

Serial: 251583

IN THE SUPREME COURT OF MISSISSIPPI

No. 2024-EC-00406-SCT

FILED

APR 11 2024

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

***TATE REEVES, GOVERNOR OF
MISSISSIPPI***

Appellant

v.

***JOHNNY GARY, ERIC MITCHELL AND
LEFLORE COUNTY ELECTION
COMMISSION***

Appellees

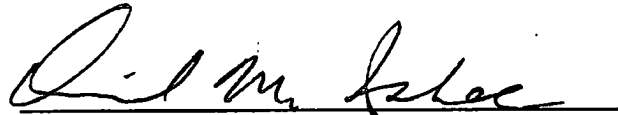
EN BANC ORDER

Before the en banc Court are Governor Tate Reeves's Time-Sensitive Emergency Motion to Stay or Vacate, Johnny Gary and Eric Mitchell's Response in Opposition, and the Leflore County Election Commission's Response.

After due consideration, we find that the motion should be granted.

IT IS THEREFORE ORDERED that the motion is granted. The Circuit Court of Leflore County's April 8, 2024 Order and Opinion in *Gary v. Reeves*, No. 2024-0021(CM)(L), is vacated.

SO ORDERED, this the 11th day of April, 2024.



DAVID M. ISHEE, JUSTICE
FOR THE COURT

AGREE: RANDOLPH, C.J., COLEMAN, MAXWELL, BEAM, CHAMERLIN, ISHEE
AND GRIFFIS, JJ.

KITCHENS AND KING, P.JJ., OBJECT WITH SEPARATE WRITTEN STATEMENT TO
FOLLOW.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2024-EC-00406-SCT

Tate Reeves, Governor of Mississippi

v.

**Johnny Gary, Eric Mitchell and Leflore
County Election Commission**

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**KING, PRESIDING JUSTICE, OBJECTING TO THE ORDER WITH
SEPARATE WRITTEN STATEMENT:**

¶1. Johnny Gary beat Debra Hibbler by fifteen votes in the Democratic primary for Leflore County Chancery Court, and Hibbler contested the primary election. While Hibbler’s primary election challenge lawsuit was pending, Gary won the uncontested November general election and took office. On February 15, 2024, the trial court found that Gary’s election should be vacated on the basis of fraud and ordered a new election be set between him and Hibbler.¹

¶2. On March 6, 2024, the Governor issued a writ of election. The writ ordered that a special election for Leflore County Chancery Clerk be held between Gary and Hibbler on April 16, 2024, forty-one days after the writ was issued. The writ stated that “[t]he special

¹Similarly, Eric Mitchell won the Democratic primary for Leflore County District 4 Supervisor against Wayne Self, and then Mitchell won the general election against an independent candidate and took office. Self sued, and Self’s case and Hibbler’s case, with significantly overlapping evidence, were consolidated for purposes of trial. Mitchell’s election was likewise vacated due to fraud, the writ of election from the governor was the same as in Gary’s case, and Mitchell consequently joins Gary in this case challenging the writ of election. Mitchell also appealed the trial court’s judgment regarding fraud in the election to this Court, and that appeal is currently pending.

election *shall* be held and notice *shall* be given in a manner consistent with Miss. Code Ann. § 23-15-835 and the laws of the State of Mississippi governing special elections.” (Emphasis added.)

¶3. In the writ, the Governor explicitly required the Leflore County Election Commission (Election Commission) to follow the notice provisions of Section 23-15-835, which provides that

[t]he election commissioners of the several counties to whom the writ of election may be directed shall, immediately upon receipt of the writ, give notice of the special election to fill a vacancy in such county or county district office by posting notices at the courthouses and in each supervisor’s district in the county for ninety (90) days before the election[.]

Miss. Code Ann. § 23-15-835 (Rev. 2018). Gary sued for declaratory and injunctive relief, arguing that the Governor exceeded his authority because he was required to follow Mississippi Code Section 23-15-833, which requires special elections for vacancies be held in November, and Mississippi Code Section 23-15-835, which requires ninety days’ notice for special elections that fill a vacancy. The trial court agreed, finding that the writ contradicted the ninety-day notice requirement. The trial court also found the writ ambiguous for directing the Election Commission to give notice consistent with Section 23-15-835, while also requiring an election be held in forty-one days. The trial court consequently declared the writ null and void.

