

**THE COURT OF APPEALS OF TENNESSEE,**  
**WESTERN DIVISION**

**DAVID G. MILLS**  
Appellant,

vs.

**SHELBY COUNTY  
ELECTION  
COMMISSION,**  
Appellee,

No. **W2005-02883-  
COA-R3-CV**

and

**PAUL G. SUMMERS,  
ATTORNEY GENERAL,**  
Appellee

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**REPLY BRIEF OF THE APPELLANT**

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Respectfully submitted,

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## **ARGUMENT**

### **I. THE LITERAL LANGUAGE OF ARTICLE IV, SECTION 1, SHOULD BE READ AS A “STATUTE OF FRAUDS AND PERJURIES” FOR VOTING, AND ARTICLE 1, SECTION 5, REQUIRES THAT ARTICLE IV’S VOTING REQUIREMENTS APPLY TO ALL TENNESSEANS**

Appellee argues that Appellant’s claim of being required to vote paperless is not a special or particularized injury uncommon to the citizens and taxpayers generally. From this proposition, Appellee concludes that Appellant has failed to state a claim upon which relief should be granted. (Appellee’s Brief, p. x).

Appellant actually claims that his injury is not common to all (that is the basic problem -- all citizens and taxpayers are not treated equally or commonly) and that only some citizens suffer injuries like his while others suffer no injuries like his at all. Appellant’s claim is the opposite of an allegation of injury common to all. In no way are Appellant’s complaints allegations of common or universal injury; they are claims of disparate injury. But at first blush, the significant disparity in injuries may not be obvious.

After many months of looking at the election process, it has dawned on the Appellant that the election process must be viewed in reverse in order to truly see the significant disparate injury between paper and paperless voting systems. We need to look at the election contest lawsuit first and then work backwards to the actual casting of the

ballot. When one puts the microscope on the disparities between, and the differences between, an election contest that depends upon the evidence of paper ballots and an election contest that depends upon the evidence of expert opinion, the disparities and differences are stark.

Appellant believes that the usage of paper in human transactions is the greatest fraud and perjury deterrent yet invented by the legal system. This is the lesson of the original “Statute of Frauds and Perjuries,” (29 Car. II c. 3). The act of voting is a human transaction, one between the government and the people. If the original “Statute of Frauds and Perjuries” teaches us anything, it teaches that the absence of paper in any human transaction, not just a business transaction, is a fraud and perjury inducer. The global lesson of the “Statute of Frauds and Perjuries” is that the law disfavors testimony-based outcomes (fraud and perjury producers) when it is possible to avoid them in advance. Those of us who must vote without the benefit of a paper record of our vote must vote in a system that encourages or promotes fraud; those of us who get to vote on a paper based system get to vote in a system that deters it.

Fraud deterrence begins and ends at the courthouse, the turf of the judicial branch of government. If the judicial branch of government cannot deter fraudulent elections through its processes, there will be no democratic government. When Article IV, § 1 of the Tennessee Constitution is viewed literally, and as it was intended to be viewed, its paper component becomes a “Statute of Frauds and Perjuries” for voting, and similarly by deterring fraud, protects the democratic process. “The purity of the ballot box” is the paper ballot and its box; the ballot box was not a paperless system in its “pure” form.

Appellant would argue that turning to paperless voting has produced the same legal infirmities in the voting context that existed in the commercial context prior to the enactment of the “Statute of Frauds and Perjuries.” The original “Statute of Frauds and Perjuries” recognized the legal infirmities of paperless business transactions and rectified them. So too should this court recognize the legal infirmities brought about by paperless voting and rectify them.

The Court will recall that in 1677 the British enacted the original “Statute of Frauds and Perjuries.” Often lawyers, because of the shortening of the title of the statute to simply the “Statute of Frauds,” forget about the perjury aspect of the statute’s enactment. The “Statute of Frauds and Perjuries” was originally enacted because experience had shown, that without paper evidence of the essential terms of a business transaction, business transaction cases became little more than a contest of who was the best perjurer. The perjury contest made business transactions ripe for fraud.

So ever since its enactment, as the court well knows, the "Statute of Frauds" has been used to eject from court, most business transaction cases which are not based upon a proper paper record, to avoid the unsavory swearing contest. Furthermore, as this court well knows, the “Statute of Frauds and Perjuries” became first the law of the colonies, and later, of each and every state, because the courts recognized the value of paper as a deterrent to fraud and perjury. Ever since its enactment, the law has disfavored testimony based outcomes when it is possible to avoid them in advance.

Hopefully, the following argument will demonstrate that an election contest lawsuit, without individual paper ballots as proof of who won, is just as utterly ridiculous as a commercial transaction case without proper paper documentation.

