

COMMONWEALTH OF KENTUCKY  
COURT OF APPEALS  
NO. 2015-CA-000661

ADAIR COUNTY BOARD OF ELECTIONS

APPELLANT

v.

**APPEAL FROM ADAIR CIRCUIT COURT  
ACTION NO. 14-CI-00211**

BEN ARNOLD, CURTIS HARDWICK,  
RUTH SMITH, WILLIAM BURTON  
and JUNE PARSONS

APPELLEES

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**APPELLEE’S PETITION FOR REHEARING**

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Come the Appellees, Ben Arnold, Ruth Smith, and William Burton, by counsel, and hereby submit their Petition for Rehearing of the Court of Appeals Opinion rendered on September 11, 2015.

**FACTS OF THE CASE**

The majority opinion devoted eight pages to the factual issues involved in this case. Because of same the Petitioners shall not devote its entire Petition to a recitation of all the factual issues discussed herein. It is agreed by all that the election process in this matter failed. In their opinion the majority stated, “To say this was a shoddy election that does not reflect the principles upon which our country was founded is a gross understatement.” [Opinion at Page 16.] The lower court found that an indeterminate amount of votes in the mayoral election were unaccounted for. It was undisputed that this number could have easily exceeded one hundred votes. The key words in the finding were “indeterminate” and “easily exceeded”. The majority

opinion does not address these findings. The majority opinion states that an election must be upheld if by any reasonable method it can be found that a successful candidate can be determined.

The majority opinion noted that Mr. Arnold testified that there were two hundred and eighty-five (285) unaccounted for votes. That number is well in excess of the number of one hundred and seventy-nine (179), the difference reported in this election. According to Mr. Arnold's testimony, there were two hundred and thirty-two *unaccounted signatures* initially in from the voter roster. [Ben Arnold, Trial Recording at 4:04:25.] Arnold testified that fifteen of these *unaccounted signatures* were absentee votes in his favor that went unreported by the Board of Elections. [*Id.* at 3:43:33.] Also within those two hundred and thirty-two (232) *unaccounted signatures* were seventy+ (70+) "machine errors" where Arnold's name had been written in, but the "write in" box had not been marked, causing the ballots to not be counted by the voting machines. [*Id.* at 6:30:18.] These "machine errors" are valid votes as defined in 31 KAR 6:030. Only fifty-three (53) of those two hundred and thirty-two (232) unaccounted signatures were true undervotes. [*Id.* at 3:38:38.] After this accounting, there still remains roughly ninety-four (94) *unaccounted for signatures*.

The majority, in reversing the lower court's decision, relied on a standard requiring Arnold to show that there was no way to reasonably determine a winner. Based on all the trial evidence and Arnold's testimony there is sufficient evidence to call the winner of the election into question. Arnold's trial testimony effectively gave him more than eighty-five (85) additional votes (15 absentee votes + 70+ "machine errors" on write in votes) and while a vote recount did

not take place, and those votes have not been officially credited to Arnold, same should be considered when deciding if a winner can reasonably be determined. Crediting Arnold with those votes would chisel the vote differential down to approximately ninety-four (94) votes.

Based on Arnold's testimony the two hundred and thirty-two (232) unaccounted for roster signatures can be characterized in one of two ways. Either there are two hundred and thirty-two (232) unaccounted for signatures, containing only fifty-three (53) true undervotes, leaving one hundred and seventy-nine (179) signatures unaccounted for or there are two hundred and thirty-two (232) unaccounted for signatures, containing fifty-three (53) true undervotes, fifteen (15) unrecorded absentee ballots, and seventy plus (70+) "machine errors" where a write in vote was not recorded due to a failure to shade the "write in" box, leaving ninety-four (94) roster signatures still unaccounted for. In either event, Arnold's testimony established there were one hundred and seventy-nine (179) unaccounted for signatures that were not undervotes.

This figure does not take into account the indeterminate numbers of voters who were unaccounted for due to errors such as failure to properly maintain the seals on the voting machine. Ben Loy, a member of the Adair County Board of Elections testified at trial that two voting machines were not sealed. [Ben Loy, Trial Recording at 6:19:43.] One of these unsealed machines came from the West Columbia precinct. The sheriff of this precinct, Cynthia Rowe, testified that she was certain her machine was locked and sealed when it left her poll. [Cynthia Rowe, Trial Recording at 12:23:43.] The court below found this to be a very important factor that the majority opinion simply did not consider to be worth mentioning. Also separate from the one hundred and seventy-nine (179) unaccounted for signatures are the fifty-three (53) other voters,

who due to being miscoded, were actually precluded from voting. [*Id.* at 4:06:00.] These fifty-three (53) disenfranchised voters are not to be confused with the fifty-two (52) other miscoded voters who did not attempt to vote. In addition, as the dissenting opinion acknowledges, there were an unknown number of people who illegally voted in the Mayor race after wrongfully receiving a city ballot due to the county clerk's improper instructions authorizing poll workers to provide a city ballot to anyone who claimed to pay city taxes or owned property in the city. [Opinion at Page 21.]

