

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**WILL ROYSTER**

**APPELLANT,**

**v.  
JOHN J. RIZZO, ET AL.**

**RESPONDENTS.**

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DOCKET NUMBER WD72947

DATE: October 13, 2010

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Appeal From:

Jackson County Circuit Court  
The Honorable W. Stephen Nixon, Judge

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Appellate Judges:

Special Division: James M. Smart, Jr., Presiding Judge, Mark D. Pfeiffer, Judge and Gary D. Witt, Judge

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Attorneys:

Philip O. Willoughby, Jr. and Arnold R. Day, Jr., Kansas City, MO, for appellant.

Michael J. Gunter, Kansas City, MO, for respondent John J. Rizzo; David B. Raymond, Charles G. Renner and Hannah K. Hemry, Kansas City, MO, for respondent Kansas City Board of Election Commissioners; Edwin R. Frownfelter, Kansas City, MO for respondent Secretary of State of Missouri.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

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**v.**

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No. WD72947

Jackson County

Before Special Division: James M. Smart, Jr., Presiding Judge, Mark D. Pfeiffer, Judge and Gary D. Witt, Judge

This is an election contest that arises out of the August 3, 2010 Primary Election to determine the Democratic candidate for the office of State Representative. Will Royster, a Democratic candidate for office of the State Representative for the 40<sup>th</sup> Legislative District, sued John J. Rizzo, also a Democratic candidate for the office, the Kansas City Election Board, and the Missouri Secretary of State. This lawsuit was filed after Rizzo was certified as the winner of the contest, eventually by a vote of 664 to 663.

On August 24, 2010, Royster filed his Verified Petition to Contest Election in the Jackson County Circuit Court, and the First Amended Petition was filed on September 7, 2010. In his Amended Petition, Royster alleged a variety of voting irregularities that he claimed were in violation of Missouri state law, entitling him to a new primary election. Specifically, Royster alleged, *inter alia*, that non-English speaking voters were improperly assisted or instructed on how to vote at two polling locations, that improper electioneering occurred at one polling location, that certain precincts were improperly consolidated into a single polling place, and that other voting formalities required by state law were not followed during the election. Furthermore, the Petition contained the following three counts seeking relief: Count I (Request For Recount Due To Irregularities); Count II (New Election); Count III (Request For Recount Because Of Less Than One Percent Difference In Vote).

On September 7, 2010, a bench trial was held. Upon conclusion of the evidence, the trial court announced from the bench that it was not going to order a new primary election and later issued its Amended Judgment denying all of Royster's claims and requested relief. Royster appeals.

**AFFIRMED.**

Royster raises four Points in this appeal, but the thrust of each one "is whether or not the trial court erred when it found that the irregularities that developed during the August 3, 2010, primary election were not of sufficient magnitude under Missouri law to warrant a new election under Section 115 RSMo., or even a recount under Section 115.539, RSMo." As it pertains to his argument that the trial court erred in refusing to order a hand recount, Royster's argument is

flawed because it fails to take into account the fact that Missouri law provides that he is entitled to only one recount in this context, which he has already received. Furthermore, the Missouri Supreme Court has repeatedly made clear that a new election is a “drastic remedy”, and Royster has failed to demonstrate that he was entitled to a new election as a matter of law.

In Point One, Royster alleges that the “trial court erred in its decision when it found that the presence and actions of the Somali interpreters at two polling places, their electioneering, the directions they gave to voters on how and for whom to vote while there, and their handling and voting of the ballots and signing in for voters were not sufficient irregularities to warrant a new election.” While the trial court found that certain non-English speaking voters failed to take the requisite oath pursuant to Section 115.445.3 prior to receiving assistance in casting their vote; Royster has failed to demonstrate that the trial court erred in concluding that all of these voters were registered and voted for the individual for whom they chose without any illegal or fraudulent interference. Here, Royster has failed to demonstrate that the trial court erred in concluding that the irregularities in question were not of a sufficient magnitude to warrant ordering a new election.

In Point Two, Royster alleges that the “trial court erred in its decision when it found that multiple violations of statutorily required procedures for qualifying voters to receive ballots and to vote in the election were not sufficient to justify a new election.” Section 115.457 states that “[i]f a ballot appears without the initials of two election judges, the ballot shall be rejected, *except when it appears the absence of initials is due to a mistake of the election judges and that the ballot is otherwise legal and proper.*” The only specific finding of wrongdoing found by the trial court in this regard was that fourteen ballots were identified that were not initialed by two election judges. As it pertained to these disputed ballots, the trial court reached the critical legal conclusion that “[t]he credible evidence demonstrates that the ballots without the initials of two (2) election judges are in that condition due to mistakes made by the election judges and that the ballot is otherwise legal and proper.” Because the trial court expressly found that the failure to initial the ballots in question was due to the mistakes made by the election judge, we conclude that the trial court did not err in refusing to reject these ballots pursuant to Section 115.457.

In Point Three, Royster argues the “trial court erred in its decision when it determined that precincts in the 40th Legislative District were lawfully consolidated, because Section 115.115 RSMo. prohibits in all cases, the consolidation of polling places for precincts that do not join geographically.” Royster has failed, once again, to demonstrate that the trial court’s relevant findings and conclusions in this regard were somehow in error: “No evidence suggests that the combining or consolidating of the precincts had any impact on the election.” Therefore, the trial court did not err in denying his claim because he failed to demonstrate that he was entitled to the requested relief.

In Point Four, Royster argues that the “trial court erred in denying a new election because . . . the combination of the many violations of election laws showed such a total disregard for the law, and a willful violation of the general spirit and controlling purpose thereof, that the election should have been invalidated.” This Point merely conglomerates the arguments previously made by Royster on appeal and argues that their totality warrants a new election. Point denied.

In short, the trial court found, based on the evidence presented to it that:

The credible evidence proves that only registered voters voted a[t] Garfield Elementary School and the Kansas City Museum voting locations. That evidence also proves that there is no question that Contestee Rizzo received 664 votes and that Contestant Royster received 663 votes. The credible evidence proves that there was no voter misconduct and there was no voter fraud with regard to this election.

We affirm the judgment of the circuit court based on the fact that Royster has simply failed to demonstrate that the court's judgment was somehow in error.

Opinion by Gary D. Witt, Judge

October 13, 2010

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