

IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS
DIVISION FOUR

JAMES KNIGHT

VS.

Case No. 58CV-18-768

JIM ED GIBSON, in his INDIVIDUAL CAPACITY,
BEN CROSS, in his OFFICIAL CAPACITY as
COUNTY JUDGE of POPE COUNTY, ARKANSAS,
and the ARKANSAS STATE RACING COMMISSION

FILED
POPE CO. CIRCUIT CLERK
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PLAINTIFF
HC
DEFENDANTS

BRIEF IN SUPPORT OF MOTION TO DISMISS

Separate Defendant, Jim Ed Gibson, respectfully submits this brief in support of his Motion to Dismiss the Plaintiff's Second Amended Complaint, pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure.

INTRODUCTION

On November 6, 2018, the People of the State of Arkansas passed Amendment 100 to the Arkansas Constitution, known as the Arkansas Casino Gaming Amendment of 2018. Amendment 100 went into effect on November 14, 2018, and it empowered the Arkansas State Racing Commission ("ASRC") to "administer and regulate casino licenses, including their issuance and renewal . . ." and to "adopt rules necessary to carry out the purposes of [the] Amendment . . ." Ark. Const. Amend. 100, §§ 4(a) and (c). Amendment 100 further mandated that the ASRC "shall issue four casino licenses" and "shall award a casino license to a casino applicant for a casino to be located in Pope County within two miles of the city limits of the county seat." Ark. Const. Amend. 100, §§ 4(i) and (k). Amendment 100 requires an applicant for a casino license in Pope County to submit "either a letter of support from the county judge or a resolution from the quorum

court in the county where the proposed casino is to be located . . .” Ark. Const. Amend. 100, §§ 4(n).

Jim Ed Gibson was elected as County Judge of Pope County in 1998, and he was re-elected to consecutive two-year terms until his retirement on December 31, 2018. Judge Gibson did not seek re-election in 2018. On December 21, 2018, when Judge Gibson was the duly elected and acting County Judge, he issued a letter in support of Gulfside Casino Partnership, LLC, (“Gulfside”) which stated, “If a license is issued for a casino in Pope County Arkansas I give my support for Gulfside Casino Partnership.” (See ¶ 23 of the Second Amended Complaint, and Exhibit “A” to the Second Amended Complaint, pg. 3.)

Before issuing this letter, Judge Gibson exercised extensive due diligence into Gulfside, as contemplated by Amendment 100. He found that Gulfside owns and operates a casino in Gulfport, Mississippi, where it employs 1,900 people. He confirmed that Gulfside has an unblemished record of regulatory compliance. He received and considered endorsements from community leaders in Gulfport, who vouched for Gulfside’s reputation as a responsible corporate citizen and a generous contributor to the community, in addition to the millions of dollars it pays in state and local taxes. He secured a commitment from Gulfside to build a resort-style casino, including a hotel, restaurants, and an entertainment venue, in addition to gaming, as well as Gulfside’s pledge to invest \$150 million in the initial phase of the project, with plans to invest an additional \$100 million. He considered that Gulfside’s proposal included more than 1,500 permanent hospitality jobs and a total annual payroll of \$60.5 million. He also took into account the more than \$28 million in gaming taxes that will go to the county, state, and Arkansas Racing Commission, as well as ad valorem, property, sales, and other traditional taxes. During Judge Gibson’s discussions with Gulfside representatives, they expressed their interest in supporting local education, which is

evidenced by Gulfside's recent commitment to donate \$20 million to the Pope County Education Foundation to benefit local schools, if granted a license. Based upon all of these factors, Judge Gibson gave his support to Gulfside.

On November 6, 2018, Pope County adopted an Amendment to its Code of Ordinances, titled, the "Pope County Local Control for Casino Gaming Amendment of 2018." (the "Pope County Ordinance") (See ¶¶ 20-21 of the Second Amended Complaint, and Exhibit "A" to the Second Amended Complaint, pg. 2.) The Pope County Ordinance purports to prohibit the County Judge from issuing a letter of support without first referring the question to a local election, where it must be approved by a majority of the **registered voters** of Pope County, Arkansas. *Id.* (Emphasis added.) Plaintiff's Second Amended Complaint seeks (1) an order of this Court declaring Judge Gibson's letter of support invalid and (2) writs of certiorari and mandamus declaring the letter of support improper and invalid.

The Second Amended Complaint should be dismissed because the Pope County Ordinance, upon which it is based, is clearly unconstitutional. The Pope County Ordinance is unconstitutional for at least two reasons. First, it creates an additional qualification for obtaining a casino license, not found in Amendment 100, and second, it places a heightened burden upon passage of a referendum, in violation of Article V, Section 1 of the Arkansas Constitution. Further, the Second Amended Complaint makes no allegation against Judge Gibson in his individual capacity. The relief it seeks can only be obtained against a sitting government official, which Judge Gibson is not. For all of these reasons, the Second Amended Complaint should be dismissed.

