

[F]or that cannot be called an election or the expression of the popular sentiment where a part only of the electors have been allowed to be heard, and the others, without being guilty of fraud or negligence, have been excluded.¹

1. Reconsideration or rehearing.

MCR 2.119(F)(3) provides guidance to courts in stating that reconsideration is appropriate if there is a "palpable error by which the court and the parties have been misled and show that a different disposition of the [order] must result from correction of the error." MCR 2.119(F)(3). The palpable error provision is not mandatory; rather, it "only provides guidance to a court about when it may be appropriate to consider a motion for rehearing or reconsideration" *People v Walter*, 266 Mich App 341, 350; 700 NW2d 424 (2005). A trial court possesses considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kolu v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000). Indeed, nothing in MCR 2.119(F)(3) restricts this court's discretion to grant a motion for reconsideration. *Smith v Sinai Hospital of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986) ("If a trial court wants to give a 'second chance' to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion. All this rule does is provide the trial court with some guidance on when it may wish to deny motions for rehearing."). Thus, "[a]s a general matter, courts are permitted to revisit issues they previously decided, even if presented with a motion for reconsideration that offers nothing new to the court." *Hill City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007).

2. The December 17, 2020 "hand recount" was insufficient and premised on fraud; Plaintiff has new evidence which the court must consider that could not have been obtained sooner due to discover responses delivered after oral argument.

¹ Cooley, *Treatise on the Constitutional Limitations* (2d ed 1871) pp 614-15.

The Michigan Constitution [Const 1963, art 2] § 4(1)(h) permits a self-executing and liberally construed right to have the results of statewide elections audited, in such manner as prescribed by law, to ensure the accuracy and integrity of elections. Defendants argued that they have performed an "audit" when they conducted a "hand recount" on December 17, 2021. This is false for several reasons: (1) the hand recount only counted the presidential election and (2) it was wholly inadequate and premised on fraud. We know this based on previous expert reports filed with the Court. We also know this based on new information included within this motion.

Expert witness Jeffrey Lenberg has prepared a report dated June 9, 2021 titled "*Case Study Banks Township – Antrim County Election Management Server Found to be Subverted*" [Exhibit 2]. This report details a case study that "was performed on Banks Township to show the results of the manipulation of the project files on the EMS and how the EMS handled the errors introduced." *Id.* at 1. In this case, the Dominion software:

"The software would typically show an error if the vote selections were shifted outside of a single contest, moreover, when all of the votes for all of the contests on the ballot are moved outside the indexes on that individual ballot the software would be expected to throw what is called an exception in software engineering. When an exception occurs, it must be handled by a programming routine that is designed for error handling (aka exception handling); if this does not occur, the result is typically a crash of the program, and immediate termination of the application."

Id. In this test, 210 ballots were fed into the tabulator. "The objective of the test was to illustrate that the paper tapes would accurately convey the totals of the vote while the EMS would show undervotes for all contests, the result is the categorical loss of all the votes due to the subversion." The results show that all the votes on the EMS went to undervotes, which should not happen. This is significant because all down ballot races are incorrectly tallied.

In the case of the Antrim County EMS it does not produce any errors on the EMS because the exception is handled in a fashion to create an undervote and disregard the authentic vote. The subversion intentionally suppresses the errors that would likely occur in order to allow manipulation of the votes without detection.

Id. The report clearly states that all down ballot races, including Proposal 20-1,² went to an undervote and had results shifted [Exhibit 3]. It is incredible unlikely that these results are correct considering the subversion because no votes were counted in down ballot races as reflected in the report. For this reason, an audit of all down ballot races is required.

Expert witness Jeffrey Lenberg has prepared another report dated June 9, 2021 titled "*Centralized Subversion of Election Vote Totals and Paper Tapes*" [Exhibit 4]. Simply editing this "file and modifying the mapping of the bullets on the ballots (vote selections) to the candidates allows for manipulation of the vote results." *Id.* at 3. Figure 4 of the report shows the *actual* "manipulation of the raw binary data that creates the modification of both the paper tapes and the results file." The output creates fraudulent paper tapes that do not match the ballots. "The results files on the compact flash cards are also fraudulent and will be processed normally by the EMS showing the same fraudulent vote totals matching the paper tape." *Id.* "This subversion is undetectable in the current canvassing process, as the paper tapes and the vote totals reported on the EMS will precisely match despite the fact they have been fraudulently manipulated." *Id.* The report details how the "VIF_BALLOT_INSTANCE.DVD" file can also be modified. The combination of modifications will "allow for an attacker to choose a variation where either paper tape of the results file [or] modified alone." *Id.* at 6. Essentially one modification to a single file can change the results of the paper tape and electronic total. The votes can be manipulated by a third-party actor, i.e. Election Source, at a central location remotely.

