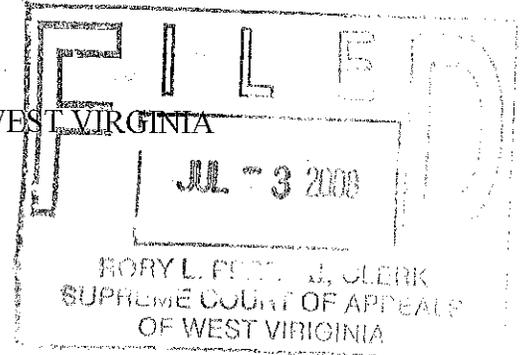


APPEAL NO. 34143
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



TERRY HILL,

Appellant,

On Appeal from the Circuit Court of Lincoln
County Civil Action No. 06-C-52

v.

GREGORY BRENT STOWERS,

Appellee.

APPELLANT'S BRIEF

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BRIEF OF APPELLANT

Appellant and plaintiff below, Terry Hill, appeals from the circuit court's **FINAL ORDER: Granting Rule 12(b)(6) Motion to Dismiss**". As explained below, the circuit court's dismissal of the complaint on the basis of Rule 12(b)(6) of the West Virginia Rules of Civil Procedure requires reversal under West Virginia law. Appellant requests that the case be remanded back to circuit court and that another circuit judge be appointed from outside of the Twenty-Fifth Circuit.

I. THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an Appeal from the "Final Order" entered October 1, 2007, by Judge Jay M. Hoke granting appellee's (defendant below) Gregory Stowers' Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure without giving appellant the opportunity to conduct discovery and present evidence in support of his claims. The circuit court ruled that appellant has no cause of action against appellee for his (appellant's) election defeat resulting from unlawful vote buying conducted by appellee Greg Stowers, the reported winner of the election for Circuit Clerk of Lincoln County in the 1996 general election.

This civil action arises from the appellee Stowers' admitted and unlawful vote buying activities in Lincoln County which he and other persons acting in concert with him conducted since about 1990. The purpose of the unlawful vote buying activities was to secure the election of candidates for public office, including appellee Stowers in the Office of Circuit Clerk. As a result of vote buying, appellee Stowers was the reported winner of the race for circuit clerk and he served in that office until after his indictment by a federal grand jury in May of 2005. The federal indictment and the Complaint in this action alleges that appellee unlawfully bought votes and

improperly influenced voters for the purpose of electing candidates on the "Stowers Slate".¹

Appellant Terry Hill was a candidate for the Office of the Circuit Clerk of Lincoln County in the 1996 general election in which both the appellant and appellee Stowers were write-in candidates on the Democratic ticket. Appellant Hill alleges that appellee's unlawful, improper and fraudulent vote buying activities affected the outcome of the 1996 general election for Circuit Clerk. Appellant's civil action seeks civil redress by way of damages as a result of the unlawful and fraudulent manipulation of the electoral process by appellee Stowers.

Further, appellant requested that Judge Hoke voluntarily recuse himself pursuant to Trial Court Rule 17.02 due to the nature of the proceeding below and his political and working connections to appellee, the same circuit clerk that in the past provided service to Judge Hoke's circuit court. Judge Hoke declined to voluntarily recuse himself.² Thereafter, on October 19, 2006, appellant filed a formal motion pursuant to Trial Court Rule 17.01 requesting the disqualification of Judge Hoke. By letter dated April 5, 2007, Judge Hoke denied the motion for disqualification which was affirmed by the Chief Justice of this Court by Administrative Order entered April 17, 2007.

Appellee filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the West

¹ The full scope of the allegations are set forth in the Complaint and the Federal Third Superceding Indictment against Mr. Stowers which are part of the record herein.

² Judge Hoke treated appellant's request for a voluntary recusal under Trial Court Rule 17.02 as a motion for disqualification under Rule 17.01 which he transmitted to the Chief Justice. The circuit court's conversion of appellant's request for a voluntary recusal to a formal motion was done so Judge Hoke could rule without delay on appellee's motion to dismiss. (See circuit court's October 10, 2006 correspondence). By Administrative Order entered October 12, 2006, the Chief Justice affirmed Judge Hoke's refusal to recuse himself.

