

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
17TH DIVISION**

MARION HUMPHREY

PLAINTIFF

Vs.

Case No. 60CV-2018-4857

**HONORABLE MARK MARTIN,
In his Official Capacity as Secretary
Of State for the State of Arkansas**

DEFENDANT

**RANDY ZOOK, individually and on
Behalf of the Legislative Question
Committee ARKANSANS FOR JOBS
AND JUSTICE**

INTERVENOR

ORDER

Now on this 30th day of August, 2018, this matter comes on for hearing, the Plaintiff, Marion Humphrey, appearing in person and by and through his attorneys, David H. Williams and Jeff Priebe, the Defendant Mark Martin appearing by and through his attorneys, A.J. Kelly and Michael Fincher, and the Intervenor, Randy Zook, appearing by and through his attorneys, Stephen R. Lancaster, Gary D. Marts, and Elizabeth Robben Murray, and the court being well and sufficiently advised, finds as follows by clear and convincing evidence:

1. This court has jurisdiction over the parties and the subject matter of this litigation. Venue is proper in Pulaski County, Arkansas.
2. This court has considered the arguments of counsel for the respective parties, has reviewed and considered the cases cited by the parties in their briefs submitted to the court, the Constitution of the State of Arkansas, relevant statutes and the Arkansas Rules of Civil Procedure.
3. This court is called upon to review the legitimacy of the process in referring proposed Issue No. 1 (SJR 8) to the voters of the State of Arkansas in the November 6, 2018, general election. This court is not tasked with a review of the merits or demerits of the subject matter of the amendment. The like or dislike of the amendment or the potential results of its implementation are not before this court. The ruling in this

case is confined to the separate issue requirements contained in Article 19, Section 22 of the Constitution of the State of Arkansas. Proposed constitutional amendments “shall be so submitted as to enable the electors to vote on each amendment separately.” Art. 19, Sec. 22. The separate issue test has been addressed by the Arkansas Supreme Court in two cases: *Brockelhurst v. State*, 195 Ark. 67, 72-73, 111 S.W.2d 527, 529-30 (1937) and *Forrester v. Martin*, 2011 Ark. 277, 383 S.W.3d 375 (2011) (citing *Brockelhurst*, *id.*; *Californians for an Open Primary v. McPherson*, 134 P.3d 299 (Cal. 2006); *Legislature of the State of California v. Eu*, 816 P.2d 1309, 1321 (Cal. 1991)).

4. This court does not consider the *Brockelhurst* case as instructive on the issues before it and has not relied on that case in making this decision. As stated by the court at the final hearing, this argument made by the appellant in *Brockelhurst* was dealt with by the Supreme Court in two sentences without any instructive language regarding the manner in which this trial court should address the current issues before it.
5. Plaintiff alleges the Arkansas Legislature, in submitting what is designated as Issue No. 1 for consideration by the voters in the November 6, 2018, general election, engaged in what is commonly referred to as “logrolling” by including in one proposed amendment four separate and distinct issues for the voters to decide in violation of the single subject requirement of Art. 19, Sec. 22 of the Arkansas Constitution.
6. Plaintiff seeks: a Writ of Mandamus, Declaratory and Injunctive Relief pursuant to the Arkansas Rules of Civil Procedure, specifically Rules 57 and 65; a declaration pursuant to Rule 57 that Issue No. 1 violates the Arkansas Constitution, specifically Art. 19, Sec. 22; and a declaration and injunction ordering the Secretary of State to not count, canvass, or certify any ballots or votes cast for Issue No. 1.
7. Pursuant to Ark. Const. Art. 19, Sec. 22, the Arkansas General Assembly has the authority to refer proposed amendments to the Arkansas Constitution as ballot measures to be voted on by the electorate. Only three such proposed constitutional amendments may be referred by the General Assembly during any election cycle.
8. In the Regular Session of the 91st General Assembly in 2017, the Arkansas General Assembly referred two proposed amendments to the Arkansas Constitution to the voters of Arkansas: Senate Joint Resolution 8 which is

the amendment at issue in this case and identified by the Secretary of State as Issue No. 1; and, House Joint Resolution 1016 which deals with requirements for voter identification and identified as Issue No. 2 on the ballot.

