

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-1652-FT

Cir. Ct. No. 01-CV-83)

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN RE APRIL 2, 2002 OFFICIAL BALLOT FOR VILLAGE
OF KNAPP OFFICES:**

DALE S. HAMMOND,

PLAINTIFF-APPELLANT,

v.

BOARD OF CANVASSERS FOR THE VILLAGE OF KNAPP,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dunn County:
WILLIAM C. STEWART, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Dale S. Hammond appeals a judgment upholding the board of canvassers' decision that rejected his challenge to the results of an election for village trustees.¹ The board concluded that the election for three trustees resulted in a three-way tie for second. Names were drawn to determine the winners. After Hammond lost the draw, he asked the board of canvassers to reject every ballot cast because the ballots impermissibly identified the incumbents and failed to include Hammond's middle initial. Because we conclude that the board's authority does not extend to invalidating the election, we affirm the judgment affirming the board's decision.

¶2 The parties agree that the ballots were defective in that they did not include Hammond's middle initial, and, more significantly, they identified the incumbents. The board of canvassers, however, does not have authority to reject all of the ballots based on these defects. The board's duties are primarily ministerial and not judicial, and involve review of individual ballots to determine whether the voter made mistakes that invalidate his or her selection. *See Clapp v. Joint School Dist. No. 1*, 21 Wis. 2d 473, 478, 124 N.W.2d 678 (1963). Irregularities relating to the ground work of the election are not within the board's authority. The scope of the circuit court's authority is no greater. *Id.* Neither the board nor the circuit court should decide the legality of the election as a whole where the defect in the ballot does not compromise the board's ability to determine the will of the people entitled to vote. *Id.* at 481.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1999-2000 version.

¶3 Hammond's complaints do not relate to the ability of the board to ascertain the voter's choice as expressed on the ballots. Rather, he challenges the manner in which the voters may have arrived at their decision. A ballot legally cast cannot be rejected if it expresses the will of the voter. *Roth v. LaFarge School Dist. Bd. of Canvassers*, 2001 WI App 221, ¶28, 247 Wis. 2d 708, 634 N.W.2d 882.

¶4 Had Hammond challenged the ballot before the election, he would have prevailed. After the election, however, WIS. STAT. §5.01(1) compels the courts to overlook defects that do not interfere with our ability to ascertain the will of the electors. *Leuch v. Milwaukee County Bd. of Election Comm'rs*, 244 Wis. 305, 316, 12 N.W.2d 61 (1943). Voters should be allowed to assume that public officers have properly created the ballot, and innocent electors ought not be disenfranchised by the mistakes of election officials. *See State ex rel. Dithmar v. Bunnell*, 131 Wis. 198, 205-06, 110 N.W. 177 (1907). Defects in the form of the ballot that do not interfere with the board's ability to determine the elector's choice should be raised before the election takes place. After the election is held, the courts will not disenfranchise all of the voters whose choice is clear merely because of a ballot defect over which they had no control. *See id.*

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

