

IN THE CIRCUIT COURT OF FORREST COUNTY, MISSISSIPPI

FILED

DAVE WARE

AUG 09 2013

PLAINTIFF

VERSUS

For Elin Odean
FORREST COUNTY CIRCUIT CLERK

CIVIL ACTION NO. CI13-0152

JOHNNY L. DUPREE AND ELECTION COMMISSION
FOR THE CITY OF HATTIESBURG

DEFENDANTS

CONSOLIDATED ONLY FOR TRIAL WITH

IN THE CIRCUIT COURT OF LAMAR COUNTY, MISSISSIPPI

DAVE WARE

PLAINTIFF

VERSUS

CIVIL ACTION NO. 2013-053H

JOHNNY L. DUPREE AND ELECTION COMMISSION
FOR THE CITY OF HATTIESBURG

DEFENDANTS

PLAINTIFF DAVE WARE'S MOTION FOR
ENTRY OF JUDGMENT AS A MATTER OF LAW
AND FOR ALTERNATIVE RELIEF

During the June 4, 2013 General Municipal Election for Hattiesburg Mayor, Plaintiff Dave Ware ("Ware" or "Plaintiff") won the machine-tallied votes by 148 votes, defeating Defendant Johnny DuPree in the regular ballots cast on Election Day. However, when 581 absentee ballots were counted, many of which were illegal ballots, DuPree erased Ware's preliminary lead and moved ahead by a 33-vote margin. When 47 affidavit and other paper ballots were counted by the Hattiesburg Municipal Election Commission (the "MEC"), DuPree's lead increased to 37 votes. On June 7, 2013, the MEC certified DuPree as the winner of the election with 4,775 votes for DuPree and 4,738 votes for Ware.

Because of serious and material irregularities in the conduct of the election, particularly with regard to the casting and counting of some six hundred absentee ballots, Plaintiff filed this

action to contest the results of the June 4 election. The case was tried beginning July 23, 2013, and lasted for seven days.

During the trial, Plaintiff offered unrefuted evidence that over 375 absentee ballots out of 581 that were counted were fatally flawed because of radical departures from mandatory provisions of Mississippi's Election Code. The Defendant offered no proof in an attempt to demonstrate the Plaintiff's evidence was insufficient, but instead tried to show the Plaintiff failed to prove that the outcome of the election would not have changed even with these violations. However, Plaintiff also showed other illegal ballots, which taken together mathematically demonstrated that Ware actually won the election by the legal votes cast. Indeed, Plaintiff has shown in several instances that illegal voters cast ballots in the election, substantial discrepancies occurred in the poll books and sign-in registers at several precincts, and other willful violations of election law, particularly concerning absentee balloting procedures, all of which were sufficient to cast serious doubt on the outcome of the election. The Plaintiff clearly met his burden of proof by a preponderance of the evidence under both the first and second "prongs" of the case law to have the jury and this Court, if necessary, declare him the winner, or at the very least, order a special election.

After trial, the jury unequivocally reached a 9-3 verdict declaring that Ware was the rightful winner of the June 4 General Election for Mayor. The Court properly polled the jurors individually and each juror without hesitation affirmed the verdict in open court. However, after the verdict was announced and confirmed by the judge's polling, the Court unexpectedly (and incorrectly) polled the jurors again on more than one occasion to ascertain which three jurors voted for the Defendant. This attempt (although with good intent by the trial judge) was a clear invasion of the mental processes of the juror's deliberations that were done in the sanctity of the

jury room. One juror, apparently afraid of “retaliation” and fearful that he or she would have to announce a vote for the Plaintiff in open court in front of a hostile audience, quickly decided to reverse his or her vote and then voted for the Defendant in the courtroom. It was reversible error for the trial court to require the jurors to vote in open court; it was further error not to affirm the verdict properly reached, particularly when it became obvious, through a note from the jury, that the only reason for the “changed” vote was fear of “retaliation.”

To affirm the proper verdict reached by the jury, and in the alternative to request a judgment as a matter of law, in light of the uncontradicted proof of well more than enough illegal votes clearly cast for the Defendant to change the outcome of the election, Dave Ware files this Motion for Entry of Judgment and For Alternative Relief, and further would show as follows:

1. This Court should respectfully affirm the proper verdict reached by the jury and announced and confirmed unanimously by each individual juror in open court upon the *sua sponte* polling of the trial court. It is clear from the record that the jury, after approximately six hours of deliberations, reached a verdict, which the jury delivered to the Court in writing, in accordance with the instructions given by the Court. The jury went so far as to indicate the vote of the jury, which was 9-3 for Dave Ware. The placement of the numerical division of the jurors on the verdict itself was surplusage and should have been deleted and reformed by the court, if necessary. When the Court polled each juror, *all twelve of them* stated that this was the jury’s verdict. At that point, with the jury properly polled, there remained nothing further to be done except to accept and record the verdict and enter judgment in favor of the Plaintiff. Consistent with the jury’s verdict, the Order Granting Mistrial should be vacated and a Judgment should be entered that Dave Ware should be declared the winner of the June 4 election.

