CV-23-755

IN THE ARKANSAS SUPREME COURT

ARKANSAS VOTER INTEGRITY INITIATIVE, INC., and CONRAD REYNOLDS*	APPELLANTS
vs.	
JOHN THURSTON, in his official capacity as SECRETARY OF STATE, the STATE BOARD OF ELECTION COMMISSIONERS, and ELECTION SYSTEMS AND SOFTWARE, LLC	APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, FOURTH DIVISION

THE HON. TIMOTHY FOX, CIRCUIT JUDGE

REPLY BRIEF OF THE APPELLANTS

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*Donnie Scroggins abandons any further relief and is not a party to the appeal.

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I. THE CIRCUIT COURT IMPROPERLY AND INCORRECTLY RESOLVED QUESTIONS OF FACT TO WRONGLY CONCLUDE THAT THE MACHINES COMPLY WITH ARK. CODE. ANN. § 7-5-504(6)(7)

The appellees' joint brief overlooks a number of key, crucial facts that were either unresolved or improperly resolved by the trial judge and not a jury. The most important, material fact that was absolutely and unequivocally disputed is that the voter can verify or verifies his or her ballot selections on the BMD touchscreen before the ballot is printed. As argued extensively in their opening brief, this is impossible because it would either mean:

A. the BMD is the ballot, or a part of it, which conflicts with the circuit judge's own finding and the plain language of Ark. Code Ann. § 7-1-101(20) that the ExpressVote computer and touchscreen are a "marking device" and not a ballot; or

B. verification of vote selections occur on a ballot before the ballot exists—which is impossible, if not an absurdity.

That is just one factual finding, but there are more, and they are laid out in the appellants' opening brief. Also, these were not questions of law. The appellants have evidence that the voter cannot verify vote selections on the ballot on a touchscreen monitor, and the appellees alleged their evidence showed that the voter could. This is a question about facts—when and where does verification of ballot selections on the ballot occur.

It is in the exclusive province of the jury to determine disputed questions of fact. *Hot Springs R. Co. v. McMillan*, 76 Ark. 88, 88 S.W. 846, 847 (1905) (citations omitted). And fact-finding is, undoubtedly, what the trial court did. The trial judge himself even said "the only question [he] had, **factually**" dealt with the BMD's touchscreen during the voting process and was part of the disputed facts surrounding confirmation on the BMD touchscreen. (RT 74–75) (emphasis added). The appellees overlook the significance of this exchange—the trial judge himself said it was a factual issue. The appellants had a right to have this factual question resolved by a jury and not from the bench.

II. THE VIOLATION OF THE APPELLANTS' INVIOLATE CONSTITUTIONAL RIGHT IS NOT A HARMLESS ERROR

The appellees posit that an injunction was the only thing sought by the appellants. That is inaccurate as they also sought a declaratory judgment, a judgment for an illegal exaction, for a violation of the deceptive trade practices act, and one for fraud. Their conclusion that the appellants were not entitled to a jury trial is baffling because jury trials are specifically permitted by law in all causes of action pled by the appellants but an injunction, and the appellees conceded as much in their brief. However, their claim is that the trial judge got the facts correct. As such, because the trial judge got it correct, the denial of the jury trial right was *a harmless error*.

To be clear, since the appellees must have misunderstood Article 2, § 7 of the Arkansas Constitution, inviolate translates to incapable of being violated. *See* INVIOLATE, Black's Law Dictionary (11th ed. 2019). While the appellants can see a self-interested corporation in America like ESS wanting to protect its bottom line at the expense of constitutional rights, it is unfathomable that a constitutional officer in our government

would think that violating an inviolate constitutional right is *a harmless error*.

The State and ESS also mischaracterize how the jury system functions. The way it should have worked was for the parties to put on evidence about the voting process, the voting equipment, and the configuration of the ballots. The judge should have provided the jury with the law as it was written in the statute in a jury instruction, not his re-written interpretation.[1] The jury would retire to deliberate, comparing the facts introduced and accepted into evidence and the law in the jury instruction to reach a verdict, which the trial judge could set it aside if it was "clearly contrary to the law." Ark. R. Civ. P. 59(a)(c).

