IN THE

SUPREME COURT OF GEORGIA

Garland Favorito, et al

Appellants

Versus

Karen Handel, Secretary of State, et al

Appellees

Docket Number

S09A1367

APPELLANTS' SUPPLEMENTAL DISPUTE OF FACTS AND ASSERTIONS MADE BY APPELLEES IN THEIR BRIEF TO THE GEORGIA SUPREME COURT

Walker Chandler

State Bar of Georgia No. 120675

P.O.Box 7, Zebulon Ga. 30295

770 567-3882 ; wlc3882@yahoo.com

The following asserted summary conclusions and Statements of Fact made in the Appellees' Brief to the Georgia Supreme Court have been disputed by Appellants in their brief to the Georgia Supreme Court or in the *"Plaintiffs' Response To Defendants' Assertions As To Facts That They Allege Are Undisputed"*. Page references hereinbelow refer to the page of Appellees' brief on which disputed assertions are given, to wit:

Pg1

"The Appellants' case is not supported by expert testimony or reports".

DISPUTED: Numerous reports were cited in depositions and a key factor in obtaining the admissions received from the state's witnesses. [R65, Pg 200, 249-253, 263], [R62, pg 61-66, 71-72] , [R63, pg 36-40]. Expert testimony was not needed after the Defendant's own witnesses admitted the essential elements of the Appellants' complaint.

Pg1

"It involves no actual loss of vote to any citizen – real or alleged -- and no loss of vote to the Appellants"

DISPUTED: Appellees have no evidence to prove that no vote loss occurred and it would be technically impossible to produce such evidence. Appellants produced evidence of discrepancies including vote loss [R.65, p. 263 & associated exhibit]

Pg1

"Rather, it involves wide ranging allegations that electronic touchscreen voting violates the Georgia Constitution, the United States Constitution, Georgia statutory law, and what Appellants have claimed is the "historic intent" of the law to disallow electronic voting."

Disputed: Appellees have no evidence that Appellants have ever claimed there is historic intent of the law to disallow electronic voting and in fact have in their possession video tapes of Plaintiff Favorito testifying before the House and Senate committees in favor of electronic voting with an appropriate independent audit trails [R65, pg 286-299]

Pg1

Indeed, the current system is the most reliable Georgia has ever had – without dispute.

DISPUTED: The Appellees have offered no evidence to quantify the reliability of the vote recording and counting of the current system and it is technically impossible to do so without an independent audit trail of the votes cast as the law required.

Pg 5

"Of the seven companies making electronic voting machines who submitted bids only three met all certification requirements, and only Diebold met the requirements and could deliver voting machines in a timely matter to meet the State's needs"

DISPUTED: As explained in the Appellants' dispute of asserted Defendants' Fact 8, the law at the time allowed for implementation of the equipment by 2004. Appellees offered no evidence as to why the implementation had to occur in 2002.

Pg 6

Georgia's system of touchscreen voting machines was also unique in creating an independent center – the Center for Election Systems at Kennesaw State University – which has become a world leader on election systems.

DISPUTED: As explained in the Appellants' dispute of asserted Defendants' Fact 10. the Appellees' claim is a highly subjective opinion, not a statement of fact. Appellants further disagree that leadership can be provided by any organization that advocates voting equipment and methods that have resulted in the violations alleged in this complaint.

Pg 6

"The total system involved in electronic voting, in this regard – and as monitored and partially assisted in creation independently at the Center…":

DISPUTED: As explained in Appellants' dispute of Defendants asserted Fact 11: "Kennesaw State's Elections Center cannot monitor voting systems independently as claimed since it is part of the University System of Georgia, as stated on its web site. "

Pg 7

"No touchscreen voting systems were eligible for purchase in Georgia unless they met federal certification requirements first. "

DISPUTED: No Penetration Analysis was performed on the voting machines by the federal certification testing authority. [R65, pg 249-23,Exhibit 8] The purpose of such an analysis is to "...identify all entry points and the methods of attack to which each is vulnerable" as explained in Appellants' dispute of Defendants' Fact 12.