9. Issue No. 1 proposes four changes to the Arkansas Constitution:
 - SECTION 1: Adding Section 53 to Article 7, limiting in part contingency fees for certain attorney (Plaintiff's attorney) representation in civil court actions to a maximum of 33 1/3%, and providing for certain enforcement and modification provisions to be vested under the control of the Arkansas Legislature;
 - SECTION 2: Amending Article 5, Section 32, by limiting non-economic damages to \$500,000 per person and \$500,000 in the aggregate for certain cases, which can be adjusted for inflation by the Legislature, and limiting punitive damages in certain cases to \$500,000 or three (3) times compensatory damages;
 - SECTION 3: Amending Amendment 80, Section 3, to allow the General Assembly to review, repeal, and adopt certain rules of pleading, practice and procedure prescribed by the Arkansas Supreme Court; and
 - SECTION 4: Reducing the minimum vote of the General Assembly to annul or amend any rules promulgated by the Supreme court from a two-thirds (2/3) majority of each house of the legislature to a three-fifths (3/5) vote of each house of the legislature.
10. The only Arkansas case applicable to the issue in controversy is *Forrester v. Martin*, id. As previously stated, *Brockelhurst v. State*, 195 Ark. 67, 111 S.W.2d 527 (1937) is not instructive or persuasive regarding the present issue before this court. In *Forrester*, the Arkansas Supreme Court adopted the reasoning outlined in the California case of *Californians for an Open Primary v. McPherson*, 38 Cal.4th 735, 43 Cal.Rptr.3d 315, 134 P.3d 299 (2006) stating "under Art. 19, Sec. 22, there is no violation of the separate-issue requirement so long as *all of the amendment parts are reasonably germane to each other and to the general subject of the amendment.*" *McPherson*, which the Arkansas Supreme Court adopted as its basis for upholding Amendment 89 to the Arkansas Constitution,

also stated: “the separate-vote provision should be construed consistently with its kindred provision, the single subject rule.”

11. Plaintiff contends the four parts of Issue No. 1 are not reasonably germane to each other nor to the general subject of the amendment.
12. Defendant and Intervenor contend Issue No. 1 and the four parts outlined therein, comply with the requirements of *Forrester*. Intervenor states Plaintiff simply cannot demonstrate that the four narrow sections of Issue No. 1 are not reasonably germane to the general subject of judicial power or to each other. Intervenor argues Issue No. 1 has four provisions, each of which deal with something that the judiciary currently does. Defendant states the separate sections of SJR 8, Issue No. 1, are related to each other and to the general subject of courts and the judiciary.
13. Plaintiff argues Issue No. 1 constitutes logrolling in that the four provisions contained therein are not reasonably germane to each other nor are they reasonably germane to the general subject of the amendment. The first section of Issue No. 1 caps contingency fee contracts at 33 1/3 %. Plaintiff argues this section infringes on the rights of Arkansas citizens to freely contract. He argues section 2 of Issue No. 1 infringes on the rights of Arkansas citizens to be adequately compensated in full for damages suffered at the hands of a wrongdoer. Plaintiff argues the first two sections of proposed Issue No. 1 infringe on citizen rights. The third section of Issue No. 1 takes rule making authority from the Arkansas Supreme Court and vests it in the Legislature. Plaintiff argues this shift in rule making authority has nothing to do with sections 1 and 2 of Issue No. 1.
14. Intervenor says the subject of Issue No. 1 is judicial power. Defendant says it is about the courts and the judiciary. Both argue the four sections of Issue No. 1 are reasonably germane to each other and to the general subject of the amendment per *Forrester*.
15. All of the parties before the court have argued various other issues regarding this matter, i.e., (1) The ballot title is not misleading and does not constitute manifest fraud. (2) The court should ignore the extraneous materials and various statements utilized by the Intervenor’s committee in support of the proposed amendment. (3) Defendant argues Plaintiff’s complaint should be dismissed in its entirety pursuant to sovereign immunity. (4) Intervenor argues no court has ever removed a proposed

constitutional amendment from the ballot pre-election. (5) Both Defendant and Intervenor argue the proposed amendment has a presumption of constitutionality and to remove Issue No. 1 deprives the voters of their right to cast their ballot on this issue. (6) The court should adopt the dissent contained in *Forrester*. These arguments play no part in this court's decision. All of the aforementioned arguments are irrelevant to the matter at hand.

