

FILED

2022 APR 18 AM 11:00

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

DAVIDSON CO. CHANCERY CT.

VB

D.C.&M.

TENNESSEANS FOR SENSIBLE ELECTION LAWS,

Plaintiff,

vs.

TENNESSEE BUREAU OF ETHICS and CAMPAIGN
FINANCE, REGISTRY OF ELECTION FINANCE,

Defendants.

No. 18-0821-III (I)

MEMORANDUM OPINION AND ORDER
ON PLAINTIFF'S PETITION FOR CONTEMPT

This case came on for a hearing on Defendant's Motion for Summary Judgment and thereafter for trial on the Petition for Contempt. A separate Memorandum Opinion and Order has been issued ruling on Defendant's claim that sovereign immunity renders the original injunction void; or at least precludes the imposition of a monetary penalty against the State if the State were to be found in willful contempt.

1. Defendant's Motion for Summary Judgment

Defendant also asserted that it was entitled to summary judgment on the contempt petition because this Court's injunction could not be construed to preclude the enforcement of the amended version of Tenn. Code Ann. §2-10-121; and, that enforcement of that provision could not be a "willful" violation of the injunction since the amended version has never been declared unconstitutional.

As to the first issue, the Order of this Court regarding enforcement of Tenn. Code Ann. §2-10-121 is clear. The defendant was "permanently enjoined from enforcing . . . Tenn.

Code Ann. §2-10-121.” Memorandum and Order filed October 11, 2018 at p. 2. That Order was appealed and affirmed in all respects by the Court of Appeals in an Opinion filed December 12, 2019. Between the issuance of this Court’s injunction and consideration of the matter in the Court of Appeals, the legislature amended the statute to remove the exemption for statewide political party PACs. *Tennesseans for Sensible Election Laws v. Tennessee Bureau of Ethics and Campaign Finance*, 2019 WL 6770481 (Tenn. App. 2019) slip op at p. 10-12. Defendant contended that the constitutional challenge to Tenn. Code Ann. §2-10-121 was rendered moot by the 2019 amendment. *Id.* The Court of Appeals specifically found that the amendment did not render the constitutional challenge moot. *Id.* at p. 12.

Defendant did not enforce the statute, as amended, in 2019 or 2020. However, in January 2021 defendant made the decision to begin enforcing the statute again. The detailed facts surrounding this sequence of events is thoroughly set forth in “Section II. Timeline, Facts, and Procedural History” in Plaintiff’s Reply to Defendant’s Response in Opposition to Plaintiff’s Petition for Contempt, filed February 19, 2022. That section of the foregoing referenced document is hereby incorporated herein as findings of fact in this Memorandum Opinion and Order.

The essence of defendant’s argument is that this Court could not enjoin enforcement of a statute that did not exist at the time the injunction was issued. In the abstract, this is undoubtedly true. However, Tenn. Code Ann. §2-10-121 was in existence at the time this Court’s injunction was issued and the fact that it was amended in some respect by the legislature after the issuance of the injunction does not nullify or make moot the injunction which proscribes the statute’s enforcement. Under the defendant’s theory, the legislature could have made any change at all and taken the statute out from under the injunction issued in 2018. Any minor change to

that code section would allow the State to circumvent this Court's injunction under defendant's theory.

Defendant was enjoined from enforcing Tenn. Code Ann. §2-10-121 and even if the legislature had completely eradicated the discriminatory unconstitutional aspects of that code section this Court's injunction would still prohibit defendant from enforcing it absent the granting of relief from the 2018 Order establishing the injunction. The facts and conclusions in this Court's Order on Defendant's Motion for Relief from Judgment filed December 16, 2021 are hereby incorporated in this Memorandum Opinion by reference. For these reasons, Defendant's Motion for Summary Judgment based upon the amendment of the statute in 2019 is DENIED.

