THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM THE GREENVILLE COUNTY
COURT OF COMMON PLEAS

Edward W. Miller, Circuit Court Judge

Docket No. 2005-CP-23-7572

Robert Gecy .....Respondent,

v.

Tammy Bagwell.....Appellant.

BRIEF OF RESPONDENT

J. Theodore Gentry (No. 64038)
WYCHE, BURGESS, FREEMAN &
PARHAM, P. A.
44 E. Camperdown Way
Post Office Box 728
Greenville, SC 29602-0728
864-242-8270

COUNSEL FOR
RESPONDENT ROBERT GECY

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Respondent Robert Gecy won the popular vote in the Simpsonville City Council Ward IV election. This was an at-large election. The Simpsonville Election Commission overturned the election result on the basis that two registered voters – both of whom were residents of Simpsonville and thus eligible to vote in the election – voted in the election, but in the wrong precinct. On appeal, the Court of Common Pleas reinstated the election, noting that if these two voters had voted in the correct precincts instead of where they voted, the election result would have been exactly the same; the physical location where the votes were cast makes no difference. The Court of Common Pleas also held that Appellant Bagwell's notice of protest of the election did not meet statutory requirements, as interpreted by this Court.

This appeal presents the following issues:

1. Should this Court affirm the holding that, in the specific context of a post-election challenge, an election result should not be thrown out on the basis of ballots cast by two registered voters, who were residents of Simpsonville and thus entitled to vote in the election, simply because those voters voted in the wrong physical location, where such casting of a vote in the wrong precinct had no effect on the result of the election?

2. Should this Court affirm the holding that Appellant's notice of protest did not meet the standard set forth by this Court in *Butler v. Town of Edgefield*, 328 S.C. 238, 245-46, 493 S.E.2d 838, 842 (1997), where that notice was merely a boilerplate list of possible challenges to an election result, where that notice did not identify either the individual voters nor the particular alleged irregularity on which Ms. Bagwell ultimately made her challenge, and where the notice was admittedly designed to be as broad as

possible, for the purpose of allowing Ms. Bagwell a chance to later find some issue on which to challenge the election?

3. Should this Court affirm the holding of the Court of Common Pleas on one or more of the following alternate sustaining grounds:

a. That Appellant Bagwell's challenge should have been rejected because it was based on evidence that was not "after-discovered" within the meaning of S.C. Code Ann. § 7-13-810, and because Ms. Bagwell failed to make any showing that she exercised required due diligence before the election?

b. That it was error to invalidate the ballot of Ms. Estes, when it is reasonable to infer that her registration information had been mishandled by the State of South Carolina?

Statement of the Case

I. Statement of Facts

On November 8, 2005, the City of Simpsonville held an election to fill three four-year terms on the Simpsonville City Council. There were two announced candidates in the Ward IV race, Robert Gecy and Tammy Bagwell. This was an at-large race, meaning that all residents of Simpsonville voted in the election.

The initial election tally placed Mr. Gecy ahead of Ms. Bagwell, 426-424, with one write-in for another individual, and seven uncounted provisional ballots.

On November 11, 2005, the Simpsonville Election Commission ("the Commission") met to consider the provisional ballots in accordance with S.C. Code Ann. § 7-13-830. The Commission eventually voted to count all seven provisional ballots.[1] Four of those provisional ballots were cast for Mr. Gecy, and three for Ms. Bagwell. This made the final tally 430-427 in favor of Mr. Gecy, with one write-in.

Because the margin between the two candidates was less than 1% of the total number of votes cast, South Carolina law required a recount. S.C. Code Ann. § 7-17-280. This recount was conducted, and it reconfirmed that Mr. Gecy had won the election by 430 to 427. The votes have thus been tallied and re-tallied; there is, and can be, no dispute that Mr. Gecy won a majority of the votes cast.

If the two challenged voters had voted in the correct precincts, instead of where they did vote, the vote totals would have been unchanged. Mr. Gecy would still have prevailed by the count of 430-427.

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[1] As we discuss below, the Commission's ruling regarding Ms. Poe, one of the seven challenged voters, is significant in establishing the law of the case in this proceeding.

II. Procedural History

Ms. Bagwell filed her notice of protest with the Chairman of the Commission on November 10, 2005. (R. pp. 5, 153) The notice of protest was designed to cover the entire waterfront of potential election irregularities. (R. pp. 47, 165-66) (counsel "had to go upon my experience . . . of the kinds of problems that tend to show up")) In fact, her notice of protest was simply a boilerplate list of several possible grounds for challenging an election. Consequently, her notice of protest did not mention either of the voters whose votes have now been invalidated. Indeed, it did not even generally aver that voters living within the City of Simpsonville had voted in the wrong precinct.

A hearing on that protest was conducted before the Commission on November 12, 2005.

The Commission issued its decision on November 18, 2005. (R. pp. 3-38) The Commission's decision identified two voters – Ms. Estes and Mr. Killian – whose votes it said should not be counted.[2] The Commission held that each of these two individuals – residents and registered voters of Simpsonville – had voted in the wrong precinct. On this basis alone, the Commission invalidated the popular vote in favor of Mr. Gecy and ordered a new election.

