

**IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE**

Bee DeSelm, et al.)	
)	
Appellants)	
)	
)	SC: _____
v.)	
)	CA: E206-00681-COA-R10-CV
)	
Timothy Hutchison, et al.)	
)	
Appellees)	

**T.R.A.P. 10(B) APPLICATION TO APPEAL
FROM THE DENIAL OF T.R.A.P. 10 EXTRAORDINARY APPEAL
BY THE TENNESSEE COURT OF APPEALS**

Appellants Bee DeSelm, James Gray and John Schmid apply to this Court for permission to appeal from the denial of T.R.A.P. 10 Extraordinary appeal by the Tennessee Court of Appeals on April 4, 2006. (Copy of Order Attached)

1. Pending before this Court is a motion pursuant to T.C.A. § 16-3-201(d) for this Court to assume jurisdiction of this appeal.

2. Appellants move pursuant to T.R.A.P. 2 to suspend the Appellate Rules and permit Appellant's T.C.A. § 6-3-201(d) motion and attached documents to be considered on this application and Appellant not be required to reproduce those voluminous papers again in this application.¹

¹ Pursuant to T.R.A.P. 2 this suspension of the rules is in the interest of expediting a decision on the matter.

3. On April 3, 2006 Knox County Chancellor John Weaver denied Plaintiffs' right to be heard because "matters were not on the Court's docket" Plaintiffs amended complaints for T.R.Civ.P. 65.04 as of right pursuant to T.R.Civ.P. 15.01 and intervening complaints as of right pursuant to T.R.Civ.P. 24.01 for mandatory injunctions and writs of mandamus to the Knox County Election Commission pertaining to a May 2, 2006 primary election in Knox County Tennessee and the removal of candidates disqualified by Knox County Charter Term Limits to be on that ballot.

4. Complaints for Declaratory Judgment as to Knox County Charter Term Limits and Timothy Hutchison serving as sheriff in violation of Knox County's Term Limits have been pending in the Knox County Chancery Court in *DeSelm v. Hutchison* since July 12, 2006.

5. On March 29, 2006 Plaintiff *DeSelm* was before Chancellor Weaver arguing:

A. For a mandatory injunction to the Knox County Law Director to support and defend Knox County's Term Limits by seeking declaratory judgment as to Knox County's Charter Term Limits;

B. Declaratory Judgment whether Knox-County's four term sheriff, Timothy Hutchison, was disqualified from holding that office because he was disqualified at his last election in August 2002 and therefore the office of Knox County Sheriff is vacant;

C. Whether Plaintiff *DeSelm* could sue Knox County Law Director Mike Moyers on his bond and surety pursuant to T.C.A. § 8-19-301(3) for failure and neglect to perform the duty of his office by failing to support and defend the Knox County Charter Term Limits; and

D. Whether Chancellor Weaver was disqualified by Supreme Court Rule 10, Canon 3 E.;

6. Literally, as Plaintiff *DeSelm* was presenting her arguments to Chancellor Weaver on March 29th, Counsel was informed by his office that this Court released its opinion in *Bailey v. Shelby County* and Counsel brought this Court's opinion to the attention of Chancellor Weaver, the Knox County Law Director and opposing Counsel.

7. Chancellor Weaver took under advisement the issues heard on March 29, 2006, including motions that he disqualify himself.

8. To date Chancellor Weaver has not rendered a decision on the motions heard March 29, 2006 in *DeSelm*.

9. On March 29, 2006 at 4:00 p.m. the Knox County Election Commission convened to consider this Court's opinion in *Bailey v. Shelby County* rendered that morning.

10. Knox County Law Director Mike Moyers advised the Knox County Election Commission to remove the names of twelve (12) Knox County Commissioners disqualified by Knox County Term Limits from the May 2, 2006 ballot but declined to advise the Election Commission to remove the name of Sheriff Hutchison or any other Knox County office holders.

11. Knox County Election Commission Director Greg MacKay informed the Election Commission that if disqualified candidates were removed and qualifying was reopened and then re-closed by April 7th or 8th, he could have a new ballot prepared for the May 2, 2006 primary.

12. Knox County Law Director Moyers recused himself from further matters pertaining to the May 2, 2006 election after advising the Election Commission to remove the twelve (12) commissioners from the May 2, 2006 ballot.