Virginia Rules of Civil Procedure, contending that the complaint does not state a claim upon which relief can be granted. Judge Hoke granted appellee's motion to dismiss and dismissed the civil action in its entirety. No discovery took place in the case. Appellee never provided any responses to appellant's interrogatories and request for production of documents served early in the case, resulting in motions to compel.

II. FACTUAL BACKGROUND

This civil action arises from the unlawful vote buying activities in Lincoln County conducted by appellee Stowers and others acting in concert with him since about 1990. The purpose of appellee's unlawful vote buying activities was to secure the election of candidates for public office in Lincoln County including Mr. Stowers as circuit clerk. A federal investigation resulted in the conviction of Mr. Stowers and various others for vote-buying activities in Lincoln County. This case presents an extraordinary set of circumstances involving vote buying actions by appellee Stowers resulting in the interference with the democratic electoral process in Lincoln County.

The Complaint in this action alleges that Mr. Stowers, together with others, unlawfully paid voters with cash and other items of value to improperly influence their votes for the purpose of electing the candidates on the "Stowers Slate." Appellant Terry Hill was a candidate for the Office of the Circuit Clerk of Lincoln County in the 1996 general election in which he and Mr. Stowers were write-in candidates on the Democratic ticket. Several months prior to the election, Mr. Stowers had been appointed as Circuit Clerk by the Circuit Court to fill, until the general election, the office which has been vacated by the incumbent office holder earlier in the year.

Appellee Stowers was the purported winner of the general election in 1996, with a margin of approximately 600 votes. Thereafter, as a result of unlawful vote buying activities, Mr. Stowers

held the Office of Clerk of the Circuit Court of Lincoln County until his resignation from office due to the federal prosecution. While Mr. Stowers held the position of Clerk of the Circuit Court of Lincoln County, the elected office of circuit judge was held by Judge Jay Hoke.

Appellant alleges, and appellee Stowers has admitted in the federal prosecution against him, that he was the organizer, leader, manager and supervisor of the criminal activity to buy votes in the Lincoln County elections for at least a fifteen year period. Appellant alleges that appellee Stowers knowingly conspired and undertook actions of knowingly and willfully paying voters in Lincoln County for the object of securing the election of candidates for public office, including himself with respect to the Office of the Clerk of the Circuit Court of Lincoln County.

Appellant further alleges that Mr. Stowers obtained more votes than appellant in the 1996 general election for circuit clerk as a proximate result of the unlawful vote buying activities which appellee organized, directed and undertook. Appellant asserts claims for damages against appellee Stowers arising from the fraudulent vote buying activities. Appellant's claims arise under state constitutional law, statutory law, public policy and legal precedent.

III. ASSIGNMENT OF ERROR

The circuit court erred in granting appellee's motion to dismiss under Rule 12(b)(6). The circuit judge also erred by denying appellant's motion to disqualify the circuit judge because his impartiality might reasonably be questioned pursuant to Trial Court Rule 17.01.

IV. POINTS AND AUTHORITIES AND DISCUSSION OF LAW

A. JURISDICTION

This Court has jurisdiction over this appeal because the circuit court's Order dismissing appellant's complaint is a final order ending the entire litigation. This Court also has jurisdiction and

authority over the disqualification of a circuit judge and appointment of another judge to preside in further proceedings herein.

B. STANDARD OF REVIEW

The Supreme Court of Appeals reviews a circuit court's dismissal of a complaint under Rule 12(b)(6) *de novo*. State ex. rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995). Likewise, the standard of review of the disqualification of a circuit judge is *de novo*.

C. THE CIRCUIT COURT ERRED IN GRANTING APPELLANT'S RULE 12(b)(6) MOTION TO DISMISS

1. Legal Standards Applicable to a Motion to Dismiss.

It is well established that for purposes of a motion to dismiss, the Complaint must be construed in the light most favorable to the plaintiff and the allegations in the Complaint must be taken as true. See e.g. Strickland v. Kittle, 168 W.Va. 147, 287 S.E.2d 148 (1981); S.P.R. v. City of Fairmont, 167 W.Va. 880, 280 S.E.2d 712 (1981); John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W.Va. 603, 245 S.E.2d 157 (1978). In particular, a motion to dismiss for failure to state a claim is viewed with disfavor. Chapman v. Kane Transfer Co., 160 W.Va. 530, 236 S.E.2d 207 (1977); Mandolidis v. Elkins Indus., Inc., 161 W.Va. 695, 246 S.E.2d 907 (1978).

