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Chuck McKay, appellant, v. Anita Bartels et al., appellees.

___ N.W.3d ___

Filed March 22, 2024. No. S-23-062.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Declaratory Judgments.** Under Neb. Rev. Stat. § 25-21,149 (Reissue 2016), the purpose of a declaratory judgment action is to declare rights, status, and other legal relations.
3. **Declaratory Judgments: Justiciable Issues.** The existence of a justiciable issue is a fundamental requirement for a court's exercise of its discretion to grant declaratory relief. A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
4. **Declaratory Judgments: Equity.** Declaratory and equitable relief are not appropriate where another equally serviceable remedy has been provided by law, and such relief is available only in the absence of a full, adequate, and serviceable remedy.
5. **Declaratory Judgments.** The appropriateness of a declaratory judgment is ascertained by the precise relief sought.
6. **Declaratory Judgments: Judicial Construction: Statutes.** Although a declaratory judgment action is an appropriate method to obtain judicial construction of a statute, it is fundamentally an action to obtain a declaration of rights.
7. **Statutes: Voting.** It is the nature of the relief sought, not the underlying defect alleged, that determines whether the election contest statutes are implicated.

8. ____: ____. Generally, the election contest statutes are the exclusive means for challenging the results of an election.
9. **Voting: Words and Phrases.** An election contest is a challenge by an election's loser against the winner, calling for an analysis of the election returns, which may include reviewing voter qualifications or recounting the ballots.
10. **Voting: Courts.** In election contests, judges serve in the capacity of election inspectors, where the court's whole duty is to inspect and interpret the polls.

Appeal from the District Court for Saline County: David J. A. Bargen, Judge. Affirmed.

Lyle J. Koenig, of Koenig Law Firm, for appellant.

Tad D. Eickman for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

INTRODUCTION

Chuck McKay appeals the district court's dismissal of his complaint for declaratory relief concerning the 2022 Republican Party primary election in Saline County, Nebraska. The court concluded that McKay's complaint failed to state a claim entitling him to relief because the exclusive remedy for his claims was an election contest under Neb. Rev. Stat. §§ 32-1101 to 32-1117 (Reissue 2016 & Cum. Supp. 2022). We affirm.

BACKGROUND

Because this appeal is of a preanswer motion to dismiss, McKay's complaint provides the only factual background of events underlying his claims.

On August 2, 2022, McKay filed a "Complaint for Declaratory Judgment, or in the Alternative Equitable Relief," in the district court for Saline County. McKay named Anita Bartels, the "purported" Saline County clerk, and all five Saline County commissioners as defendants.

As alleged, on or about January 6, 2022, McKay filed as a candidate in the May 10, 2022, primary election for the Republican Party's nomination for the office of county commissioner for "District #1" (District 1) of Saline County. At that time, Bartels informed McKay that the Saline County Board of Commissioners had not redistricted, "and 'we don't believe that there will be any changes to your district.'" However, McKay alleged that at some point in time before the primary election, Bartels unilaterally and unlawfully changed the boundary of District 1. Bartels' change added approximately 13 blocks and 74 homes located in Wilber, Nebraska, to District 1.

Bartels did not provide McKay with notice of the change in the boundary. McKay discovered the change at an unspecified time after the election. On June 7, 2022, 29 days after the primary election, the Saline County Board of Commissioners approved Bartels' change to the boundary of District 1.

The result of the primary election for county commissioner of District 1 was 175 votes for the incumbent, Stephanie Krivohlavek; 165 votes for McKay; and 95 votes for a third candidate. However, McKay alleged that when the votes from the area added to District 1 are disregarded, Krivohlavek received only 113 votes, while McKay received 115 votes. In other words, counting only the "legal" votes, McKay won the election.