13. The Election Commission voted to hire an attorney and reconvene at 4:00 p.m. Friday March 31, 2006.

14. The following morning, March 30, 2006, Plaintiff DeSelm filed a motion to renew her *quo warranto* action to remove Timothy Hutchison from office as a civic minded citizen pursuant to *Bennett v. Stutts*, 521 S.W.2d 575 (Tenn.19975) where the Knox

County Law Director and Knox County District Attorney refused her written demands to act, and for a mandatory injunction to the Knox County Election Commission to remove Timothy Hutchison's name for the May 2, 2006 primary election.

15. Plaintiff DeSelm also moved to join the Knox County Election Commission and the Tennessee Coordinator of Elections and gave all parties notice that she would present her application for T.R.Civ.P. 65.04 to Chancellor Weaver at 1:30 p.m. on March 31, 2006 or as soon thereafter as she could be heard by the Court.

16. On the morning of March 31, 2006 Plaintiff James Gray filed a separate action as Chairman of the Knox County Democratic Party naming the Knox County Election Commission as a party defendant.

17. Plaintiff Gray sought the same T.R.Civ.P. 65.04 relief as sought by Plaintiff DeSelm; moved to consolidate his action with *DeSelm v. Hutchison*; and provided notice to all parties that he would call up his complaint for mandatory injunction along with Plaintiff *DeSelm's* at 1:30 p.m on March 31, 2006 .

18. The Tennessee Coordinator of Elections and Knox County Election Commission were represented by separate attorneys from Nashville who requested the hearing be held on Monday April 3, 2006. The undersigned agreed.

19. Plaintiff DeSelm and Gray appeared before Chancellor Weaver at 1:30 p.m. on April 3, 2006.

20. Also Present were attorneys Robert H. Watson, Jr. representing Timothy Hutchison; attorney Jerold Becker representing Knox county Law Director Mike Moyers in his personal defense for liability on his bond and surety; and Knox County Chief Deputy Law Director John Owings and Deputy Law Director Mary Ann Stackhouse.

21. Plaintiffs' Counsel announced the parties agreement for a hearing on Monday April 3rd to permit Nashville Counsel to be present.

22. Chancellor Weaver *sua sponte* raised an issue whether T.R.Civ.P. 6 notice had been complied with for Plaintiff's T.R.Civ.P. 65.04 application for mandatory injunction on notice. Plaintiffs' Counsel, being of the opinion that the five (5) T.R.Civ.P. 6 notice for a motion did not apply to a T.R.Civ.P. 65.04 application for Temporary Injunction on notice asserted proper notice had been given.

23. Chancellor Weaver *sua sponte* ruled there was nothing before him on March 31st, apparently because Plaintiffs appeared on their T.R.Civ.P. 65.04 application less than five (5) days.

24. Chancellor Weaver refused to set a hearing for Monday April 3rd because "there was nothing before him".

25. Thereafter, Counsel for Plaintiffs DeSelm and Gray filed motions to shorten any T.R.Civ.P. 6 time requirement to apply for a temporary mandatory injunction on notice pursuant to T.R.Civ.P. 65.04 in the pending action by Plaintiff DeSelm and in the new action by Plaintiff Gray and to hear the applications at 1:30 p.m. on April 3rd.

26. During the afternoon of March 31, 2006 Chancellor issued an order he would hear the motions to shorten time on the T.R.Civ.P. 65.04 applications on April 3, 2006 at 10:00 p.m.

27. On the morning of March 31, 2006 Plaintiff Gray also submitted the attached call to the Knox County Election Commission to declare the office of sheriff vacant and issue a writ of special election pursuant to T.C.A. § 2-14-201 et seq.

28. The Knox County Election Commission met at 4:00 p.m. on March 31, 2006 with a telephone hook-up with new Nashville counsel, Jim Murphy, and Tennessee Coordinator of Elections Brook Thompson.

29. Mr. Murphy and Coordinator of Elections Thompson advised the Election Commission to leave the names of disqualified candidates on the ballot and conduct the election as scheduled for May 2, 2006.

30. The Knox County Election Commission, contrary to its anticipated removal of at least the twelve (12) disqualified

commissioners, failed to take any action in response to this Court's opinion in *Bailey v. Shelby*.

31. The effect of the Knox County Election Commission failure to act left the Knox County May 2, 2006 primary election as scheduled and a ballot for the voters that was unconstitutionally impure ballot.

