

**SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

MARIAN ALLEN

APPELLANT

V.

CASE NO. 2009-EC-01783

**CITY OF LAUREL, MISSISSIPPI; MAYOR MELVIN
MACK; LAUREL MUNICIPAL ELECTION COMMISSION;
CIRCUIT CLERK BART GAVIN; BEAT 5 ELECTION
COMMISSIONER ORA HOLDEN; AND
JONES COUNTY**

APPELLEES

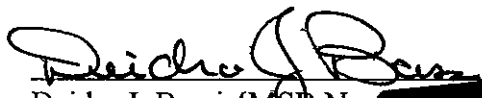
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellees certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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2. City of Laurel, Mississippi; Mayor Melvin Mack; and
Laurel Municipal Election Commission - Appellees
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4. Circuit Clerk Bart Gavin; Beat 5 Election Commissioner Ora Holden;
and Jones County - Appellees
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6. Honorable Frank G. Vollor
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7. Honorable Billy G. Bridges
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APPELLEES

BRIEF FOR APPELLEES

Come now Appellees and file their Brief in the above-styled appeal.

I. STATEMENT OF THE ISSUE

The issue is:

Whether or not the Circuit Court was correct in granting summary judgment in this matter.

II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal by Marian Allen from an order of the Circuit Court of the Second Judicial District of Jones County, Mississippi, dated October 13, 2009, (R. 82-83; RE-004 - 005) granting summary judgment in favor of all of the Defendants in this matter. The case filed in the lower court concerns a general election, and specifically was an election contest of the Ward 7 Councilperson race for the City of Laurel municipal election held on June 2, 2009. In its Final Judgment, the Circuit Court reasoned that the outcome of the election contest would have remained the same even if all the allegations pled by Ms. Allen were taken as true. However, the Court went much further and found a complete failure by Ms. Allen to offer any evidence to rebut the evidence presented in

the Defendants' Motions for Summary Judgment. The Court did not find any credible evidence of voter fraud as alleged by Ms. Allen.

B. Course of Proceedings

On June 8, 2009, Marian Allen filed a contest of the June 2, 2009 City of Laurel municipal election in the Jones County Circuit Court for the Second Judicial District which has been entitled "*Marian Allen vs. The City of Laurel and Mayor Melvin Mack, Laurel Municipal Election Commission, Circuit Clerk Bart Gavin and Beat 5 Election Commission Ora Holden and Unknown It for Voting Machines*", Case No. 2009-48CV-6 ((R. 3-19; RE-006 - 022). Ms. Allen was proceeding *pro se*.

On September 15, 2009, the City of Laurel, Melvin Mack, and the Laurel Municipal Election Commission, by and through its counsel, filed an Answer and Defenses to Initial Pleading (R.38-40; RE-032 - 034). In said answer, all of the allegations were denied and defenses were asserted. Thereafter, on September 28, 2009, Bart Gavin, et al, the other defendants, filed their Answer and Defenses to Initial Pleading (R. 69-71; RE-063 - 065).

On September 14, 2009, Defendants, City of Laurel, Mayor Melvin Mack, and Laurel Municipal Commission, by and through their attorney, filed their Motion for Summary Judgment (R. 29-37; RE-023 - 031). On September 29, 2009, Defendants, Circuit Clerk, Bart Gavin, Jones County, and Beat 5 Election Commissioner, Ora Holden, filed their Motion for Summary Judgment (R. 72-81; RE-066 - 075).

On September 17, 2009, Marian Allen filed Plaintiff's Response and Objection to Defendant Motion for Summary Judgment in response to the Motion for Summary Judgment filed by the City, Mack, and Laurel Municipal Election Commission (R. 41-42; RE-035 - 036). In addition, on

September 17, 2009, Allen filed Plaintiff's Reply to Defendants Answers and Defenses (R. 43-68; RE-037 - 062).

On October 13, 2009, there was a hearing on both of the Defendants' Motions for Summary Judgment in which full argument was presented by all parties (T. 36-54).

C. Disposition in the Court Below

On October 13, 2009, the Final Judgment was entered in the Defendants' favor and the Plaintiff's election contest was dismissed with prejudice (R. 82-83; RE-004 - 005).