To summarize, the differential in this election between Hardwick and Arnold was one hundred and seventy-nine (179) votes. There were two hundred and thirty two (232) *unaccounted for signatures* on the voter roster, fifty-three (53) of which were under votes. This leaves one hundred and seventy-nine (179) *unaccounted for signatures*, eighty-five (85) of which could be considered votes in favor of Arnold. Outside of the *unaccounted for signatures*, there were fifty-three (53) voters who were disenfranchised do to miscoding and an indeterminable amount voters given the wrong ballot. Also two of the voting machines were missing their required seals. The seals are required as a means to prevent and audit tampering, and following the lower court's decision the appeal was filed by the Board of Elections, not Curtis Hardwick as one would expect.

### **ARGUMENT**

The Petitioner herein makes three arguments in this pleading. First, that the dissenting opinion was the correct opinion in this matter and the majority opinion erred when it supplanted its Findings of Fact for that of the Trial Court. Second, that in any event, the testimony before

the Court was that in excess of one hundred and seventy-nine (179) votes were in question in this matter. The Court of Appeals disregarded that and found that it could determine Mr. Hardwick was reasonably elected. Finally, the Court by its action herein grants Curtis Hardwick a reversal of a Judgment in an Appeal he did not even join. That is contrary to doctrine of law of the case.

**I. REAL DEFERENCE WAS NOT  
GIVEN TO THE TRIAL COURT'S FINDING**

The Court of Appeals Opinion *sup sponte* conducted its own analysis of the vote totals. However, this was not appropriate in review of this matter. The Court of Appeals is prohibited from substituting its judgment for that of the Trial Court sitting under the Findings of Fact. Keeney v. Keeney, Ky. App. 223 S.W.3d 843 (2007).

Doubt as to the correctness of a finding will not justify its reversal and an Appellate Court should not disturb trial court findings as purported by substantial evidence. VGR v. Commonwealth, Cabinet for Health and Family Services, Ky. 364 S.W.3d 106 (2012).

The party who appealed the finding that favors the party with the burden of proof must show that no substantial evidence purported the finding and that the finding was unreasonable under the evidence. Abel Verdon Construction v. Rivera, 348 S.W.3d 749 (2011).

Unfortunately, that is exactly what the majority opinion does. The Court does not contest the trial court's finding that the election was replete with substantial errors. It does not contest that there were an indeterminate number of voters unaccounted for.

The majority opinion does not even address the string of cases that support the proposition that an election may be voided if a true victor cannot be ascertained. Johnson v.

May, 305 Ky. 292, 294 203 S.W.2d 37, 38, 39 (1947). See also McClendon v. Hodges, 272 S.W. 3d 188 (Ky. 2008).

In Wood v. Kirby, Ky. 566 S.W.2d 751, 755 (Ky. 1978), the Supreme Court opined that one must look to the totality of the evidence to determine whether the victor can be adjudged to be fairly elected. That is what the lower court did. The majority opinion focused on counting votes but that was not the totality of the circumstances. It ignored all the irregularities that affected the ability to adjudge a candidate was fairly elected.

Instead, the Court of Appeals simply ignored the court's finding that not only a certain number of votes were clearly unaccounted for, but also that there were an indeterminate number of votes that were lost due to the errors of the election. Those findings both were clearly established by substantial evidence. The lower court's findings were taken from the testimony of the case and Judge Vance's review of the voter rosters. When taken together, that clearly means it cannot be stated that the court below was clearly erroneous in finding that the election in question was void.

The majority opinion in this matter took all the evidence in a light most favorable to the Appellant and did not consider the contrary evidence as the trial court did. As the dissent so aptly stated, "I believe it is appropriate to accept the trial court's finding as written, rather than assume it meant something different". [Opinion at Page 28.] The majority opinion by its own independent analysis of the evidence made its own Findings of Fact that the Plaintiff did not meet its burden. It supplanted the role of the trial court. In its opinion, the majority does not mention what findings the court below made that were clearly erroneous. It held essentially that

the Plaintiff in this matter did not meet his burden to show by clear and convincing evidence that there was no method by which it could be reasonably determined that the election was valid.

The first question herein is, “did the lower court decide the case under the right law?” The court below based its analysis under the cases cited by this Court.

The lower court found that it cannot be reasonably determined who was elected in this election. That is exactly the standard that the majority opinion stated that was applicable in this matter. [Opinion at Page 14.]