[2] In violation of its obligations to draw all inferences in favor of upholding the election result, *Taylor v. Town of Atlantic Beach Election Comm'n*, 363 S.C. 8, 12, 609 S.E.2d 500, 502 (2005) and to avoid relying on "conjecture, speculation, and surmise," *Fielding v. South Carolina Election Commission*, 305 S.C. 313, 317, 408 S.E.2d 232, 234 (1991), the Commission also drew the baseless inference that unspecified "other" persons also voted in the wrong precincts. (R. pp. 15-17, 30)

Pursuant to S.C. Code Ann. § 5-15-140, Mr. Gecy appealed the Commission's ruling to the Court of Common Pleas for Greenville County. By statute, this appeal stayed all election proceedings.[3]

After briefing, Judge Edward Miller heard arguments in the case on January 23, 2006. Judge Miller issued his opinion on February 9, 2006.[4] The Court's opinion upheld Mr. Gecy's appeal, and reinstated the popular election result, on two alternative grounds. First, the Court held that in the particular narrow context of a post-election challenge, the "fact that these two citizens voted in the wrong precinct did not affect the vote count, and so will not support" the decision to overturn the election. (R. p. 42) Noting that there are no South Carolina cases overturning an election on such grounds, the Court relied on the clear line of cases from this Court holding that an irregularity that does not affect the election result is insufficient to overturn the election. (R. pp. 41-43)

In the alternative, the Court of Common Pleas also held that Appellant Bagwell's notice of protest was legally insufficient under this Court's holding in *Butler v. Town of Edgefield*, 328 S.C. at 245-46, 493 S.E.2d at 842, which requires that a notice of protest

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[3] Because he occupied the seat in question at the time of the election, Mr. Gecy has continued to sit on the Simpsonville City Council during this Ms. Bagwell's protest. S.C. Code Ann. § 5-15-120.

[4] Ms. Bagwell's counsel casts aspersions on Judge Miller's order because counsel for Mr. Gecy was asked to provide a draft order. (App. Br. 14, 18) These thinly veiled criticisms are unfounded and inappropriate. As is clear from the record, Ms. Bagwell's counsel received a copy of the draft and made ample comments on it, informing the Court that the "proposed Order is fatally flawed and that a ruling consistent with it would constitute clear and indisputable error." (R. p. 221) This Court has held that there is nothing wrong with the practice of asking counsel to provide the court with a draft order, which is provided to the other side for review. *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) (In cases other than death penalty, "it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency"); *see also Grant v. South Carolina Coastal Council*, 319 S.C. 348, 356 n.5, 461 S.E.2d 388, 392 n.5 (1995) (no showing prejudice in order drafted by counsel, even where not sent to opposing counsel).

"state facts . . . sufficient to apprise the contestee of the cause for which his election is contested, it being insufficient . . . to allege mere conclusions of the pleader." The Court noted that *Butler* states that this procedural requirement "must be strictly followed." (R. p. 46) The Court held that Ms. Bagwell's notice of protest failed to state any facts or to apprise Mr. Gecy of the basis for the challenge. The Court rejected Ms. Bagwell's position that a challenger to an election may file a "broadly drawn protest document" with the hope of subsequently finding evidence to support one or more of the "generic grounds" in the protest. (R. p. 48) In particular, the Court held that the allegation in Ms. Bagwell's protest that "[p]ersons who had not provided accurate information for the voter rolls were nonetheless allowed to cast full ballots" was "as a matter of plain English," "neither a 'concise' nor a 'sufficiently specific' indication that two city residents were alleged to have voted in the wrong precinct, and so does not satisfy the requirement of *Butler*." (R. pp. 47-48)[5]

Ms. Bagwell filed a motion for reconsideration on February 20, 2006 (R. p. 128) The Court of Common Pleas denied that motion on March 6, 2006. That order contains at least two noteworthy holdings. First, in addressing Appellant Bagwell's contention that the two voters were not properly registered, the Court held (i) that the issue of voting by persons not properly registered was not raised in the notice of protest and so was not properly before the court; and (ii) that the issue of proper registration was nothing more than an attempt to restate and recharacterize Ms. Bagwell's original argument that the

[5] The Court also held that the finding of the Commission that certain unspecified "other" voters had also voted in the wrong precinct was unsupported by evidence, and constituted an improper inference on the part of the Commission against the validity of the election. (R. pp. 44-45) Appellant apparently does not challenge this holding.

The Court concluded that it did not need to reach the other grounds for reversal of the Commission advanced by Mr. Gecy. (R. p. 49)

two voters had voted in the wrong place. (R. p. 51) Second, the Court rejected Ms. Bagwell's contention that there was some deference due to the Simpsonville Election Commission's holding that her notice of protest was adequate. The Court observed that this conclusion as to the notice's adequacy was a legal conclusion, not a finding of fact. (R. pp. 51-52)

Ms. Bagwell filed her notice of appeal on March 10, 2006.

Jurisdiction, Burden of Proof, and Standard of Review

This matter is appealable directly to the Supreme Court under SCACR 203(d)(1)(E).

This Court reviews the decision below for errors of law. It will not disturb findings of fact that are supported in the record. *Fielding v. South Carolina Election Comm'n*, 305 S.C. 313, 317, 408 S.E.2d 232, 234 (1991).

This deference does not extend, as Appellant Bagwell contends, to the inferences and legal conclusions of the Election Commission. This Court has held consistently that all *inferences* are to be drawn in favor of upholding the result of the challenged election. This means that a protestant like Ms. Bagwell faces a stiff burden of providing unambiguous proof of a material impropriety that affected the result of the election:

> We will employ *every reasonable presumption* to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities *unless the result is changed or rendered doubtful*. In the absence of fraud, a constitutional violation, or a statute providing that an irregularity or illegality invalidates an election, we will not set aside an election for a mere irregularity.

