election Code Sections 1.015, 13.001 and 13.002. There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

14. There is no evidence of “Example Fourteen”: “Discrepancies in the Cast Vote Records.”

In Example Fourteen, Contestant asserts that votes were improperly counted in countywide races because of alleged discrepancies in the canvass between various contests. There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

15. There is no evidence of “Example Fifteen”: “Failure To Supply Adequate Supply Election Equipment.”

In Example Fifteen, Contestant asserts that the Election Administrator’s Office failed to adequately supply election equipment for polling locations on Election Day in violation of the Texas Election Code as identified in Sections 51.004, 51.010 and 51.011. There is no evidence (1)

that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

16. There is no evidence of “Example Sixteen” “Inadequate Staffing At Polling Locations.”

In Example Sixteen, Contestant asserts that Harris County Elections Administrator’s Office operated polling locations in violation of the Texas Election Code Sections, 32.002 and 85.009, by failing to provide the required staffing for the polling locations. There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

17. There is no evidence of “Example Seventeen”: “Failure To Prepare Required Election Returns At Polling Locations.”

In Example Seventeen, Contestant asserts that the Harris County Election Administrator’s Office failed to adequately instruct presiding judges how to prepare returns of the election for the polling location by providing the total number of votes counted for each candidate and for and against each measure in violation of Texas Election Code Section 65.014. There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

18. There is no evidence of “Example Eighteen”: “EA Tatum’s Failure to Follow Election Code Requirements for Delivery of Election Results to Central Count.”

In Example Eighteen, Contestant asserts EA Tatum sent non-polling location workers to pick up the election results and deliver the equipment and documents to Central Count in violation of section 66.051 of the Texas Election Code. There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

19. There is no evidence of “Example Nineteen”: “EA Tatum’s Failure to Provide Chain of Custody for Election Results Delivered to Central Count.”

In Example Nineteen, Contestant asserts that the EA rarely provided chain of custody documentation that indicated the election result materials that were delivered to Central Count on Election Night, the time of delivery or the person receiving the documentation. There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.

20. There is no evidence of “Example Twenty”: “EA Tatum’s Failure to Properly Reconcile Mail-in Ballots.”

In Example Twenty, Contestant asserts that the EA’s official reconciliation report has reported 9,307 more mail-in ballots were counted that were actually turned in by Harris County voters. There is no evidence (1) that violations of the Election Code occurred, and (2) that any such violations, which are not conceded, materially affected the outcome of the election.\

III. CONCLUSION & PRAYER

For these reasons, Contestee respectfully requests this Court to set this motion for hearing and, after such hearing, to grant a summary judgment dismissing Contestant’s election contest in its entirety, as outlined above, as a matter of law. Additionally or alternatively, this Court should dismiss all discrete legal claims, causes of action, and theories for which Contestant has adduced no evidence. Finally, Contestee requests all other relief to which she may be justly entitled.

[Signature on Following Page]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Texas Rule of Civil Procedure 21a, a true and correct copy of the foregoing instrument was forwarded to all counsel of record and/or parties on April 26, 2023 via the Texas e-filing system.

/s/ Kevin Haynes
Kevin Haynes

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