Pg 7

"Following testing and certification and purchase, the individual units received are then tested again on receipt and distributed to local jurisdictions – a form of testing called "acceptance testing…There they are kept under lock and seal by law, with highly regulated conditions as to the circumstances in which they must be kept"

DISPUTED: As explained in Appellants' dispute of Defendants Fact 10, Dekalb County has been found by the State Election Board not to have secured

their machines properly against theft and weather conditions while former Secretary Cox admitted that tabulation servers and related equipment were stolen in 2002:

Pg 8

"At the time of an election, each of the pieces of equipment in the system – including even computer media – are again tested to assure that they have not been tampered with"

DISPUTED: As explained in Appellants' dispute of Defendants' asserted Fact 14, the Appellees have provided no evidence other than statements that each piece of equipment in the system is tested again at the time of an election.

Pg 9

"Thus, the idea that touchscreen voting equipment is subject to malicious code inserted into the machines in advance – an idea that Appellants repeatedly floated at the depositions in the case and in written discovery – is a chimera. That is because the malefactor can not know the ballot design which varies widely by precinct and is not known by anybody until shortly before an election."

DISPUTED: As explained in Appellants' dispute of Defendants Fact 16 the order of ballot content is determined by the outcome of the Governor's election which occurred at least two years prior to the use of that ballot in an election. [R63, Pg 18, ln 12]

Pg 10

"Thus, the idea, for instance, that Diebold could determine the outcome of an election by secretly making machines or software to yield certain results, which the Appellants repeatedly asserted in discovery, is simply not tenable (if not entirely impossible), at least in Georgia. Diebold does not have access to the ballot designs and could not design Trojan software to find the right place on the touchscreen or to mimic the actual ballots"

DISPUTED: As explained in Appellants' dispute of Defendants' Fact 17 Appellees provided no evidence to prove that Diebold cannot obtain ballot designs.

Pg11

This system assures that there is no state-wide swapping out of software or results, since it would discover it by the parallel test.

DISPUTED: The parallel test is conducted with "dummy" ballots and does not audit actual election results nor could it provide assurance that it would discover actual vote swapping as explained in Plaintiffs dispute of Defendant's asserted Fact 15. Furthermore, Appellees' witness Professor Williams admitted that the voting machines could act differently in test mode than when conducting an election [R62, Pg 66-67]

Pg 12

"The elector's votes cannot be traced back to the elector because he or she is not identified with a particular voter access card"

DISPUTED: As explained in Appellants' dispute of Defendants' Fact 22, the Voter Verified Paper Audit Trail Pilot Project report produced in April of 2007 by the office of the Secretary of State concluded that: "*The sequential printing of the VVPAT paper ballots does not guarantee voter anonymity as required by Georgia law."'*

Pg 13

"*After the election the voter's ballot can be displayed and printed"*

DISPUTED: The Appellees have provided no evidence that proves the image displayed and printed matches the ballot selections that the voter originally saw on the touchscreen before casting his or her vote on Election Day. Mr. Cobb has also admitted in deposition, there is also no way to be sure that the results of software tampering won't be passed along to those "ballot images". [R63, pg 40- 41]"

Pg 14

"The paper trail created by the machines allows their results to be physically audited"

DISPUTED: Any so called "audit trails" are generated by the equipment at a time *after* the votes may have been corrupted. Mr. Cobb has already admitted that there are no independent audit trails as was required by law. [R63 pg 33, ln 13]

Pg 14

"Witness after witness explained without dispute that these materials generate an audit trail by which the performance of the machines and election results can be and are examined."

DISPUTED: Although the Appellees do not cite who these witnesses are, their own expert witness contradicts this claim. As previously explained, Mr. Cobb admitted that there are no independent audit trails as was required by law. [R63 pg 33, ln 13]

Pg 14

"Any voter in Georgia, however, who does not wish to vote with the electronic voting system can vote – for any reason – with a mail-in absentee ballot"

DISPUTED: As explained in Appellants' dispute of Defendants' Fact 24, a voter choosing to vote in this manner must have pre-defined knowledge of who can provide the absentee ballot, from what office the ballot can be requested, how the ballot can be obtained and when the ballot must be obtained and cast.

Pg 14

"A voter likewise knows who he or she voted for at the time of voting because voters can check their ballot after making their selections to make sure their votes are identified for the right candidates or issues"

DISPUTED: As explained in Appellants' dispute of Defendants Fact 21 and 28, the votes shown on the touchscreen disappear when the ballot is cast and voters cannot see the electronic bits to check their ballots [R63, pg 13].

