

2009-EC-01682-SCTT

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CASE NUMBER _____

IN RE: BILLY G. RAYNER, In His Official Capacity as
Circuit Clerk of Jasper County, Mississippi, and as a Qualified
Member of the Voting Electorate of the Thirteenth Judicial
District of the State of Mississippi; CINDY M. JENSEN, In Her
Official Capacity as Circuit Clerk of Simpson County,
Mississippi, and as a Qualified Member of the Voting Electorate
of the Thirteenth Judicial District of the State of Mississippi;
ANTHONY GRAYSON, In His Official Capacity as Circuit
Clerk of Smith County, Mississippi, and as a Qualified Member
of the Voting Electorate of the Thirteenth Judicial District of the
State of Mississippi, and RICHARD FELTON AULTMAN, In
His Capacity as Election Commissioner of Covington County,
Mississippi, and as a Qualified Member of the Voting Electorate
of the Thirteenth Judicial District of the State of Mississippi,

PLAINTIFFS/
APPELLANTS/
PETITIONERS

VERSUS

HALEY BARBOUR, In His Official Capacity as
Governor of the State of Mississippi and as a
Member of the State Board of Election
Commissioners; DELBERT HOSEMANN, In His
Official Capacity as Secretary of State of the State
of Mississippi, as the Chief Election Officer of the
State of Mississippi, and as a Member of the State
Board of Election Commissioners; and JIM HOOD,
In His Official Capacity as Attorney General of the
State of Mississippi and as a Member of the State
Board of Election Commissioners,

DEFENDANTS/
APPELLEES

BILLY R. ROGERS,

INTERVENOR

APPEAL FROM THE CIRCUIT COURT OF THE FIRST
JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

BRIEF OF PLAINTIFFS/APPELLANTS IN SUPPORT
OF PETITION FOR EXPEDITED APPEAL

S. Wayne Easterling
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have a possible interest
in the outcome of this case:

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Anthony Grayson
Circuit Clerk of Smith County, Mississippi
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Richard Felton Aultman
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Governor
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Delbert Hosemann
Secretary of State
State of Mississippi
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Jackson, MS 39205

Jim Hood
Attorney General
State of Mississippi
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Jackson, MS 39205

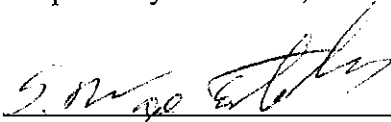
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Respectfully submitted,

A handwritten signature in cursive script, appearing to read "S. Wayne Easterling", is written over a horizontal line.

S. WAYNE EASTERLING

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BRIEF OF PLAINTIFFS/APPELLANT IN SUPPORT

OF PETITION FOR EXPEDITED APPEAL

The plaintiffs/appellants herein are three circuit clerks and one member of the Election Commissioners in the four-county area comprising the Thirteenth Judicial District of Mississippi.¹

¹The four counties are Covington, Jasper, Simpson, and Smith Counties.

The defendants herein, sued in their official capacities only, are the Governor, the Secretary of State, and the Attorney General of the State of Mississippi who collectively comprise the State Board of Election Commissioners. The relief sought by the plaintiffs/appellants are a declaratory judgment determining that the defendants acted improperly in ordering a write-in election to elect a circuit judge in their district for the election to be held on November 2, 2010. They also request a preliminary and final injunction halting that part of the election.

Inasmuch as the election is scheduled for November 2, 2010, plaintiffs herein have requested an expedited hearing. The material facts involved are undisputed.

STATEMENT OF UNDISPUTED FACTS

Long-time Thirteenth Judicial District Circuit Judge Robert Evans served his district and the state with great distinction for a number of years. He qualified for re-election without opposition; but unfortunately, he succumbed to cancer on July 13, 2010, subsequent to the deadline for judicial candidates to qualify in May prior to the election.

In September, the defendants entered a declaration requiring the election for circuit judge in said district to be conducted as a "write-in" election, to be followed three weeks later by a run-off election between the two candidates receiving the most votes if neither receives a majority of the votes cast in the November 2 election.

The facts in this case are very similar to the situation facing officials and voters in the Tenth Chancery Court District, comprising Forrest, Lamar, Marion, Pearl River, and Perry Counties. In that district, Chancellor James H. C. Thomas qualified for re-election without opposition; but unfortunately, he died on October 1, 2010. In that race, ballots had been printed prior to his death; and his name will appear on the ballot with a blank space for a write-in candidate under his name. In the race for the Thirteenth Judicial District judgeship, Judge Evans' name will not appear on the ballot.

ARGUMENT

Plaintiffs recognize that Section 23-15-365 of the Mississippi Code of 1972 authorizes write-in ballots in certain situations. They also recognize that Section 23-15-1015 provides for an election for circuit judges and chancellors to be held every fourth year and that the vacancy occurred in the fourth year of Judge Evan's term.