Taylor v. Town of Atlantic Beach Election Comm'n, 363 S.C. 8, 12, 609 S.E.2d 500, 502 (2005) (emphasis added); *see also Fielding*, 305 S.C. at 317, 408 S.E.2d at 234

("irregularities or illegalities which do not appear to have affected the result of the election will not be allowed to overturn it").

Summary of Argument

Ms. Bagwell seeks to portray her challenge as supporting the integrity and inviolability of the electoral process. In fact, hers is precisely the sort of challenge that should not be allowed to proceed, because it turns the electoral process into a post-election scavenger hunt for unknown and unseen potential election irregularities. When it became clear that Ms. Bagwell had lost the popular vote, she filed a boilerplate, broad-brush notice of protest, designed to give her time to try to *find* an irregularity that she could use to throw out the election result. When she finished combing through the remains of the election, however, all she could find were two Simpsonville residents who voted in the wrong precinct. That is, her claim was that the entire election should be thrown out – with the result that *no one's* vote would count – because two Simpsonville residents, whose residency qualified them to vote in this election, had cast their ballots in the wrong physical location.[6]

Ms. Bagwell did not file her protest to protect the integrity of the electoral process, but because she lost the popular vote and wanted to pick apart the process. Her protest is substantively inadequate, because the only irregularities her search revealed did not affect the outcome. Her protest is procedurally inadequate, because her notice of

[6] Demonstrating how cleanly run this election was, and how desperate Ms. Bagwell was to grasp at any straw available to her to get the popular result nullified, she also presented evidence to the Simpsonville Election Commission of such trivial irregularities as voters who signed the roll book on the wrong line, or poll workers who failed to initial next to a voter's signature. (R. pp. 138, 145-46)

protest was completely generic, and was designed to give her time to scrutinize the election, and not to inform Mr. Gecy.

I. The Physical Location of the Casting of Votes Does Not Affect the Outcome. The Court of Common Pleas correctly held that the Commission's decision to throw out this election was based on a technicality that had no substantive impact on the election. The Commission threw out the election – with the effect of invalidating all the votes cast in the election – solely on the basis of the physical location where two registered Simpsonville voters cast their votes. The fact that a ballot was placed in the wrong "box," when all the "boxes" are combined to reach the final result, has no impact on the outcome. Overturning an entire election, on a post-election challenge, on such a flimsy basis is without precedent in South Carolina. Indeed, South Carolina law is clear that an election result may not be thrown out on the basis of "irregularities and illegalities which do not appear to have affected the result of the election." *Fielding v. South Carolina Election Comm'n*, 305 S.C. 313, 317, 408 S.E.2d 232, 234 (1991).

II. Ms. Bagwell's Notice of Protest Was Inadequate. Ms. Bagwell's protest was defective because it did not specify the particular grounds that she claimed invalidated the election. Such a specification is required by law, and this Court has held that its absence is fatal to a protest. Reinforcing the very high standard that must be met before a completed election will be thrown out, South Carolina law requires that a notice of protest "state facts . . . sufficient to apprise the contestee of the cause for which his election is contested, it being insufficient . . . to allege mere conclusions of the pleader." This requirement is no mere technicality; it "must be strictly followed." *Butler v. Town of Edgefield*, 328 S.C. at 245-46, 493 S.E.2d at 842; *see* S.C. Code Ann. § 5-15-30.

Ms. Bagwell's notice of protest did not specify the irregularities on which the Election Commission threw out the election, did not identify the voters in question, and indeed did not state any specific facts whatsoever as required by *Butler*. By her counsel's admission at the hearing before the Commission, her protest document was designed to be as broad as possible, in order that she might then go and *find* a basis for throwing out the election. This sort of after-the-fact nitpicking of elections is inconsistent with both the spirit and the letter of our election laws. It is hard to imagine a more damaging incentive than a law allowing a candidate on the short end of a close election to throw out the widest possible array of speculative charges against the election, and then to go and try to dig up whatever imperfection the candidate might be able to scrape together to try to besmirch the election. The statute required Ms. Bagwell to inform Mr. Gecy of the particular facts and grounds on which she relied. She failed to provide this notice.

Ms. Bagwell invites the Court to open the floodgates to indiscriminate protests in numerous elections throughout the State. In any election that has a close outcome, it could become standard procedure to file the same generic, boilerplate notice of protest to give the loser – even if she has no known grounds for protest – a chance to search for a possible complaint. This result would be contrary to the statute and to this Court's decisions.

III. Additional Sustaining Grounds. In addition to the foregoing grounds, which were reached and relied on by the Court of Common Pleas, the decision below should be upheld on any or all of the following bases, which also appear in the record. *See I'On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

A. Ms. Bagwell's Protest Was Not Based on "After-Discovered" Evidence Within the Meaning of the Statute. The election challenge statute, S.C. Code Ann. § 7-13-810, contains the requirement that a protest be based at least in part on after-discovered evidence. This phrase has a particular legal meaning, referring to evidence that could not have been discovered earlier in the exercise of due diligence. And, contrary to Ms. Bagwell's interpretation of the cases, this Court has indicated that this is still a requirement of the law. *See Dukes v. Redmond*, 357 S.C. 454, 457, 593 S.E.2d 606, 608 (2004) (evidence presented by protestant "qualifies as after-discovered evidence under this section"). This requirement makes sense. It would be perverse to create a system under which candidates have no incentive to raise discoverable problems *before the election*, when they can be fixed with little or no impact on the process, and where instead a candidate is encouraged to wait until she has lost and then to pull out all the stops to *find* problems. Indeed, allowing an election to be overturned on the basis of information that could have been found, but was not, gives rise to a real risk of mischief; a losing candidate's supporters could come forward to "acknowledge" some flaw in their own vote (which they knew of but the candidate did not) to help their candidate have the election declared invalid.