32. On April 2, 2006 a currently elected Knox County Commissioner, John Schmid, who is disqualified from seeking a third term, prepared and served on all parties a petition to intervene as of right pursuant to T.R.Civ.P. 24.01 in *Gray v. Hutchison* and *DeSelm v. Hutchison* and filed an intervening complaint for relief by temporary mandatory injunction and writ of mandamus pertaining to the failure of the Knox County Election Commission to act to remove his name, and other disqualified candidates including Sheriff Hutchison, from the May 2, 2006 ballot. Intervening Plaintiff Schmid's pleadings was served by email on all parties on Sunday April 2, 2006 with a motion to shorten any T.R.Civ.P. 6 time required with a notice that the motions would be called up to be heard at 10:00 a.m. to be heard with the other matters in Chancellor Weaver's March 31, 2006 order.

33. Also during the weekend and on April 2, 2006 Plaintiff James Gray whose initial complaint was on the Court's docket for April 3, 2006 at 10:00 a.m., prepared an amendment as

of right pursuant to T.R.Civ.P. 15.01, there having been no responsive pleading filed, to seek a mandatory injunction and writ of mandamus against the Knox County Election Commission to require it to act to provide an equal, fair and pure election on May 2, 2006 after this Court's opinion in *Bailey v. Shelby County*. Plaintiff's Gray's amended complaint was served by email on all parties on April 2, 2006 with a motion to shorten any T.R.Civ.P. 6 time and filed with a notice that they would be called up to be heard at 10:00 a.m. April 3, 2006 to be heard with the matters in Chancellor Weaver's March 31, 2006 order.

34. Plaintiff DeSelm also during the weekend prepared petitions to intervene as of right in *Gray v. Hutchison* pursuant to T.R.Civ.P. 24.01 and executed an affidavit verifying to both to Plaintiff Grays pleadings and the Intervening Complaint of Plaintiff Schmid and emailed those pleadings and affidavit with a notice that her pleadings would be called up to be heard at 10:00 a.m. April 3rd to be heard with the matters in Chancellor Weaver's March 31, 2006 order.

35. All of the pleadings served by email on the parties on April 2, 2006 were filed shortly after 8:00 a.m. on Monday April 3rd and copies were hand delivered to the Parties counsel.

36. Senior Counsel for the State Attorney General from Nashville for the Coordinator of Elections; James Murphy

from Nashville for the Knox County Election Commission; Robert H. Watson, Jr. for Timothy Hutchison; Jerold Becker for Michael Moyers; and Chief Knox County Law Director John Owings and Deputy Knox County Law Director Mary Ann Stackhouse were present had been served with all pleadings and notices and were present for hearings before Chancellor Weaver at 10:00 a.m. on April 3, 2006.

37. At the outset of the hearing on April 3rd, Chancellor Weaver ruled Plaintiffs DeSelm, Gray and Schmid would not be heard on any pleadings pertaining to the failure of the Knox County Election Commission to act at approximately 5:00 p.m. Friday March 31, 2006 because "those pleadings were not on the docket."

38. Thereafter Chancellor Weaver heard procedural objections to pleadings of Plaintiffs DeSelm and Gray pertaining to events that occurred before the Knox County Election Commissions' failure to remove the names of the twelve commissioners on March 31st at 5:00 p.m.

39. Chancellor Weaver denied Plaintiff Gray the right to be heard on his amendment as of right for a mandatory injunction and writ of mandamus pertaining to the failure of the Knox County Election Commission to hear his call for a special election filed on the morning of March 31, 2006.

40. Chancellor Weaver refused to hear Plaintiff Schmid on his T.R.Civ.P. 24.01 Intervening Complaint as of right in *Gray v. Hutchison*.

41. Chancellor Weaver refused to hear Plaintiff DeSelm on her T.R.Civ.P. 24.01 Intervening Complaints as of right in *Gray v. Hutchison*.

42. Chancellor Weaver, on April 3rd, took under advisement procedural objections to Plaintiffs Gray and DeSelm's applications for relief from events that occurred before the Election Commission's failure to act at 5:00 p.m. on March 31st.

43. To date, Chancellor Weaver has failed to rule on the matters argued on April 3rd.

44. To date, Chancellor Weaver has failed to rule on Plaintiff's T.R.Civ.P. 6 motions to shorten time for a hearing on Plaintiffs' T.R.Civ.P. 65.04 temporary mandatory injunctions and writ of mandamus to the Knox County Election Commission from its failure to act at 5:00 p.m. on March 31st.