Consider for a moment a typical business transaction lawsuit without a paper record of any kind. A Plaintiff claims to have been defrauded of ten thousand dollars. But there is no written contract. There is no cancelled check because the transaction was cash. The Plaintiff has no receipt and can't even produce any written correspondence. The agreement was made over the telephone and there are no witnesses. (Keep in mind for the moment that voting is supposed to be secret and there are no witnesses). Such a case would probably meet a very early death at the hands of the Statute of Frauds, and rightfully so, to prevent the perjury contest which would ensue.

But yet, we have the near equivalent of the perjury contest in the election contest case every time citizens are required to vote on a paperless system. A paperless voting system produces a testimony-based outcome, just like a paperless commercial case does, when both are avoidable in advance.

Consider for a moment two different types of voting election contests -- one with paper and one without. Note what paper evidence does to an election contest lawsuit in one case and what its absence does in the other.

Suppose in one election, where the outcome was in doubt, the voting was done on paper ballots. The challenger files suit and asks the court to subpoena all of the paper ballots. Once the ballots get to the courthouse, trial can proceed, the paper ballots can be marked as evidence (just like a contract, or a cancelled check, or a receipt or a letter of correspondence) and be handed to the jury to count. After the jury's verdict of who got the most votes, the judge declares a winner. The case is fast, cheap, highly effective and final. It is a significant fraud deterrent because there is no perjury contest or testimonial

contest determining the outcome. Anyone who monkeys with this system has a good chance of being caught if proper care is taken to protect the paper ballots.

Contrast that election contest with the election contest where there is no paper, like the paperless electronic computerized voting systems being pushed on many of us (and like Appellant will be voting on and has voted on). A challenger who wishes to contest a dubious outcome in a paperless voting system faces a much different election suit.

This election contest becomes a battle of whose software expert is most believed. It is a classic opinion-based testimonial contest. Moreover, the challenger and his expert will face overwhelming odds and the contest is rigged against the challenger. The Challenger's expert will likely have to testify without ever getting to properly examine the equipment. Why? Because the equipment is owned by private manufacturers who assert that their software is proprietary and is a trade secret. Before the challenger can ever get his expert to examine the equipment he will likely have to endure the expense and delay of a trade secrets' war.

But, to reiterate, the most serious problem for the system is that such a battle of the experts is little more than an upscale twist on the perjury contest. As with most such testimonial battles, both the jury and the court are likely to have justifiable qualms about whom they should believe. The outcome of such a case will always be somewhat dubious in the best of circumstances. Was the expert who said the voting equipment was working properly the one who was right, or was the expert who said the voting equipment was not working properly the one who was right? Most likely no one (or very few) will ever know.

At best, the second type of lawsuit is only likely to convince the court that there was enough doubt to warrant a new election and so the challenger's best hope is to end up on the same merry-go-round. Does this second kind of case deter fraud? Absolutely not. It encourages fraud. A fraudster knows he is likely never to get caught gaming a system where the outcome is based upon opinion evidence at trial.

Without paper ballots, the fate of democracy entirely rests upon opinion evidence. Upon an opinion based testimonial contest. It is that simple; and it is clearly avoidable with paper ballots.

When you have no proper legal redress for fraud, fraud will eventually become rampant when the stakes are high enough. In the 2004 Presidential election, the spending was reportedly \$500 million per side. Are those high enough stakes?

Paper ballots produce a fraud-detering, effective, and efficient election contest lawsuit, while a paperless system produces a fraud-inducing, dubious, onerous and expensive election contest lawsuit. To protect democracy for the good of all, the judicial branch of government must protect the judicial aspect of elections; it must require an election contest that deters fraud, and prevents expensive, dilatory, and dubious outcomes which are opinion based. This is far more an evidence question for the courts than it is a legislative choice of voting systems for the legislature. This is the court's turf.

For most of the USA's history, it was recognized, (perhaps self-evidently after at least a hundred years of the existence of the original "Statue of Frauds and Perjuries" prior to the U.S. Constitution), that a paper ballot was the best electoral fraud prevention device known to man.

Appellant would argue that the drafters of Article IV, § 1 of the Tennessee Constitution well understood the history of paper as a fraud deterrent and well understood (by then) the two–hundred year old lessons taught by the “Statute of Frauds.” Appellant would argue the drafters wanted the same checks and balances, lessons, and principles of the “Statute of Frauds” applied to voting when they said “secure... the purity of the ballot box.”

But in the early twentieth century our legislature, and many others, lost sight of the principle of the Statute of Frauds in the voting context and began to eradicate paper-based voting systems. That was a huge mistake. The loss of its lessons has resulted in the crisis in voting confidence which is so prevalent today.