Expert witness Jeffrey Lenberg has prepared another report dated June 9, 2021 titled "*Central Lake Township Reversals Make Ballots Impossible to Count, Helena Township 21%*"

² A proposed constitutional amendment to allow money from oil and gas mining on state-owned lands to continue to be collected in state funds for land protection and creation and maintenance of parks, nature areas, and public recreation facilities; and to describe how money in those state funds can be spent.

Ballot Reversal Rate, 20% Higher Reversal Rate for Republican voters and Mancelona Late Night Ballot Processing" [Exhibit 5]. This report reveals actual manipulation of a file named "VIF_CHOICE_INSTANCE.DVD." Simply put, Central Lake Township had an 82% reversal rate. This occurred because "there were modifications made to the ballots outer markers that led to specific ballots being reversed by the ICP tabulator." *Id.* at 1. This means these ballots were *tampered with*. "Those tampered ballots are never actually counted because they always reverse, and therefore never record votes."

Forensic analysis of the slog.txt file for Central Lake Township show there are specific irregularities found on outer markers on the physical ballots. The external markings along the edges of the ballots showed modification on blocks 15, 18, 28, 41, and 44. These irregularities were found on both the right and left side of the ballots. The physical ballots and the associated blocks around the perimeter of the ballot were tampered/modified, with either a pen, or some other marker to distort the shape of the block and make the ICP reverse the ballot instead of processing it normally.

Id. at 2-3.

This is the township in which Plaintiff Bill Bailey votes

We now know there is an 82% chance his vote did not count. Recall, Judy Koslowski stated that she was instructed to bring her tabulator and ballots to the county building on November 5, 2020 [Exhibit 6]. "Given the fact that the Central Lake Township ballots were re-processed on November 6, 2020 (three days after election day), this high reversal rate indicates an intentional injection of these tampered ballots in order to overshadow the ambient reversal rate of twenty percent." Plaintiff Bill Bailey is entitled to have his vote counted correctly and have an audit to ensure nobody's vote is disenfranchise because someone modified blocks 15, 18, 28, 41, and 44 on the ballots, causing an 82% reversal rate.

Expert witness Ben Cotton has prepared an additional report [Exhibit 7] on June 8, 2021 that reveals the Antrim County EMS server was remotely logged into by an anonymous logon on November 5, 2020 and November 17, 2020.

Antrim EMS failed to maintain windows security event logs before 4 November 2020. Consequently a full user logon activity analysis was not possible to perform. However, within the logs that were present on the system there were at least two successful logins to the EMS server by an Anonymous user. The first occurred on 11/5/2020 at 5:55:56 PM and the second occurred on 11/17/2020 at 5:16:49 PM EST. Both of these logons appeared to have escalated privileges at the time of logon. Given that this computer was supposed to be on a private network, this is very alarming. One would expect that any network logon, if authorized by the accreditation authority, would require specific usernames and passwords to be utilized, not anonymous users. Given the vulnerable state of the operating system and antivirus protections, this apparent unauthorized access is particularly alarming and certainly would not have been authorized on an accredited system.

Id. at 7. Interestingly, the CF card for Central Lake Township was programmed on November 5, 2020 at 10:22 AM. See [Ex 4] at 7. But rather than run the recount at that time, they allowed some anonymous user to remote into the system at 5:56 PM to change data. And then Defendants re-ran the election the next morning on November 6, 2020 at 9:18 AM. Taken as a whole, these reports show that a "hand recount" of just the presidential election is meaningless. Plaintiff is entitled to an audit of the entire ballot from top to bottom. Indeed, the hand recount conducted by Defendant Benson did not satisfy Plaintiff's requested relief in the original complaint, let alone the amended complaint.

Finally, expert witness Jeffrey Lenberg has prepared another report dated June 9, 2021 titled "*Missing Evidence for Evaluation of Antrim County Election, Official Ballots are Easily Fabricated, and Official Ballot PDFs Flawed Making for Errors in Processing.*" [Exhibit 8]. This report states that information is missing that must be turned over in order for the experts to complete their work. Therefore, Plaintiff's claims are not moot.

This case is about protecting the individual constitutional rights of Plaintiff, and, by extension, every registered voter in the state of Michigan. Both the state and federal constitutions anchor the fundamental right of the people to govern themselves upon the prima facie assumption that the means by which they choose their representatives must be of ultimate purity and primary importance. If the right to vote is not protected, all other guarantees afforded by the Constitution are irrelevant because they are dependent upon the integrity of the franchise and the consecration of representative choice. The duty to protect this fundamental right must, of necessity, fall on the judiciary, for it is the only remaining barrier to degeneration of elections into mere contests of fraud rather than fair attribution of the will of the people to the designated representative of their sacred and sovereign choice. To that end, the courts have recognized that the judiciary must guarantee and protect the right to vote as *the* fundamental right preservative of all other rights. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 16; 740 NW2d 444 (2007); *Reynolds v Sims*, 377 US 533, 562; 84 S Ct 1362; 12 L Ed 2d 506, 527 (1964).