Pg 15

"The voters' confidence in the system is justified."

DISPUTED: As explained in Appellants' dispute of Defendants Fact 27, improvements in overvote and undervote rates are related to ballot completeness and have nothing to do with recording and counting accuracy. A voting machine could have perfect undervote and overvote rates but still record every vote in every race incorrectly.

Pg 16

"There is, in short, no individual voting rights claim"

DISPUTED: The Appellants' voting rights claim is based upon their right to have their vote counted which the U.S. Supreme Court has ruled is as "equally open to protection as the right to put a ballot in a ballot box" *U.S. v Moseley*.

Pg 17

"(indeed, none of the solutions they did propose would withstand scrutiny)"

DISPUTED: As the Appellees admit in the immediately preceding phrase, the Appellants "were not trying to propose solutions" since that was outside the scope of the complaint and thus any of Appellants' solutions that could withstand judicial scrutiny were never collected.

Pg 18

"Yet the Supreme Court has repeatedly held that unless this fundamental right is directly abridged State laws regarding voting are not subject to strict scrutiny."

DISPUTED: Appellees have failed to cite a single U.S. Supreme Court decision where a rational basis test was applied to a vote counting or recounting complaint because all U.S. Supreme Court case law involving vote counting or recounting dictate that strict scrutiny applies.

Pg 19

"None of the cases cited in the Appellants' strict scrutiny section address this issue – the State's interest in determining the manner of voting – nor do they even mention the extensive Supreme Court case law on the subject. "

DISPUTED: The Plaintiffs cited a multitude of case law as shown on Page 3 of their brief and throughout both that brief and their Motion for Summary Judgment in the lower court in which they have argued severe violations of the fundamental right to have their votes counted, not the manner of voting.

Pg 20

"For instance, in Weber v. Shelley, 347 F.3d 1101 (9th Cir. 2003), the Ninth Circuit considered this issue at length and found that such a system was constitutional and appropriate."

DISPUTED: As a result of the *Weber v. Shelley* case:

- A California Voting Systems Panel Panel unanimously recommended Diebold decertification (8-0),
- Sec. of State Shelley, (who was substituted via pro forma), **banned** Diebold AccuVote-TSx machines that used software identical to that employed by Georgia,
- The California Attorney general's office initiated a criminal investigation into Diebold,
- California sued Diebold and received a $2.6 million out of court settlement;

[R63, pg38]

Pg 21

"As the facts in the record demonstrate without material dispute, it is the least prone to error."

DISPUTED: The Appellees do not cite the record to support their claim. The Appellants reassert their dispute cited on Page 15 for this claim

Pg 21

"Few, have any idea how to even being to forge an electronic ballots. And if that were to occur it would be much easier to detect."

DISPUTED: The Appellees cite nothing to support this claim.

Pg 24

"To the contrary, as discussed at length in the Statement of Facts, above, there are numerous controls that prevent swapping from occurring. "

DISPUTED: The state's own witness admitted that if a portion of a candidate's votes were recorded for another candidate on Election Day it could not be detected [R62, pg 44, ln 22]

Pg 25

"The fundamental conceit of Appellants' equal protection challenge was that having options supposedly deprives people of rights."

DISPUTED: The Appellees cannot cite a single instance in any document ever produced by the Appellants where the Appellants have challenged the right of the people to have the option to vote by absentee ballot.

Pg 27

"In 1983 computers existed, electronic media existed, and, in fact, electronic voting existed though not by touchscreen terminal (at that time votes were downloaded by various methods of voting directly into a computer database). "

DISPUTED: The reference cited in the record refers to optical scan voting which electronically reads a paper ballot that can be verified by the voter, audited by an election official and retained for candidates entitled to recounts.{R63. Pg 20]

Pg 28

"The facts are undisputed that voters' ballots are kept secret"

The Voter Verified Paper Audit Trail Pilot Project Report published by the Office of the Secretary of State on April 11, 2007 admitted: "The sequential printing of the VVPAT paper ballots does not guarantee voter anonymity as required by Georgia law." [R65, p. 200]

Pg 28

"It is also an undisputable fact that voters know how they voted and can verify this when voting"

DISPUTED: The Appellants have never produced any evidence to prove that the votes shown to the voter on a screen are actually recorded on the voting machine and PCMCIA card that allegedly contains the votes. Such proof is technically impossible to obtain without an independent audit trail that the law required.