16. The rule as stated in *Forrester* is the rule to be followed. It matters not whether it is strict, lenient, harsh, accommodating or any other adjective anyone would choose to apply to it. It is what it is.

17. This court has considered this matter in light of Plaintiff's arguments and in light of the combined arguments provided by Defendant and Intervenor. This court has tried to analyze the arguments from various viewpoints and with the presumption that the proposed amendment is constitutional and without the presumption. The end result is the same.

18. Taking the four sections of Issue No. 1 and analyzing them reveals as follows:

- a. Plaintiff argues the cap on contingency fees is a taking from the citizens of Arkansas the right to freely contract with an attorney of their choice and in an amount (of the contingency fee) as agreed. Defendant states the cap is a part of the courts and judiciary subject matter of the amendment, and coupled with the three other provisions of Issue No. 1, is reasonably germane to the other sections and to the general subject of the amendment which is "courts and the judiciary." Intervenor argues the cap relates to the general subject of judicial power and is reasonably germane to the other three sections of Issue No. 1.
- b. Plaintiff argues Section 2 of Issue No. 1 deprives the citizens of Arkansas the right to be adequately compensated for full damages as a result of wrong they have suffered. Defendant and Intervenor argue the cap on non-economic and punitive damages deals with the "courts and the judiciary" and "judicial power" and therefore meets the test required in *Forrester*. Intervenor used the phrase to describe the general subject of the amendment as a "reallocation of judicial power." Intervenor further argued "courts and the judiciary" and "judicial power" are the "same thing."

- c. Section 3, of Issue No. 1, Plaintiff argues is a taking of power from the judiciary to make its own rules of pleading, practice and procedure. No one argues it is anything other than a taking of power from the judiciary to control its rules. Plaintiff argues Section 3 is not necessary nor germane to Sections 1 and 2 as Sections 1 and 2 have their own enforcement provisions. Intervenor counters the powers to be taken by the Legislature are necessary to prevent the Supreme Court from enacting rules counter to Sections 1 and 2.
 - d. No one addressed the import of Section 4 of Issue No. 1 other than to say it deals with judicial power.
19. Intervenor argues there is no requirement the General Assembly set out or specify the general subject of Issue No. 1. That is correct. But, reading the amendment and considering the arguments of all the parties, it is clear the general subject of the amendment is not readily ascertainable. Even Defendant and Intervenor have a different interpretation of the general subject: courts and the judiciary or judicial power. They are not the same. If the Defendant and Intervenor (whose arguments are adopted by each other) cannot agree on the general subject, whose responsibility is it to determine the general subject? The Plaintiff? The Defendant? The Intervenor? Or is it the responsibility of this court to determine the general subject of Issue No. 1? It is the responsibility of this court in light of the disagreement among all three litigants as to the general subject of Issue No. 1.
20. What is the general subject of Issue No. 1? Is it the taking, or reallocation of power from the judiciary and vesting it in the Legislature? Is it the courts and the judiciary? Is it about the right of citizens to freely contract? Is it about the right of citizens to be adequately compensated for damages suffered? Is it about limiting recovery? Is it about limiting the practice of law by attorneys? Is it about compensatory damages? Is it about punitive damages? The general subject is unclear to this court.
21. It is the duty and responsibility of the Arkansas General Assembly, acting as a body of a constitutional convention, to draft a proposed constitutional amendment which, if it has multiple parts or sections, are reasonably germane to each other and to the general subject of the amendment. If the general subject of the amendment is unclear to the court tasked with this responsibility to determine the legitimacy of the

adoption process, and subject to disagreement among the litigants; how can anyone say Issue No. 1 meets the rule in *Forrester, id.*?