The second questions is, “was that finding clearly erroneous?” The majority opinion, instead of deciding if substantial evidence supported this finding, delved into the record and found evidence to disturb those Findings of Fact. The evidence was present to support the findings. The dissenting opinion correctly states, “ The trial court found the evidence was such that a high but unknown amount of votes could not be cast by city voters, were voted illegally by county voters, or were otherwise not cast properly due to numerous errors, omissions and acts of negligence.” [Opinion at Page 29.]

If the lower court erred in its standard of law, the appropriate remedy would be to reverse and remand this matter for Findings of Fact based upon the appropriate standard of law. If that is not the case, then the Court of Appeals must review the record in such light to find if substantial evidence supported its decision. That is what the dissenting opinion did. It clearly stated that substantial evidence was present to support the court’s factual holdings. This Court should reconsider its decision based upon that analysis.

## **II. THE COURT OF APPEALS IGNORED**

## **CONTRARY EVIDENCE IN THE RECORD**

Even if one accepts the process by which the majority opinion analyzed the case in question, it was not appropriate for it to simply discount all the evidence in favor of the Plaintiff herein and accept as truth the testimony and interpretation of counsel for the Appellant of same. As stated in detail in the Facts in this case, Mr. Arnold clearly presented testimony that more than 179 votes were in actual contest. [Opinion at Page 7] This does not even take into account the indeterminate number of voters who were disenfranchised through errors in the electoral process and violations of the law in handling of the ballot machine. KRS 117.275. However, the majority opinion in this matter did not find the evidence persuasive. While the evidence in a case may be conflicting, that fact alone is insufficient to warrant a reversal of the trial court's findings. Brooks v. Brooks Furniture Manufacturers, Inc., Ky. App. 325 S.W.3d 904 (2010). This Court weighed the evidence presented to the lower court and found the evidence wanting for the Plaintiff. That, however, is not how the decision of the trial court should be judged.

The decision of the trial court is granted deference. The presumption before the reviewing Court is that the decision be affirmed unless it is clearly appropriate to overturn said decision. That includes cases even where the Court may have disagreed with some of the reasoning of the court below.

Unfortunately in this matter, the majority opinion weighed the testimony of Dr. Arnold about the number of votes in question and discounted it. It accepted as true the testimony and assertions of counsel of the Board of Elections as certain facts. It discounted that there could be any problems with the other issues that could not be determined in a particular number of votes

in question.

By doing so, the majority opinion in fact presumed the court's decision below was incorrect. It, in fact, looked for methods in which to not affirm the court below. As stated previously, if the Court believed that the lower court applied the wrong standards, then the case should be reversed and remanded for specific findings on that. However, the majority opinion in accepting the interpretation of the Finding of Facts in a light favorable to the Appellant usurps its role and was not a valid action by a reviewing Court.

### **III. STANDING**

The opinions in this matter concur on one thing, that the Board of Elections did have standing to file an appeal pursuant to KRS 120.175. The issue that neither opinion addressed, however, was the pertinent one to this matter. The individual aggrieved by the decision of this matter was the successful candidate, Curtis Hardwick. He did not file an Appeal or a Cross Appeal. It is incumbent on the party affected to appeal from a final judgment if necessary y cross appeal. Fryar v. Stovall, Ky. 504 S.W.2d 702, 705 (1974). The question the Court did not address in this matter, and may have meant for the circuit court to address in further proceedings, was how can Mr. Hardwick continue to be Mayor when he did not appeal or in any way contest the judgment voiding his election. As argued by the Appellees in this matter, a party who does not appeal is bound by the judgment of the court, even if other parties did appeal. Hence, Curtis Hardwick is bound by the decision of the lower court holding that he is not the Mayor.

It is not clear in the Court's opinion whether or not this is an issue for the circuit court to review upon remand or if it does actually hold that Mr. Hardwick did not have to appeal to

remain as Mayor for the city of Columbia. Upon that basis alone, it would be good cause for this Court to reconsider its opinion to clarify that standing. The Board could successfully appeal and vindicate its right not to hold an election, but Mr. Hardwick for his failure to appeal of cross appeal in this matter and assert his rights may no longer be qualified to serve as Mayor. That is an issue that would be beneficial to address in a rehearing.

### **CONCLUSION**

The message sent by this Court's opinion would be that, notwithstanding a substantial amount of voting irregularities, the results of an election will stand so long as the challenger cannot find votes necessary to defeat the victor. Such a message could not disagree more with the voting standards of this country. For all the foregoing reasons, the Petitioner herein asks this Court to rehear this matter. As urged in the Brief, the Petitioner argues that this Court and its majority Opinion oversteps its bounds by overturning a verdict that was supported by substantial evidence in the record and conducting its own factual analysis separate and distinct from that of the Court.

Respectfully Submitted,

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ELMER J. GEORGE  
105 WEST MAIN STREET  
LEBANON, KY 40033  
ATTORNEY FOR APPELLEES,  
ARNOLD, SMITH, and BURTON