

IN THE CHANCERY COURT FOR ROANE COUNTY, TENNESSEE
9th JUDICIAL DISTRICT

WILLIAM THOMAS McFARLAND,

Plaintiff,

v.

No. 2014-105

MICHAEL S. PEMBERTON,
ROANE COUNTY ELECTION
COMMISSION, by and through its
Commissioners LOWELL P. MALMQUIST,
VICKIE WATTS, RALPH DePORTER,
CELIA SIMON, and JAMES RYANS,
and MARK GOINS, Tennessee Coordinator
of Elections,

Defendants.

COMPLAINT TO CONTEST ELECTION

Comes now the Plaintiff, William Thomas McFarland, by and through counsel, and brings this Complaint to contest an election pursuant to Tenn. Code Ann. §2-17-101, against the Defendants, Michael S. Pemberton, the Roane County Election Commission, by and through its Commissioners Lowell P. Malmquist, Vickie Watts, Ralph DePorter, Celia Simon, and James Ryans, Mark Goins, Tennessee Coordinator of Elections. For grounds, Plaintiff states as follows:

PARTIES

1. The Plaintiff, William Thomas McFarland, is an individual and resident of Roane County, Tennessee.

2. The Defendant, Michael S. Pemberton ("Defendant Pemberton"), is an individual and resident of the State of Tennessee, with a home located at 9314 Mill Stone Lane, in Knox

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BY Diana M. M. D.C.

County, Tennessee, and a second home located at 255 Kirkham Drive, in Roane County, Tennessee. Defendant Pemberton, at all times pertinent herein, also maintains his place of business at 9539 Kingston Pike, in Knox County, Tennessee.

3. Defendant Roane County Election Commission, by and through its Commissioners Lowell P. Malmquist, Vickie Watts, Ralph DePorter, Celia Simon, and James Ryans (collectively "Defendant Election Commission"), is the duly organized and acting county election commission for Roane County Tennessee. The named members of the Roane County Election Commission are sued in their official capacities only.

4. Defendant Mark Goins, Tennessee Coordinator of Elections, who is appointed by the Secretary of State pursuant to Tennessee Code Annotated §2-11-201, is charged with, *inter alia*, ensuring that all election commissions within the state prohibit any person ineligible to hold office from becoming qualified to have such person's name placed on the ballot. Tenn. Code Ann. §2-11-202(a)(12). Defendant Goins is sued in his official capacity only.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action, and venue is proper in this Court, pursuant to the provisions of Tennessee Code Annotated §2-17-101, et seq.

FACTS

6. Plaintiff was a candidate for election to the office of Ninth Judicial Circuit Court Judge in the general election for Circuit Court Judge for the Ninth Judicial District (which encompasses Loudon, Roane, Meigs and Morgan Counties, Tennessee) on August 7, 2014 (the "Election").

7. Defendant Pemberton was Plaintiff's opponent in the Election.

8. At all times material herein, a candidate for Circuit Court Judge in the State of Tennessee is required, before his election, to have been a resident of the State of Tennessee for a minimum of five (5) years and of the circuit or district at least one (1) year. Article IV, Section 4 of the Tennessee Constitution.

9. Pursuant to the Tennessee Election Code, Tenn. Code Ann. § 2-2-122, the determination of whether a person is a resident, or where a person resides for purposes of the election code, is made based upon the following principles: a) The determination of whether a person is a resident or where the person resides or has residence for purposes of the election code shall be made in the light of the following principles:

(1) The residence of a person is that place in which the person's habitation is fixed, and to which, whenever the person is absent, the person has a definite intention to return; provided, that a person may not register to vote using a business location as the registration address when the sole basis for the person's presence at such location is based on a business or commercial use;

(2) A change of residence is generally made only by the act of removal joined with the intent to remain in another place. There can be only one (1) residence;

(3) A person does not become a resident of a place solely by intending to make it the person's residence. There must be appropriate action consistent with the intention;

