

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

DEWAYNE BUNCH, et al,

PLAINTIFFS,

v.

**KENTUCKY STATE BOARD OF ELECTIONS,
et al.,**

DEFENDANTS,

**PLAINTIFFS' OFFER OF PROOF and 2nd SUPPLEMENTAL RESPONSE TO
MOTIONS TO DISMISS FILED BY DEFENDANTS**

COMES NOW the Plaintiffs, by and through attorneys of record, and pleads as follows:

The Court must recall at all times that the voting here in question involves invisible electronic ballots which have not been inspected at any time by any party hereto, even the County Clerk has not counted them. Rather, the electronic ballots have been purported to be counted in secret by trade secret counting software owned by the vendors. There is no reason at all or basis for confidence in the electronic counting until verified by the plaintiffs not only because the Clerk himself is a defendant-candidate here, but also because it is the nature of the computer to do precisely as it is told without reference to any laws, morals or ethics. Thus, any pre-election or post-election testing of the machines (if any) will be totally irrelevant and the only question is “What were the computerized machines asked to do on Election Day itself?”

The Mississippi case previously provided of Waters v. Gnemi recites “secret vote counting” as one such cause of a new election, and such unverified counting indeed occurs on

electronic voting equipment. Unlike older voting machines that were mechanical and where a pre-election test is a pretty good indication of a machine's performance on election day, where computers with broad powers to obey whoever tells them what to do are used, no such confidence is possible. Indeed, with computers it is readily possible to tell the computer weeks, months or years in advance what to do on scheduled election days, and this instruction will lay dormant until that time, in a computer technique called an "Easter Egg." To the extent public confidence is at all important, this confidence can not be maintained in the face of unusual results without discovery and possible trial.

Discovery and trial may obviate the secretness of the counting or otherwise answer questions, thus the truth-seeking process of the judicial system should be allowed to move forward.

To supplement the plaintiffs' previous briefing that strict scrutiny generally requires that dismissals of civil rights cases not be granted, plaintiffs supplement their response to point out the following factual errors by the defendants:

1. Defendants' Falsely Argue the "50% Rule of Standing." Plaintiffs previously argued that they did in fact receive 50% or more of the winner's votes *cast*, but those votes simply weren't *counted* properly. *See* KRS 120.055. As an offer of proof, plaintiffs have already confirmed in one or more precincts through voter interviews that the results in those precincts are incorrect. Moreover, since plaintiff's evidence and argument go to the validity of the entire election, the entire assumption that the defendants' totals are "correct" and plaintiffs will only be able to play "catch up" to the winners' figures are logically erroneous and grossly unfair. If, for example, the voting totals were simply switched and the winners' totals became the losers' totals and vice versa, such a switch could put the so-called "loser" outside the margin

of 50% of the winner's totals, even though the "loser" was in fact the winner. Would such a switch in fact insulate this injustice from any judicial review? Recall that in this particular case, the chief vote counting official is himself a defendant-candidate.

As another switching example that has already been confirmed in this case, numerous voters in Whitley County on May 16, 2006 witnessed "vote switching" on that Election day, where they pressed a vote for a plaintiff but a defendant candidate lit up as the selection instead (other voters no doubt failed to notice this switch). Through this method, legal votes are switched to candidates for which they were never intended, undermining the accuracy of the "winners" totals. Discovery may well show what other types of switching were present, and by how much. At the very least, the question of whether the plaintiffs are within the "50% of votes cast" rule, if it applies here, is a fact issue for later adjudication at trial or summary judgment, and not an issue that can be dispensed with at this premature dismissal stage.

Because the plaintiffs believe and plead to the Court that there is a good faith basis for each of them to believe that they received at least 50% of the votes *cast* (but not necessarily of those *counted* in the original count), the defendants motions to dismiss based on this standing argument should be denied, because they are assuming away issues of fact and confusing issues of votes *counted* with those of votes *cast*. It is determining the intent of the voters that is important, not insulating from review the processes whereby the defendants themselves, or some of them, purport to count and announce their own re-election and then argue it can not be questioned to this court because they've counted themselves in so well.