The final issue raised in the Motion for Summary Judgment was the issue of willfulness. The undersigned FINDS that there is a dispute as to material facts regarding the issue of willfulness in the violation of this Court's injunction. The timing of the decision to begin enforcing the statute supports the idea that it was a willful decision since no enforcement efforts were made in 2019 or 2020 after the statute was amended. In addition, defendant collected \$64,000.00 in 2021 from enforcing the statute and has not returned any of that money to PACs who were required to pay the enjoined registration fee, even after Defendant's Motion for Relief from Judgment was denied.

The Court also adopts the following facts as indicating that there is a factual dispute regarding the issue of willfulness which renders summary judgment inappropriate: Plaintiff's Response to Defendant's Statement of Undisputed Material Facts and Statement of Additional Facts filed February 10, 2022 including Defendant's Fact No. 1 and Plaintiff's Response thereto as well as Plaintiff's Fact No. 6, Plaintiff's Fact No. 7, Plaintiff's Fact No. 9, Plaintiff's Fact No. 10, Plaintiff's Fact No. 11, all of which are incorporated herein by reference. Because of the

factual disputes relating to the issue of willfulness, summary judgment is inappropriate and defendant's Motion is therefore DENIED.

2. Contempt Trial

After hearing the arguments on the motions for summary judgment the Court went on to receive proof on the contempt petition. There was no live testimony presented. The parties submitted Exhibits 1 through 6, including the deposition transcript of Lance Frizzell (Exhibit 4), Defendant's Rule 30.02(6) designee. Both parties rested on their arguments and the Exhibits. The matter was taken under advisement primarily to address the sovereign immunity issue and if it was not found to be dispositive, to rule upon the petition for contempt. After carefully considering the proof and arguments, the court hereby FINDS, CONCLUDES, and RULES as follows:

The injunction at issue was lawful. The injunction was issued by a court with personal and subject matter jurisdiction. It was upheld on appeal. *Tennesseans for Sensible Election Laws v. Tennessee Bureau of Ethics and Campaign Finance*, 2019 WL 6770481 (Tenn. App. 2019). It was not barred by sovereign immunity. See, Memorandum Opinion and Order on the Issue of Sovereign Immunity filed April 6, 2022.

The injunction at issue is clear and unambiguous. As discussed above, and in this Court's previous ruling on Defendant's Motion for Relief from Judgment, the injunction was simple and straightforward. It precluded defendant from enforcing Tenn. Code Ann. §2-10-121. It is also equally clear that defendant violated this injunction by enforcing Tenn. Code Ann. §2-10-121. The only real issue is whether the element of willfulness has been proven by a preponderance of the evidence in this case to sustain a finding of civil contempt.

Defendant has contended that its violation of the injunction could not be found to be willful since the Registry was required to enforce Tenn. Code Ann. §2-10-121, as amended in 2019, because “the statute as amended mandates enforcement” Defendant’s Pretrial Brief at p. 6, filed February 14, 2022. Defendant argues that it had no discretion to disobey the amended statute. *id* at p. 13-14. But the defendant did exercise discretion in declining to enforce the amended statute during 2019 and 2020. Even after the court of appeals opinion became final in 2020, the defendant declined to enforce the statute as amended in 2019 until January of 2021.

Apparently after some discussion with the Tennessee Attorney General’s Office, defendant initiated enforcement of Tenn. Code Ann. §2-10-121 in January of 2021.¹ Counsel for plaintiff notified defendant of his concern that defendant was in contempt of this Court’s injunction after receiving notice of the renewed enforcement. Internal communications of the defendant indicate that plaintiff’s contempt allegation was “expected.” A detailed statement of facts with appropriate citations to all of the documents involved is set forth in Plaintiff’s Reply to Defendant’s Response and Opposition to Plaintiff’s Petition for Contempt filed February 19, 2021 in “Section II. Timeline, Facts, and Procedural History”, which extends from page 1-7, and which section is hereby incorporated by reference with the facts and citations hereby made findings of fact of the Court.² By “expecting” a contempt charge defendant obviously considered that it’s conduct could be construed as contemptuous. Defendant nevertheless initiated

¹ Defendant has not specifically asserted the advice of counsel as a defense to this contempt action, but the Court notes that it has long been the law in this State that contempt of court “is not justified or excused by reason of the fact that a party acted on advice of counsel.” *Robinson v. Air Draulics Engineering Co.*, 377 S.W.2d 908, 911 (Tenn. 1964).