This process was stolen from the appellants by the trial judge who substituted his discretion and his decisions for that of the jury. The framers of our constitution created the right to a jury trial to prevent the crown from taking the facts and law, as the crown saw it, to determine the rights of the citizenry. *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968). *See also Baldwin v. New York*, 399 U.S. 66, 72 (1970) ("the primary

[1] To conclude that a voter can verify vote selections on a ballot by doing so on an object that is not a ballot is a re-writing of the statute to state that vote selections must be "verified on the ballot or on the marking device" before the ballot is cast.

purpose of the jury is to prevent the possibility of oppression by the government").

The right to a jury trial has evolved into a process in which lawyers and litigants make choices about who they trust with major life decisions in our society—like rights about voting. Litigants at the trial level can take advantage of or avoid heavy-handed judges who they perceive as leaning for or against their positions by consenting to bench trials or demanding a jury trial. When the constitutional right to a jury trial exists, as it does in this case, its violation is never a harmless error.

III. THE APPELLEES HAVE FAILED TO REBUT OR REFUTE THE POINTS ON APPEAL ABOUT THE TRIAL JUDGE'S BIAS.

The appellees take the position that the appellants only raise an appearance of bias. However, the appellants raised objective indicators of bias and statements of bias in the judge's prejudgment of the issue, laughing at the motion to recuse, refusal to hear evidence, and denial of the right to a jury trial. These are objective, manifested acts that occurred and directly indicated bias. Alternatively, they are indicators of bias.

The appellees attempt to distinguish *Riverside Marine* as inapplicable to the facts of this case. However, their arguments support

those of the appellants for the applicability of *Riverside* to the case at bar. *Riverside* stands for the principle that the inopportune communication of prejudgment necessitates recusal. *Riverside Marine Remanufacturers, Inc. v. Booth*, 93 Ark. App. 48, 53, 216 S.W.3d 611, 615 (2005).

Here are the analogies between the instant case and *Riverside Marine*:

A. In *Riverside*, the trial judge made a ruling on the merits before those appellants had presented their case. *Id.* at 50, 216 S.W.3d at 613. In the instant case, the trial judge made a ruling on the merits before these appellants had presented their case. (RT 72) (RT 75). This is a near equal analogy. The only discernible difference is that the AVII appellants had called one witness but had not finished with that witness when the judge communicated prejudgment;

B. The judge in *Riverside* gave the appearance of having a mindset that could not be reconciled with the proposition that he was committed to hear all relevant, credible evidence, weighing it and arriving at a judicious result." *Id.* at 51, 216 S.W.3d at 614. The judge in this case did the same thing when he said that he had decided the "threshold issue" and that there was no way for the appellants to prevail before the first witness finished testifying. (RT 72); and

C. The judge in *Riverside* made a partially informed decision on incomplete evidence. *Id.* The judge in this case did too. Even worse, he did it before he even resolved the "one thing, [he] had, factually," in which he questioned. (RT 75).

Looking at that contention closer, on (RT 72), the trial judge first announces his ruling:

> BY THE COURT: Okay. So here's what I'm trying to tell you. Here's what I'm telling you-all, it's clear to the Court that this entire process and the machine and the printout, **it has given the voter a chance as required by the statute. So on a threshold issue the lawsuit fails.** (emphasis added).

After rambling for a bit, the trial judge launches into an examination of the witness by the court, asking about factual issues which consists of seven questions taking up one and a half pages of transcript. (RT 74–75). As part of taking in that evidence, the following colloquy occurred:

> BY THE COURT CONTINUING:
>
> Q. The only question I had, **factually**, was—because it may have been on some former incarnations—can you just push print and feel sure that you got all the individual things right, or do you have to go through the summary screen and approve it before you can hit print?
>
> A. You are required to view the summary screen.
>
> Q. All right. So under the present software, you have to see the summary screen. Right?
>
> A. Yes sir. (RT 75) (emphasis added).