22. The cap on contingency fees is clearly an infringement on the rights of citizens of this state to freely contract. It prevents a person to hire an attorney of their choice in the manner in which they choose to do so, all pursuant to the Rules of Professional Conduct and all ethical precepts in force and effect today. The Arkansas Rules of Professional Conduct, Rule 1.5 does set certain requirements for all fees, as well as contingent fee agreements. Nowhere in the Rules of Professional Conduct is the Arkansas Supreme Court exercising the power over the amount of the contingency fee. Even with the passage of Issue No. 1, this rule will remain in effect. (Unless removed by a 3/5 vote of the Legislature) Intervenor argues the courts routinely approve contingency fee contracts in probate proceedings. See Ark. Cod Annot. § 28-48-108. This a power set out in statute by the Arkansas Legislature. It is a power given to the judiciary by statute. It can be modified, expanded, restricted or removed by a vote of the Legislature. In almost 20 years on the bench, this court has never rejected a request to approve a contingency fee contract. This court has never set the percentage in a contingency fee contract nor is this court aware of any court in this state that does so.
23. A cap on non-economic and punitive damages infringes on the rights of the citizens and litigants to be adequately compensated for the full amount of damages suffered by them in a court of law. Intervenor argues the court regularly controls damages and exerts power over damages by utilizing the Arkansas Model Jury Instructions; that there is a whole section on damage instructions. Intervenor is correct there is such a chapter. But this court does not, nor does any court set damages except in a bench trial. The Model Instructions are a framework within which both parties, plaintiff and defendant, operate in order to allow a jury to set damages, if any, to be awarded a party. The remittitur argument made by Intervenor is not persuasive as remittitur is only proper after certain findings and much deliberation to alter or amend a jury verdict. It is done to prevent passion or prejudice from influencing a jury verdict. It will still be available should this amendment be adopted. (Again, if not modified or altered by a 3/5 vote of the Legislature.)
24. Section 3 of Issue No. 1 is clearly about “judicial power”. It is about a reallocation (a euphemism used by Intervenor instead of the word

“taking”) of judicial power. There is no argument or dispute regarding this section of the proposed amendment.

25. The foregoing paragraphs serve to point out the differing viewpoints that can be utilized in determining the subject of this amendment.
26. For purposes of this decision, this court will adopt the arguments of both Defendant and Intervenor for purposes of analyzing Issue No. 1, and accept the general purpose of the proposed amendment as argued by Defendant and Intervenor respectively: the “courts and the judiciary” or “judicial power”. Additionally, the court will use a “lenient and accommodating rule” of interpretation.
27. The next step in the analysis is to determine whether the four parts of Issue No. 1 are “reasonably germane to each other and to the general subject of the amendment” pursuant to *Forrester, id.*
28. Whether this court considers the matter in light of Plaintiff’s argument or the arguments of both Defendant and Intervenor, the result is the same. Section 1, of Issue No. 1, must be “reasonably germane” to Sections 2, 3 and 4. Section 2 must be “reasonably germane” to Sections 1, 3 and 4. Section 3 must be “reasonably germane” to Sections 1, 2 and 4. Section 4 must be “reasonably germane” to Sections 1, 2 and 3. All four sections of Issue No. 1 must be reasonably germane to the general subject of the amendment. And, it deserves repeating, the general purpose of the amendment is unclear.
29. Taking Plaintiff’s position, Section 1, 2 and 3 are not “reasonably germane” because Sections 1 and 2 take rights from the citizens of the State of Arkansas and Section 3 takes the right to control its own rules from the Arkansas Supreme Court. Taking Defendant’s and Intervenor’s arguments, all four sections deal with the “courts and the judiciary” and “judicial power” and are therefore “reasonably germane to each other and to the general subject of the amendment.”
30. If the General Assembly had proposed SJR 8 containing only Sections 1, 2 and 3, it is conceivable this court might be able to find Issue No. 1 complies with Art. 19, Sect. 22 of the Arkansas Constitution, and the rule of construction found in *Forrester, id.* However, Issue No. 1 contains Section 4. Plaintiff, Defendant and Intervenor gloss over Section 4 as being part and parcel of Section 3. It is not! Section 4 reduces the legislative threshold vote requirement from 2/3 (66 2/3%) to 3/5 (60%) of both houses. This is a legislative rule change. It is an internal,