2. Plaintiff Ronnie Faulkner Has 50% Even Under the Defendants' Numbers.

Plaintiffs have previously argued that the motions of the defendants are insufficient to even shift the burden to defendants because they fail to state any actual or even hypothetical facts for which

dismissal is required. Had defendant Kay Schwartz, for example, done so, she might not have erroneously failed to perform mathematical calculations to determine whether her challenger Ronnie Faulker was or was not in fact within 50% of her number, even under the defendants' self-serving definition of this test.

Plaintiff Faulkner was deemed to have 2309 votes on the initial count and 2310 votes after a canvass. Defendant Schwartz was deemed to have 4311 votes. Fifty percent of 4311 is 2155.5 votes, and Faulkner clearly received more than that sum. However, the reality of that simple calculation did not stop Schwartz from interposing a motion with the court, misleading the Court by implying, *without providing any numbers or record for the court that the plaintiffs could contest*, that the parties were separated by more than 50% in votes *counted*. This strongly emphasizes why the defendants' motions to dismiss should be denied on their generally empty factual allegations and deficient legal briefing for a case of importance to Whitley County.

3. The General Rule of Standing is that Where One Plaintiff Has Standing, They All Have Standing. The United States Supreme Court has ruled in a case that has specifically been applied to election law/voting cases, that if one plaintiff has standing they all have standing, and the Court need not assess each and every plaintiff under a standing analysis. If the Court determines that any one of the Plaintiffs has standing, the Court has jurisdiction and may proceed with the case. See Carey v. Population Servs. Int'l, 431 U.S. 678, 682 (1977) (not an election case, but general rules of standing and recognized that when at least one plaintiff has standing to make the asserted claims, a court need not determine the standing of other plaintiffs; this case also cited in election law cases/orders).

Here, the plaintiffs have clearly have actual or potential damage as candidates, including reputational damage, financial damage through lost campaign investments, and damaged liberty

and political association interests. The only conceivable way in which it could be asserted that they had no right to complain is the “50% of votes *cast*” rule of standing, but that rule is met here certainly by Ronnie Faulkner, and this alone is sufficient to dispense with the standing analysis as to *all* plaintiffs. Standing, being primarily a prudential doctrine focused on the actuality of damage and the consideration of whether plaintiffs are well placed to be the actual defenders of the interests asserted, is clearly met here.

4. Claimed Errors Regarding Service of Process Can Not Be Blamed on the Plaintiffs. Service of Process was Made Properly. No Prejudice to Defendants.

Defendants have also claimed that certified mail is inadequate service of process. The general rules for service of process provide for notice “reasonably calculated” to give actual notice. Here, the defendants all had notice via front page headlines on several days in Whitley County (including the Times-Tribune) specifically stating that an election contest had been filed. (See May 27 and May 30 editions, for example, among others).

In this case, the other options for service of process, such as using the sheriff, were not reasonable given that the Whitley County Sheriff’s office had directly indicated hostility toward the case, the Whitley County Sheriff being one of the Defendants. Such was not directly the case with the Clerk’s office, even though the Circuit Court Clerk Gary Barton is also a defendant in this case. As an offer of proof, plaintiffs’ counsel Leroy Gilbert, Jr., approached the Circuit Court Clerk’s office in a timely manner and was told that no 7 day summons form existed and that they could not modify a 20 day summons to state “7” because it was not one of the blanks in the form they had. Plaintiffs’ attorney then, with the agreement of the Clerk’s office, had the summonses typed up and the summonses were delivered to the Clerk who then agreed to serve them via Certified Mail, a service provided to parties by the Clerk, and all were paid for. It is

the Clerk, a defendant in this case that offered a method of service and dictated the sum to be paid therefore which was paid. At least a day's delay was directly caused by the inavailability of a seven day summons form from the Clerk, even though it appears that all defendants, including the Court Clerk himself, now agree that KRS 120.055 requires such a special seven day summons. The Meeks case (an election contest case) found that the 20 day response time for Respondent on the summons issued to the Respondent, as opposed to the statutory 7 day response time, was not prejudicial to the parties, and was deemed a harmless error. See Meeks vs. Ellis, Ky. App., 7 S.W.3d 391, (1999).