There is absolutely no record basis for concluding that any aspect of Ms. Bagwell's evidence regarding these two voters was "after-discovered" within the meaning of the statute. Ms. Bagwell made no record showing that the information embodied in her protest could not have been discovered before the election. Indeed, it is clear that Ms. Bagwell engaged in no diligence at all to detect potential irregularities until after she knew she had lost. Her protest was thus statutorily improper.

B. It is Reasonable to Infer That Ms. Estes' Vote Was Cast in the Wrong Place Because of Official Error. Because Mr. Gecy's margin of victory was three votes (with one write-in), if even one of the two disallowed votes is counted, Mr. Gecy's victory would be preserved.

It is reasonable to infer that any problem with Ms. Estes' registration was the result of official error, which means her vote should be counted. By operation of law, submission of an address change form for one's driver's license operates as notification of change of address for voter registration unless the voter opts out of that change. S.C. Code Ann. § 7-5-320. Ms. Estes submitted an address change form for her driver's license, and there is no evidence that she opted out of the change for voter registration purposes. This change should have resulted in a change in her address on the voter rolls – which would have made it clear that she had arrived at the wrong precinct polling place. All of this, in turn, means that the appearance of Ms. Estes' name in the wrong precinct roll book can reasonably be inferred to be the result of official error: the failure of the appropriate authorities to carry out her address change after it was submitted. As Ms. Bagwell has acknowledged, a voter should not be disenfranchised by the actions of the government. (App. Br. 11 n. 6; R. pp. 6 n.7, 102 n.5, 137) *See Taylor*, 363 S.C. at 12, 609 S.E.2d at 502.

* * * *

Ms. Bagwell seeks to throw out this election – and with it the votes of every single voter in Simpsonville – because two registered voters cast their votes in the wrong place. This would be a stunningly undemocratic result, and the Court of Common Pleas correctly rejected it.

Argument

The integrity and stability of our elections is at the very heart of our democracy. When an election is thrown out and re-done, public faith in the process is shaken. It is not just one or two voters whose votes are thrown out. *Every voter* who participated in the election has his or her vote invalidated by such a decision. Recognizing this, this Court has set an extremely high standard for the invalidation of an election. The proponent of invalidating the election bears more than even the normal burden of proof. "*[E]very* reasonable presumption in favor of sustaining a contested election will be employed." *Fielding v. South Carolina Election Comm'n*, 305 S.C. 313, 317, 408 S.E.2d 232, 234 (1991) (emphasis added). A protest based on "conjecture, speculation, and surmise" will not be upheld. *Id.*, 305 S.C. at 318, 408 S.E.2d at 235. Moreover, "irregularities and illegalities which do not appear to have affected the result of the election will not be allowed to overturn it." *Id.*, 305 S.C. at 317, 408 S.E.2d at 234. Ms. Bagwell's attempt to invalidate this election ignores these well established principles.

I. In a Post-Election Protest, Casting Votes in the Wrong Precinct Should Not Overturn the Election

Ms. Bagwell's protest rests on an attack on the ballots cast by two *registered* voters – Ms. Estes and Mr. Killian – both of whom reside in Simpsonville, and both of whom were eligible to vote in the election. Her argument rests on the hypertechnical basis that each voted in the wrong *precinct* – despite the fact that the precinct lines make no difference in this election, as all precincts in question are within Simpsonville. Since the two votes would count equally in this election regardless of what physical location they were cast in, the fact that these two votes may have been dropped into the wrong box

did not "affect[] the result of the election" and so cannot "be allowed to overturn it." *Fielding, supra.*

Assuming that these two voters voted in the wrong precinct, it simply does not matter. It is undisputed in the record that both of these voters were Simpsonville residents, that both were registered to vote in Simpsonville, and that their residency qualified them to vote in this election. (R. pp. 41-42, 50-51, 148, 152, 226-29, 231, 237) It does not appear in the record that either was challenged at the polls. This was an at-large race, and so the ballots in every precinct would have been identical; the only significance of the precinct lines was the convenience of having multiple polling places. The only quibble about the participation of these two voters is that their ballots were cast in the wrong physical location. This is precisely the sort of irregularity that this Court has stated should *not* overturn an election. The physical location at which these two votes were cast did not "affect[ ] the result of the election" and so "will not be allowed to overturn it." *Fielding*, 305 S.C. at 317, 408 S.E.2d at 234.

Ms. Bagwell points to S.C. Code Ann. § 7-13-810 for the proposition that a challenge to an election may be based on evidence that an elector voted in the wrong precinct. She fails, however, to take account of this Court's clear and repeated admonition that irregularities and illegalities will overturn an election *only where they affect the result.* Thus, casting a ballot in the wrong precinct *could* affect the result – and thus could form a proper basis for a challenge – *where the voter did not reside within the municipality at all*, or where different precincts were voting in different elections. But that is not this case. Here, the two voters in question were city residents, were registered voters, and this was an at-large election in which all precincts voted. The fact that they

cast ballots in the wrong precincts makes no difference to the result, and so will not overturn the election.