¶4. The Governor filed a Mississippi Rule of Appellate Procedure 8(c) motion to stay or vacate the trial court’s judgment. M.R.A.P. 8(c). In it, he argued that Section 23-15-835 was inapplicable because no vacancies existed, and it applies to special elections for vacant

offices; this special election was ordered pursuant to Mississippi Code Section 23-15-937, which does not have an explicit notice requirement. Gary argues that Section 23-15-835 is applicable to this case. The Election Commission argues that the writ creates an irreconcilable conflict for the Election Commission. It raises concern that this conflict will start an endless litigation cycle. It states that voters have been confused about whether to request absentee ballots, and it points to the fact that only ninety-six absentee ballots had been requested for the special election, compared to 928 requested in the original primary election.

¶5. For this Court to grant a motion to stay or vacate under Rule 8, the moving party, in this case the Governor, has the burden of establishing that: (1) “he is likely to succeed on the merits of the appeal”; (2) “he will suffer irreparable injury”; (3) “no substantial harm will come to other interested parties”; and (4) “a stay would do no harm to the public interest.” *Bd. of Trs. of Jackson Pub. Sch. Dist. v. Knox*, 638 So. 2d 1278, 1281 (Miss. 1994) (quoting former M.R.C.P. 62 cmt.). This Court granted the motion and vacated the trial court’s judgment without providing any rationale whatsoever for its decision. I believe that decision was incorrect for several reasons.

¶6. First, the Governor neither argues nor demonstrates that he will suffer irreparable injury. That he will suffer any injury, much less irreparable injury, by the special election not taking place on April 16, 2024 is highly doubtful; certainly, he did not meet his burden to demonstrate irreparable injury when he did not even argue that he will be irreparably injured. Indeed, it is befuddling why the Governor dug his heels in regarding this writ, rather

than simply issuing a new one that clarified matters regarding the date of the election and the notice he wanted given.

¶7. Second, I question whether the Governor could credibly succeed on the merits. The writ was internally conflicting. The writ ordered the Election Commission to comply with a ninety-day notice provision while giving only forty-one days until the election. The writ points to Section 23-15-835 not as authority it must follow, but as a shorthand for the procedure it mandated the Election Commission follow. Then it contradicted that mandate with the date set for the election. This Court need not decide whether the Governor should be bound by Section 23-15-835 as a general matter—indeed, I acknowledge that the Governor is correct that Section 23-15-835 governs special elections when a vacancy exists, and none existed here. Rather, it is whether the Governor should be bound by the terms of his own mandate. The writ conflicted internally and created confusion; that conflict and ambiguity should be resolved against the drafter, as with any document. *See Banks v. Banks*, 648 So. 2d 1116, 1121 (Miss. 1994) (ambiguities and vagueness in a contract are construed against the drafter) (quoting *Kight v. Sheppard Bldg. Supply Inc.*, 537 So. 2d 1355, 1358 (Miss. 1989)); *Richmond v. State*, 751 So. 2d 1038, 1046 (Miss. 1999) (State binds itself to an indictment, even when it burdens itself with additional and unnecessary elements of proof).

¶8. Furthermore, vacating the trial court judgment will do harm to the public interest in this case. The purpose of election statutes is “so that we might have fair and free elections which express the will of the voters.” *O’Neal v. Simpson*, 350 So. 2d 998, 1007 (Miss.

1977). Indeed, “the sole purpose of all elections” is to “fairly and honestly ascertain[]” “the will of the people[.]” *Shines v. Hamilton*, 87 Miss. 384, 39 So. 1008, 1010 (1906). Thus, the election laws’ primary purpose is to protect the public and their will in a fair manner. The Election Commission has cited public confusion, and the back and forth nature of this special election is simply not providing the public an adequate chance to fairly express its will. The public has been harmed by the contradictory writ issued by the Governor, and vacating the trial court’s judgment compounds that harm. I express no opinion on how much notice the Governor should mandate for a special election ordered pursuant to Mississippi Code Section 23-15-937, as is this one. I simply believe that the Governor is bound by the contradictory writ he issued, and that the ambiguity should be resolved in favor of protecting the fair discernment of the public’s will. This Court, however, has done the opposite, and allowed a confusing writ to stand, which will result in an election with an outcome that is in doubt as to the will of the confused public.

¶9. Consequently, I object to the order vacating the trial court’s judgment. The Governor should issue a noncontradictory writ of election for this special election.

KITCHENS, P.J., JOINS THIS SEPARATE WRITTEN STATEMENT.