Any perceived delays or methods of service of persons here, if any, are not the fault of the Plaintiffs and are not prejudicial to the parties. This is a classic case of estoppel and unclean hands based on the realities of actual notice at all times to the defendants, as well as some of defendants' own involvement in selecting and executing service means that the less culpable parties here are the plaintiffs.

Finally, defendants also attempt to argue that the methods of service cited in the statute KRS 120.055 are the exclusive methods of service (namely, personal service, tacking to door, and leaving with person 16 or older at residence). However, the statute in no way identifies these methods as exclusive. Indeed, tacking on a door in many circumstances may not be reasonably calculated to give the notice of a summons when the "winning" candidate to be served may be out of town. The statute should be construed as providing additional methods of service without being deemed to provide the exclusive methods of service. Indeed, nowhere does the statute say the petition must be served in one of these manners, the statute in fact uses words of permission, without limiting them, when it says that the petition "may be served....". The word "may" is quite different from the word "shall", and the fact that the Legislature was in

command of the use of the word “shall” is clearly shown in subsequent sentences. The general rules regarding service apply here and service via certified mail is perfectly adequate.

Moreover, there is obviously no lack of actual notice in that defendants were filing appearances and motions to dismiss long before the alleged statutory deadlines, proving the receipt of actual notice. In fact, the petition filed at close of business Friday was being responded to first thing Monday by Sheriff Hodge and others.

5. All Candidates and Plaintiffs are Within the 25% Rule of KRS 120.155. The Kentucky Statutes also provide that 25% of the winner’s votes cast is also sufficient to obtain standing in a “regular” election. This rule is no doubt intended to apply at a lower standard because of the increased importance of the general or regular elections. However, in Whitley County, the primary election for all material races IS the general election, in that there is no opposition on the ballot in almost all races, with the exception this year of jailer, Congress, Whitley County Judge/Executive, as well as two magistrate races. Thus, it is the intent of the Legislature that a lower standard apply in races that will in fact determine representation for all practice purposes, and such is the case here. KRS 120.055 provides 30 days to file the contest, and only 25% of the votes cast, and the Court would also be justified in looking to this lower standard to apply in those races that will never actually have a meaningful regular or general election contest.

6. As Previously Argued and As Argued Here Today, Statutes that Limit Civil Rights of Candidates in our form of Government are to be Strictly Construed in Favor of Plaintiffs. The statutes here declare bribery, intimidation, violence and other ills as some of the features associated with election irregularities. This can only emphasize with an exclamation point the importance of the legal principles of orderly judicial review favoring the reaching of

the merits. The defendants' interests in preserving their alleged "wins" and the reputational interest therein is recognized and adequately protected by the Court's duty and discretion to order accelerated discovery and an accelerated trial, but the balance of Constitutional and other interests in this case would be decidedly skewed in the favor of injustice if the Court were to be unwilling to let the plaintiffs examine and look under the rock of electronic secret vote counting. As in *Waters v Gnemi*, our Republic is only as legitimate and as strong as the legitimacy of our elections, and where those elections feature invisible and secret counts of the vote, they are in need of more exploration and discovery. Plaintiffs specifically pointed to this unknown by naming 'Unknown Defendants' in their Petition. The highest role of this and any Court is to police the process to ensure fairness. This is a case of first impression regarding electronic voting in Kentucky, besides the grand jury convened in Boyd County, and as such, this is yet another reason Courts have cited for denying all motions to dismiss.

All of the defendants' motions to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served, via facsimile to the following persons:

ORIGINAL TO:

Gary Barton, Clerk
Whitley Circuit Court
Post Office Box 329
Williamsburg, Kentucky 40769

COPIES TO:

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All on this the _____ day of July, 2006.

Leroy A. Gilbert, Jr.