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SUPREME COURT OF ARKANSAS

No. 11-375

KEITH HAMAKER APPELLANT V. PULASKI COUNTY ELECTION COMMISSION APPELLEE	**Opinion Delivered** September 29, 2011 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. 60CV-10-1848] HONORABLE MACKIE PIERCE, JUDGE AFFIRMED.

JIM HANNAH, Chief Justice

Appellant Keith Hamaker appeals the Pulaski County Circuit Court's order regarding election procedures. Specifically, he contends that appellee Pulaski County Election Commission "has no right to allow a voting area undefined by election law." He also contends that the Commission should be required to force a voter to vote within the confines of a voting booth. Additionally, he contends that a voter does not have the right to vote outside the "immediate voting area," which Arkansas Code Annotated section 7-5-309(a)(4) (Supp. 2009), defines as the area "within six feet (6') of the voting booths." Finally, in his reply brief, Hamaker contends that Arkansas Code Annotated section 7-5-309, as amended by Act 1033 of 2011, should be declared unconstitutional. Because this appeal pertains to elections and election procedures, this court has jurisdiction pursuant to Arkansas Supreme Court Rule 1-2(a)(4) (2011). We affirm.

In his first amended complaint filed in the circuit court on July 13, 2010, Hamaker

alleged that the Commission had breached the public's trust by allowing a practice he described as "Community Table Voting." Hamaker stated that, on November 4, 2008, he and his wife entered the polling place to cast their ballots at precinct 89, which was located at Unitarian Universalist Church on Reservoir Road in Little Rock. According to Hamaker, several people were marking their ballots at tables set up in front of the voting booths. He noted that each table was large enough to accommodate up to ten people and that there were approximately six people at one table and eight at another. Hamaker stated that those voters' ballot selections were in clear view of the others sitting at the table and any person who passed by the table.

Hamaker requested that the circuit court issue an order prohibiting the Commission, in any future election, from

> (1) [a]llowing voting to take place at any community table, where ballots are marked in open view of other voters at the table, and anyone passing by;
>
> (2) [a]llowing voting to take place in any area that does not fit the area so defined by Arkansas Code Annotated section 7-5-309(a)(4), excepting such areas needed to accommodate disabled voters; and
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> (3) [a]llowing voting to take place in any area that does not ensure the secrecy and privacy of the voter, excepting poll workers or persons named by disabled voters to assist them as defined by Arkansas Code Annotated section 7-5-310(b)(2).

Hamaker also requested that the circuit court order the Commission to file a report with the circuit court sixty days prior to each upcoming election, up to and including the presidential election of November 2012, that lists the number of voting booths to be placed at each precinct in Pulaski County and demonstrates compliance with section 7-5-309(a)(1) (Supp.

2009), which concerns the number of voting booths required at each precinct.

The Commission filed a motion to dismiss,[1] and Hamaker filed a motion for summary judgment; the circuit court denied both motions. Subsequently, the circuit court held a hearing on Hamaker's complaint. Melinda Allen, Director of Elections for the Commission, testified that when a voter receives a ballot, he or she can take the ballot to a voting booth to vote privately, or, if the polling place has a table, the voter can take the ballot to the table. She stated that ballot clerks are trained to let voters know that if they want to vote privately, they must vote in voting booths. Allen also testified that the Commission was not in compliance with the statutory requirement to provide one booth for every fifty voters. Donna Hamaker testified that when she went to vote at precinct 89 in the November 2008 election, a poll worker instructed her to go to a table to vote. She further testified that she was directed to vote at a table in May 2010, but not in November 2010. Keith Hamaker testified that when he went to vote at precinct 89 in the November 2008 election, a poll worker directed him to sit at a table to vote. He stated that there were no dividers at the table and that voters were sitting "elbow to elbow." Both Mr. and Ms. Hamaker testified that they waited for booths to become available for voting and did not vote at a table.