We need to again recognize the principle that paper is the greatest deterrent to fraud ever invented by the legal system and apply the Statute of Frauds’ principles to the election process again, just as we continue to do in commercial transactions. Paper records deter fraud so long as the paper is protected.

We need a uniform statewide statute of frauds for voting, just like we used to have when Article IV, § 1 of the Tennessee Constitution was understood as requiring paper ballots. A uniform statewide statute of frauds for voting, not just for some, but for all of us.

Whether this court will require the return to a statewide universal paper based voting system is a justiciable controversy and the issues raised by a lack of a statewide universal standard are ones for which relief can be granted by this court.

**II. THE FACT THAT THERE IS NO UNIFORM STATEWIDE  
STATUTE OF FRAUDS FOR VOTING  
MEANS THAT THERE IS AN INJURY TO THE APPELLANT  
WHEN IT IS UNCONTROVERTED THAT HE CANNOT AVAIL  
HIMSELF OF ITS PROTECTIONS**

Suppose for the sake of argument, that the general assembly passed a statute stating that the application of the commercial Statute of Frauds was optional and that individual counties could elect to opt out of its requirements. Suppose that some counties elected to retain its requirements and some elected to opt out of them. Is there any court that would tolerate a county by county application of the Statute of Frauds? Hopefully not.

But who would have standing to bring an action against those counties that opted out? If a lone citizen had decided to challenge his county's decision to opt out of the requirements of the Statute of Frauds, would the courts say the lone citizen had no standing to sue on his own behalf or to bring suit on behalf of his fellow citizens similarly situated? One would certainly hope not.

One would hope the courts would say that a lone citizen had received a distinct and palpable injury, that his injury was caused by his county's opting out of the requirements of the Statute of Frauds, and that returning to the application of the statute of frauds would remedy his injury. One would hope.

One would hope that the action of a lone citizen could return the application of the Statute of Frauds to all citizens, rather than have the statute continue to apply to some citizens but not to all. One would hope.

One would hope that the loss of the requirements of the Statute of Frauds would be a sufficient enough injury to a lone individual so that that lone individual would have standing to sue even though the lone individual never actually needed to seek its protection in court. One would hope.

On the issue of standing, perhaps the seminal question should be: “Who should the court expect to bring a lawsuit challenging the constitutionality of paperless voting?” Would the court expect the General Assembly to challenge the constitutionality of its own statutes? Would the court expect the Shelby County Election Commission to bring suit challenging its choice to use paperless voting machines allowed by statute? Just who should be allowed bring this lawsuit? While the Appellee complains that the Appellant should not be the one, it offers the Court no suggestion as to whom should have standing to question the constitutionality of paperless voting.

If citizens should be allowed to bring such a suit, is it necessary to have more than one citizen? One would hope not. If so, then Appellant should have standing for himself and others so situated.

**III. EVIDENCE FROM THE MEDIA**  
**OF THE ELECTION CRISIS BROUGHT ABOUT BY**  
**COMPUTERIZED AND PAPERLESS ELECTIONS**

Appellant has also attached in the Appendix to this brief, (Exhibits A-D), several recent articles published in the national media which indicate that computer based and paperless systems are causing a national crisis of confidence in voting.

## **CONCLUSION**

Shall Tennessee have a voting Statute of Frauds for all its citizens or shall we not, that is the question. Put another way, should the fate of democracy here rest solely on opinion evidence?

Appellant claims that Article IV, § 1 of the Tennessee Constitution was intended to be a voting Statute of Frauds and that Article I, § 5 of the Tennessee Constitution was meant to apply the requirements of Article IV, § 1 uniformly and equally to all Tennesseans. Article IV, § 1 was written to ensure that paper evidence of votes cast be available for trial; it was not written so as to require opinion evidence to replace paper evidence. Appellant claims we once had a uniform voting Statute of Frauds (although it was not called that) the uniformity of which was mistakenly eradicated, and argues that since we now realize the mistake, we should correct it. He argues that we should once again have a voting Statute of Frauds for all Tennesseans.

If the Court agrees with Appellant's claims and observations, then the only question remaining is whether one lone person can bring a claim to ensure that all citizens have the protection a voting Statute of Frauds would bring; or, must someone else or some group do it on behalf of the citizens of Tennessee, and if so, who? If more than one, how many? Appellant believes that no other group or person could represent his interests better than he. He also believes that no other group or person could

represent the interests of the citizens of Shelby County demonstrably better than he. He believes he should be granted standing to represent the interests of both.

Respectfully submitted,

/s/ David G. Mills  
David G. Mills

**CERTIFICATE OF SERVICE**

I hereby certify that on this day I sent a true copy of this Reply Brief to the following attorneys by regular mail or facsimile at these addresses:

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Signed this 26th day of June, 2006.

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