45. The effect of the delay being created by the procedures in the Chancery Court are in violation of T.R.Civ.P. 1 to provide for a "just, speedy and inexpensive determination" of the actions and have departed from the accepted and usual course of judicial proceedings as to require immediate review.

46. This Court's March 29, 2006 opinion in *Bailey v. Shelby County*, coupled with the failure of the Knox County Law

Director to support and defend Knox County's Charter Term Limits and have Knox County's Charter before this Court with Shelby County's Charter, has created an emergency and a crisis between the Constitution of Tennessee and the election mechanics provided for by State law and Knox County laws that are insufficient to address the emergency and harmonize the election mechanics with the Constitution.

47. Plaintiffs applied to the Chancery Court for relief by mandatory injunction and writ of mandamus to implement a "Citizen's Election Plan" to harmonize Tennessee's insufficient election mechanics with the Constitution of Tennessee to protect the people's guarantees of "free and equal" elections; "every person [being] entitled to vote"; and "purity of the ballot box for office."

48. The Citizen's Election Plan Appellants seek to present to this Court is a non-partisan, fair, constitutional plan that allows all citizens to have an equal opportunity to qualify and run for an office of Knox County; saves public funds from being wasted and misappropriated for an unconstitutional, unlawful and void May 2, 2006 election; prohibits any candidate from obtaining a tactical political advantage; provides Knox County voters a free and fair election; removes uncertainty in the election; and creates purity in the ballot. The Citizen's Election Plan is offered in response to the Knox County Election

Commission's "Do Nothing Election Plan"; the Tennessee Coordinator of Election's "Expensive Unconstitutional 'Ignore The Problem' Election Plan"; and a "Sandbagger's Election Plan" that would permit persons to get into a public office by taking advantage of election disorder to obtain political appointment.

49. The effective and efficient implementation Citizen's Election Plan is time restricted by the Constitution of Tennessee's requirement that a general election be held in August 2006.

50. The effect of the delay created by procedures in the Chancery Court are such that will make moot an effective and efficient implementation of the Citizens' Election Plan by the passage of time.

51. The effect of the delay created by procedures in the Chancery Court will create irreparable harm to the Constitution of Tennessee guarantees of "free and equal" elections; "every person [being] entitled to vote"; and "purity of the ballot box for office" to Knox County voters, office holders and candidates by being subjected to a unconstitutional, unlawful and void primary election on May 2, 2006.

52. The effect of the delay created by procedures in the Chancery Court will render any judgment in this case ineffectual.

53. Appeals from any judgment in the Chancery Court, if and when entered, are inevitable.

54. There exist a need for finality to protect the integrity of the democratic election process in Knox County to remove uncertainty and impurity of the ballot.

55. Policy factors listed in T.R.A.P. 9(a) each weigh heavily in favor of granting an interlocutory appeal and specifically T.R.A.P. 9(a)(3) providing for the need to develop a uniform body of law.

56. T.C.A. § 16-3-201(d) provides the public policy of Tennessee is that this Court take jurisdiction of issues that affect the right to hold or retain public office and constitutional law such as are presented in this appeal.

57. T.C.A. § 16-3-201(d) provides the public policy of Tennessee is served by this Court accepting appeals where every voter, office holder and candidate of Knox County is affected by an opinion of this Court, there exist unusual public interest, and for which there is a need for a expedited decision.

WHEREFORE, pursuant to T.R.A.P. 10(b) Plaintiffs applies to this Supreme Court to appeal from the denial of T.R.A.P. 10 Extraordinary Appeal by the Tennessee Court of Appeals.

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APPEAL BOND

The undersigned hereby acknowledges himself surety of
the cost of this appeal as provided by law.

Herbert Moncier

HERBERT S. MONCIER
Attorney for Appellants

CERTIFICATE OF SERVICE

A copy of the foregoing has been served on:

1. The Knox County Law Director;
2. Robert H. Watson, Jr., Attorney for Timothy Hutchison;
3. Jerold Becker, attorney for Michael E. Moyers;
4. James Murphy, attorney for the Knox County Election Commission;
5. Janet Kleinfelter, Senior Counsel, Tennessee Attorney General's Office, Attorney for Coordinator of Elections for the State of Tennessee;
6. The Knox County District Attorney General.



HERBERT S. MONCIER