Section 7-13-810 does not say that *any* voting in the wrong precinct will invalidate an election; it says only that voting in the wrong precinct is evidence that may be used in a protest. Such a protest still must be adjudicated pursuant to the standards set forth by this Court in *Fielding* and elsewhere, and thus can succeed only if the voting in the wrong precinct affected the result – which here it did not.

We are aware of *no* South Carolina case invalidating an election on the technical basis that otherwise valid ballots were put in the wrong box. This Court's decision in *Dukes v. Redmond*, 357 S.C. 454, 593 S.E.2d 606 (2004) is instructive here, by way of comparison. In *Dukes*, the Court directed that a mayoral election be overturned because it was determined that the challenged individuals *actually resided outside the city.* Because they lived "outside the city limits, they were not eligible to vote in the mayoral election." 357 S.C. at 458, 593 S.E.2d at 608. Here, by contrast, none of the challenged voters resides outside the city.[7]

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[7] The Commission's own treatment of a ballot challenge regarding a Ms. Poe, on the day before it heard this protest, emphasizes the unfairness of its treatment of the votes of Ms. Estes and Mr. Killian. Ms. Poe resided outside Simpsonville, but had moved into Simpsonville. She did not correct her address with the county voter registration board. Despite this, she appeared at her polling place within the City of Simpsonville on election day. She was there given a provisional ballot – which included this City Council race – which she voted. That procedure is not in accord with S.C. Code Ann. § 7-5-440(B), which clearly provides that there are only two options for dealing with a voter who has moved but not changed her address: she can either vote at her *former* polling place, or at the county's central voter registration office. Despite the fact that Ms. Poe's vote was not cast under either statutory option, the Commission voted to count her vote in this election, apparently concluding that as a matter of equity and justice to an individual who was in fact a resident of the City, her vote should be counted in the City election.

The Commission's stated reason for its decision was that it would not disenfranchise a voter on the basis of an error by an election official. (R. pp. 6 n.7, 140-

Ms. Bagwell – undoubtedly recognizing the tenuousness of her original argument that the physical location where the votes were cast somehow makes a difference – now attempts to repackage her challenge as one aimed at the *registration* of these two voters, as opposed to voting in the wrong precinct. Examination of the transcript of the hearing before the Simpsonville Election Commission reveals that her original presentation was aimed solely at the location where the votes were cast. (R. pp. 137-38, 159, 160-61)

The Court of Common Pleas' decision denying Ms. Bagwell's motion for rehearing deals with this alternate characterization of Ms. Bagwell's claim. As that Court first held, Ms. Bagwell's notice of protest does not discuss improper "registration," and so is inadequate under *Butler v. Town of Edgefield*. (R. p. 51) *See infra* Section II.

Second, as the Court of Common Pleas also observed, Ms. Bagwell's characterization of her argument as one involving registration does not change the substance of the issue presented. Mr. Gecy does not dispute that Ms. Bagwell has presented evidence of an irregularity in the voting – that is, that two individuals appear to have been registered, and to have voted, in a Simpsonville precinct other than the precinct in which they resided at the time. The question, though, is whether that irregularity "affected the result of the election," and thus whether it is sufficient to overturn an entire election in a *post-election* challenge, where the standard for throwing out votes is particularly high. (We would therefore emphasize that this case has no implications for a ballot challenge at the polls by a poll watcher, or other pre-election challenges, to a voter

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41) Ms. Bagwell argued in favor of allowing Ms. Poe's vote, despite the fact that (under Ms. Bagwell's theory) Ms. Poe was illegally registered. There is no rational basis upon which the vote of one city resident who was not registered in her precinct of residence can be counted, while the votes of two others would not be counted.

who is registered in the wrong precinct.[8]) Ms. Bagwell contends that Mr. Killian and Ms. Estes were improperly registered because their registration called for them to vote in a place in the city different from their precinct of residence. That is simply another way of saying that these two residents of Simpsonville, who were on the election rolls, cast their ballots in the wrong physical location. As we have demonstrated, such an irregularity does not affect the outcome of the race, and so will not overturn that outcome.

In this regard, Ms. Bagwell's acknowledgement that Ms. Estes could have voted pursuant to S.C. Code Ann. § 7-5-440 (which provides procedures for voting when a voter has moved from one precinct to another within the same county) is particularly significant. (App. Br. 9, 18; R. pp. 101-02) As we have noted, if even one of the two votes in question is counted, the election of Mr. Gecy stands. Ms. Bagwell's acknowledgement that Ms. Estes could have voted legally is sufficient to meet that standard and uphold the election. To contend that the election should nevertheless be thrown out is pure elevation of form over substance.[9]

Ms. Bagwell focuses on the irregularity in where these two votes were cast, but ignores the standard established by the Court for post-election challenges, requiring that an irregularity have an effect on the outcome. Thus, the cases cited by Ms. Bagwell offer her no support, for the simple reason that they do not relate to post-election challenges.

