

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

EFFIE STEWART, et al., :

Plaintiffs, : **Case No.: 5:02CV2028**

vs. : **Judge David Dowd, Jr.**

BLACKWELL, et al. :

Defendants. :

**SANDUSKY COUNTY DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Defendants, the Sandusky County Board of Elections, Harry Heyman, Thomas Younker, John Rettig, Sandusky County Board of Commissioners, Brad Smith, Daniel Liskai, and Terry Thatcher (collectively "Sandusky County Defendants" or "Sandusky County"), by and through counsel, now oppose the Plaintiffs' Motion for Summary Judgment ("Plaintiffs' MSJ") for the following compelling reasons:

- 1) Plaintiffs make nothing more than conclusory allegations against Sandusky County;
- 2) Even if Plaintiffs made an Equal Protection claim against Sandusky County, this claim would fail because they have no evidence that Sandusky County's method of voting is not uniform; and
- 3) Plaintiffs have no evidence that there is any problem whatsoever with the optical scan method of voting currently used by Sandusky County.

These reasons are set forth in more detail below.

I. Plaintiffs make nothing more than conclusory allegations against Sandusky County.

As an initial matter, Sandusky County hereby adopts and incorporates by reference all of the arguments set forth in the other Defendants' Memorandum Contra Plaintiffs' Motion for Summary Judgment, as well as the arguments that Sandusky County set forth in its Motion for

Summary Judgment. Like its Motion for Summary Judgment, the only reason that Sandusky County did not simply join in the other Memorandum Contra to Plaintiffs' Motion for Summary Judgment, and refrain from filing their own memorandum, is because: 1) they are the only defendant who currently uses an optical scan ballot, and 2) they are the only defendant that has *not* had a race discrimination claim made against it under § 2 of the Voting Rights Act.

First and foremost, Plaintiffs' MSJ, which is in excess of thirty-nine (39) pages, states nothing more than conclusory allegations against Sandusky County. Specifically, the *only* references at all to the method of voting conducted in Sandusky County is when the Plaintiffs lump Sandusky County in with the list of the other county defendants that they make conclusory allegations against in the first two unnumbered pages of Plaintiff's MSJ, and when they list who the parties are to this lawsuit. (Plaintiffs' MSJ at 1-2). No other references to Sandusky County are made.

None of the witnesses that Plaintiffs' cite to (either those who testified on behalf of the Plaintiffs or those who testified on behalf of the other defendants) have testified that they examined or that they have an opinion on either the method by which Sandusky County conducts its elections, or on any data which reflects any results of those elections. Moreover, the single citation they make to any evidence concerning Sandusky County is when they lump a general citation to Ms. Tuckerman's deposition in with citations to other witnesses' depositions which allegedly demonstrate that "[t]here are scores of problems that have occurred throughout counties in Ohio using the 'non-notice' equipment that are not due to any intentional error of the voter." (Plaintiffs' MSJ at 7). This generalized and conclusory allegation fails because Plaintiffs' cannot demonstrate that Ms. Tuckerman, or any of the other cited witnesses, have experienced any problems with Sandusky County's current method of voting.

II. Even If Plaintiffs Made An Equal Protection Claim Against Sandusky County, This Claim Would Fail Because They Have No Evidence That Sandusky County's Method Of Voting Is Not Uniform.

A close examination demonstrates that the bulk of Plaintiffs' MSJ is devoted to either: 1) claims against the State of Ohio for allowing different counties to conduct their elections by way of different voting methods (Plaintiffs' MSJ at 2-3), 2) claims against the use of punch card ballots (Plaintiffs' MSJ at 19, 24-25), or 3) claims for race discrimination under § 2 of the Voting Rights Act (Plaintiffs' MSJ at 3, 26-37). Plaintiffs' do not claim that Sandusky County uses punch card ballots or that they have violated § 2 of the Voting Rights Act. While Plaintiffs also do not appear to be making an Equal Protection claim against Sandusky County, assuming that they had, it would fail.

Plaintiffs argue that the use of "error-prone"¹ voting equipment violates the Equal Protection rights of those voters who use such equipment. (Plaintiffs' MSJ at 10). They base their equal protection argument on the holding of *Bush v. Gore*, 531 U.S. 98 (2000). However, the Equal Protection problems in that case were related solely to the Florida Supreme Court's decision to conduct a limited recount of punch card ballots that had no readily discernible standard. *Id.* at 105. Essentially, the problem was that different counties, *all within Florida*, were using different standards for conducting their recounts. See *Id.* at 106-108.² Based on this holding, the Plaintiffs then make the allegation that "[t]he *State of Ohio's* continuing use of error-prone voting systems in some of its counties contravenes this basic equal protection principle." (Plaintiffs' MSJ at 10)(emphasis added). Without commenting on the merit of any Equal Protection claim against the State of Ohio, the fact remains that Plaintiffs cannot rely upon *Bush*

¹ This is a term that Plaintiffs' apparently believe is synonymous with terms such as "defective" and "non-notice." (Plaintiffs' MSJ at 11).