McKay asserted that Nebraska law requires a county board of commissioners to approve any change in a district's boundary prior to an election. Accordingly, he contended that because the Saline County Board of Commissioners did not approve a change to District 1's boundary prior to the primary election, the boundary was illegally changed and the change was a legal nullity and void; thus, the votes of persons added to District 1 should not be counted. McKay further contended that the court should declare him the nominated candidate because the outcome of the election with those votes excluded could be ascertained.

In addition, McKay alleged that at all relevant times, Bartels was a resident of Gage County and, thus, did not satisfy the residency requirement to be the county clerk for Saline County. McKay asserted that under Nebraska law, county clerks must reside in the county that they serve, and when they do not, any official action taken by the officeholder is null and void. Accordingly, McKay contended that the change to District 1's boundary before the primary election was null and void; thus, no change in the boundary was effectuated, and the result of the election should be set aside.

Finally, McKay asserted that the Board's failure to properly redistrict, as well as Bartels' unauthorized redistricting and failure to provide him with notice, deprived him of his right to due process.

In his prayer for relief, McKay sought orders declaring that (1) county commissioners must approve any change to district boundaries prior to an election; (2) a county clerk must reside in the county of which the individual is the clerk, and if the individual resides outside of the county, the individual's actions taken in the office are null and void; and (3) Bartels' unilateral change to the boundary of District 1 is null and void. McKay also sought orders requiring (4) the appropriate party to certify him as the Republican Party's nominated candidate for District 1's commissioner and (5) his attorney fees and costs be paid by the appropriate party.

The defendants, represented by the then-Saline County Attorney, moved to dismiss McKay's complaint under Neb. Ct. R. Pldg. §§ 6-1112(b)(1), (b)(6), and (c). The defendants' motion requested the court to dismiss McKay's complaint with prejudice on the grounds that it was barred by the applicable statute of limitations, the court lacked subject matter jurisdiction, McKay lacked standing, and McKay failed to state a claim upon which relief could be granted.

The defendants filed a brief in support of their motion to dismiss. They contended that McKay's complaint was governed by the requirement to provide notice of an election

contest set forth in § 32-1109, which states in part: "Notice of such contest shall be given to the person whose election is contested within twenty days after the votes have been officially canvassed." The brief asserted that the official canvass of votes was completed on May 13, 2022, and that "[n]otice in this case was not filed within the time limit provided." For those reasons, the defendants contended that the court lacked jurisdiction over McKay's complaint, because it made allegations concerning the county clerk and the county's redistricting after the 2020 census.

The district court, on its own motion, canceled the hearing on the defendants' motion in lieu of a briefing schedule and ordered the motion taken under advisement as of September 28, 2022. The briefs filed pursuant to the court's order were not made a part of the appellate record.

On January 4, 2023, the court entered its order on the defendants' motion to dismiss. The court concluded that McKay's complaint should not be dismissed under § 6-1112(b)(1), because it had subject matter jurisdiction over complaints seeking declaratory judgments and equitable relief. The court also concluded that the defendant's motion to dismiss was improper under § 6-1112(c), because a judgment on the pleadings would not be timely when the defendants did not file an answer and McKay's complaint was the only pleading filed in the case.

The court ultimately sustained the defendant's motion to dismiss under § 6-1112(b)(6), concluding McKay's complaint failed to state a claim upon which relief could be granted. Relying on our opinions in *Eriksen v. Ray*[1] and *Pierce v. Drobny*,[2] the court found that regardless of McKay's characterization of his case, "his suit is undeniably one to contest an election," and an election contest under §§ 32-1101 to 32-1117 was the only remedy available to him. Accordingly,

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[1] *Eriksen v. Ray*, 212 Neb. 8, 321 N.W.2d 59 (1982).

[2] *Pierce v. Drobny*, 279 Neb. 251, 777 N.W.2d 322 (2010).

McKay's complaint failed to state a claim for which declaratory or equitable relief could be granted. Finally, the court concluded that "[b]ecause McKay's additional claims are subsumed by the requirement to bring his challenge pursuant to the election contest statutes, they, too, fail to state a proper claim."