In an order entered December 22, 2010, the circuit court made the following findings and rulings:

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[1]In its motion to dismiss, the Commission argued, inter alia, that the right to a secret ballot is personal; therefore, Hamaker lacked standing to assert on behalf of others an alleged violation of that right. The circuit court denied the Commission's motion to dismiss, and the Commission did not file a cross-appeal on the issue of standing.

1. Arkansas Code Ann. § 7-5-309(a)(1) currently requires the provision of at least one (1) voting booth for each fifty (50) registered electors in the last-preceding comparable election at each polling site.

2. The number of voting booths to be provided at each polling location is to be based upon the number of voters who voted at the polling site on Election Day in the last-preceding comparable election. Those persons voting early or by absentee ballot shall not be included in the calculation.

3. The Pulaski County Election Commission shall have until the May 2012 Primary Election to come into full compliance with Ark. Code Ann. § 7-5-309(a)(1) or its successor.

4. The Pulaski County Election Commission shall report to this Court, 30 days prior to any election, the progress it has made in complying with Ark. Code Ann. § 7-5-309(a)(1) and this ruling. A copy shall be sent to the Plaintiff in this matter.

5. The Pulaski County Election Commission shall train poll workers to direct voters to a voting booth to mark the ballot. Poll workers shall be trained not to direct voters to any other location to mark a ballot.

6. However, nothing in this Order shall be interpreted to indicate that the Pulaski County Election Commission must force a voter to prepare his/her ballot in a voting booth. If a voter elects to forego using a voting booth, the Pulaski County Election Commission is not in violation of this Order.

7. The Pulaski County Election Commission shall not provide any tables to be used specifically for the purpose of voting. This does not preclude the provision of tables needed for the effective administration of Election Day activities.

Hamaker now brings this appeal.

Hamaker first contends that the Commission "has no right to allow a voting area undefined by election law." Specifically, he challenges the Commission's practice of facilitating what he refers to as "Community Table" voting. He states that, in addition to providing voting booths, the Commission created a second voting area when it instructed poll workers to direct voters to sit at tables set up for the sole purpose of marking ballots. Allen's

testimony supports Hamaker's assertion that the Commission had previously created a second voting area at open tables that prevented voters from marking their ballots in secrecy. But the circuit court ruled that the Commission was to discontinue this practice. The circuit court ordered that the Commission train poll workers to direct voters to a voting booth to mark their ballots and that poll workers shall be trained not to direct voters to any other location to mark ballots. Moreover, the circuit court ordered the Commission not to provide any tables to be used specifically for the purpose of voting. In sum, the circuit court ruled for Hamaker on this issue, and he cannot complain on appeal of a ruling in his favor. *E.g.*, *Wilson v. Fullerton*, 332 Ark. 111, 964 S.W.2d 208 (1998).

To address Hamaker's remaining arguments, we are required to interpret section 7-5-309(a)(2), (4). Specifically, we must determine (1) whether the Commission must force a voter to mark his or her ballot within the confines of a voting booth, and (2) whether a voter has the right to vote outside the confines of the "immediate voting area." We review issues of statutory interpretation de novo. *E.g.*, *Hanners v. Giant Oil Co. of Ark.*, 373 Ark. 418, 284 S.W.3d 468 (2008). We are not bound by the circuit court's decision; however, in the absence of a showing that the circuit court erred, its interpretation will be accepted as correct on appeal. *Id.* When reviewing issues of statutory interpretation, we keep in mind that the first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Id.* We construe the statute so that no word is left void, superfluous or

insignificant, and we give meaning and effect to every word in the statute, if possible. *E.g.*, *Brown v. Kelton*, 2011 Ark. 93, 380 S.W.3d 361.

