

(3) of 6
12/17/7

12/17/7

VIRGINIA:

IN THE CIRCUIT COURT OF NELSON COUNTY

LARRY DALE SAUNDERS,

Petitioner

12/17/7

v.

Case Number: CL07000354

JOE DAN JOHNSON, et. al.,

Defendants.

PETITIONER'S ANSWER AND MOTION TO AMEND COMPLAINT

COMES NOW your Petitioner Larry Dale Saunders, through counsel, and hereby files his Answer and Motion to Amend the Complaint filed by your Petitioner on December 6, 2007. Your Petitioner respectfully requests that this Court deny the Motion requested by Defendant and grant your Petitioner leave to amend the Complaint, and support thereof states as follows:

ANSWER

1. Your Petitioner admits the allegations of paragraph number 15 insofar as the paragraph alleges that there was a determination by this Court, on December 11, 2007, that the printout receipts examined determined that Defendant Johnson had three more votes than your Petitioner. Your Petitioner asserts that had the ballots been hand counted, the defendant would not have had three more votes than your Petitioner given the evidence presented in the Amended Complaint attached hereto.

2. Your Petitioner admits the allegations of paragraph 16 of the Motion.

3. Your Petitioner denies the allegations of paragraph 17 of the Motion and asserts that that Mrs. Carwile's provisional vote is not the only basis for the election contest. Given the facts presented at this time, there exists an error in the printout receipt of the optical scan tabulator in that it improperly lists seventeen ballots as undervotes. However, only twelve undervotes are found within all of the optical scan ballots. Thus, there are five legal votes that are improperly listed as undervotes. Attached herewith, your Petitioner is requesting leave to amend his Complaint to include such additional objections to the conduct and the result of the election.

4. Your Petitioner neither admits nor denies the allegations of paragraph 18 of the Motion, but for purposes of the Answer denies and demands strict proof thereof.

5. Your Petitioner admits the allegations of paragraph 19 insofar as the Complaint filed on December 6, 2007 only contains one objection to the conduct or the result of the election. As previously mentioned, your Petitioner is seeking leave to amend said Complaint to incorporate additional objections to the conduct and result of the election.

6. Your Petitioner denies the allegations of paragraph 20 of the Motion.

7. Your Petitioner neither admits nor denies the allegations of paragraph 21 of the Motion, but for purposes of the Answer denies and demands strict proof thereof.

8. Your Petitioner denies the allegations of Paragraph 22 of the Motion. Mrs. Carwile's vote was improperly excluded from being counted for the reason that Mrs. Carwile properly registered pursuant to § 24.2-420.1(A). *Non-Soft*

9. Your Petitioner denies the allegations of paragraph 23 of the Motion.

9. Your Petitioner denies the allegations of paragraph 24, Mrs. Carwile satisfies the registration requirements as provided by § 24.2-420.1(A), of the Virginia Code, and therefore, her vote is improperly denied. In support thereof, your Petitioner gives the following:

(a) Mrs. Carwile is a spouse of a member of the uniformed service of the United States, as defined in 42 U.S.C. Sec.1973ff-6(7), who is on active duty.

(b) The time Mrs. Carwile is absent from Nelson County meets the criteria of being "normally absent," as required in § 24.2-420.1(A). In support thereof, your Petitioner offers an examples of Mrs. Carwile's "absence" from Nelson County:

(i) Mrs. Carwile left for Germany the beginning of December to be with her spouse who is honorably serving our Country in this time of war.

(ii) Mrs. Carwile shall remain overseas with her spouse until the middle of January.

(iii) Additionally, throughout Mrs. Carwile's residence in Nelson County, she has and will continue to travel to Georgia to be with her family, while her husband is deployed overseas.

(c) Your Petitioner denies the allegation that Mrs. Carwile's attempt to register in October, 2007 bars her from registering on Election Day pursuant to § 24.2-420.1(A), of the Virginia Code. Said statute specifically states that any spouse, of a military member on active duty, may register in person on Election Day provided said spouse is normally absent from the county in which the spouse resides. Nowhere in § 24.2-420.1(A), does it mention that attempting to register shall bar a qualified spouse from registering in person Election Day.

10. Your Petitioner denies the allegations of paragraph 25 of the Motion, and incorporates the Amended Complaint, which further establishes valid objections for an election contest. Therefore, the Complaint should not be dismissed; rather, it should be amended to incorporate such additional objections.