McKay filed a timely appeal, which we moved to our docket pursuant to Neb. Ct. R. App. P. § 2-102(C) (rev. 2022).

ASSIGNMENTS OF ERROR

McKay assigns, restated, that the district court erred in finding that his complaint for declaratory judgment or equitable relief failed to state a claim for which relief could be granted because his exclusive remedy was an election contest under §§ 32-1101 to 32-1117.

STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[3]

ANALYSIS

[2-5] We begin by noting that the purpose of a declaratory judgment action is "to declare rights, status, and other legal relations."[4] The existence of a justiciable issue is a fundamental requirement for a court's exercise of its discretion to grant declaratory relief.[5] A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of

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[3] *Lopez v. Catholic Charities*, 315 Neb. 617, 998 N.W.2d 31 (2023).

[4] Neb. Rev. Stat. § 25-21,149 (Reissue 2016).

[5] E.g., *U.S. Specialty Ins. Co. v. D S Avionics*, 301 Neb. 388, 918 N.W.2d 589 (2018), *modified on denial of rehearing* 302 Neb. 283, 923 N.W.2d 367 (2019).

present judicial enforcement.[6] Declaratory and equitable relief are not appropriate where another equally serviceable remedy has been provided by law,[7] and such relief is available only in the absence of a full, adequate, and serviceable remedy.[8] The appropriateness of a declaratory judgment is ascertained by the precise relief sought.[9] With these principles in mind, we turn to McKay's prayers for relief to determine whether declaratory relief is appropriate.

[6] To the extent McKay seeks a declaration that "a county clerk shall reside in a county for which he or she holds office,"[10] a county board of commissioners, not a county clerk, "shall be responsible for drawing its own district boundaries,"[11] and a county board of commissioners "shall [redistrict] if necessary to maintain substantial population equality as required,"[12] he has failed to state an independent claim entitling him to declaratory relief. Although a declaratory judgment action is an appropriate method to obtain judicial construction of a statute,[13] it is fundamentally an action to obtain a declaration

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[6] E.g., *Bramble v. Bramble*, 303 Neb. 380, 929 N.W.2d 484 (2019); *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989); *Ellis v. County of Scotts Bluff*, 210 Neb. 495, 315 N.W.2d 451 (1982).

[7] See, e.g., *Mueller v. Peetz*, 313 Neb. 173, 983 N.W.2d 503 (2023); *Sandoval v. Ricketts*, 302 Neb. 138, 922 N.W.2d 222 (2019); *Murphy v. Holt County Committee of Reorganization*, 181 Neb. 182, 147 N.W.2d 522 (1966); *State, ex rel. Hunt, v. Mayor, etc., of Kearney*, 28 Neb. 103, 44 N.W. 90 (1889).

[8] See, e.g., *State ex rel. Wagner v. Evnen*, 307 Neb. 142, 948 N.W.2d 244 (2020); *Cain v. Lymber*, 306 Neb. 820, 947 N.W.2d 541 (2020); *Hotchkiss v. Keck*, 86 Neb. 322, 125 N.W. 509 (1910).

[9] See *Hauserman v. Stadler*, 251 Neb. 106, 554 N.W.2d 798 (1996).

[10] Neb. Rev. Stat. § 23-1301 (Reissue 2022). See Neb. Rev. Stat. §§ 32-517 and 32-560 (Reissue 2016).

[11] Neb. Rev. Stat. § 32-553(2) (Cum. Supp. 2022).

[12] § 32-553(1)(b) and (c).

[13] *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). See *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989).

of rights.[14] These requests for relief do not, by themselves, present a justiciable issue as to McKay's rights.