Pg 28

"The Appellants, however, would like a return to the punch card systems which caused the voting debacle in Florida in 2000."

DISPUTED: The Appellants did not explicitly advocate any such return to punch card ballots in the cited reference [R65, pg147-150] as admitted by the Appellees on page 17 of their own brief to the Supreme Court of Georgia.

Pg 30

"In Count II the Appellants again predicated their claim on what they believe to be a historical intent by the Constitution not to allow electronic voting"

DISPUTED: The Defendant's have never made any such claim but instead have claimed that electronic voting machines which produce only electronic ballots

without a paper ballot audit mechanism, cannot provide equal protection and the right to Due Process for the voters.

Pg 31

"The Complaint went on to claim, in essence, that Diebold is conducting the elections in Georgia"

DISPUTED: The Appellants have never made such a claim but claim instead that the People have been removed from verifying the selections that are on the ballot of record, auditing the results of the elections and obtaining full, true recounts.

Pg 32

"The undisputed evidence of record shows that the touchscreen voting system is the most reliable voting system Georgia has ever had."

DISPUTED: The reference cited does not assess the reliability, accuracy or correctness of the voting machine recording mechanisms which are the subject of this complaint. [Cobb Affidavit Pg 9]

Pg 32

"It is repeatedly monitored to assure that this is the case."

DISPUTED: Appellees offer no evidence of Election Day monitoring for vote recording accuracy and it would be technically impossible to do so without an independent audit trail of each vote cast as the law required.

Pg 33

"As stated by the witnesses at depositions, no instance of failing to record votes when the machines are properly operating or even of successful tampering with the machines in Georgia has ever been discovered, despite repeated investigation into this issue. "

DISPUTED: Defendants cited no evidence to support this claim of repeated investigations and it would be technically impossible to do so without the independent audit trail of each vote cast as the law required.. Appellants provided evidence of discrepancies including failure to record votes. [R.65, p. 263, Exhibit]

Pg 34

"Second, Appellants overlook the fact that even the electronic totals are re-run from scratch. [Cobb. dep.; Barnes dep.] If there were fraud on an individual machine doing so could catch it. "

DISPUTED: Mr. Barnes testified that a recount starts with the PCMCIA card. [R63, pg 42] therefore, any fraud committed prior to the recording of the votes on the card could not possibly be detected.

Pg 37

There is no non-discretionary specific duty that the Appellees have refused to perform in the present case

DISPUTED: The Appellees failed to perform a non–discretionary, legal duty of ensuring that ”such voting machines have an independent audit trail of each vote cast” as required by O.C.G.A 21-2-301(b) of the 2001 Georgia Election Code. This law was in effect for the entire time when the machines were procured, piloted, allegedly certified and purchased with approximately $54 million of taxpayer funds on May 3, 2002. Appellees’ expert witness, Ray Cobb, admitted that “I'm not aware of any audit trails independent of the equipment.” [R63, pg 33, ln 13]

R38

“But the evidence of record shows, directly refuting Appellants’ contentions in this regard, that <u>the machines and the processes they used were properly certified.”</u>

DISPUTED: The Appellants dispute this claim for al of the reasons stated in Pages 34-37 of their brief to the Georgia Supreme Court as supported by numerous instances in the record including [R62, pg 59, 65 72, 74, 78] [R65, pg 249-253 , 255-256 & associated exhibits].

Respectfully submitted,

_____, Attorney for Appellants

Certificate of Font, Paper and Type Size

This work is set forth in Times New Roman font, size 14, on recyclable paper.

Certificate of Service

I, Walker Chandler, Attorney for Appellants, hereby certify that I have served this APPELLANTS' SUPPLEMENTAL DISPUTE OF FACTS AND ASSERTIONS MADE BY APELLEES IN THEIR BRIEF TO THE GEORGIA SUPREME COURT upon The Honorable Stefan Ernst Ritter, counsel of record for Appellees, by personally handing same to him or his assistant, this 13th day of July, 2009.

_____

Walker Chandler, State Bar of Georgia No. 120675