(4) A person does not lose residence if, with the definite intention of returning, the person leaves home and goes to another country, state or place within this state for temporary purposes, even if of one or more years duration;

(5) The place where a married person's spouse and family have their habitation is presumed to be the person's place of residence, but a married person who takes up or continues abode with the intention of remaining at a place other than where the person's family resides is a resident where the person abides;

(6) A person may be a resident of a place regardless of the nature of the person's habitation, whether house or apartment, mobile home or public institution, owned or rented; however, a commercial address may not be used for residential purposes, unless the applicant provides evidence of such applicant's residential use of such address;

(7) A person does not gain or lose residence solely by reason of the person's presence or absence while employed in the service of the United States or of this state, or while a student at an institution of learning, or while kept in an institution at public expense, or while confined in a public prison or while living on a military reservation; and

(8) No member of the armed forces of the United States, or such member's spouse or dependent, is a resident of this state solely by reason of being stationed in this state.

(b)(1) The following factors, among other relevant matters, may be considered in the determination of where a person is a resident:

- (A) The person's possession, acquisition or surrender of inhabitable property;
- (B) Location of the person's occupation;
- (C) Place of licensing or registration of the person's personal property;
- (D) Place of payment of taxes which are governed by residence;
- (E) Purpose of the person's presence in a particular place; and
- (F) Place of the person's licensing for activities such as driving.

10. Plaintiff alleges that at the time Defendant Pemberton was required to have been a legal resident of the Ninth Judicial District, which was required by law to have been established no later than one (1) year prior to the August 7, 2014 election – which was August 7, 2013 (the “Qualification Date”), Defendant was not a legal resident of the Ninth Judicial District.

11. Plaintiff alleges that as of the Qualification Date, Defendant Pemberton was a legal resident of Knox County, Tennessee.

12. Plaintiff alleges that as of the Qualification Date, Defendant Pemberton's habitation, along with that of his wife and child, was fixed at a home, owned by Defendant Pemberton and his wife, located at 9314 Mill Stone Lane, in Knox County, Tennessee.

13. Plaintiff alleges that as of the Qualification Date, the location of Defendant Pemberton's occupation, his law practice, was located in a commercial building, owned by Defendant Pemberton through his professional law partnership, located at 9539 Kingston Pike, in Knox County, Tennessee.

14. Plaintiff alleges that as of the Qualification Date, Defendant Pemberton was registered to vote with the Election Commission of Knox County, Tennessee, having previously indicated to said commission that he was a qualified voter residing at his home and legal residence located at 9314 Mill Stone Lane, in Knox County, Tennessee.

15. Plaintiff alleges that as of the Qualification Date, upon information and belief, Defendant Pemberton's child was registered to attend school in the Knox County public school system, Defendant Pemberton having previously indicated to said school system that he was residing at his home and legal residence located at 9314 Mill Stone Lane, in Knox County, Tennessee.

16. On or about January 11, 2013, Defendant Pemberton, along with his wife, purchased a second house located at 255 Kirkham Drive, located in Roane County, Tennessee (the "Roane County Property").

17. Plaintiff alleges that at the time of Defendant Pemberton's purchase of the Roane County Property, Defendant Pemberton did not intend to make the Roane County Property his fixed habitation and/or primary residence.

18. Plaintiff alleges that Defendant Pemberton did not take any action consistent with the intent to make the Roane County Property his fixed habitation and/or legal residence at any time prior to the Qualification Date.

19. Plaintiff alleges that as of the Qualification Date, upon information and belief, the place of licensing or registration of Defendant Pemberton's personal property was not the Roane County Property.

20. Plaintiff alleges that as of the Qualification Date, upon information and belief, Defendant Pemberton's place of taxes which are governed by residence was not the Roane County Property.

21. Plaintiff alleges that as of the Qualification Date, upon information and belief, the place of Defendant Pemberton's licensing for activities such as driving was not the Roane County Property.