McKay's remaining requests are for an order declaring Bartels' change to District 1's boundary to be null and void because she failed to satisfy the residency requirement of the office,[15] was without statutory authority to change the district's boundary,[16] or both, and for an order requiring the appropriate authority to certify him the nominee of the Republican Party's primary election for the Commissioner of District 1.[17] In other words, McKay seeks an order to be certified the nominee *because* Bartels' change to District 1's boundary was void. McKay has not requested an order declaring that Bartels' boundary change was void, and therefore, the primary election for the Republican Party's nomination for the office of county commissioner for District 1 of Saline County was void.

Indeed, at oral argument, he made "very clear" that he does "not want a new election." As McKay states in his appellate

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[14] *Bentley v. School Dist. No. 025*, 255 Neb. 404, 586 N.W.2d 306 (1998); *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995), *disapproved on other grounds, American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011).

[15] But see, *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), *disapproved on other grounds, Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004); *Prucka v. Eastern Sarpy Drainage Dist.*, 157 Neb. 284, 59 N.W.2d 761 (1953); *McCollough v. County of Douglas*, 150 Neb. 389, 34 N.W.2d 654 (1948); *State, ex rel. Gossett, v. O'Grady*, 137 Neb. 824, 291 N.W. 497 (1940); *Baker v. State*, 112 Neb. 654, 200 N.W. 876 (1924); *Dredla v. Baache*, 60 Neb. 655, 83 N.W. 916 (1900); *Ex parte Johnson*, 15 Neb. 512, 19 N.W. 594 (1884).

[16] But see, *Nickel v. School Board of Axtell*, 157 Neb. 813, 61 N.W.2d 566 (1953); *Elliott v. Wille*, 112 Neb. 78, 200 N.W. 347 (1924); *Commonwealth Real Estate Co. v. City of South Omaha*, 78 Neb. 368, 110 N.W. 1007 (1907).

[17] But see, *Stasch v. Weber*, 188 Neb. 710, 199 N.W.2d 391 (1972); *Thompson v. James*, 125 Neb. 350, 250 N.W. 237 (1933); *Laws v. Vincent*, 16 Neb. 208, 20 N.W. 213 (1884).

brief, he "seeks to correct the results of [the] election"[18] and "affirm [the election] after excluding the votes which were illegally included."[19] Accordingly, McKay's request for an order declaring Bartels' change to District 1's boundary null and void does not present a justiciable issue independent from his request for an order that the appropriate authority certify him as the nominee of the Republican Party's primary election for the commissioner of District 1. However, such affirmative relief as ordering him to be certified as the nominee is not within the scope of a declaratory judgment.[20]

[7] Even if we read McKay's complaint to have sufficiently prayed for an order declaring him as the Republican Party's nominee for the commissioner of District 1 by including allegations that "people voted in the County Commissioner race that were not legally entitled to vote in that district," and "[h]ad the illegal votes not been counted . . . McKay [would have won] the election," and that "[b]ecause the outcome of the election can be determined . . . this court should enter its order declaring him the winner of the election," McKay has still failed to state a claim entitling him to such relief. It is the nature of the relief sought, not the underlying defect alleged, that determines whether the election contest statutes are implicated.[21] Despite McKay's assertions that he "is not contesting the election,"[22] that is precisely what he is attempting to do.

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[18] Brief for appellant at 8.

[19] Brief for appellant at 9.

[20] See, *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997); *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997), *disapproved on other grounds, Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999). See, also, *State ex rel. Wagner v. Evnen, supra* note 8; *Cain v. Lymber, supra* note 8.

[21] *Pierce v. Drobny, supra* note 2. See, also, *Hein v. M & N Feed Yards, Inc.*, 205 Neb. 691, 289 N.W.2d 756 (1980); *Loney v. Courtnay*, 24 Neb. 580, 39 N.W. 616 (1888).

[22] Brief for appellant at 9.

[8-10] We have long recognized that, generally, the election contest statutes are the exclusive means for challenging the results of an election.[23] Sections 32-1101 to 32-1117 "apply to contests of any election,"[24] whether it be a general, primary, or special election, and "contested elections for officers of all political subdivisions" are governed by § 32-1109. An "election contest" is "[a] challenge by an election's loser against the winner, calling for an analysis of the election returns, which may include reviewing voter qualifications or re-counting the ballots."[25] In election contests, judges serve in the capacity of election inspectors, where the court's whole duty is to inspect and interpret the polls.[26]

Particularly relevant here, § 32-1101(2)(e) provides that an election may be contested "[i]f illegal votes have been received or legal votes rejected at the polls sufficient to change the results." It is difficult, if not impossible, to see how McKay is not contesting the election when he claims that illegal votes were received in the primary election, which changed the result of the election such that he should have been certified the Republican Party nominee for the office of commissioner for District 1.[27]

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[23] See, *Pierce v. Drobny, supra* note 2; *Eriksen v. Ray, supra* note 1; *State, ex rel. Hunt, v. Mayor, etc., of Kearney, supra* note 7. See, also, *Sorensen v. Swanson*, 181 Neb. 205, 147 N.W.2d 620 (1967); *Murphy v. Holt County Committee of Reorganization, supra* note 7; *Sutton v. Anderson*, 176 Neb. 543, 126 N.W.2d 836 (1964); *Longe v. County of Wayne*, 175 Neb. 245, 121 N.W.2d 196 (1963); *State ex rel. Brogan v. Boehner*, 174 Neb. 689, 119 N.W.2d 147 (1963); *State v. Barr*, 90 Neb. 766, 134 N.W. 525 (1912); *Hotchkiss v. Keck, supra* note 8; *State v. Cosgrave*, 85 Neb. 187, 122 N.W. 885 (1909); *State v. Frantz*, 55 Neb. 167, 75 N.W. 546 (1898); *State, ex rel. Fair, v. Frazier*, 28 Neb. 438, 44 N.W. 471 (1890); *Laws v. Vincent, supra* note 17; *Kane v. The People*, 4 Neb. 509 (1876).

[24] § 32-1101(1).

[25] Black's Law Dictionary 655 (11th ed. 2019).

[26] See *Griffith v. Bonawitz*, 73 Neb. 622, 103 N.W. 327 (1905).

[27] See, also, *Arends v. Whitten*, 172 Neb. 297, 109 N.W.2d 363 (1961).

Indeed, at oral argument, McKay conceded that the allegedly illegal votes were reflected in the canvass and official summary of votes cast. "The precinct sign-in register, the record of early voters, and the official summary of votes cast shall be subject to the inspection of any person who may wish to examine the same after the primary . . . election."[28] Had McKay wished to contest the votes received from the area Bartels added to District 1, McKay could have brought an election contest by providing notice to his opponent specifying "the names of the voters whose votes [he] contested . . . and the grounds upon which such votes [were] illegal."[29] McKay failed to do so.

Moreover, McKay has failed to identify any reason why an election contest did not provide a full, adequate, and serviceable remedy for his claim that would make declaratory relief appropriate. Hence, his requested declaratory relief is not appropriate.

In reaching our conclusion that the district court did not err in dismissing McKay's complaint for its failure to state a claim, nothing we have said should be construed as endorsing the propriety of the circumstances and the actions by public officials in Saline County as alleged in McKay's complaint, if true. However, those issues are not the subject of this appeal, when the only issue before us is whether McKay's action for declaratory relief is appropriate.

CONCLUSION

Because McKay's complaint seeks only to contest an election, he has failed to state a claim entitling him to declaratory or equitable relief. Hence, we affirm the judgment of the district court.

Affirmed.

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[28] Neb. Rev. Stat. § 32-1032 (Reissue 2016).

[29] § 32-1109(1). Cf., Neb. Rev. Stat. §§ 25-21,121 and 25-21,122 (Reissue 2016); Neb. Rev. Stat. § 32-555(1) and (2) (Reissue 2016).