IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

DAVE WARE — **PLAINTIFF**

VERSUS — **CAUSE NO. C113-0152**

JOHNNY L. DUPREE AND ELECTION COMMISSION FOR THE CITY OF HATTIESBURG, MS — **DEFENDANTS**

PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT, JOHNNY L. DUPREE

COMES NOW, the Plaintiff, Dave Ware, by and through his undersigned counsel and files this his Response to the Motion for Summary Judgment filed by Defendant, Johnny L. Dupree, and would respectfully show as follows:

INTRODUCTION

"In every case, before any burden falls to the nonmovant, the party moving for summary judgment first must have met its burden under Mississippi Rule of Civil Procedure 56."Dalton v. Cellular South, Inc., 20 So.3d 1227, 1234 (Miss. 2009). "A summary judgment motion is only properly granted when no genuine issue of material fact exists." Jackson Clinic for Women, P.A. v. Henley, 965 So.2d 643, 649 (Miss.2007) (citations omitted). "[T]he evidence must be viewed in the light most favorable to the party against whom the motion has been made." Green v. Allendale Planting Co., 954 So.2d 1032, 1037 (Miss.2007) (quoting Price v. Purdue Pharma Co., 920 So.2d 479, 483 (Miss.2006)). "The moving party has the burden of demonstrating that no genuine issue of material fact(s) exists, and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact." *Id.* (quoting Howard v. City of Biloxi, 943 So.2d 751, 754 (Miss.App.2006)). Here, against these well-familiar standards, the Defendant fails to meet any of them, and his motion for summary judgment should accordingly be denied.

I.

The Motion of DuPree is not supported as required by Rule 56 of the Mississippi Rules of Civil Procedure by sworn proof and admissible evidence. Instead, the Motion is only based on unsupported claims and allegations. Also, DuPree's Motion ignores the cumulative impact of the many other claims of Dave Ware in his Petition as Amended.

II.

The Plaintiff admits the allegations contained in Paragraphs 3 and 4 of DuPree's Motion for Summary Judgment.

III.

The Plaintiff denies the allegations contained in Paragraphs 5 and 6 of DuPree's Motion for Summary Judgment..

IV.

Twenty-Four Challenged Votes Are Not Affidavit Ballots.

V.

In response to Paragraphs 7, 8 and 9 of the Motion, the Plaintiff would show that in Paragraphs 21, 22, and 23 of his Petition he alleged that twenty-four ballots that were voted in the June 4th general election should not have been counted because they were not initialed by the initialing manager. Plaintiff specifically alleged that ballots that he was challenging were the nineteen **emergency** and **curbside** ballots cast at the Rowan Precinct and another five curbside ballots from the East 6th Street Precinct. It is important to note that the Plaintiff did not claim in his Petition that the nineteen emergency and curbside ballots from the Rowan precinct were "affidavit" ballots, which would be covered under MCA Section 23-15-573. In fact, it is the

Plaintiff's understanding that these "**emergency**" or irregular ballots cast in this precinct were used when the DRE "touch screen" voting machines at this precinct were temporarily malfunctioning. According to MCA Section 23-15-531.12, the poll managers were required to have the voters cast "emergency" or irregular paper ballots until the voting machines again became operable. The Statute further provides "Such paper ballots shall be administered, as far as practicable, in accordance with the laws concerning paper ballots." According to MCA Section 23-15-541, as amended, all paper ballots must be initialed before they are provided to the voters to be cast. Our appellate courts have consistently held that all paper ballots, except for affidavit ballots, must be initialed to be considered to be legal ballots. See Rush v. Ivy, 853 So.2d 1226 (Miss. 2003), where the Supreme Court in 2003 (post Wilbourn v. Hobson) held that it was appropriate for the lower court to declare by summary judgment that a regular ballot that had not been initialed should not have been counted as provided in MCA Section 23-15-541.

VI.

The Plaintiff would show that "**curbside**" votes at the Rowan Precinct (that are included in the affected nineteen votes) were required to have been cast by "physically disabled" voters who appeared to vote from their vehicles and claimed they could not enter the polling place. According to MCA Section 23-15-541(2)(b), as amended, when paper ballots are used for curbside voting (as was done in this case) the "initialing manager shall initial the ballot as provided by law, and the disabled elector, after marking his or her ballot shall fold the ballot or place it in a ballot sleeve. The initialing manager or alternate initialing manager shall determine whether the initials on the ballot are genuine, and upon a determination that the initials are genuine, mark "voted" by the elector's name." [Section 2 of MCA Section 23-15-541, as amended, was added by the Legislature in 2008 and did not exist at the time the Wilbourn v.