The trial judge then uses his factual finding as confirmation of his prior ruling. (RT 76). This exchange shows that the trial judge had not only prejudged the issue—whether the machines complied with the statute—but did it before he even satisfied his own factual analysis of the voting

process! There is no more clear or exacting example of prejudgment than a judge who has prejudged an issue before his own questions of fact are resolved. Both this court and the *Riverside* Court explained when the communication of bias triggers recusal:

> A judge trying a case without a jury may develop "bias" as the trial progresses, and that "bias" ultimately may result in the court's judgment. It is, however, the communication of that bias at inappropriate times and in inappropriate ways that will cause us to reverse.

Patterson v. R.T., 301 Ark. 400, 407, 784 S.W.2d 777, 781 (1990). *See also Riverside*, 93 Ark. App. at 52, 216 S.W.3d at 614 (citing *Patterson, supra*).

Announcing his decision before the first witness had finished testifying and before the trial judge even got all his factual questions resolved is a communication of bias at an inappropriate time and in an inappropriate way. These appellants and those in *Riverside Marine* are indeed in the same boat, and unless this court acts, the appellants' boat is up the creek without a paddle. By way of further expounding the prejudgment and bias, the trial judge asked eleven different questions about the nature of the appellants' case to resolve items he did not understand ***after*** he issued his prejudged ruling. (RT 76–78), (RT 80–84), (RT 86), (RT 88–89), (RT 91).

The appellees also characterize the motion to recuse as being based on an adverse ruling. That was not the motion. The motion was "I am a bit troubled because I have just called one witness…I haven't put on my entire case" (RT 82), "my concern, Your Honor, is it appears you've already ruled before you've heard my evidence" (RT 87), "my position is the court has made a ruling without hearing all of the evidence" (RT 89), and "[y]ou decided my case before hearing the evidence, so I move for you to recuse." (RT 93).

The allegations of having no evidence and complaining only of an adverse ruling are unfair cheap shots at the appellants. When a trial judge decides your case and says that your lawsuit fails before you put on all your evidence, then of course the evidence you possess which is contrary to the judge's ruling is not "germane." (RT 89). In that situation, asking repeatedly about what evidence you have is nothing more than hollow, rhetorical, and empty questions banging like "drums, drums in the deep." J.R.R. Tolkien, *The Lord of the Rings, The Fellowship of the Ring (Book II)*, 322, HarperCollinsPublishers (2005).

IV. THE MOTION TO DISMISS WAS ADDRESSED IN THE OPENING BRIEF

A. As a matter of law, the motion to dismiss was converted to summary judgment when the trial judge considered matters external to the pleadings.

It was not the 12(b)(6) motion that was ruled on by the circuit court, because the motion was converted to one for summary judgment. This court addressed a similar situation in *Nielsen v. Berger-Nielsen*, 347 Ark. 996, 1003, 69 S.W.3d 414, 418 (2002). In *Nielsen*, the trial court's order indicated that the dismissal of the complaint was under Ark. R. Civ. P. 12(b)(6). *Id.* However, it was clear that the trial court in *Nielsen* took into account other pleadings, documents, and information when making its decision. *Id.* As such, regardless of how the trial court characterized it in its order, the *Nielsen* Court held that it was not a dismissal, but instead a summary judgment. *Id.* The *sui generis* nature of that holding is that under Ark. R. Civ. P. 12(b) and (c), a motion to dismiss is converted to a motion for summary judgment when matters outside of the pleadings are presented to and not excluded by the court. *Nielsen*, 347 Ark. at 1003, 69 S.W.3d at 418 (citing *Francis v. Francis,* 343 Ark. 104, 31 S.W.3d 841 (2000); *McQuay v. Guntharp,* 331 Ark. 466, 963 S.W.2d 583 (1998); *Clark v. Ridgeway,* 323 Ark. 378, 914 S.W.2d 745 (1996)).

