

VIRGINIA:

IN THE CIRCUIT COURT OF NELSON COUNTY  
Civil Division

LARRY DALE SAUNDERS,

Plaintiff,

Case No.: CL07000354

v.

JOE DAN JOHNSON, *et al.*,

Defendants.

CLERK NELSON COUNTY  
CIRCUIT COURT

JAN 28 2008

**FILED**

Motion to Quash Subpoenas

The Honorable Judy S. Smythers ("Ms. Smythers"), Clerk of the Circuit Court of Nelson County, moves the Court to quash the subpoenas served upon her in this case. In support of her motion, she says the following:

1. Ms. Smythers is the Clerk of the Circuit Court of Nelson County.
2. This case involves a contest of the 2007 election to a seat on the Nelson County Board of Supervisors.
3. The defendant in this case has caused Ms. Smythers to be served with subpoenas to attend a deposition on January 29, 2007, and to attend the trial of this matter on January 30, 2007.
4. Pursuant to Virginia Code § 24.2-669, Ms. Smythers is the custodian of all ballots cast in elections. After elections are done, she receives and holds the ballots for a length of time specified in the § 24.2-669.
5. After the election involved in this case, Ms. Smythers received the ballots cast in the election. She stored them safely and securely in her office.

6. Because of the closeness of the election, it became apparent that challenges to the results were likely to occur.

7. Pursuant to Order of this Court, Ms. Smythers allowed the plaintiff and his attorney to inspect the ballots. The Order was entered by The Honorable J. Samuel Johnston, Jr.

8. Ms. Smythers was present while the inspection occurred.

9. The only possible purpose for Ms. Smythers to testify is to describe what happened during the inspection of the ballots. There is no suggestion in this case that she did not receive the ballots or store them as required by statute.

10. Virginia Code § 19.2-271 forbids such testimony. Section 19.2-271 provides, in pertinent part, as follows:

No clerk of any court . . . shall be competent to testify in any criminal or civil proceeding. . . as to any matter which came before him in the course of his official duties. . . .

Va. Code § 19.2-271.

11. Section 19.2-271 is virtually a blanket prohibition against clerks testifying about matters that occur in their offices. The courts have recognized a narrow exception to the rule, in cases in which a clerk is called to testify about completely ministerial actions. For instance, in *Carter v. Commonwealth*, 12 Va. App 156, 158, 403 S.E. 2d 360 (1991), the Court held that a clerk could testify about the *filing* of a certificate of analysis in a drug case.

12. The Court made clear in *Carter*, however, that the clerks cannot testify about "substantive issues involving elements of the case or affirmative defenses," *id.* at 158-59, or about other "factual matters which have come before them in the course of their official duties." *Id.* at 158.

13. The only possible purpose for Ms. Smythers to testify is about matters that are not ministerial and that came before her in her official capacity.

14. There is no contest in this case over the ministerial actions that Ms. Smythers performed: that she received the ballots and stored them, as required by statute.

15. The only possible relevance her testimony can have is to describe what happened when the plaintiff inspected the ballot, and, presumably, whether the ballots were somehow altered when he reviewed them.

16. This testimony goes to a factual matter which came before her in the court of her official duties, and is flatly prohibited by statute.

17. Virginia Code § 19.2-271 is an important element in the Commonwealth's judicial system. It insures that judicial proceedings are not tainted in any way by the appearance that judicial personnel favor one side or the other. It keeps the court's staff above the fray.

18. Here, the subpoenas will contravene the purpose of this statute, and will pull a judicial officer into partisan litigation. This should not occur.

WHEREFORE, Judy S. Smythers requests this Court to quash the subpoenas served upon her in this matter.

Judy S. Smythers

By

  
Counsel

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Certificate of Service

I certify that on January ~~24~~<sup>25</sup>, 2008, I faxed and mailed a copy of the foregoing to Daniel Rutherford, Esquire, P. O. Box 5, Lovingson, Virginia 22949, John P. Fishwick, Esquire, P. O. Box 601 Roanoke, Virginia 24004-0601, and to Carlene Booth Johnson, Esquire, 262 Chellowe Road, Dillwyn, Virginia 23936, and mailed a copy to Mr. John W. Ponton, 64 Dowdy Drive, Shipman, Virginia 22971, and Ms. Mary Kathryn D. Allen, 1115 Gladstone Road, Gladstone, Virginia 24553.

