

THE SUPREME COURT OF ARKANSAS HOLDS THAT ARKANSAS  
CODE ANNOTATED, SECTION 7-5-309 GIVES VOTERS THE  
CHOICE TO CAST OPEN OR SECRET BALLOTS

In *Hamaker v. Pulaski County Election Commission*<sup>1</sup>, the Supreme Court of Arkansas held that Arkansas Code Annotated, Section 7-5-309 (LEXIS Repl. 2011), does not force a voter to mark a ballot within the confines of a voting booth<sup>2</sup> nor force a voter to mark a ballot within the immediate voting area.<sup>3</sup>

On July 13, 2010, Mr. Hamaker filed his first amended complaint in the underlying action in Pulaski County Circuit Court, alleging that the Pulaski County Election Commission (hereinafter “PCEC” or “Commission”) breached the public’s trust by allowing a practice of so-called “community table voting.”<sup>4</sup> Mr. Hamaker further stated that on November 4, 2008, he and his wife entered the polling place to cast their ballots at precinct 89, where several people were marking their ballots at tables set up in front of the voting booths.<sup>5</sup> Accordingly, Hamaker requested that the circuit court issue an order prohibiting the PCEC from allowing community table voting, voting outside the designated voting area as defined by Arkansas Code Annotated section 7-5-309(a)(4)<sup>6</sup>, and also prohibit voting to take place in any area that does not ensure the secrecy and privacy of the voter.<sup>7</sup>

In response, the PCEC filed a motion to dismiss,<sup>8</sup> arguing that the right to a secret ballot is personal, and as such, Hamaker lacked standing to assert, on behalf of others, an alleged violation of that right.<sup>9</sup> The circuit court denied the Commission’s motion and a hearing ensued, in which the court heard testimony from Mr. and Mrs. Hamaker as well as the Commission Director.<sup>10</sup> On December 22, 2010, the circuit court made seven findings and rulings: 1) that section 7-5-309(a)(1) requires at least one voting booth for each fifty registered electors in the last-preceding comparable election; 2) the number of voting booths to be provided at each polling place is to be commensurate with the number of previous-cycle voter attendance; 3) that

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1. 2011 Ark. 390, 2011 WL 4490985.
  2. *Hamaker*, 2011 Ark. 390, at 6, 2011 WL 4490985, at \*3.
  3. *Id.* at 7, 2011 WL 4490985, at \*4.
  4. *Id.* at 1-2, 2011 WL 4490985, at \*1.
  5. *Id.* at 2, 2011 WL 4490985, at \*1.
  6. ARK. CODE ANN. § 7-5-309(a)(4) (LEXIS Repl. 2011).
  7. *Hamaker*, 2011 Ark. 390, at 2, 2011 WL 4490985, at \*1.
  8. *Id.* at 3, 2011 WL 4490985, at \*1.
  9. *Id.* at 3 n.1.
  10. *Id.* at 3, 2011 WL 4490985, at \*1.

the PCEC has until May 2012 to come into full compliance with 309(a)(1); 4) that the PCEC shall report to the court thirty days prior to the election to discuss the progress it has made in complying with 309(a)(1); 5) that the PCEC shall train poll workers to direct voters to voting booths and no other locations; 6) nothing may force the voter to mark a ballot secretly; and 7) the PCEC shall not provide tables to be used specifically for the purpose of voting.<sup>11</sup>

Hamaker appealed the circuit court order regarding the election procedures, contending that (1) the PCEC had “no right to allow a voting area undefined by election law,” (2) that the PCEC should be required to force a voter to vote within the confines of a voting booth, and (3) that a voter does not have the right to vote outside the “immediate voting area.”<sup>12</sup> Because the appeal concerned elections and election procedures, the Court had jurisdiction pursuant to Arkansas Supreme Court Rule 1-2(a)(4).<sup>13</sup>

In reviewing the appeal, the Court considered the lower court’s order and observed that the circuit court essentially ruled in Hamaker’s favor.<sup>14</sup> Accordingly, the Court held that Hamaker could not complain on appeal of a ruling in his favor.<sup>15</sup> Thus, the Court only considered the remaining two issues on appeal, reviewing both issues of statutory construction *de novo*.<sup>16</sup>

Considering whether subsection (a)(2) requires the PCEC to force voters to mark ballots in the confines of a voting booth, the Court deconstructed the operative language of the statute that states: “[e]ach voting booth shall be situated so as to *permit* a voter to prepare his or her ballot . . .”<sup>17</sup> Finding that the PCEC must provide only the opportunity for a voter to prepare a ballot in a voting booth, the Court affirmed the circuit court and held that the PCEC may not force a voter to mark a ballot within the confines of the voting booth under subsection (a)(2).<sup>18</sup>

As to Hamaker’s contention that the PCEC must confine voters to vote within the designated voting area, the Court considered the operative language of subsection (a)(4), which defines the “immediate voting area” as “within six feet (6’) of the voting booths,” where “[a] person other than the poll workers and those admitted for the purpose of voting shall not be per-

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11. *Id.* at 4, 2011 WL 4490985, at \*2.