legislative modification, not a court, judiciary or judicial power modification or reallocation of power. The courts nor the judiciary (to use the terms separately as have the Defendant and Intervenor, but is one and the same to this court) have never had the judicial power to modify the voting threshold required in any legislative process or procedure. Section 4 of SJR 8, or Issue No. 1, is an impermissible, unrelated addition to Issue No. 1. It is in violation Art. 19, Sec. 22 of the Arkansas Constitution. Section 4 is not “reasonably germane” to the other three sections of Issue No. 1 nor is it reasonably germane to the general subject of the amendment.

31. Plaintiff’s argument, standing alone, has merit. It is a strained argument to find Sections 1 and 2 of Issue No. 1 are reasonably germane to Section 3. Section 1 is clearly about depriving citizens the right to freely contract with an attorney of their choosing and in a contingency amount they agree is reasonable, considering the risks and task to be undertaken on behalf of a potential plaintiff by an attorney. Section 2 clearly deprives the citizens of the State of Arkansas the right to be fairly and adequately compensated for the full amount of damages they have suffered in a court of law. The taking of rulemaking authority from the Arkansas Supreme Court and vesting it in the hands of the Arkansas Legislature is not reasonably germane to Sections 1 and 2 of Issue No. 1. In addition, Section 4 remains totally and without any reasonable relation to Sections 1, 2 and 3 of Issue 1. Section 4 is not reasonably germane to the other sections of the proposed amendment.
32. Issue No. 1, as proposed, clearly violates Art. 19, Sec. 22 of the Arkansas Constitution under any analysis. The General Assembly, by proposing Issue No. 1 with four sections and Issue No. 2, have submitted five disparate amendments to the voters in violation of the Arkansas Constitution.
33. Defendant argues Plaintiff is not entitled to any relief from this court. Defendant is mistaken in that argument. Plaintiff has a right to vote for a proposed constitutional amendment that is enacted pursuant to the requirements of Art. 19, Sec. 22 of the Arkansas Constitution. Plaintiff has clearly demonstrated Issue No. 1 fails to meet the single-subject test of *Forrester, id.* Plaintiff has clearly demonstrated the four parts of Issue No. 1 are not reasonably germane to each other nor are those four parts reasonably germane to the subject (whatever that subject may be) of the

amendment. If the subject of the amendment is judicial power, the four parts do not relate to judicial power nor are they reasonably germane to each other. If the subject of the amendment is the courts and the judiciary, the four parts of the amendment do not relate to the courts and the judiciary nor are they reasonably germane to each other. The Arkansas General Assembly in proposing and passing Issue No. 1 has engaged in impermissible logrolling.

34. Plaintiff is entitled to declaratory judgment and a writ of mandamus.

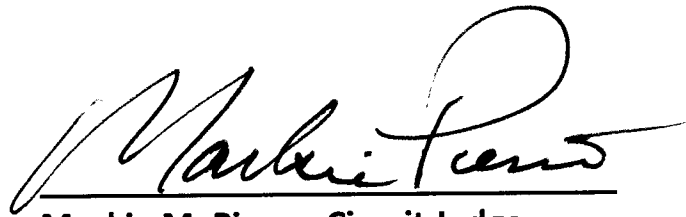
35. It is the opinion of this court Issue No. 1 fails to comply with Art. 19, Sec. 22 of the Arkansas Constitution and is therefore unconstitutional.

Pursuant to Rules 57 and 78(d) of the Arkansas Rules of Civil Procedure, the Defendant, Mark Martin, in his official capacity as Secretary of State for the State of Arkansas is ordered and directed to refrain from counting, canvassing, or certifying any votes for or against Issue No. 1.

The counting, canvassing or certifying of votes for or against Issue No. 1 in the November 6, 2018, general election is a ministerial duty.

36. Defendant's Motion to Dismiss is denied. This court has jurisdiction to issue a writ of mandamus and declaratory judgment. Sovereign immunity does not apply.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Mackie Pierce", written over a horizontal line.

Mackie M. Pierce, Circuit Judge

DATE: September 6, 2018