² Despite their attempt to stretch the holding of *Gore v. Bush* to suit their liking, even Plaintiffs' concede that "uniform treatment' of voters" is what that case requires. (Plaintiff's MSJ at 11).

v. Gore for an Equal Protection claim against Sandusky County, since they have come forward with no evidence that suggests that Sandusky County does not provide all of its voters with a uniform method of voting throughout Sandusky County.³

III. Plaintiffs Have No Evidence That There Is Any Problem Whatsoever With The Optical Scan Method Of Voting Currently Used By Sandusky County.

Plaintiffs claim that strict scrutiny is somehow applicable when reviewing the method of voting conducted in Sandusky County must be rejected because Plaintiffs have no evidence that any voter in Sandusky County is more likely to have his or her vote counted than any other Sandusky County voter. (Plaintiffs' MSJ at 13). But even under the applicable rational basis standard of review (See Sandusky County's MSJ at 12), Plaintiffs have simply produced *no evidence* whatsoever to demonstrate *any* problem with the method of voting utilized by Sandusky County. They do attempt to use a chart made by Ms. Kropf to demonstrate that in the 2000 Presidential Election in Ohio, those counties that used an Optical Scan ballot had a Non-Vote Rate of 1.7% and an Unintentional Non-Vote Rate of 1.4%. (Plaintiffs' MSJ at 18). However, because Sandusky County *did not use an optical scan ballot in 2000*, but instead used a punch card ballot, this chart is completely irrelevant to any claim made against Sandusky County.⁴ (Tuckerman Depo. at 21).

More importantly, Ms. Kropf's testimony demonstrates that the counties that did use an optical ballot experienced a lower Non-Vote Rate in the U.S. Senate Race in the 2000 General Election. Specifically, those counties who used an optical scan ballot in that election

³ Plaintiffs' reliance upon *Reynolds v. Sims*, 377 U.S. 533 (1964), is also not applicable to the uniform method of voting conducted in Sandusky County, since that case concerned an Alabama Reapportionment plan. Similarly, Plaintiffs' reliance upon *Moore v. Ogilvie*, 394 U.S. 814 (1969), is inapplicable to Sandusky County, since that case involved a challenge to an Illinois statute. (Plaintiffs' MSJ at 12).

⁴ Even if Sandusky County had used an optical scan ballot in the 2000 Presidential Election, the fact that all the counties that used an optical scan ballot, *when combined together*, may have had an average Non-Vote Rate of 1.7%, this would not demonstrate that *Sandusky County* had a Non-Vote Rate of 1.7%.

experienced an average of a 5.2% Non-Vote Rate, while those counties that utilized an electronic method of voting in that race experienced an average of a 6.1% Non-Vote Rate in that same race. Also in that same race, those counties that utilized a Lever method of voting experienced an average Non-Vote Rate of 8.2%. (Plaintiffs' MSJ at 21-22). This is particularly important because the Court can take judicial notice that the U.S. Senate race is a statewide race, and thus, Plaintiffs' cannot claim that the difference in Non-Vote Rates is attributable to "[v]oters throughout the State of Ohio [] voting for different candidates in different parts of the state." (Plaintiffs' MSJ at 20-21).

Plaintiffs claim that since the optical scan ballot utilized by Sandusky County is counted at a central location after the polls have closed, this method constitutes "non-notice" equipment which does not provide a voter a chance to assess his choices before finally casting his vote in the precinct at the time of voting. (Plaintiffs' at p. 5). However, Plaintiffs have not demonstrated that Mr. Walch, upon whose testimony they rely for this proposition, has ever examined the method of voting conducted by Sandusky County Ohio. Moreover, an examination of the optical scan ballot demonstrates that it is so simple that a Sandusky County voter can easily examine his ballot for himself to assess his choices before finally casting the ballot. (Sandusky County's MSJ 3-6). In fact, two of the Plaintiffs own expert witnesses, Roy G. Saltman and Dr. Herb Asher, agreed that as long as a voter on an optical scan ballot follows and understands the directions on an optical scan ballot, they will *not* unintentionally cast a non-vote. (Sandusky County's MSJ at 18-19).

The testimony of these two expert witnesses for the Plaintiffs is also significant because, even if the use of so called non-notice technology does lead to higher rates of non-votes (residual ballots) than does the use of so called error notice technology, the fact remains that there is *no*

risk of a non-vote in Sandusky County so long as the voter follows and understands the directions. (Plaintiffs' MSJ at 8). Moreover, this fact means that the Plaintiffs' claims that "defective voting machines" are used, that some voting machinery "fails to satisfy minimal criteria for accuracy and reliability," and that some voters "cannot even tell if their votes are among those denied" has no applicability whatsoever to the use of optical scan ballots by Sandusky County. (Plaintiffs' MSJ at 11).

IV. Conclusion.

For all of the above reasons, Sandusky County respectfully requests that this Court deny Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 16, 2004, a copy of the foregoing was filed electronically. Notice of the filing will be sent to and can be accessed by all parties by operation of the Court's electronic filing system.

/s/ Jeffrey Stankunas _____
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