The standard which a plaintiff must meet to overcome a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) is a liberal standard; and the burden in resisting a motion to dismiss is a relatively light one. John W. Lodge Distrib. Co. v. Texaco, Inc., *supra*. Mandolidis v. Elkins Indus. Inc., *supra*. The trial court should not dismiss a complaint pursuant to Rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts

in support of his claim which would entitle him to relief. Doe v. Wal-Mart Stores, Inc., 198 W.Va. 100, 479 S.E.2d 610 (1996); Garrison v. Herbert Jay Thomas Mem. Hosp. Ass'n., 190 W.Va. 214, 438 S.E.2d 6 (1993).

2. Appellant's Claims Arising From Insidious and Surreptitious Election Fraud are Founded in West Virginia Law.

As revealed by the federal indictment and his conviction, appellee Stowers conducted unlawful and fraudulent vote buying activities in Lincoln County for many years, including his election in 1996 for circuit clerk. The factual background must be taken as true in the consideration of appellant's motion to dismiss the complaint.

Appellant Terry Hill initiated this civil action upon the discovery of the salient facts revealing Mr. Stowers' election misconduct. The Complaint states various claims including a constitutional claim (Count I), a statutory claim (Count II), a claim that respondent's victory for the office of circuit clerk was void and a claim for unjust enrichment (Count III), and a claim for violation of public policy in West Virginia (Count IV).

(a). Terry Hill Had a Fundamental Constitutional Right to Run For Office In A Lawful Election.

This Court has held that the West Virginia Constitution confers a **fundamental right to run for public office**. State ex. rel. Billings v. The City of Point Pleasant, 194 W.Va. 301, 460 S.E.2d 436 (1995). In the Billings decision, the Court explained that Article IV of the Constitution guarantees a right of political participation through extension of the franchise to all adults through Section 1 and Section 4. Id. at 305. In addition, "a citizen's decision to run for office necessarily involves him or her in expression that lies at the very core of free speech protected by Section 7 of

Article III” of the Constitution. Id. (Citing authorities).

This Court has consistently held that the right to become a candidate for office is a fundamental right. Id. at 306, citing Syl. Pt. 1, State ex. rel. Piccirillo v. City of Follansbee, 160 W.Va. 329, 233 S.E2d 419 (1977). As a corollary, the Court explained that a candidate’s right is necessarily tied to the voter’s rights as “the right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on the right strike at the heart of representative democracy.” Id. at 305, citing Reynolds v. Sims, 377 U.S. 533, 555 (1964). This Court in Billings further explained that:

A citizen’s right to vote is not worth much if the law denies his or her candidate of choice the opportunity to run. “The rights of voters and the rights of candidates do not lend themselves to neat separation; laws that effect candidates always have at least some theoretical, correlating effect on voters.” (citations omitted).

“A fundamental principle of our representative democracy is, in [Alexander] Hamilton’s words, ‘that the people should choose whom they please to govern them’ . . . As [James] Madison pointed out at the convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself.”

Id. at 305, quoting from Bullock v. Carter, 405 U.S. 134 (1972) and Powell v. McCormack, 395 U.S. 484 (1969).

The Court in Billings further observed that the rights of a candidate for office necessarily implicates the freedom of association protected by Section 16 of Article III of the state Constitution. Limiting fair access to the ballot “necessarily constricts the opportunities of political associations not only to prevail in the electoral process, but also to participate meaningfully in it.” Id. at 305.

Thus, there can be no doubt there is a fundamental constitutional right in the State of West Virginia to run for political office in a free and unrestricted electoral process. Here, appellee Gregory Stowers destroyed the free, lawful and open electoral process in Lincoln County for many years; and he has consequently undermined democracy and directly interfered and infringed upon the right of appellant to run for the office of circuit clerk in an unfettered election. Appellee's actions give rise to a state constitutional claim which the courts must recognize and protect.

(b). West Virginia Statutory Law Gives Rise To A Valid Cause of Action for Unlawful Vote Buying.