However, plaintiffs/appellants contend that judicial elections can be distinguished from other elections in several important areas; and for the election to proceed as ordered will cause them to ignore other statutes dealing with judicial elections.

It should be stated that plaintiffs/appellants do not seek to criticize the defendants. They concede that the defendants are acting in the utmost good faith and they recognize that great effort has been expended by them in an effort to educate the voters as to the proper procedure to follow in casting absentee ballots. However, it is apparent to the plaintiffs that to follow the method ordered by defendants will result in great confusion and will effectively disenfranchise a significant number of voters.

Judicial elections impose special requirements on the candidates and on the election official. Article 6, Section 154 of the Constitution of Mississippi requires that a circuit or chancery judge to be a practicing attorney for five years, to be at least 26 years of age, and to have been a citizen of this State for five years. These qualifications can be verified and/or challenged by requiring candidates to qualify within a reasonable period of time prior to the election. Section 23-15-977 requires candidates to qualify by the first Monday in May prior to the election. However, a write-in election does not identify for the voters which persons meet the constitutional requirements to hold office, and does not allow any challenge to these qualifications. It is not known how a decision will be made as to whether a write-in nominee can be deemed qualified by those counting the votes. There is also the very strong possibility that votes will be cast for otherwise qualified individuals who are unwilling to assume the office of Circuit Judge.

Section 23-15-974, *et seq.*, imposes unique requirements upon candidates in a judicial election. Section 23-15-977.1 requires a candidate to take a special oath prior to beginning his campaign. Each candidate is required to run a nonpartisan campaign. There are specific fund raising requirements and financial disclosure requirements imposed on these candidates that do not apply to non-judicial elections. If the election proceeds as ordered, plaintiffs/appellants herein will be required to disregard these statutes.

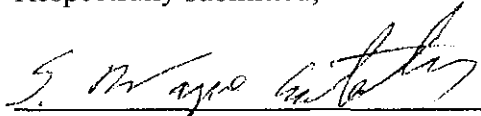
The Governor has appointed the Honorable Eddie H. Bowen to fill the vacancy created by the death of Judge Evans. The Governor acted pursuant to the authority granted him by Sections 9-1-103 and 23-15-849 of the Mississippi Code of 1972. Section 23-15-849 specifically addresses these situations when a circuit judge or chancellor has vacated the office. The defendants interpret the nine-month requirement contained in this section as not applying in the case of the election occurring at the conclusion of the original four-year term. They contend that the regular election only applies in Section 23-15-1015 election occurring every four years. However, plaintiffs contend that the nine-month period authorizes the Governor to appoint a candidate who can meet the nine-month waiting period and can serve until the next regular election for state officers or for representatives in Congress. That election would occur in November, 2011; and the Governor would appoint a replacement candidate until the 2011 election occurs. This interpretation would allow for full compliance with the statutes that govern judicial elections. It would insure that the will of the voters would be carried out and would prevent mass confusion.

Plaintiff Billy Rayner, Circuit Clerk of Jasper County, Mississippi, testified as to his experience in preparing for this election. He had processed eleven absentee ballots prior to the hearing date; and of the eleven, five had asked him for assistance in determining for whom to vote in the race for circuit judge. When he advised that he could only state the qualifications required for the office, three of the five refused to vote for this important office; one announced that he had voted for Donald Duck, and the remaining indicated that he had voted for Mr. Rayner.

While plaintiffs recognize that the determination of conflicting election statutes is a duty imposed upon the executive branch and their determination should only be set aside in the most extraordinary circumstances, they respectfully contend that the interpretation given to the statutes by the defendants is erroneous. See *Barbour v. State, et rel, Attorney General Jim Hood*, 974 So.2d 232 (Miss. 2008).

Therefore, the plaintiffs herein respectfully request that this Court enjoin that part of the November 2, 2010, election presently scheduled and order that the election occur in November, 2011.

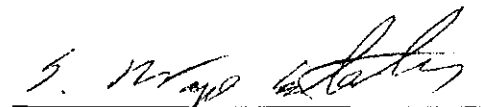
Respectfully submitted,


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CERTIFICATE

A true copy of the foregoing brief of plaintiffs/appellants has been mailed, postage prepaid, to the Honorable Henry L. Lackey, Special Judge, Post Office Drawer T, Calhoun City, Mississippi 38916; to the Honorable Harold E. Pizzetta, III, Office of the Attorney General, Post Office Box 220, Jackson, Mississippi 39205-0220, attorney for defendants; and to the Honorable Steve C. Thornton, Post Office Box 16465, Jackson, Mississippi 39236, attorney for intervenor, on this 19th day of October, A.D., 2010.


S. Wayne Easterling