D. Statement of Facts Relative to Issues Presented for Review

- The election being contested was a general election.
- The Circuit Court was presented by the Defendants with an Affidavit of the City of Laurel Deputy Clerk, Terry Smith, showing the certified results of the June 2, 2009 City of Laurel Municipal Election. It shows that Trey W. Chinn received the greatest number of votes for Ward 7 Councilperson, i.e. 284 votes, and Marian Allen received 99 votes. (R. 33-37; RE-027 - 031)
- § 23-15-951 Mississippi Code of 1972, as Annotated and Amended, is the applicable statute governing general elections such as the one at issue, and it provides that "... the person having the greatest number of legal votes at the election. . ." shall prevail.
- § 23-15-931 Mississippi Code of 1972 cited by Ms. Allen applies to primary elections and not general elections and, therefore, does not apply to the case at bar.
- Examination of the Plaintiff's Initial Pleading as filed reflects that Plaintiff has objected to a total of 51 votes for various reasons. Accordingly, if all 51

votes were given to Marian Allen, it would make her total votes be 150 (i.e. 99 votes plus 51 votes). If the 51 votes were subtracted from Trey Chinn's number of votes received (284 minus 51), there would be 233 votes for Trey Chinn. Therefore, Trey Chinn would have received the greatest number of legal votes in the Ward 7 Councilperson election even if all the allegations of Ms. Allen had merit, which Defendants specifically deny, and were taken from Mr. Chinn and given to Ms. Allen.

- The Circuit Court considered the pleadings, the argument of counsel, and the evidence presented to it, and found that the Plaintiff did not rebut the foregoing evidence, nor did she present evidence of voter fraud, and, therefore, entered its Final Judgment dismissing the case. (R. 82-83; RE-004 - 005)

III. SUMMARY OF THE ARGUMENT

§ 23-15-951 of the Mississippi Code of 1972, Annotated and Amended, governs this election contest (i.e. general election) and provides that the person having the greatest number of legal votes at the election shall prevail. The certified returns for the City of Laurel election on June 2, 2009, as well as an affidavit from the City Clerk, clearly show that Trey Chinn received 284 votes, and Marian Allen received 99 votes. After considering the pleadings, the evidence, and the arguments of counsel, the Court found that Ms. Allen had presented no evidence to rebut the Defendants' evidence that the election results were accurate, i.e. no credible evidence of voter fraud.

Further, the Court found that even taking into consideration the votes being contested by Ms. Allen and crediting those to her, and taking those same votes away from Trey Chinn, would not have changed the election results. The allegations of Ms. Allen regarding voting irregularities, which

were denied by the Defendants, were nonmandatory irregularities and thus, even if proven, would not require a new election. Accordingly, there was no genuine issue of any material fact, and Final Judgment was entered as a matter of law.

IV. ARGUMENT

A. Standard of Review

Mississippi Rule of Civil Procedure 56(c) provides that:

...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In order for summary judgment to be granted, it must be established that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *Galloway v. Travelers Ins. Co.*, 515 So.2d 678, 682 (Miss. 1987). The nonmoving party “is not entitled to rely on general allegations or denial, but must come forward with ‘significant probative evidence demonstrating the existence of triable issues of fact.’” *Prescott v. LeafRiver Forest Prods., Inc.*, 740 So.2d 301, 309 (Miss. 1999), quoting *Brown v. Credit Ctr.*, 444 So.2d 358, 364 (Miss. 1983). The Court reviews the lower court’s grant or denial of the motion for summary judgment *de novo*, “making its own determination on the motion.” *Lowery v. Guar. Bank and Trust Co.*, 592 So.2d 79, 81 (Miss. 1991) “The evidentiary matters are reviewed in the light most favorable to the nonmoving party.” *Id.*

B. **Ms. Allen’s appeal should be denied since no genuine issue of material fact exists and her claim fails as a matter of law.**

Ms. Allen’s initial filing in this matter (R. 3-19; RE. 006 - 022) consists of a 2 page listing of Ms. Allen’s problems with certain aspects of the election at issue. For example, she alleges that

she cannot “understand” voters’ signatures on the Poll Book, that some signatures are similar to others, that a certain number of votes were reported by the Commissioner but the poll list had more votes than reported, and that there were residency violations. Attached to Ms. Allen’s initial pleading were 8 exhibits as follows:

- Exhibit 1: 1 page of a Voters List for Ward 7 that consisted of names that began with “C”, with handwritten remarks on it (R. 5; RE. 008)
- Exhibit 2: Poll List consisting of 4 pages for Ward 7 (R. 6-9; RE. 009 - 012)
- Exhibit 3: 6/2/09 Poll List with extraneous markings on it (R. 10-14; RE. 013 - 017)
- Exhibit 4: Copy of Jones County Road Index (R. 15-16; RE. 018 - 019)
- Exhibit 5: Copy of a 6/3/2009 fax with extraneous markings on it (R. 17-19; RE. 020 - 022)

None of these exhibits were certified copies or authenticated copies. These exhibits were not verified or authenticated in any way by any records custodian. In fact, the exhibits were not adequately explained in the Plaintiff’s initial pleading, which is incomprehensible.

Shortly after the Defendants were served, they filed Motions for Summary Judgment (R. 29-37; RE. 023 - 031 & R. 72-81; RE. 066 - 075). In doing so, they presented evidence of the bonafide certified election results for the Ward 7 Councilperson’s race which is the subject of the complaint.

In response, the Plaintiff did not present any credible evidence to the contrary, i.e. no affidavits, no certified or authenticated documents, and no testimony of any type. The Court was only given a synopsis of Ms. Allen’s opinion of why she thought voter fraud had occurred in the election. See transcript of Summary Judgment hearing (T. 36-54).

Ms. Allen's mere allegations unsupported by any credible evidence cannot stand against evidence presented by the Defendants of the certified election results. However, the court went one step further. Rather than only finding that Ms. Allen presented no credible evidence of voter fraud, the Court found that even if all contested votes were given to Ms. Allen and taken from Trey Chinn, the election results would be the same.

If a statute does not expressly provide that a particular act is "essential to the election's validity" or that failure to comply voids an election, the Court considers the statute directory only and not mandatory, so long as the act does not affect the integrity of the election. *Riley v. Clayton*, 441 So.2d 1322 (Miss. 1983) (overruled by *Lewis v. Griffith*, 664 So.2d 177 (Miss. 1995)). Absent fraud -- which has not been demonstrated by Ms. Allen -- any ballots which Ms. Allen claims were "noncomplying" are deemed valid and are counted. As shown by Ms. Allen's initial filing, her complaints fall into the categories of acts that were directory and not mandatory. Thus, the applicable statutes do not categorize the complained acts as essential to the election's validity or that could void an election. Accordingly, the Court was well within its discretion to deem the election results valid as it did.

C. Ms. Allen's Statement of the Issues are addressed below:

1. The first issue stated by Ms. Allen is: "Did the Circuit Clerk and the Circuit Court err in Denying to summons the Municipal Election Commissions as prescribe in the Municipal Election Handbook and MS Code Ann. 23-15-931 to the next term of Court." (Allen's Brief, page 4.)

It appears that Ms. Allen is referring to a hearing conducted on August 20, 2009 by the Circuit Court in this matter because she refers to the transcript from that hearing on page 7 of her brief. This hearing was initiated by the Court and was on some pending motions in the case. For this hearing, Marian Allen had subpoenas issued by the Clerk; however, Ms. Allen did not provide

for service of the subpoenas as is customary. Therefore, the subpoenas were not served. It is Ms. Allen's position that it was the duty of the Clerk to serve the summonses upon the subpoenaed witnesses and Municipal Election Commission. There are multiple flaws with Ms. Allen's reasoning.

First and foremost, § 23-15-931, which discusses municipal election commissions, is not the applicable statute. The applicable statute for general elections such as this is Miss. Code Ann. § 23-15-951, and no such requirement for summons to the Election Commission exists.

An additional flaw in Ms. Allen's argument is that while the clerk issues summons upon request, it is not the duty of the clerk to serve the summons. Specifically, the statute states that the summons shall be served "as in other cases". Clerks do not serve summons. In all other cases that this counsel is aware of, the parties requesting the summons to be issued are responsible for service of the summons. The fact that Ms. Allen decided to proceed *pro se* does not change the clerk's duty.