² These facts and document citations were also incorporated into this Memorandum Opinion and Order in Section 1, above.

enforcement of the statute without seeking relief from this Court's injunction forbidding enforcement.

The testimony of Lance Frizzell also confirms that the defendant exercised discretion in determining when to enforce, not enforce or temporarily pause enforcement of the statute. Transcript of deposition of Lance Frizzell taken January 27, 2021, Exhibit 4 to the Contempt Trial, *e.g.* p. 62. Defendant made a conscious choice to enforce the statute. A conscious choice is a deliberate action. A deliberate action is willful.

In addition, defendant began enforcing the statute, and continued to do so, prior to filing a motion for relief from judgment. Defendant only stopped enforcing the statute after its motion for relief from judgment was denied. Based upon all of these facts, the Court FINDS that the defendant willfully violated this Court's injunction by a preponderance of the evidence.

3. Conclusion

Prior to the trial on this contempt petition defendant again stopped enforcing the statute. At trial, defendant argued that the issue of civil contempt has been rendered moot, because they are currently complying with this Court's injunction and the purpose of civil contempt is to coerce compliance. The defendant's position is meritorious except for one detail: defendant has retained all of the registration fees that were obtained by the unlawful enforcement of the unconstitutional statute. Based upon the defendant's retention of these improperly collected fees, this Court FINDS that defendant remains in contempt. Accordingly, having found that the defendant is in contempt of court, it is hereby

ORDERED that the Registry shall refund all improperly collected registration fees, obtained through the enforcement of Tenn. Code Ann. §2-10-121 in violation of this Court's

injunction, within 15 days of the date this Memorandum Opinion and Order is stamped "Filed" by the Clerk and Master; it is further

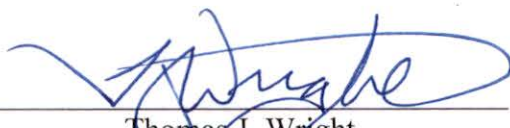
ORDERED that additional coercive fines will be considered if defendant fails to refund the registration fees as ordered above, Tenn. Code Ann. §29-9-104(b); it is further

ORDERED that counsel for plaintiff may submit a request for attorney fees for prosecuting this Petition for Contempt and the Court will consider an award of attorney fees to the plaintiff as damages for the contemptuous conduct of the Registry, Tenn. Code Ann. §29-9-105; *Reed v. Hamilton*, 39 S.W.3d 115 (Tenn. App. 2000), perm. app. denied (2001); it is further

ORDERED that the request for attorney fees, if desired, shall be filed within 15 days of the date this Memorandum Opinion and Order is stamped "Filed" by the Clerk and Master, and that counsel for defendant will then have 15 days from the date of plaintiff's filing to file any response thereto, after which the Court will issue an Order based solely on the submissions of counsel; it is finally

ORDERED that any court costs associated with these proceedings are hereby taxed against the defendant for which execution may issue if necessary.

Enter:



Thomas J. Wright
Senior Judge

CERTIFICATE OF SERVICE

A true and exact copy of the foregoing Order has been served upon the following persons via email at the email addresses listed:

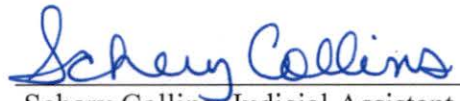
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On this the 14th day of April, 2022.


Schery Collins, Judicial Assistant
to Senior Judge Thomas J. Wright

CERTIFICATE OF SERVICE

I, hereby certify that a true and exact copy of the foregoing was mailed or personally delivered to

all parties on page 8 of order

via U. S. Mail, postage prepaid, this the 18 day of April, 2022

V. L. Bailey
Clerk & Master