LEGAL STANDARD

The Second Amended Complaint should be dismissed for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), Arkansas Rules of Civil Procedure. In

testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Johnson v. Butler*, 2016 Ark. 253, 5, 494 S.W.3d 412, 416 (2016). However, Arkansas's rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Id.* Moreover, for purposes of a motion to dismiss, the Court will treat only the facts alleged in a complaint as true but not a party's theories, speculation, or statutory interpretation. *Ark. State Claims Comm'n v. Duit Constr. Co.*, 2014 Ark. 432, at 8, 445 S.W.3d 496, 503. Here, the facts are largely undisputed, but the Plaintiff's legal theories are fatally flawed. For the reasons set out in detail below, the Amended Complaint must be dismissed as a matter of law.

ARGUMENT

I. The Pope County Ordinance Is Unconstitutional.

The Second Amended Complaint is premised entirely upon an unconstitutional county ordinance, and as such, it must be dismissed. The Pope County Ordinance is unconstitutional because it adds qualifications for obtaining a casino license not found in Amendment 100, and it places an unconstitutional burden by requiring a majority of registered voters, as opposed to a majority of those who vote in the election.

Amendment 100 sets forth the requirements that must be met in order to obtain a casino license, and a local election to approve the county judge's letter of support is not one of them. The ordinance imposes an additional qualification not found in the Constitution and is, therefore, invalid. It is similar to attempts to add qualifications to the right to vote not found in the constitution, which are invalid. *Martin v. Kohls*, 2014 Ark. 427 at 13-14, 444 S.W.3d 844, 851-52 (2014) (citing *Rison v. Farr*, 24 Ark. 161, 172 (1865); *Faubus v. Miles*, 237 Ark. 957, 963, 377 S.W.2d 601, 604 (1964)). It is similar to attempts to add qualifications to those specified in the

constitution in order to hold office, which are invalid. *E.g., Mississippi County v. Green* 200 Ark. 204, 138 S.W.2d 377 (1940) (holding unconstitutional adding qualifications for county judges beyond those in Ark. Const. Art. 7 § 29); *Allred v. McLoud*, 343 Ark. 35, 31 S.W.3d 836 (2000) (holding unconstitutional adding qualifications term limits for county offices not found in Arkansas constitution); *Daniels v. Dennis*, 365 Ark. 338, 229 S.W.3d 880 (2006) (holding unconstitutional additional qualifications for circuit judge not found in Ark. Const. Amend. 80 § 16). An election is not a requirement for obtaining a casino license under Amendment 100. The ordinance's addition of an election is invalid.

Further, the Pope County Ordinance is unconstitutional because it requires a supermajority in order to approve the decision of the county judge. The Arkansas Constitution provides, "Any measure submitted to the people as herein provided shall take effect and become a law when approved by a **majority of the votes cast upon such measure, and not otherwise**, and shall not be required to receive a majority of the electors voting at such election." Ark. Const. Art. V, § 1. (Emphasis added.) The Pope County Ordinance is in direct conflict with the Constitution, as it requires that "a majority of the **registered voters** of Pope County, Arkansas must approve and authorized the County Judge to take such action." (See Exhibit "A" to the Second Amended Complaint, pg. 2.) (Emphasis added.) A majority of the registered voters is a far higher bar than a majority of votes cast upon a measure, which is the standard prescribed by the Arkansas Constitution, and as such, the Pope County Ordinance is unconstitutional.

To demonstrate the absurdity of the Pope County Ordinance, consider the 2018 general election. According to the Arkansas Secretary of State, there were 34,486 registered voters in Pope County. As such, it would require 17,244 votes to approve a county judge's letter of support. However, in the 2018 general election, a total of just 18,051 ballots were cast in Pope County. As

such, approval of a county judge's letter of support would require over 95.5% of the voters who cast a ballot in 2018.

Amendment 100 sets forth what must be done to obtain a casino license. The ordinance cannot impose what Amendment 100 does not. Plaintiff's entire case is premised on the validity of the ordinance, and it cannot stand. The ordinance should be declared invalid and the complaint dismissed.

II. Judge Gibson is not a sitting government officer.

The relief Plaintiff seeks can only be obtained from the person holding the office of County Judge. He wants the letter of support withdrawn until and unless an election authorizes its issuance. As an initial matter, the sitting county judge does not have the authority to withdraw, revoke, or rescind the letter given by Judge Gibson. However, assuming, *arguendo*, that the sitting county judge had such authority, Judge Gibson is not the sitting county judge. As such, he lacks any authority to take any action as county judge because he does not hold that office.

This common sense legal reality is confirmed by the statutes under which Plaintiff proceeds. Both writs he seeks, *certiorari* and *mandamus*, may only be issued to sitting government officials. Ark. Code Ann. § 16-13-205(a); Ark. Code Ann. § 16-115-101(1). They cannot issue to a private citizen in his individual capacity.

Judge Gibson must be dismissed.

CONCLUSION

The People of the State of Arkansas enacted Amendment 100 setting out what must be done to obtain a license. Pope County can neither add to nor take away from those qualifying conditions. The ordinance imposing an election on which this case is based is invalid, should be

declared so, and the case dismissed. Further, the relief sought cannot be obtained against Judge Gibson, and the complaint as to him should be dismissed.

Respectfully submitted,

JIM ED GIBSON

By: 

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby state upon oath that a true and correct copy of the above and foregoing has been served upon all counsel of record by placing a copy of the same in the United States Mail, postage prepaid, and via email, to the following:

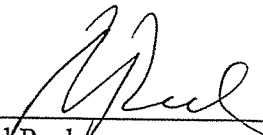
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