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[8] Thus, Ms. Bagwell is incorrect that upholding this election result would rob S.C. Code Ann. § 7-5-440 of meaning. (App. Br. 11) That statute operates in the specific context of a ballot question or challenge at the polls, or before polling, and would govern procedures where a voter was challenged on the basis of his or her residence. It again bears emphasizing that this is a post-election protest, which is governed by different standards. Section 7-5-440 does not govern such a protest.

[9] Mr. Gecy does not concede that there is record support for Ms. Bagwell's claim that Mr. Killian had never lived in the precinct of his registration, and thus could not have availed himself of § 7-5-440. The Election Commission found that Mr. Killian could have invoked § 7-5-440. (R. pp. 24-25)

In a case like this one, even an "illegality" will not overturn the race, if it did not affect the outcome.

Both cases primarily relied on by Ms. Bagwell – *Burgess v. Easley Municipal Election Commission*, 325 S.C. 6, 478 S.E.2d 680 (1997) and *James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (N.C. 2005) – relate to challenges made *at the polls at the time the vote was cast.* Indeed, although the *Burgess* opinion makes reference to the polling-place challenge to Mr. Burgess's vote, the opinion does not deal directly with that ballot challenge. Instead, it relates to whether Mr. Burgess, a write-in candidate for Mayor, was a qualified candidate with standing to challenge an election result on the basis of the form of the ballot. *James* is a North Carolina decision dealing with the casting of "provisional ballots" – that is, ballots as to which a challenge was made before they were cast. The standard for such individual challenges – where only the particular ballot in question is at issue – is different from the standard here. Accordingly Ms. Bagwell's cases neither consider nor apply the legal principle that is decisive here: that, in a post-election protest of the entire election, irregularities or illegalities that do not affect the outcome of the election will not be allowed to overturn it. These cases are irrelevant to this appeal.

Ms. Bagwell's "parade-of-horribles" hypothetical suggestion that upholding this election would mean that a Simpsonville resident who moved to Charleston might be allowed to vote is a red herring. (App. Br. 12) All that is at issue here are voters who moved within the City of Simpsonville; a voter who lived outside the city and tried to vote within it would present a different case.[10] As both the Simpsonville Election

[10] Specifically, it is *Dukes v. Redmond*, 357 S.C. 454, 593 S.E.2d 606 (2004).

Commission and Ms. Bagwell have acknowledged, the law provides a means for voters who have moved within a city to vote. (R. pp. 24-26, 101)

Ms. Bagwell's broader suggestion that allowing this election to stand would somehow result in "disarray" or confusion is totally without record support. (App. Br. 12) Again, the only question presented in this appeal is whether voting in the wrong precinct can serve as a basis for a *post-election* challenge; the case has no broader implications for precinct voting requirements. We submit that the far greater risk of chaos lies in allowing protests like Ms. Bagwell's – based on whatever irregularities she could piece together after the votes were counted – to succeed where there has been no showing of voters from outside the city who would have an impact on the outcome of the election.

Each of Ms. Estes and Mr. Killian was a registered voter and a resident of Simpsonville. Their votes should count in this race. The Commission erred in refusing to count them.

II. The Protest Must be Dismissed Because Ms. Bagwell's Notice of Protest Was Inadequate

This protest was lodged under S.C. Code Ann. § 5-15-130. That statute requires that the notice of protest be filed within 48 hours of the closing of the polls, and that it include "a concise statement of the grounds therefor." This Court has held that a notice of protest that fails to provide such a concise statement of the grounds for the protest must be dismissed.

> The notice in an election contest "should briefly state facts or a combination of facts sufficient to apprise the contestee of the cause for which his election is contested, it being insufficient to allege generally that fraud was committed, or to allege mere conclusions of the pleader."

Butler v. Town of Edgefield, 328 S.C. at 245-46, 493 S.E.2d at 842 (quoting 26 AM. JUR. 2D *Elections* § 434 (1996)).

The *Butler* Court went on to observe that "the procedure prescribed by statute [for an election contest] must be strictly followed." It explained that the "purpose of the notice requirement is to adequately inform the contestee as to the nature of the contest." 328 S.C. at 246, 493 S.E.2d at 842. While Ms. Bagwell calls the Court of Common Pleas "hypertechnical" for holding her to the standard set forth in *Butler* (App. Br. 2), in fact this Court made clear in *Butler* that strict adherence to this requirement is necessary.

Ms. Bagwell's notice of protest fails this requirement. (R. p. 53; *see* R. pp. 46-49, 51) It contains no statement of *facts* whatsoever, as required by *Butler*. Indeed, Ms. Bagwell's counsel acknowledged that the notice was drafted to be as broad as possible, and to encompass all of the usual grounds upon which an election might be overturned, for the purpose of keeping Ms. Bagwell's options open until she could *find* a grounds for her protest.[11] (R. pp 165-66) That is, in the words of *Butler*, Ms. Bagwell only "allege[d] generally that fraud was committed." If Ms. Bagwell did in fact know about Ms. Estes and Mr. Killian, she did not put her knowledge into her notice of protest. On the other hand, if Ms. Bagwell did not know what her grounds were when she filed the protest, the protest obviously cannot have served to "adequately inform [Mr. Gecy] as to the nature of the contest," *Butler, supra*, as Ms. Bagwell herself did not have that information when the protest was drafted.