2. It was reversible error for the trial court to require the jurors to vote in open court. Although the trial court may have continued to poll the jurors to determine which jurors voted for the Defendant for good faith reasons, the judge's continued polling from the perspective of the jurors obviously amounted to improper pressure or influence such that it caused the one juror to change his or her vote ultimately causing the 8-4 deadlock. The trial judge's attempts to cure this substantial error by causing the jury to return to the jury room for further deliberations and ultimately allowing the jurors to vote in private by writing which party they voted for on the verdict form itself did not cure this error. The verdict as received was in proper form, and there was no ambiguity or inconsistency in the form of the verdict or the initial polling of the jurors by the Court that prevented the Court from accepting and recording the verdict as required by law.

3. Even if the Court declines to affirm the verdict reached by the jury, Ware is entitled to a directed verdict, or a judgment notwithstanding the Court's Order Granting Mistrial. The Plaintiff by this Motion renews his Motion for Directed Verdict. Counsel for Plaintiff made an *ore tenus* motion for a directed verdict at the conclusion of Plaintiff's case in chief and again at the conclusion of all of the evidence. As a matter of law, given the unrefuted factual record adduced at trial, Ware has demonstrated enough illegal votes that must be deducted from Defendant's votes to reverse the result of the election. Defendant won the certified results by a mere 37-vote margin. Ware has shown well more than enough illegal votes cast for Defendant to erase that margin, under several different combinations of illegal ballots cast. The standard for granting a judgment as a matter of law is effectively the same, and Ware meets that standard clearly. Accordingly, the Court should direct a verdict for Ware or otherwise enter a judgment as a matter of law in Ware's favor, declaring him the winner of the legal votes cast in the June 4 election for Mayor.

4. Ware has proven with mathematical certainty that more than 37 votes for DuPree were illegal and must be excluded from the certified totals. In addition to direct evidence, the Plaintiff also submitted substantial circumstantial evidence that 68 absentee ballots that were directly solicited and witnessed by Johniece DuPree and others directly involved in the DuPree campaign from the jail (36 votes) and from elderly and disabled voters (ultimately 32 votes) were clearly cast for the Defendant. Indeed, the only reasonable inference that can be drawn from Plaintiff's evidence is that the vast majority of those 68 ballots (if not all of them) were cast for Defendant. And they more than erase his margin of victory when excluded from the totals, as required by law. The Defendant failed to rebut this proof upon cross-examination and certainly did not do so in his own case. The jurors' initial verdict clearly demonstrated they found the proof more than credible. In addition, the Plaintiff's expert demonstrated to a mathematical certainty that, even assuming *all* of Ware's absentee ballots at four specific precincts were invalid due to mandatory violations (which is highly implausible), the remaining illegal absentee ballots at those precincts, which then must be votes for Defendant, must be rejected as well, causing Ware to be declared the true winner.

5. Additionally, Ware is entitled to a judgment as a matter of law because he has proven that over 375 of 581 absentee ballots cast and counted are illegal and must be excluded from the total votes counted. This is required because of the failure of the poll managers to follow their mandatory duty to properly review and reject the absentee ballots the night of the election, which led to hundreds of obviously illegal ballots being commingled with legal ones. As such, entirety of the absentee ballots as a class have been "tainted" and their removal from the final tally is required. Upon removal of all of the absentee ballots the Plaintiff, again, is the clear winner.

6. Alternatively, even though the Plaintiff does not concede that he has not been declared the true winner by the jury and by the overwhelming evidence, the above proof at least requires a new special election. The number of illegal ballots that should not have been counted in the certified totals is well more than enough votes to obscure the will of the electorate and make their true will impossible to ascertain in the June 4 General Election for the Mayor of Hattiesburg. During the election, there were a number of other serious irregularities that support a “reasonable inference of fraud,” or, “at least a ‘hint of unseemliness’” that calls into question the validity of the certified results. The proof outlined above and at trial at least demonstrates the will of the voters cannot be ascertained because of the illegal votes that were improperly counted. The other substantial and material irregularities during the election caused the secrecy of the ballots and the integrity of the election process to be thwarted. Applying the two-part test used to determine whether a new election is required, (1) enough illegal votes were cast for the Defendant to change the result of the election, or (2) enough votes must be disqualified, particularly with regard to the absentee ballots, that the will of the voters is impossible to discern. Moreover, regardless of the percentage of illegal absentee, affidavit, curbside and emergency votes to the total of all votes cast in the general election, the proof at trial showed that this election was attended by fraud or substantial willful violations of election law, such that this Court must order a new special election.

7. There is no doubt that enough illegal votes were cast for Defendant DuPree to change the outcome of the election just among the 375 illegal absentee ballots alone. Defendant’s margin of victory rests in the absentee ballots; without counting them, Ware is the winner of the legal votes cast. Crediting Defendant’s position that, once the absentee ballots