

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
FIRST DIVISION

PROTECT FAYETTEVILLE, f/k/a
REPEAL 119; PAUL SAGAN; PETER
TONNESSEN; and PAUL PHANEUF

VS.

NO. CV 2015-1510-1

FILED FOR RECORD
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2015 SEP -3 AM 10:42
WASHINGTON COUNTY ARK
CIRCUIT CLERK
K. SYLVESTER

THE CITY OF FAYETTEVILLE, ARKANSAS;
WASHINGTON COUNTY, ARKANSAS;
LIONELD JORDAN, in his official capacity as
MAYOR OF THE CITY OF FAYETTEVILLE,
WASHINGTON COUNTY, ARKANSAS;
ADELLA GRAY, SARAH MARSH,
MARK KINION, MATTHEW PETTY,
JUSTIN TENNANT, MARTIN W. SCHOPPMYER, JR.,
JOHN LA TOUR AND ALAN LONG, in their
official capacities as ALDERMEN OF THE
FAYETTEVILLE CITY COUNCIL; THE
HONORABLE RENEE OELSCHLAEGER,
THE HONORABLE MAX DEITCHLER, AND
THE HONORABLE BILL ACKERMAN, in their
official capacities as the COMMISSIONERS
of the WASHINGTON COUNTY
ELECTION COMMISSION

DEFENDANTS

**ORDER DENYING MOTION FOR EMERGENCY TEMPORARY
RESTRAINING ORDER AND RENEWED MOTION FOR
EMERGENCY TEMPORARY RESTRAINING ORDER**

Now on this 3rd day of September, 2015, comes on for decision the plaintiffs'
Motion for Emergency Temporary Restraining Order filed August 31, and the
plaintiffs' Renewed Motion for Emergency Temporary Restraining Order filed
September 1, and having reviewed the motions, the court finds as follows:

The relief sought in each of the two motions is identical. The plaintiffs ask the court to (1) prohibit the special election from occurring on September 8; (2) order the Washington County Election Commission to remove Ordinance 5781 from the ballot on September 8; and (3) halt any early voting associated therewith.

Although not titled as such, the motions are clearly seeking mandamus relief. See Ark. Code Ann. § 16-115-101. Therefore, the court must construe the motions as petitions for writs of mandamus. See *Cornett v. Prather*, 293 Ark. 108, 737 S.W.2d 159 (1987).

Rule 78(d) of the Arkansas Rules of Civil Procedure states:

Upon the filing of petitions for writs of mandamus or prohibition in election matters, it shall be the mandatory duty of the circuit court having jurisdiction to fix and announce a day of court to be held no sooner than 2 and no longer than 7 days thereafter to hear and determine the cause.

Upon the filing of the Motion for Emergency Temporary Restraining Order on August 31, the court set a hearing date of September 4. Upon the filing of the Renewed Motion for Emergency Temporary Restraining Order on September 1, the court notified the parties that both motions would be heard at the September 4 setting.

The Arkansas Supreme Court has held that a petition for declaratory relief and motion for writ of mandamus filed one day before an election was moot. *Oliver*

v. Phillips, 375 Ark. 287, 290 S.W.3d 11 (2008). The court stated that the petitioner, who was challenging the election, failed to pursue his petition expeditiously in order to obtain mandamus relief before the election, and the petitioner offered no compelling reason for his delay in filing the petition. *Id.* At 292, 290 S.W.3d at 15.

The *Oliver* court further stated:

In addition, waiting until the day before the election to file the petition rendered it impossible for the trial court to fulfill the requirement under Rule 78(d) that the trial court hold a hearing no sooner than two and no longer than seven days thereafter. We established in [*Ball v Phillips County Election Commission*, 364 Ark. 574, 222 S.W.3d 205 (2006)] that this type of eligibility challenge should be filed in time to resolve all relevant issues prior to the election.

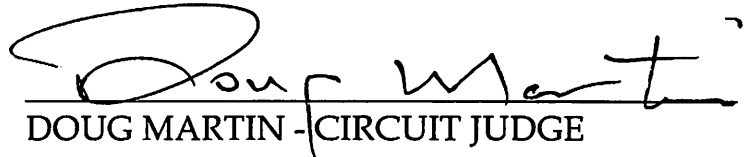
Id. At 292-293, 290 S.W.3 at 15.

While the facts in the present case are not identical to those of the *Oliver* case, the court's rationale in *Oliver* applies to the present case in the sense that a challenge to an election should be filed in time to resolve all relevant issues prior to the election. In the present case, the election began early voting on September 1, one day after the plaintiffs filed the Motion for Emergency Temporary Restraining Order and the same day the plaintiffs filed the Renewed Motion for Emergency Temporary Restraining Order. In other words, the plaintiffs failed to pursue their petitions expeditiously in order to obtain mandamus relief prior to the election, and the plaintiffs offer no compelling reason for their delay in filing the petitions. Waiting

until the day before voting began to file the petition rendered it impossible for the court to fulfill the requirement under Rule 78(d) that the trial court hold a hearing no sooner than two days thereafter to hear and resolve all issues prior to the election.

For the reasons stated above, the plaintiffs' Motion for Emergency Temporary Restraining Order and Renewed Motion for Emergency Temporary Restraining Order are hereby denied as moot, and the hearing scheduled for September 4, 2015, is therefore unnecessary and is hereby cancelled.

IT IS SO ORDERED.


DOUG MARTIN - CIRCUIT JUDGE

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