West Virginia statutory law specifically forbids certain activity in connection with voting in public elections. W.Va. Code §3-8-11, entitled "Specific acts forbidden", explicitly forbids any person from the following:

directly or indirectly, by himself, or by any other person on his behalf. . . by any. . . means attempt to intimidate or exert any undue influence, in order to induce [persons] to vote or refrain from voting. . . at any election or who shall by any fraudulent device or contrivance, impede or prevent the free exercise of the suffrage by any elector, or. . . compel, induce or prevail upon any elector either to vote or refrain from voting for or against any particular candidate or measure.

W.Va. Code §3-8-11(a).

In addition, W.Va. Code §3-9-12 ("Improper influence and bribery by candidates; penalties.") forbids any candidate for public office to loan or give, directly or indirectly, or offer or promise to loan or give "any money, or other thing of value to any elector, for the purpose of influencing or retaining the vote such elector"

Another statutory enactment, W.Va. Code §3-9-13 ("Buying or selling vote unlawful; penalties.") provides:

It is unlawful for any person to offer or to pay money or anything of value to any person as consideration for the vote of the offeree or payee, as the case may be, to be cast for or against any candidate or issue in any election held in the state. . . .

W.Va. Code §3-9-13(a).

Plainly, West Virginia law forbids any improper influence upon elections and, in particular, proscribes vote buying. Appellee Gregory Stowers admittedly violated West Virginia statutory law by vote buying and other improper activities in Lincoln County and specifically, in the 1996 general election for circuit clerk.

Pursuant to W.Va. Code §55-7-9:

Any person injured by the violation of any statute **may recover from the offender** such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages.

(emphasis added). The statutory provisions prohibiting vote buying discussed above, together with W.Va. Code §55-7-9, clearly give rise to a cause of action available to appellant for damages occasioned by appellee's misconduct of vote buying.

In Pritt v. The Republican National Committee, 210 W.Va. 446, 557 S.E.2d 853 (2001), Charlotte Pritt, the unsuccessful candidate for governor, brought a civil action alleging that

defendants had defamed her and violated W.Va. Code §3-8-11.³ In Pritt, the trial court granted summary judgment and dismissed Pritt's claims. However, this Court, finding that there were genuine issues of material fact, reversed the trial court's summary judgment order. This Court

³W.Va. Code §3-8-11, also relied upon by appellant, is referenced and quoted (in part) in the text supra. Charlotte Pritt asserted a claim pursuant to subsection (c) of section 11 which makes it unlawful to knowingly publish any false statement in regard to any candidate with the intent to effect any voting at an election. Pritt v. The Republican National Committee, 210 W.Va. at 450, and note 5.

held that Pritt's claims were appropriate for the jury to decide.

In Pritt, this Court did not disapprove or rule invalid a cause of action arising under W.Va. Code §3-8-11 forbidding certain election misconduct. Like plaintiff in Pritt, appellant Terry Hill is entitled to pursue claims against appellee for violation of law.

(c). Election Contest Procedures Before The County Commission Do Not Bar Appellant's Claims Arising From Appellee's Unlawful Vote Buying.

In granting the motion to dismiss, the circuit court agreed with appellee that Article 7 (Contested Elections) of Chapter 3 (Elections) of the West Virginia Code was the sole and exclusive means for appellant to seek redress regardless of the vote-buying crimes committed by appellee Stowers to unlawfully fix the outcome of the election for circuit clerk. (See e.g. Final Order, ¶¶ 8-10, 13). The circuit court rejected appellant's claim for compensatory damages (such as for lost income) arising from the unlawful vote buying affecting the outcome of the election for circuit clerk.

The circuit court's Final Order cites W.Va. Code §3-7-6 and 7. Section 6 provides that the county commission shall be the judge of contested elections, qualifications and returns of their own members and of all county and district officers. This section further provides that a person intending to contest an election shall give the contestee notice in writing of such intention within ten days after the result of the election with a list of the votes he will dispute, with the objections to each and with each objection to the election. Section 7 provides that the county commission shall hear and decide election contests initiated pursuant to Section 6.

However, contrary to the circuit court's ruling, no law mandates that the remedies in the above referenced statutes for contested elections are the sole and exclusive means for appellant, the victim of unlawful vote buying, to seek damages for the insidious and unlawful vote buying activities

as occurred here. The existence of a statutory procedure at the county commission level for a contested election does not eliminate other means of relief for appellant respecting appellee's wrongful misconduct in vote buying and election fraud. There is no valid legal reason to hold that a contested election procedure before the county commission precludes appellant Terry Hill's claims in this case arising directly from appellee's (later discovered) election fraud and vote buying.