[11] At the hearing before the Election Commission, Ms. Bagwell's counsel stated that in drafting the notice counsel "had to go upon my experience . . . of the kinds of problems that tend to show up." (R. p. 166)

Examination of Ms. Bagwell's protest makes it clear that it was not drafted to described the situations of Ms. Estes or Mr. Killian. Instead, it makes numerous allegations of circumstances that were not the subject of the hearing (such as voting by persons who did not reside in Simpsonville). And the protest nowhere makes a clear and clean allegation of voting by Simpsonville residents in the wrong precinct. This was a kitchen-sink pleading, and it did nothing to inform Mr. Gecy of the nature of the contest. This statement fails the requirement that the grounds for protest "should be stated so plainly and clearly that the contestee may prepare to meet them without unnecessary labor or expense," *Butler*, 328 S.C. at 247, 493 S.E.2d at 843, *quoting State ex rel. Davis v. State Board of Canvassers*, 86 S.C. 451, 458-59, 68 S.E. 676, 679 (1910).

Ms. Bagwell argues that her third ground should be read to allege that Mr. Killian and Ms. Estes voted in the wrong precinct. That third ground alleges that "[p]ersons who had not provided accurate information for the voter rolls were nonetheless allowed to cast full ballots." (R. p. 53) This generic statement, having nothing to do with polling places, cannot be converted into an allegation that Ms. Estes and Mr. Killian voted in the wrong precinct. Ms. Bagwell attempts to defend her notice as "concise." Instead, it was vague, and there is a large difference between the two attributes. At most, her protest states that there were some unspecified voters who provided unspecified inaccurate information (or, perhaps, failed to provide unspecified accurate information) in a way that made their voting, somehow, illegal. This is a far cry from claiming that registered voters named Killian and Estes voted in the wrong precinct.

Weighed in the balance of *Butler*, this general allegation of irregularities is plainly inadequate. Even if Mr. Gecy knew enough about Ms. Bagwell's protest to ignore all of

the other specified grounds in her protest and to focus on this one, this vague allegation did nothing to tell him what it is he is defending against. *Butler* requires that the notice of protest provide Mr. Gecy with information, and with facts. This notice gave him none. It is fatally inadequate.

Ms. Bagwell suggests that the inadequacy of her notice should be excused by the short time frame available to prepare protests under the statute. (App. Br. 18-19) This argument simply ignores the fact that the notice requirement is also part of the statute. Mr. Gecy submits that the statutory requirements complained of by Ms. Bagwell are actually an indication that protests should be based on known facts, not on general allegations that the protesting party hopes to substantiate later.

Ms. Bagwell also argues that the failure in her pleading could be remedied by a retroactive granting of a motion to amend. Section 5-15-130, which requires a statement of the grounds for the protest, does not allow for such later amendment. Because the notice requirement is embodied in statute, Ms. Bagwell's general appeal to the Civil Rules regarding amendments is misplaced; the Election Code supersedes the Rules on this point. The statutory requirement for the notice of protest is simply different from, and more stringent than, the requirements for a civil complaint. Even if an amendment were statutorily possible, however, it would not remedy the defect. The point of the pleading requirement, *Butler* makes clear, is to apprise Mr. Gecy at the time the notice is filed of the nature of the challenge. An amendment after the fact would do nothing to remedy the initial failure to tell him the grounds of the protest. In this context, an amendment to conform to the pleadings would completely undermine the statutory requirement of a specification in the notice of the grounds of the protest.

More generally, allowing a party to proceed as Ms. Bagwell did here is bad for democracy. When she learned she had lost by three votes, she apparently did not know of any improprieties in the election. Nevertheless, she filed a shotgun-style pleading attacking every aspect of the election, and set out to find something wrong. Putting to one side the fact that all she could find was two registered voters who voted in the wrong place (with no impact on the vote count), the law does not and should not countenance this sort of after-the-fact effort to ask for an instant replay review of all four quarters after the game has ended, the players have left the field, and the fans have gone home. The law requires a concise statement of the grounds for the protest, not a broad recitation of everything that might be wrong. Ms. Bagwell's notice failed to specify the grounds for her protest, and it should have been dismissed.

III. The Decision Below Should Also Be Affirmed on One or Both of the Following Additional Bases

The Court below did not reach certain additional arguments made by Mr. Gecy. (R. p. 49) To the extent that this Court finds it appropriate to reach these arguments, each of them provides additional grounds for sustaining the decision below. *I'On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

A. The Statutory Requirement That a Protest Be Based on "After-Discovered" Evidence Imposes a Requirement of Due Diligence on Ms. Bagwell. Her Protest Did Not Meet This Requirement.

This first additional ground reflects a fundamental difference in understanding between the parties of the requirements for a post-election protest like Ms. Bagwell's. In a nutshell, Ms. Bagwell's position is that there is *no requirement whatsoever* that the protesting party exercise due diligence, or show that the information forming the basis for the protest was not known, and could not have been known, prior to the election itself.

Put another way, in Ms. Bagwell's view, it is acceptable for a candidate to await the outcome of the election, and only then to begin to investigate to see whether she can *find* some basis on which to have the election thrown out.

Mr. Gecy, by contrast, believes that this is not the law, nor is it sensible. South Carolina law requires that a protest be based, at least in part, on "after-discovered evidence." The term "after-discovered" has a particular legal meaning, and requires a showing that the evidence *could not* in the exercise of due diligence have been obtained earlier. There is a tremendous difference in the consequences that flow from irregularities identified at or before the time of the election (which typically result, at worst, in the decision not to count a single ballot but leave the election result in place), and those that are found only later and used to throw out the entire election. The law therefore has a strong preference for identifying irregularities before they can taint an entire election.