Hobson case was decided in 1992. Similarly, the "machine voting" discussed in Wilbourn no longer exists in Mississippi. Ten years after Wilbourn the current electronic voting machines came into use] In this case, MCA Section 23-15-541(2) would be the specific statute that dictates the initialing requirement of curbside ballots.

VII.

It is clear that Wilbourn v. Hobson, 608 So.2d 1187 (Miss. 1992) only applies to **affidavit** ballots and it is significantly limited because the parties therein stipulated that no fraud or other intentional violations of the election code existed.[1] Affidavit ballots are used when someone wishes to cast a vote but their name does not appear on the pollbook. Affidavit ballots are simply not the same as "emergency" or what the election statutes refer to as irregular ballots. They are also not the same as "curbside" ballots. Emergency and curbside paper ballots must be initialed to assure the integrity of the ballots and to "prevent the fraudulent use of paper ballots". *SeeId.* at 1192. In that case the Supreme Court further held, " It is obvious that the initialing requirement was primarily meant to avoid the practice of stuffing the ballot boxes. Initialing provides a security measure to help election officials detect and protect against counterfeit ballots." *Id.* at 1192. Considering the wide spread disregard for mandated safeguards and procedures including the suspect use of curbside ballots, initials on these ballots as required is properly enforced.

VIII.

Defendant has cited several cases for the general proposition that"technical irregularities will not vitiate an election where there is no evidence of fraud or intentional wrong." A close

1Indeed, the Defendant quotes a statement inWilbourn that "where voting machines are used, affidavit and absentee ballots are the only ones available on paper," Motion at 4, Paragraph 14. But this is clearly incorrect, as emergency ballots and challenged ballots are likewise voted in most elections, including the one at issue here.

review of these cases makes it clear that the appellate courts will not declare a new winner or order a new election where the irregularities have not been determined to be violations of the **mandatory** provisions of the election code such as the ones present here. These provisions are specifically enacted to protect the integrity of the ballot and prevent fraud. The Courts have stated that the number of illegal votes involved must either affect the ultimate outcome of the election or make it impossible to ascertain the will of the electorate. When (as in this case) the irregularities are deemed to be violations of the mandatory provisions of the election code, such as with absentee ballots, the courts will not hesitate to declare a new winner or call a new election. See Thompson v. Jones ,17 So.3d 524 (Miss. 2008).

IX.

Defendant also claims that five curbside ballots in the East 6th Street (USO) precinct were not required to be initialed as "affidavit" ballots. There were a total of 115 true affidavit ballots cast, but only 47 of those ballots were approved by the Election Commission and counted. Within these 47 **counted** affidavit ballots were 12 ballots that were not initialed. At first glance it might appear that the case of Wilbourn v. Hobson, supra, dictates that, except for other violations of the election code, the affidavit ballots must be counted, even if they are not initialed. The problem with the Defendant's rush to apply Wilbournis that upon examination of the ballot boxes the Election Commission, after consultation with the precinct poll managers, informed Plaintiff's representatives that the five affidavit ballots that were marked with a "C" were actually **curbside** ballots that the poll workers inexplicably placed in "affidavit" envelopes. The reason these five ballots could not have been handled as affidavit ballots is that each of these voters' names appear in the poll books. According to the Election Commissioners these five "C" or curbside ballots were not counted on election night and the Commissioners reviewed them and

determined that they should be counted when they separately reviewed the affidavit ballots at a later date.

X.

Rule 56 of the Mississippi Rules of Civil Procedure requires that the Defendant, in order to prevail in a motion for summary judgment must offer authenticated documents or affidavit testimony in support of his Motion other than conclusory statements that the five ballots from East 6th Street were affidavit votes. A party seeking summary judgment may not rely upon unsworn allegations in pleadings or arguments and assertions in briefs to meet his burden of proof in showing there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. At the very least there would be an issue of material fact that would have to be developed at trial from testimony of the poll managers, election commissioners, or others as to how these five ballots were processed as curbside ballots.

XI.