The nation cannot survive as a constitutional republic if the government allows the transfer and adjudication of thousands of "votes" by non-delegated, unaccountable officials (without legally required oversight), the acceptance and counting of illegitimate or ghost votes, and the rank absence of *any semblance* of operational integrity in the electronic systems used to process ballots and tabulate votes. If we allow manipulation of ballots during and after they are processed, then who can guarantee that the fundamental constitutional rights of our citizenry are protected?

The last bastion to protect these rights is the judiciary. Justice Cooley instructed that *the manner* in which an election is conducted is "the substance of every election and a failure to

comply with the law in these particulars is not generally to be treated as *a mere irregularity*." Cooley, Treatise on the Constitutional Limitations (2d ed 1871), p 619 (emphasis added). The law requires the judiciary to step in under circumstances where the two other branches of government have failed to carry out their constitutional duties to protect the rights of the citizenry. Justice Cooley stated long ago that the judiciary is the only safety net to ensure the integrity of an election.

In Michigan, the key above all is that in both theory and spirit of the Constitution and Laws only those votes which are given by qualified electors are valid. Quo warranto proceedings "may inquire into the qualifications of those who have voted...to test the right to a public office." *Id.* at 628. Though the election boards and canvassers might be bound in their decision by the number of votes deposited in accordance with the law regulating their actions, "where there is competent evidence that illegal votes have been admitted, the decision of the board can be challenged, because they were in such case "compelled to admit votes which they know to be illegal, and they cannot "constitute tribunals of last resort for the determination of the rights of parties claiming an election."." Cooley, *supra* at p 628 (emphasis supplied), quoting *People v Cicotte*, 16 Mich 283, 311 (1868) (Christiancy, J) (emphasis added), overruled on other grounds at *Petrie v Curtis*, 387 Mich 436, 440; 196 NW2d 761 (1972). "If this were so, and there were no legal redress...there would be much reason to apprehend that elections would degenerate into *mere contests of fraud*." *Id.* Indeed, where there is such evidence, Justice Christiancy "doubt[ed] the competency of the legislature, should they attempt it...to make the decision of inspectors or canvassers *final* under our constitution." *Id.* at 312 (emphasis added). This, of course, means that the Court must allow the citizens' challenge and refuse the attestations of the non-delegated as final arbiters with authority to ignore genuine and material evidence of abject fraud.

To these ends, the Michigan Constitution first and foremost declares that "[a]ll political power is inherent in the people" and "Government is instituted for their equal benefit, security and protection." Const 1963, art 1, § 1 (emphasis added). It next declares that "[n]o person shall be denied the equal protection of the laws" Const 1963, art 1, § 2. Both the Michigan and Federal Constitutions guarantee equal protection to all qualified voters.

The Michigan Constitution also guarantees the sanctity of the vote in elections by charging the Legislature with the duty to enact laws regulating the "time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." Const 1963, art 2, § 4(2). Subsection 1(h) provides for the self-executing and liberally construed right to have the results of statewide elections audited, in such manner as prescribed by law, to ensure the accuracy and integrity of elections. Const 1963, art 2, § 4(1)(h).

An action at law is guaranteed *to anyone* by virtue of the provision under which this lawsuit has been filed upon a showing of material fraud or error. MCL 600.4545(1). As such an action proceeds *quo warranto*, it is inherent in the very nature of such an action that standing resides in the complainant to challenge the fraud and abuse committed by the official defendants. MCL 600.4545(3). Indeed, standing is secondary under such an action, the focus being on the merit of the claims assuming proper and formal presentation, which no one doubts here, and the malfeasance, abuse or fraud of the official defendants and those acting on their behalf, which have been proved in this case. *Grand Rapids v Harper*, 32 Mich App 324, 329; 188 NW2d 668 (1971), citing 4 Honigman & Hawkins, Michigan Court Rules Annotated (2d Ed), Rule 715, p 237. Accord *Penn Sch Dist v Bd of Ed*, 14 Mich App 109, 117-18; 165 NW2d 464 (1968), citing

Honigman, *supra*, and stating that it is well-established under MCL 600.4545(3) that "a private citizen may bring a *quo warranto* action of the nature presented in this case, without *any showing of a special personal interest in the subject matter* at hand." (emphasis added). Under the *quo warranto* proceedings, standing is an inherent attribute and this Court has all the power and authority under that provision to rectify the abject fraud that occurred in the November 2020 election in Antrim County, Michigan. *Grand Rapids v Harper*, 32 Mich App at 329; *Penn Sch Dist v Bd of Ed*, 14 Mich App at 117-18; *Grand Rapids City Clerk v Judge of Superior Court*, 366 Mich 335, 340; 115 NW2d 112 (1962).