22. Plaintiff alleges that, upon information and belief, on or about November 12, 2013 (ninety-seven (97) days after the Qualification Date), Defendant Pemberton began soliciting support for a potential run for Circuit Court Judge in the Ninth Judicial District, representing that the incumbent, Judge Russell E. Simmons, would not be seeking reelection.

23. On or about November 18, 2013 (one hundred three (103) days after the Qualification Date), Defendant Pemberton changed his voter registration from Knox County, Tennessee and registered to vote with Defendant Election Commission by representing that he was a qualified voter residing at the Roane County Property.

24. On or about November 19, 2013 (one hundred four (104) days after the Qualification Date, and one (1) day after Defendant Pemberton changed his voter registration from his residence in Knox County to the Roane County Property), Attorney Patrick Cooley, then President of the Roane County Bar Association formally announced, on behalf of Judge Simmons, that Judge Simmons would not seek reelection in 2014.

25. Thereafter, Defendant Pemberton obtained a petition from the Defendant Election Commission to be placed on the ballot for Circuit Court Judge.

26. Defendant Pemberton subsequently submitted his petition to Defendant Election Commission.

27. Despite the fact that a qualified voter in Roane County, Tennessee, challenged Defendant Pemberton's qualifications as a legal resident in the Ninth Judicial District, Defendant Election Commission certified, without debate, Defendant as a candidate and allowed his name to be placed on the August 7, 2014 election ballot.

28. The election took place on August 7, 2014, and Plaintiff received 13,017 (49.4%) of the 26,374 votes cast.

29. Defendant Pemberton was voted into office having received 13,357 (50.6%) of the 26,374 votes cast.

CAUSES OF ACTION

COUNT I – ELECTION CONTEST

30. Plaintiff realleges and incorporates by reference Paragraphs 1 through 29 of this Complaint.

31. Pursuant to Article VI, Section 4 of the Tennessee Constitution, and the factors and principles for the determination of residence for purposes of the Tennessee Election Code, Tenn. Code Ann. §2-2-122, Defendant Pemberton did not meet the residency requirements set forth in the Tennessee Constitution that must have been met as of the Qualification Date.

32. As a result, Defendant Pemberton was disqualified from holding the office of Circuit Court Judge of the Ninth Judicial District.

33. Accordingly, Defendant Pemberton's election must be declared void pursuant to the provisions of Tennessee Code Annotated §2-17-101, et seq.

34. Pursuant to Hatcher v. Bell, 521 S.W.2d 799 (1974), the constitutional disqualification of a candidate receiving the highest number of votes in an election can be the predicate of an election contest.

35. Plaintiff's Complaint is timely pursuant to Tenn. Code Ann. § 2-17-105.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for and requests the following relief:

(a) That process be issued and that Defendants be required to answer this Complaint in the time required by law;

(b) That the trial of this election contest be held no less than 15 nor more than 50 days from the date this Complaint is filed, and not less than 10 days after this Complaint is served on the Defendants, as required by law;

(c) That this Court find and determine that the Defendant Pemberton did not meet the residency requirements set forth in the Tennessee Constitution and, consequently, was disqualified from holding the office of Circuit Court Judge of the Ninth Judicial District;

(d) That this Court enter judgment and declare the Election void pursuant to Tenn. Code Ann. §§ 2-17-112 and 2-17-113;

(e) That the judgment declaring the Election void be certified to the officer or body authorized to fill the vacancy or order a new election as required by Tenn. Code Ann. § 2-17-114;

(f) That Plaintiff be awarded all costs and expenses incurred in this action, including a reasonable attorney's fee, to the extent allowed by law; and

(g) That the Court award Plaintiff such other and further relief as may be just and equitable.

Respectfully submitted,

TAYLOR, PIGUE, MARCHETTI & BLAIR, PLLC

BY: 

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COST BOND

We are surety for costs incurred in this matter.

TAYLOR, PIGUE, MARCHETTI & BLAIR, PLLC

BY: 

Matthew C. Pietsch

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