2. Issue two, according to Ms. Allen, is: "Did the trial Court err when it granted final judgment for defendants on Proportional Deduction when the Appellant submitted direct evidence of willful violations of the voter laws and Fraud?"

The Court granted Final Judgment only after it considered the evidence before it and after it had conducted a hearing in which arguments were presented. The Court found in its Final Judgment that the Plaintiff had not met her burden to offer evidence in rebuttal to the evidence which had been presented by the Defendants in that matter. "When a motion for summary judgment is made and supported as provided for in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." *Miss. R. Civ. Pro. 56(e)*(emphasis added). Accordingly, Ms. Allen's statement that she submitted direct evidence of

wilful violations of the Voters Laws and fraud is simply incorrect. A review of the pleadings and transcripts reveals that there was no direct evidence of wilful violations of voting laws and fraud presented. Accordingly, this argument by Ms. Allen is not adequate to allow her to succeed in this appeal.

In addition, the allegations of irregularities were not acts that are mandatory by statutes and, therefore, the Court was not required to void the election even if the irregularities cited would have been proven.

3. The third issue argued by Ms. Allen was: "Did the trial Court err when it failed to opine Harpole vs. Kemper County Democratic Executive Comm, 908 So.2d 129, 137-39 (Miss. 2005), explaining Mississippi's rule of requiring a new election."

Ms. Allen seems to be arguing that a new election should have been required because fraud or wilful violations of elections took place and that she proved it. The flaw in this argument is that she did not present adequate evidence to rise to level of fraudulent or wilful violations of election laws in rebuttal to the Defendants' Motion for Summary Judgment.

The elements of a claim or defense of fraud in this state are well established. They include: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury. *Martin v. Winfield*, 455 So. 2d 762, 764 (Miss. 1984), citing *Gardner v. State*, 235 Miss. 119, 130, 108 So.2d 592, 594 (1959). Proving fraud is difficult, as it ought to be. Clear and convincing evidence is required. *Martin v. Winfield*, 455 So. 2d 762, 764 (Miss. 1984), citing *Cotton v. McConnell*, 435 So.2d 683, 685-689 (Miss.1983).

Ms. Allen has put no testimony or authenticated documents before the Court showing that any actual fraud has been committed. Her mere personal assertions that certain documents evidence fraud in no way meets the burden of proving fraud by clear and convincing evidence as required by law. In fact, when the certified election results were submitted into evidence, Ms. Allen offered no testimony or documents whatsoever to rebut the results. Therefore, summary judgment is proper.

A close examination of the Initial Pleading demonstrates that the attachments thereto did not constitute "evidence of fraud or wilful violation of election laws." Ms. Allen's interpretation of the voter information presented does not rise to the level necessary to meet the requirements to substantiate evidence of fraud or wilful violation of election laws. The standard for fraud is high and must be pled with significant specificity and supported by the facts. Ms. Allen's complaint simply did not rise high enough to meet this standard.

V. CONCLUSION

The Defendants in this matter have presented the Court with credible evidence that no genuine issue of any material fact exists and that they were entitled to a judgment as a matter of law pursuant to Rule 56 of the Mississippi Rules of Civil Procedure. This evidence was not rebutted by Ms. Allen, nor has she shown that a genuine issue of any material fact exists. Accordingly, the Circuit Court's Final Judgment should be affirmed.

Respectfully submitted,

**THE CITY OF LAUREL, MISSISSIPPI; MAYOR
MELVIN MACK; AND LAUREL MUNICIPAL
ELECTION COMMISSION, Appellees**

BY: 
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CIRCUIT CLERK BART GAVIN; BEAT 5
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CERTIFICATE OF SERVICE

I, Deidra J. Bassi, do hereby certify that I have forwarded, via Federal Express Overnight Delivery, the original and three copies of **Brief for Appellees** to the following:

Ms. Kathy Gillis, Clerk
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I also hereby certify that I have this day served a true and correct copy of the above and foregoing Brief to:

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This, the 16th day of November, 2010.


Deidra J. Bassi