12. *Id.* at 4–5, 2011 WL 4490985, at \*2–3.

13. Arkansas Supreme Court Rule 1-2(a)(4) (West 2011); *Hamaker*, 2011 Ark. 390, at 1, 2011 WL 4490985, at \*1.

14. *Hamaker*, 2011 Ark. 390, at 1, 2011 WL 4490985, at \* 2.

15. *Hamaker*, 2011 Ark. 390, at 1, 2011 WL 4490985, at \* 2 (citing *Wilson v. Fullerton*, 332 Ark. 111, 117, 964 S.W.2d 208, 211 (1998)).

16. *Hamaker*, 2011 Ark. 390, at 1, 2011 WL 4490985, at \* 3 (citing *Hanners v. Giant Oil Co. of Ark.*, 373 Ark. 418, 425, 284 S.W.3d 468, 474 (2008)).

17. *Hamaker*, 2011 Ark. 390, at 6, 2011 WL 4490985, at \* 3 (quoting ARK. CODE ANN. § 7-5-309(a)(2) (LEXIS Repl. 2011)(emphasis added)).

18. *Hamaker*, 2011 Ark. 390, at 6, 2011 WL 4490985, at \*3.

mitted within the immediate voting area . . .”<sup>19</sup> Applying the tools of statutory interpretation – giving effect to the plain meaning of every word in a statute<sup>20</sup> – the Court held that subsection (a)(4) provides a standard for who may lawfully enter the area, but “does not state that a voter may not mark a ballot outside of the immediate voting area.”<sup>21</sup>

Moreover, the Court reaffirmed the holding of *Schuman v. Sanderson*<sup>22</sup> and held 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.”<sup>23</sup> Accordingly, the Court held that a voter may waive the right to vote in secrecy, but one may never force a voter to cast an open ballot.<sup>24</sup> If a voter desires to vote outside the confines of a voting booth, the voter may do so, and there is no requirement that voters must avail themselves of the methods in place to ensure privacy.<sup>25</sup>

Hamaker raised one final issue on appeal, relating to the circuit court’s ruling that the PCEC was required to comply with subsection (a)(1)<sup>26</sup>, 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.”<sup>27</sup> In his opening brief, Hamaker agreed with the ruling and contended that it should be affirmed.<sup>28</sup> Subsequently, however, subsection (a)(1) was amended to provide the PCEC discretion as to the number of voting booths to be placed at each polling site.<sup>29</sup> After learning of the amendment, Hamaker asserted in his reply brief that the Court should “review Act 1033 and declare it unconstitutional.”<sup>30</sup> The Court did not reach this final argument, however, because it was not an issue raised below, and “a party cannot raise a new argument for the first time on

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19. *Id.* at 5–6, 2011 WL 4490985, at \*3.

20. *Id.* at 5, 2011 WL 4490985, at \*3 (citing *Brown v. Kelton*, 2011 Ark. 93, \_\_\_ S.W.3d \_\_\_).

21. *Hamaker*, 2011 Ark. 390, at 6-7, 2011 WL 4490985, at \*3.

22. 73 Ark. 187, 83 S.W.3d 940 (1904).

23. *Hamaker*, 2011 Ark. 390, at 7, 2011 WL 4490985, at \*4 (citing *Schuman*, 73 Ark. 187, 193, 83 S.W.940, 942 (1904)) (internal citations omitted).

24. *Id.*, 2011 WL 4490985, at \*4.

25. *Id.*, 2011 WL 4490985, at \*4.

26. ARK. CODE ANN. § 7-5-309(a)(1) (LEXIS Repl. 2011).

27. ARK. CODE ANN. § 7-5-309(a)(1), amended by Act of Apr. 1, 2011, No. 1033, 2011 Ark. Acts \_\_\_\_\_. (LEXIS Supp. 2011); *Hamaker*, 2011 Ark. 390, at 8, 2011 WL 4490985, at \*4.

28. *Hamaker*, 2011 Ark. 390, at 8, 2011 WL 4490985, at \*4.

29. *Id.* (citing Act of Apr. 1, 2011, No. 1033, 2011 Ark. Acts \_\_\_\_).

30. *Hamaker*, 2011 Ark. 390, at 8, 2011 WL 4490985, at \*4.

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.”<sup>31</sup>

*Hamaker v. Pulaski County Election Commission* upheld the personal privilege to cast a ballot in secrecy, while also upholding a voter’s right to waive such a privilege.<sup>32</sup> In this case, the Court distinguished between permitting a voter to prepare a ballot in secrecy and forcing a voter to prepare a ballot in secrecy.<sup>33</sup> By holding that the secrecy of the ballot is a personal privilege that the voter may waive, but that cannot be lawfully deprived, the Court preserved the voter’s freedom of choice in the most fundamental exercise of citizenship and democracy. With this ruling, voters may choose to don – or cast away – the shroud of privacy provided by the election booth, either voting in secrecy or voting in the open.

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31. *Id.*, 2011 WL 4490985, at \*4.

32. *See Hamaker*, 2011 Ark. 390.

33. *Id.* at 6-7, 2011 WL 4490985, at \*3.