Finally, the Court has the further authority vested in it as the custodian of the constitutional rights guaranteed to the citizenry in the election process. Indeed, *quo warranto* proceedings under MCL 600.4545 provide a clear and adequate remedy to allow the plaintiff to "test the constitutional issue[s]" arising from an election." *Grand Rapids City Clerk*, 366 Mich at 340 (emphasis added), citing *Millard ex rel Reuter v Bay City*, 334 Mich 514, 517; 54 NW2d 635 (1952) (stating that "a writ in the nature of a *quo warranto* is the proper writ to test the validity of an election" and allowing the writ to be pursued directly in the Supreme Court under authority of its general "superintending control"). The constitutional issues in this case include the purity of the November 2020 election under § 4(2), the scope of an audit under § 4(1)(h), and the constitutionality of MCL 168.31a(2), to the extent that it is or has been interpreted as limiting the scope of an audit under § 4(1)(h).

Laws protecting voters' rights have been "a part of our constitution for almost as long as Michigan has been a state." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich at 16-18. These laws exist "for the purpose of preventing fraudulent voting." *Id.* (emphasis in original). legally sufficient claims in accordance with the standard

required under MCR 2.116(C)(8). He may pursue full litigation of the issues and seek an appropriate remedy under Michigan law upon proof of his case. At a minimum, this requires a judicial pronouncement of Plaintiff's constitutional rights and the legitimacy of any statutory or administrative limitations that might be imposed thereon. Upon a demonstration of the fraud uncovered, it will be clear to the Court that in fact the constitution requires a full complete and comprehensive audit to ensure the integrity of and preserve the purity of all elections, past, present and future.'

MCR 2.119(F)(3) provides a trial court with unrestricted discretion to consider a motion for reconsideration and such is warranted where palpable error is shown by which the court and the parties have been misled, and a different disposition is required to correct the error. The Court erred in dismissing *all* of Plaintiff's sufficiently pleaded claims under MCR 2.116(C)(4) or MCR 2.116(C)(8) without analyzing each of those claims and the relief that may be sought thereunder.

In addition to the viable constitutional and statutory claims that must be separately analyzed, Michigan law provides that the Circuit Court must exercise subject matter jurisdiction over a timely filed proceeding in quo warranto. MCL 600.4545. As Defendants conceded, Plaintiff has general standing under this provision, and according to Michigan case law, he may test and pursue his constitutional and statutory claims and relief available under the statute. *Grand Rapids City Clerk*, 366 Mich at 340; *Millard ex rel Reuter*, 334 Mich at 517. The Court's decision granting summary disposition to Defendants under (C)(4) was error. Plaintiff's claims are not moot, nor has he received all the relief sought or to which he is entitled.

3. The Court erred when it stated Plaintiff received the relief requested; What happened, what didn't happen, and what should happened.

In its ruling from the bench the Circuit Court recited the counts pleaded in Plaintiff's complaint: (1) a right to an audit under Const 1963, art 2, § 4(1)(h) (the audits clause); (2) a claim for preserving the purity of elections under Const 1963, Jeffrey Lenberg has prepared another report dated June 9, 2021 titled "*Central Lake Township Reversals Make Ballots Impossible to Count, Helena Township 21% Ballot Reversal Rate, 20% Higher Reversal Rate for Republican voters and Mancelona Late Night Ballot Processing*"_art 2, § 4(2); (the purity of elections clause); (3) an equal protection claim under Const 1963, art 1, §2 (the equal protection clause); (4) a statutory claim under MCL 168.861 (retention of quo warranto remedies where fraudulent voting is discovered before recount); (5) an action in quo warranto under MCL 600.4545 (providing for filing of an action within 30 days where material fraud or error has been committed in an election and for such action to proceed in the nature of common law quo warranto); and (6) a statutory claim under MCL 168.765 (regarding the handling and processing of absentee ballots). (Transcript of Court's Ruling from the Bench (RTR), 05/18/21, pp. 9-10).

The Court concluded that the relief sought in Plaintiff's complaint was that a forensic image be taken of the precinct tabulators; that there be a non-partisan audit of the November 3, 2020 general election; that a protective order be issued for Defendants to preserve evidence; and such other relief that is equitable and just, which the Court described as "a catch all provision made in almost every civil lawsuit." (RTR, p. 10). Plaintiff never received a forensic image of the precinct tabulators. Defendants continuously blocked Plaintiff's efforts to schedule and collect forensic images of the tabulators. Plaintiff also never received all of the Antrim County equipment owned by the county. See [Ex 7]. Ben Cotton sums this up when he states that the following items were not produced: