

COMMONWEALTH OF KENTUCKY
34th JUDICIAL CIRCUIT
WHITLEY CIRCUIT COURT
CIVIL ACTION NO. 06-CI-00416
DIVISION NO. 1

DEWAYNE BUNCH, et al

v.

KENTUCKY STATE BOARD OF ELECTIONS,

Et al.

SUPPLEMENTAL RESPONSE TO MOTIONS
TO DISMISS BY PLAINTIFFS

This brief supplements the brief of plaintiffs filed 6/5/06 in opposition to motions to dismiss then filed, and stating objections thereto, which is incorporated by reference herein, and hereby supplemented. The Court will note that this case has been legitimately delayed by recusal. Mr. Gilbert, local counsel for plaintiffs, had a worse than expected outcome with surgery a couple days ago, and so *pro hac vice* counsel, having paid the required \$100 fee to the Kentucky Bar Association and obtained all necessary forms for consent to practice before this Court, with originals available for filing, appears here in place of Mr. Gilbert until his recovery.

ARGUMENT ON MOTIONS TO DISMISS (COMBINED)

Defendants misapprehend this case as strictly a primary election contest, when the prayer for relief in the petition clearly suggests it is a request for a new election overall, a somewhat different analysis relative to the traditional election contest, because (having seen the actual election) the plaintiffs are of firm belief that the election was invalid and void, and that enough irregularity was injected to say that nobody won, a new election is required.

This case arises specifically out of numerous severe irregularities in the operation of Whitley County's Danaher 1262 voting machines and the Hart E-

Slate voting machines, which failed to work properly in numerous respects, as pled in paragraph 1 of the Plaintiff's complaint. Also pled was the reality that there were many eyewitnesses to these problems, and the complaint in that regard says "numerous voters and candidates complained about the voting machines." This is sufficient for the defendants to understand that they should focus their defense on the machines, and ask questions of what malfunctions, where the malfunctions were, and explore the question of why the machines malfunctioned to create the election results. That surely states a claim, because elections, being mere procedures that don't promise substantively that the more just side will win, require the Courts and the citizens to uphold their integrity, because without procedural integrity, the elections have no claim to justice or legitimacy at all.

The Mississippi Supreme Court explained the high standards for election legitimacy like this:

"Although there is a strong public policy in attempting to preserve the will of the electorate as reflected by the tabulation of all of the votes, we take this opportunity to remind throughout the state that they invite election contests, uncertainty and the opportunity for fraud by failing to pay close heed to the election statutes whether they be mandatory or directive. **Any expense or burden such compliance creates is trivial when compared to the value of the goal of maintaining our Republic. Integrity of our government can be no greater than the integrity of elections which put our government officials in office. It is therefore the duty of every registrar to endeavor to comply with the election statutes regardless of the personal inconvenience it may create.**" *Waters v. Gnemi*, 907 So. 2d 307, 336 (Miss. Sup. Ct. 2005) (citing *Riley v. Clayton*, 441 So. 2d 1322, 1328 (Miss. Sup. Ct. 1983).

In this case, there's a mandatory duty for election officers to report problems regarding administrative or clerical errors observed in polling or tabulating. KRS 120.017(1). There's an affirmative duty for the clerk, fifteen days after the election, to file a suit naming all candidates affected. This never happened, which is a violation of Kentucky Election code but it would have required all candidates to be joined. These violations of code proximately result from the malfunctions of the machines, pleaded in paragraph one, and to dismiss

this action would appear to leave no party available to properly litigate these issues, which were clearly intended by the Legislature to be acted upon in the most forceful way.

Even in the defendants' briefs, they fail to identify WHY plaintiffs haven't stated a claim. For that reason alone, their motion fails.

Many defects are observed here in this case. For example, these computerized voting machines were (1) observed by eyewitnesses to switch the votes of voters, and (2) further observed to be difficult or impossible to change the votes back to what the voter intended (3) were unplugged from power sources or subject to varying power supply such that the memory of the machines was affected, (4) the results themselves are anomalous and the results themselves are evidence of irregularity, given that previously competitive candidates in previous elections lost by huge margins in this election, (5) Precinct results were not reported properly, in that they were a week late, (6) precinct results were not reported properly in that they combined precincts that should have been reported separately (7) Around the country Danaher machines have lost many votes and have switched votes. <http://www.votersunite.org/info/mapVoteSwitch.pdf>

The Court is requested to take judicial notice of the local newspapers which have noted that the primary election was about "landslides and firsts" including a landslide against retired sheriff H.D. Moses who previously had never been beaten in a race, but who was severely beaten by a candidate who had never won an election for sheriff or any other major office. See May 17, 2006 Times Tribune. Even winning candidates like Mobley, usually reliably vouching for election results to be just what was expected, said he was "surprised." *Id.* Candidate Schwartz admitted in the Times-Tribune that her election results "went above and beyond [her] highest imagination." Candidate Williams was "humbled" specifically by his margin of victory. These are clear admissions and acknowledgements that a major force acted on the primary election results that was heretofore unseen. It will take a trial to show whether this was an act of God,

an act of machine, or an act of human beings either corrupting the process or proving their electoral worth to all.

In all candor to the court, the winners do attribute their wins to something, because everyone wants to understand what's happened to them. So, Schwarz attributes her miracle win to her work in the clerk's office. Others, including plaintiffs, believe that machine malfunction, rigging or intentional fraud are to blame. Those contrary assertions can't be resolved by a summary judgment, much less a motion to dismiss where all the facts have to be taken in the light most favorable to plaintiffs, and the question is whether the plaintiffs could possibly prove any facts that would entitle them to the relief of a new election. The answer to that question is clearly yes, they can potentially prove irregularities sufficient to entitle them to a new election.

The Mississippi Supreme Court in *Waters v Gnemi* most recently addressed the standard for a new election. Before its holding it stressed that no one had alleged fraud, much less proven it. But the Court nevertheless ordered a new election in the most forceful terms, specifically because the means to detect whether or not fraud had occurred had been taken away. "Like secret vote counting" the Court held, having locks off of ballot boxes or similar things that deprive us of the confidence that ballots were secure, are sufficient to order and uphold a new election. See *Waters v Gnemi*.

Defendants each proceed as if this action were purely to contest their individual nominations, when in fact the prayer for relief plainly and specifically seeks a new election overall, and states that the "election *results*" (i.e., all of them) "be deemed incorrect and also for a re-election with unbiased parties overseeing the re-election." It does not, in other words, focus on specific races and primary nominations. Instead, it responds to what many Whitley County voters saw and experienced with their own eyes about the unreliability of the machines, and calls for a new election based on the lack of a fair election overall.

Of course, this includes each specific race in the election, but there's an important difference here. Namely, the operation of the machines was so irregular and unreliable that it is unknown who won or the true vote count in any race, and therefore a new election is pleaded and required. This is quite different from denying a nomination to an individual defendant and then having the defendant or announced winner removed from office individually because the individual plaintiff has proven his or her actual victory, while still allowing other candidates to proceed.

There is a separate basis for dislodging a nominee and that is when the process has been infected with enough irregularity to raise a substantial doubt as to outcome. That standard is met here, subject to the trial in this matter.

Plaintiffs have the right to prove in court that they had the requisite 50% numbers of votes cast, but that the votes counted and reported to the public do not represent anything provable or the correct figure. This is a classic fact issue, and discovery should proceed and the matter be resolved at trial.

To assist in the narrowing of issues, plaintiffs will shortly amend to provide clarification, without new grounds, which is allowable. Amendments not injecting a new *ground* of contest, or relating to existing grounds of contest, are permissible. [Wooton v. Smith, 288 Ky. 48, 155 S.W.2d 466, 1941 Ky. LEXIS 49 \(1941\)](#) (decided under prior law). See also [Best v. Sidebottom, 270 Ky. 423, 109 S.W.2d 826, 1937 Ky. LEXIS 86 \(1937\)](#) (decided under prior law, holding provision that a ground of contest shall not be filed or made more definite by amendment after the time for filing the original pleading has expired did not prevent the contestee from filing, prior to the time the contest was instituted, an amended expense account statement under [KRS 123.060](#) (repealed), correcting errors in the original statement).

Moreover, when a special judge had to be found or appointed, the rules of timing are relaxed, because they are merely directory and not mandatory.

[Charles v. Flanary, 192 Ky. 511, 233 S.W. 904, 1921 Ky. LEXIS 88 \(1921\)](#)
(decided under prior law, holding that where regular judge disqualified himself and there was some delay in obtaining a special judge, the trial could properly be commenced at a later date than five (5) days after issue was joined.). See [Seals v. Elam, 240 Ky. 485, 42 S.W.2d 700, 1931 Ky. LEXIS 429 \(1931\)](#) (decided under prior law).

Finally, plaintiffs most highly prized constitutional rights are at stake here, including state due process, federal due process, and equal protection, when 10 day or other procedural statutes are used to defeat constitutional claims. Due process protects the plaintiffs from having the lesser procedural consideration trump the higher constitutional interest of due process, both procedurally as well as substantive liberty interest. Equal protection under [Bush v. Gore 531 US ____ \(2000\)](#) is also implicated because it requires all voters to be treated with equal dignity, and they were variously subject to unequal treatment depending on what type of machine they voted on. This offends Equal Protection, just as the partial recount in [Bush v. Gore](#) offended Equal Protection. In the end, federal supremacy requires that federal law and our federal Constitution trump any competing state law.

The facts as pled by the plaintiffs are entitled to be construed totally in their favor. Motions to dismiss are always disfavored, most particularly when civil rights are involved they are almost never granted. Here, it may well be that the machines just made up miracle numbers, and that explains why the winners thought the results exceeded their highest imaginations. With something as serious as the integrity of democracy, plaintiffs deserve their day in court and their discovery.

DATED this 5th day of July, 2006

LEE GILBERT, Attorney at Law

PAUL R LEHTO, Attorney at Law, WSBA#25103 Pro Hac Vice