The existence of procedures before the county commission does not bar claims in circuit court involving the same subject matter. For instance, in Barone v. Barone, 170 W.Va. 407, 294 S.E.2d 260 (1982), this Court held that a party may assert a claim in circuit court for a tortious injury involving a will outside of the probate procedures before the county commission, and that the probate contest statute of limitations did not apply. Id., 170 W.Va. At 409. In Barone, this Court also recognized the claim of tortious interference with a testamentary bequest, a claim not within the probate jurisdiction of the county commission.

Under the circuit court's ruling, appellant had a mere 10 days to file an election contest with the County Commission detailing the votes in dispute notwithstanding that appellee's scheme to buy votes was not known until years later. The circuit court's Order, if allowed to stand, effectively and completely denies relief to Mr. Hill for the vote buying conducted by Mr. Stowers. Under basic legal principles and standards of justice, where there is harm from such misconduct, the law should and must provide an adequate remedy to the aggrieved party.

(d). Appellant Has A Cause Of Action Based On Public Policy.

It is well established law in West Virginia that a party may maintain a cause of action based upon the violation of substantial public policy. See Harless v. First National Bank in Fairmont, 162

W.Va. 116, 246 S.E.2d 270 (1978). Generally, a determination of the existence of public policy is a question of law. Syl. pt. 1, Cordle v. General Hugh Macer Corp., 174 W.Va. 321, 325 S.E.2d 111 (1984). A cause of action based upon the violation of public policy is commonly seen in the area of employment law.

As the Court observed in Page v. Columbia Natural Resources, Inc., 198 W.Va. 378, 480 S.E.2d 817 (1996), most of the retaliatory discharge cases involve violations of statutes that articulate a substantial public policy. Id. at 385, citing Birthisel v. Tri-Cities Health Services Corp., 188 W.Va. 371, 376, 424 S.E.2d 606, 611 (1992). Id. This Court in Page stated that:

The Birthisel Court explained that to identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations and judicial opinions. . . Inherent in the term “substantial public policy” is a concept that the policy will provide specific guidance to a reasonable person.

Id. at 386.

In particular, this Court has found sufficient statutory support for public policy arising from criminal law and hence, an actionable claim for the violation thereof. Id. at 386. In Page, the criminal law giving rise to substantial public policy was W.Va. Code §61-5-1 and 61-5-2 prohibiting perjury and false swearing, and 61-5-27 prohibiting intimidating or impeding any witness or attempting to obstruct or impede the administration of justice in any court. Id.

As shown by the decisions in Page and Pritt , criminal law can be a basis for a civil claim, and serve as the underpinning for a claim based upon the violation of substantial public policy. Here, criminal and constitutional law provide the predicate for substantial public policy prohibiting vote buying and other election misconduct. The violation of this substantial public policy gives rise

to a valid cause of action under West Virginia law.

In sum, public policy in West Virginia is reflected and established by state constitutional provisions, statutory law, state regulations and judicial opinions. In view of the constitutional right to run for office, statutory law pertaining to elections fraud and vote buying, and judicial opinions cited herein, public policy in West Virginia protects and safeguards free and fair elections without undue influence by unlawful vote buying. When the outcome of an election is affected by vote buying, the aggrieved candidate has a cause of action for damages against the guilty party. The public policy cannot be any more prominent. Appellee Stowers certainly cannot contend that he reasonably believed state law and public policy allowed vote buying in order to influence the outcomes of elections or that he had no guidance under West Virginia law.

Under substantial public policy, appellant Terry Hill has a valid cause of action against appellee Gregory Stowers, the person taking the elected office by virtue of vote buying.

(e). Appellee's Election to the Office of Circuit Clerk was Void.

As discussed above, vote buying and bribery by a candidate or others is unlawful in West Virginia. As stated in Michie's Jurisprudence, "it is well-established principle of law that bribery in an election committed by a person claiming to be elected, or by an agent with or without his knowledge or direction, renders his election void. 6B Michie's Jurisprudence, "Elections", §109.