The contention that the motion was granted just based on the pleadings is wholly inaccurate. Theoretically, he viewed fifty-six pages of exhibits he received into evidence. (RT 102–158). He heard testimony from a witness and asked the witness his own questions from the bench, at one point using an admitted exhibit as part of a question. (RT 42–76). He indicated that his factual question had been answered and issued a ruling based on his factual resolution. (RT 76). The trial judge cannot take evidence, make a factual conclusion, apply that factual conclusion to the law, make a ruling on how the law applies to the facts, and then claim that he only viewed the amended complaint to make his ruling because that is not what he did.

Like the appellants in *Nielsen*, the trial judge in the case at bar clearly considered matters outside of the amended complaint. Though the order might say "motion to dismiss," by law, it was summary judgment and addressed in the opening brief.

B. Alternatively, the motion to dismiss was addressed because the "threshold issue" ruled on by the circuit judge and briefed by the appellants was the nexus of the dismissal of the entire case.

The appellants' opening brief is an argument that the machines fail to comply with the statutory scheme. The trial judge found that the

"threshold" issue decided all causes of action in the case and the lawsuit failed. (RT 72). Based on this statement, the threshold issue is framed as the entire nexus of the lawsuits against ESS, which are fully addressed in the opening brief.

CONCLUSION

There is no getting around the fact that something very wrong and improper happened at the September 11, 2023, hearing for a temporary injunction. The record reflects that the trial judge resolved a disputed material fact on his own long before all the evidence had even been offered. He took his own factual resolution, applied the law as he rewrote it, made it a final order, and kicked the appellants out of court.

The critical problem is that it was never his role to make factual findings on a permanent and final basis. That role belonged solely to a jury. If, as the trial judge presumed, that the "threshold issue" he decided determined the viability of all of the appellants' causes of actions, it was even more important that very fact be properly resolved by a jury.

Not only did the trial judge get a material factual issue wrong, but he did so by prejudgment that preceded his own factual resolution of the

issues necessary to make his judgment. This is bias at its deepest core, and a bias unmistakably announced at an inopportune time and manner.

However, the appellees would have you believe that there is nothing to see here—no harm, no foul—because even though the trial judge violated the appellants' right to a jury trial, he got the facts right and the inviolate constitutional right to a jury trial simply does not apply. Is that *really* how rights work? If so, the appellants and many others in the United States have been using the phrase "constitutional rights" wrongly for at least a century.

It now falls upon this court to clean up a mess that it did not make, right a wrong it did not do, and restore justice and fairness to the legal process. This court is the end of the road for this case, and if the court does not act to reverse the circuit court, then nothing about this case will even appear to be justice—not even for the satisfaction of justice itself. *Isom v. State*, 2018 Ark. 368, 19, 563 S.W.3d 533, 546 (2018) (citing *In re Murchison*, 349 U.S. 133, 136, (1955)).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

By my signature above, I certify pursuant to Ark. R. Civ. P. 5(e) that a copy of the foregoing has been delivered by the below method to the following person or persons:

☐ First Class Mail ☐ Email ☒ AOC/ECF ☐ Hand Delivery

Jordan Broyles	Justin Brascher
Kevin Crass	Mary McCarroll
Chris Madison	Hon. Timothy Fox

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Ark. Sup. Ct. Admin. Order 19 in that there is no unredacted confidential information (no confidential information is contained in the brief), Admin Order No. 21 in that this brief contains no live hyperlinks (hyperlinks, if any, removed by Adobe Acrobat Pro Continuous Release Version 2023.008.20458), and conforms to Rule 4-2(d) because the jurisdictional statement, statement of the case, argument section, conclusion, and requested relief portions of this brief, including the footnote(s) (if any), contains 2866 words.

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