Simply stated, MCA Section 23-15-541(2), as amended, (adopted in 2008 after the Wilbourn v. Hobson case was decided in 1992) clearly provides that curbside ballots must be initialed to be counted. A poll manager mistakenly placing a paper curbside ballot in an "affidavit" envelope does not change the type of the ballot, nor its legal requirements.

XII.

Although not argued by Defendant, Plaintiff's counsel would also show that these five curbside voters were not valid and should not have been counted because (1) the voter apparently did not sign the voter receipt or registry book, nor (2) were these voters listed as having "VOTED" in the poll book. These are also mandatory provisions found in MCA Section 23-15-541(2), as amended.

XIII.

PLAINTIFF'S PETITION AS SUPPLEMENTED BY HIS MORE DEFINITE STATEMENT SUPPORTS HIS CLAIM FOR RELIEF

Defendant claims that if you assume as true that certain challenged ballots described in Paragraphs 21, 23, and 25 of the Plaintiff's Petition should not be counted then the ultimate outcome of the election would not change because the Defendant would still lead by four votes. Defendant's counsel offers no explanation or legal authority in his Motion and Brief as to why the numerous challenges to absentee and other ballots contained in Paragraphs 12 through 20, inclusive, 22, 24, 26 through 28, inclusive, and other irregularities alleged in the Petition should not be considered in this analysis.

Plaintiff has alleged multiple violations of the mandatory provision of the Absentee Balloting laws that will invalidate many more ballots that will cause the outcome of the election to change or make it impossible to ascertain the will of the electorate. The case of Thompson v. Jones , 17 So.3d 524 (Miss. 2008) is very instructive on how illegal absentee ballots are to be handled for mandatory violations. In that case, the appellate court determined that 103 of a total of 542 absentee ballots were illegal because the ballot envelopes failed to contain the signature of the official authorized to administer oaths. The Court held that the commingling of the illegal ballots with the other 439 remaining absentee ballots made it impossible to ascertain the will of the voters, affirming the trial Court's disqualification of the entire class of absentee ballots. The incumbent had only achieved a majority to avoid a runoff by a mere eleven vote margin. Disqualification of the entire class of absentee votes prevented the incumbent from receiving a majority and a special runoff election was warranted.

XIV.

In Straughter v. Collins, 819 So.2d 1244 (Miss. 2002) the appellate court reversed the decision of the trial court judge who granted a directed verdict against the contestant and ordered a new trial. The contestant lost by 36 votes and he proved that 38 votes were unlawful because of willful election violations. Plaintiff has alleged in Paragraph 19 of his Petition that 330 (56%) of the 581 total absentee ballots should not have been counted. The Defendant obtained 343 of these absentee votes. Clearly, if the jury follows the law as instructed by the Court and finds that more than 37 votes have been invalidated the outcome of the election would change and Ware would be declared the winner. Alternatively, at the least it would be impossible to ascertain the winner of the election. If the court follows the Thompson v. Jones, supra, case and throws out all of the commingled absentee ballots then Ware would be declared the winner with 4,506 votes to 4,432 votes for Dupree.

XV.

Defendant has not raised any other of the Petition's allegations regarding illegally counted votes in his Motion for Summary Judgment, but Plaintiff reserves the right to also have other non-absentee votes declared illegal for mandatory violations. Suffice it to say, the invalidation of more votes would only make the change in the ultimate outcome or uncertainty of the result more clear. TheDefendant has failed to carry his burden and prove he is entitled to summary judgment as a matter of law. Defendant has submitted no legal authorities in his brief in support of this section of this motion for summary judgment. Also, Defendant failed to submit any authenticated documents or affidavit testimony to support the factual allegations. Again, the Defendant's conclusory allegations cannot sustain his request for summary judgment. The Plaintiff has sworn to the allegations of his Petition supporting his allegations of material

irregularities in this general election and the Defendant has done nothing to properly rebut same with appropriate proof. As a result, material issues of genuine fact continue to exist that prevent the entry of summary judgment for this case. MCA Section 23-15-951, as amended, clearly provides that this election contest must be resolved by a trial.

THEREFORE, based upon the foregoing Plaintiff submits that the Defendant's Motion for Summary Judgment should be denied

Respectfully submitted this the 18th day of July, 2013.

DAVE WARE, PLAINTIFF

BY: _____
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CERTIFICATE OF SERVICE

I, David M. Ott, do hereby certify that I have this date served a copy of the above motion on all known counsel of record by regular U.S. Mail and by email, as follows:

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This the 18th day of July, 2013.

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