In McWhorter v. Dorr, 57 W.Va. 608, 50 S.E. 838 (1905), this Court held that "bribery at an election does disqualify the guilty party to hold office." Id. at 618. The Court further held that there must be a conviction before disqualification arises. Id. at 620. The dissenting opinion recognized the well established principle of law, both in England and in the United States, that bribery in an election committed by a person claiming to be elected renders his election void, whether convicted of bribery or not. The dissent made the following pertinent remarks:

It is the policy of this state, that all elections should be fair. The use of money by either candidate for an office prevents a fair election. The use of money by a candidate against his opponent is a fraud upon him. Fraud vitiates all things, wills, deeds, judgments, decrees and elections. No one should be permitted to hold office in this State who has obtained the same by fraud. So far as bribery is concerned, as shown above, a candidate who uses bribery in his election is disqualified from holding office.

Id. at 624 (emphasis added).

In the instant case, appellee stands convicted of vote buying in Lincoln County, specifically with regards to the 2004 primary election. He admitted to being the leader and organizer in this criminal activity, which the federal indictment alleges occurred since 1990.

Accordingly, appellee Gregory Stowers took the office of circuit clerk by way of a void election and he was legally disqualified from holding that office as a result of the 1996 election. The election being void as a matter of law and Mr. Stowers being disqualified from lawfully holding the office of circuit clerk, Mr. Stowers improperly and unjustly received pecuniary gain associated with that office for many years. Mr. Hill, the opposing candidate, was directly harmed by the unlawful vote buying and bribery of votes. Appellee Stowers' unjust pecuniary gain and enrichment was to the direct detriment of Mr. Hill. Mr. Hill, therefore, has a cause of action against appellee for unjust enrichment .

3. The Federal Appellate Court Decision in *Hutchinson v. Miller* is not a basis for Dismissal of the Complaint.

Appellee's motion to dismiss and the circuit court's dismissal order relies, in part, upon a decision of the Fourth Circuit Court of Appeals in Hutchinson v. Miller 797 F.2d 1292 (4th Cir.

1986), cert. denied, 479 U.S. 1088. Hutchinson only held that “federal courts are not available for awards of damages to defeated candidates.” Id. at 1280 (emphasis added). In Hutchinson, the plaintiffs were unsuccessful candidates for public office who sought to recover damages under 42 U.S.C. §1983 for civil rights deprivations and 18 U.S.C. §1964 - RICO (Racketeer Influenced and Corrupt Organizations Act). The Hutchinson plaintiffs invoked federal question jurisdiction under §1983⁴ and RICO to seek damages arising from the state electoral process. After trial, plaintiffs appealed the decision of the district court which had directed verdicts and also rendered summary judgment.

In its decision, the Fourth Circuit observed that the federal “constitution does not contemplate that the federal judiciary routinely will pass judgment on particular elections for federal, state or local office. The conduct of elections is instead a matter committed primarily to the control of states. . . .” Id. at 1280. While noting that federal courts have actively guarded the electoral process from class-based discrimination and restrictive state election laws, the court found that the suit seeking damages for election irregularities should be deferred to the states. Id.⁵

The Fourth Circuit in Hutchinson decided not “to intrude on the role of the states” or intervene into a state matter. Rather, the court held that “federal courts do not sit to award post-

⁴42 U.S.C. §1983 provides for a cause of action against state actors acting under the color of law for the deprivation of rights secured by the federal constitution and laws without due process of law.

⁵The court in Hutchinson explained that federal courts have declined to endorse actions under §1983 with respect to garden variety election irregularities. Id. at 1283. Federal courts “have declined to interfere because of the constitutional recognition that “states are primarily responsible for their own elections” Id. But cf Bush v. Gore, 531 U.S. 98 (2000) where the U.S. Supreme Court held that the Florida Supreme Court violated the Equal Protections Clause of the U.S. Constitution by its decision over election issues in Florida.

election damages to defeated candidates.” Id. at 1287. The holding in Hutchinson stands for the proposition that there is no federal court jurisdiction to decide claims arising from a state election in the absence of class-wide racial discrimination, or discriminatory and unduly restrictive state election laws (e.g., class-based restrictions on the right to vote, malapportionment or claims under the voting rights act, 42 U.S.C. §1973).⁶

In short, Hutchinson does not justify the dismissal of appellant’s state-law based claims.