We begin with section 7-5-309(a)(2), which provides that "[e]ach voting booth shall be situated so as to permit a voter to prepare his or her ballot screened from observation and shall be furnished with any supplies and conveniences as will enable the voter to prepare his or her ballot." The Commission asserts that nothing in the language of subsection (a)(2) requires the Commission to force a voter to mark his or her ballot within the confines of a voting booth. The Commission is correct. In accordance with subsection (a)(2), the Commission must situate the voting booths so as to *permit* a voter to prepare his or her ballot screened from observation. "Permit" means "[t]o give opportunity for." *Black's Law Dictionary* 1255 (9th ed. 2009). Thus, pursuant to subsection (a)(2), the Commission must provide the opportunity for a voter to prepare his or her ballot in a voting booth. Subsection (a)(2) does not, however, require the Commission to *force* a voter to prepare his or her ballot in a voting booth.

We now turn to subsection (a)(4), which Hamaker relies on for his contention that a voter may not mark a ballot outside of the "immediate voting area" as it is defined in the statute. Subsection (a)(4) defines "immediate voting area" as "within six feet (6') of the voting booths," and provides that "[a] person other than the poll workers and those admitted for the purpose of voting shall not be permitted within the immediate voting area . . . except by authority of the election judge and then only when necessary to keep order and enforce the law." Ark. Code Ann. § 7-5-309(a)(4). Subsection (a)(4) defines the immediate voting area

and states who may lawfully enter that area. But contrary to Hamaker's assertion, subsection (a)(4) does not state that a voter may not mark a ballot outside of the immediate voting area.

We add that "[t]he secrecy of the ballot is a personal privilege which the voter may waive if it is his wish, but of which he cannot be lawfully deprived." *Schuman v. Sanderson*, 73 Ark. 187, 193, 83 S.W. 940, 942 (1904) (quoting *Jones v. Glidewell*, 53 Ark. 161, 173, 13 S.W. 723, 726 (1890)). In *Schuman*, the evidence showed that when voters wanted to vote openly or requested that one of the judges prepare their tickets, they were permitted to do so, and not forced to prepare their tickets in booths. The appellant contended that the election returns should be rejected because there was an open ballot rather than a secret ballot. This court disagreed, stating that

> [t]he evidence which comes accredited from the circuit judge establishes that there was no deprivation by the judges of the secrecy of the ballot to any voter. When voters desired to vote openly, or called upon one of the judges to prepare their tickets, they were permitted as a privilege to do so, and not compelled to prepare their tickets in booths, or have two judges make out the ballots. In the absence of any positive practice by the voters sustained by the judges to force an open ballot and in the absence of any proof of the voters being restrained from a free exercise of their privilege, this evidence is not sufficient to reject the returns.

Schuman, 73 Ark. at 193, 83 S.W. at 942.

We reaffirm our holding in *Schuman* that a voter may waive his or her right to vote in secrecy. Certainly no one may force a voter to cast an open ballot, and a voter may not be restrained from exercising his or her privilege of voting in secrecy. But if a voter desires to vote outside the confines of a voting booth, he or she may do so. A voter is not required to avail himself or herself of the methods in place to ensure privacy.

Hamaker's final point relates to the circuit court's ruling that the Commission was

required to comply with section 7-5-309(a)(1), which at the time of Hamaker's suit provided that "[a]t general, primary, special, and school elections in counties that use paper ballots, the county board of election commissioners shall provide in each polling site at least one (1) voting booth for each fifty (50) registered electors voting in the last-preceding comparable election." In his opening brief on appeal, Hamaker agreed with that ruling and contended that it should be affirmed. In 2011, section 7-5-309(a)(1) was amended, and it now states, "At general, primary, special, and school elections in counties that use paper ballots, the county board of election commissioners shall provide voting booths for each polling site in a number deemed appropriate by the county board of election commissioners." Act of Apr. 1, 2011, No. 1033, 2011 Ark. Acts 4426. After learning from the Commission's response on appeal that the statute had been amended, Hamaker asserts in his reply brief that this court should "review Act 1033 and declare it unconstitutional." We do not reach this argument because Hamaker did not raise it below. It is axiomatic that a party cannot raise a new argument for the first time on appeal or when there has been no ruling by the circuit court, let alone raise a new argument for the first time in a reply brief. *McCourt Mfg. Corp. v. Rycroft*, 2010 Ark. 93, 360 S.W.3d 138.

Affirmed.