11. Your Petitioner denies the allegations of paragraph 26 of the Motion and requests that this Court deny Defendant the relief requested in the Motion to Dismiss.

MOTION FOR LEAVE TO AMEND COMPLAINT

12. Pursuant to Rule 1:8 of the Supreme Court of this Commonwealth, your Petitioner seeks leave to amend his Complaint filed December 6, 2007. In support therefore, your Petitioner asserts the following facts:

(a) Your Petitioner incorporates by reference herein the preceding paragraphs of this Answer and Motion to Amend Complaint.

(b) The election printout results from the scan tabulators indicates that there are a total of seventeen "undervotes" cast in the said supervisor's election. Given the facts presented to your Petitioner at this time, the seventeen undervotes reported by the optical scan tabulator does not accurately reflect the actual amount of undervotes found among all optical scan ballots cast in the Shipman and Gladstone precincts. In fact, there were only twelve undervotes observed when reviewing all optical scan ballots cast.

(i) Due to the fact that there are only twelve undervotes found, this means that five legal votes are improperly identified by the optical scan tabulator as undervotes. Despite the fact that said ballots are legal votes with a clear mark indicating which candidate the vote is cast for.

(ii) Located within the optical scan ballots, a ballot contains a check mark immediately after the name Larry Dale Saunders. Although the mark made on the ballot clearly identifies the candidate the ballot was cast in favor of, the mark could never have been identified by the optical scan tabulator. This is due to the fact that the mark is not in the oval provided in the ballot. Thus, such ballot would be one of the five ballots that are improperly identified as an undervote.

(iii) Pursuant to § 24.2-644(A) of the Code of Virginia, "any ballot marked so that the intent of the voter is clear shall be counted" (emphasis added). Clearly, if a ballot that is properly marked shall be counted, it is implied that such ballot must be counted for the candidate the ballot is marked in support of, which is not the case in this election.

(c) According to the facts presented to your Petitioner at this time, there also exists an "overvote" within the optical scan ballots, which the optical scan tabulator did not properly identify as such. Such ballot had an oval filled in for the Defendant Johnson. Additionally, such ballot has a clear mark located in an oval for a write in candidate, with a write in candidate's name filled out in the space provided. However, the mark on the oval for the write in candidate was not large enough for the optical scan tabulator to identify. Therefore, instead of rejecting the ballot as an overvote, which the tabulator would normally do, the tabulator counted the ballot due to the fact that the mark on the write in oval was too slight to be noticed by the tabulator.

(d) Mrs. Carwile's provisional ballot would, if counted, have been cast for your Petitioner; the ballot with a mark on the right side of Larry Dale Saunders name, would, if counted, have been cast for your Petitioner. The overvote, if removed from the

ballots, as required, would reduce a vote cast for the Defendant; and therefore, resulting in a tie vote between your Petitioner and the Defendant, each receiving 323 votes. Furthermore, this does not take into account the remaining four legal votes that are improperly identified as undervotes.

(e) Given the above, your Petitioner has presented a valid basis for an election contest, and therefore seeks leave to amend his Complaint to incorporate the aforementioned objections to the conduct and results of the election.

(f) Due to the fact that the Defendant is scheduled to be sworn in later this month, your Petitioner respectfully requests that this Court not allow the Defendant to be sworn in while the issue of the validity of the election as raised herein is pending.

WHEREFORE, your Petitioner respectfully requests that this Court grant leave to amend his Complaint and grant all such further relief as may be required.

Respectfully submitted

Larry Dale Saunders

By: *Daniel L. Rutherford*
Of Counsel

Daniel L. Rutherford, VSB # 75371
571 Front Street
P.O. Box 5
Lovingston, VA, 22949
Phone (434) 987-4820
Fax (800) 947-0389

CERTIFICATE OF MAILING

I hereby certify that a copy of this Answer and Motion to Amend was mailed, first-class mail, postage prepared, to Mr. John P. Fishwick, Jr., 101 S. Jefferson St., Suite 400, Roanoke, VA 24011, counsel for the Defendant; David McBee, Nelson County Electoral Board Chairperson, Post Office Box 292, Lovingston, VA 22949; John W. Ponton, 64 Dowdy Drive, Shipman, VA 22971; and Mary Kathryn D. Allen, 1115 Gladstone Road, Gladstone, VA 24553, on this 17 Day of December, 2007.


Daniel L. Rutherford