D. THE CIRCUIT COURT ERRED IN DENYING APPELLANT’S MOTION FOR DISQUALIFICATION.

The Office of Circuit Judge, an elective office, is inherently involved with the electoral and political process. In Lincoln County, the Stower’s faction has been a recognized political identity in Lincoln County for many years. Appellee and his father and brother, have been involved in the political process in Lincoln County and have served on various political committees having considerable political clout, including the determination of which candidates to place on the “Stowers Slate.”

Upon information and belief, Circuit Judge Jay Hoke was placed on the “Stowers Slate” as the candidate for the elected position of circuit judge. Appellant does not mean to infer that Judge Hoke was involved with any unlawful or improper vote buying activities undertaken by Mr. Stowers. Nonetheless, it is significant that Mr. Stowers, and other of his conspirators, provided cash and slips bearing a list of the names of candidates Mr. Stowers sought to have elected (i.e. slates) to precinct captains and others for unlawful vote buying purposes. (See Third Superceding Indictment, ¶¶ 5-8).

⁶Having determined that disputes arising from elections are matters for state courts, any further commentary from the Fourth Circuit is obiter dictum.

Moreover, once in office, Mr. Stowers held the position of Clerk of the Circuit Court of Lincoln County. The position of Judge of the Circuit Court, in turn, was held by the Circuit Judge Hoke. Holding their respective offices as Circuit Clerk and Circuit Judge, it can be reasonably inferred that Judge Hoke and appellee Stowers are not only personal acquaintances and had regular contact, but also worked together vis a vis their respective and inter-related public offices at the Lincoln County Courthouse. Also, as an elected officeholder, it can be reasonably assumed that Judge Hoke had some degree of contact and involvement with Mr. Stowers with regards to the political and electoral system in Lincoln County.

Appellant's motion to disqualify Judge Hoke was based upon the "appearance of impropriety" arising from the same circuit judge presiding over the case involving the same tainted electoral process who held office simultaneously with circuit clerk Stowers. It should also be noted that Mr. Stowers' vote buying occurred while he was already serving as Circuit Clerk, having been appointed shortly prior to the election at issue to fill the vacancy in that office.

Judge Hoke should not have presided in this case. His political association with Mr. Stowers and his relationship with Stowers as circuit clerk for Judge Hoke's circuit court required disqualification because Judge Hoke's "impartiality might reasonably be questioned." Trial Court Rule 17.01 provides in pertinent part:

a judge **shall be disqualified** from a proceeding only where the judge's impartiality might reasonably be questioned, in accordance with the principles established in Canon 3(E)(1) of the Code of Judicial Conduct.

(Emphasis added).

Canon 3(E)(1) of the Code of Judicial Conduct provides that "[a] judge **shall** disqualify

himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned" (Emphasis added). Canon (E) further provides a non-exclusive list of circumstances where a judge's impartiality might reasonable be questioned including that the judge has a personal bias or prejudice concerning a party, personal knowledge of disputed evidentiary facts concerning the proceeding or "has any other more than de minimis interest that could be substantially affected by the proceeding. Canon 3(E)(1)(a)-(d). However, as the commentary to Canon 3(E) states, "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply."

The commentary to Canon 3(E) further provides that "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification."⁷

Due to the nature and circumstances of this case, a reasonable person could fairly question the impartiality of Judge Hoke to preside over this case against the former Lincoln County Circuit Clerk and political boss, Gregory Stowers. Unfortunately, due to this question, Judge Hoke's dismissal of the Complaint appears as a predisposition to favor Mr. Stowers in this proceeding.

Under Rule 17.01, disqualification is appropriate and necessary.

V. Prayer For Relief

In reviewing the circuit court's dismissal under Rule 12(b)(6), this Court must accept as true the allegations in the Complaint and provide appellant with every benefit of the doubt. Appellant's

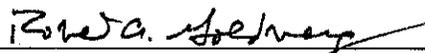
⁷In correspondence dated April 5, 2008, Judge Hoke focused on some background matters regarding appellant Terry Hill, but said little about his background with Gregory Stowers.

burden to overcome the motion to dismiss under Rule 12(b)(6) is a light one.

The above discussion shows the legal foundation for appellant's claims. The circuit court's dismissal under Rule 12(b)(6) was erroneous.

The circuit court's Order dismissing the action should be reversed and the case remanded for discovery and trial before a different circuit judge whose impartiality cannot be reasonably questioned.

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