Mr. Gecy contends that the law requires due diligence of protestants like Ms. Bagwell, and that she failed to meet that requirement. Thus, even if the Court concludes that the evidence presented by Ms. Bagwell was otherwise sufficient to throw out the election result, the absence of any showing that this information could not have been obtained before the election means that the information is not "after-discovered," and so cannot form a proper basis for a protest.

1. The Law Requires That a Post-Election Protest Be Based on Information That Was Not Known, or Knowable in the Exercise of Due Diligence, at the Time of the Election

S.C. Code Ann. § 7-13-810 prohibits what Ms. Bagwell did here – basing a protest on information that could have been discovered before the vote was cast. That statute provides, in relevant part, as follows:

> It is the duty of the managers of election to, and any elector or qualified watcher may, challenge the vote of a person who may be known or suspected not to be a qualified voter. However, the challenges by persons other than a manager must be addressed to the manager and not directly to the voter. The manager shall then present the challenge to the voter and act in accordance with the provisions provided for in this section. **All challenges must be made before the time a voter deposits a paper ballot in a ballot box or casts his vote in a voting machine, and no challenge may be considered after that time**. . . . A candidate may protest an election in which he is a candidate pursuant to § 7-17-30 **when the protest is based in whole or in part on evidence discovered after the election**. This evidence may include, but is not limited to, **after-discovered evidence** of voters who have voted in a precinct or for a district office other than the one in which they are entitled by law to vote.

(Emphasis added.)

The structure of § 7-13-810 demonstrates the fundamental flaw of this protest – in which the Bagwell campaign made no effort to identify or prevent potential voting problems at the balloting stage, but now raises those issues (which could have been resolved earlier without upsetting the entire election) after obtaining an unfavorable electoral outcome, to try to throw out the election. Section 7-13-810 forbids that approach.

The first element of § 7-13-810 is a requirement that an individual ballot be challenged at the polls. After the ballot is deposited, "no challenge may be considered." This rule is complemented by the provision that a post-election protest is proper only if it is based in whole or in part on "after-discovered" evidence. As discussed in more detail below, "after-discovered" evidence has a particular meaning at law: it refers to evidence that *could not* have been discovered in the exercise of reasonable diligence, not merely evidence that as a matter of fact was not discovered because the party introducing it did not bother to look.

Taken together, these two elements of § 7-13-810 mean that a challenge to an individual ballot that could reasonably have been made at the polls, or in the *years* before as in the apparent case of Mr. Killian, cannot be resurrected in the guise of a post-election protest. Ms. Bagwell's protest falls afoul of this rule.

This Court has recognized the significance of both elements of § 7-13-810. For instance, *Fielding v. South Carolina Election Commission* emphasizes that the contemporaneous challenge requirement be followed. "[T]he making of a challenge is essential to the preservation of an adequate record upon which appellate review can be had." 305 S.C. at 318, 408 S.E.2d at 235. If a challenge is not made at the polls, it cannot be revived later. In *Greene v. South Carolina Election Commission*, 314 S.C. 449, 453, 445 S.E.2d 451, 454 (1994), the failure of a candidate's poll watchers to make a challenge was fatal to the candidate's later attempt to raise the same issue in a protest. "[I]t was incumbent upon Greene's poll watcher to insist the poll manager issue a challenge ballot to voters" whose eligibility to vote was in question. *See also Berry v. Spigner*, 226 S.C. 183, 191, 84 S.E.2d 381, 385 (1954) (rejecting a protest in part because it was "noteworthy that not a single vote was challenged").

Although Ms. Bagwell appears to acknowledge that the law contains an after-discovered evidence requirement, her argument fails to understand the nature of that requirement. (App. Br. 15-17) Ms. Bagwell argues that any evidence that was not *in fact* uncovered until after the election qualifies as "after-discovered." That is not the law.

The phrase "after-discovered" has been uniformly interpreted to refer to evidence that *could not have been discovered* with reasonable diligence before the relevant time.[12] Ms. Bagwell's position would encourage what we have seen here: holding back until the results are in, and then a massive mobilization of effort to attack the election. Evidence does not pass the statutory hurdle of being "after-discovered" simply because the party did not bother to discover it.

This Court has also interpreted § 7-13-810 consistently with this understanding of the phrase "after-discovered." In *Hill v. South Carolina Election Commission,* 304 S.C. 150, 403 S.E.2d 309 (1991), the protestant argued that more ballots were cast in two precincts than there were voters on the voter registration lists for those precincts. The Court rejected the challenge because it was based on information that would have been available at or prior to the time the ballots were cast.

The Court noted that (like Ms. Bagwell) the protestant had not made challenges at the time the ballots in question were cast. It then observed that the alleged discrepancies "*could have been discovered* prior to the election," and noted that "we see no reason why a challenge could not have been made at the time a voter was given a ballot." *Hill,* 304 S.C. at 152, 403 S.E.2d at 309-310 (emphasis added). Thus, the protests were not based

[12] The phrase "after-discovered evidence" – the phrase used in § 7-13-810 – has been construed the same in other areas of the law. *See, e.g., Raby Construction, L.L.P. v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004) (motion for relief from judgment under SCRCP 60(b)(2), must be based on "after-discovered evidence," defined as "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial." *See also State v. Spann,* 334 S.C. 618, 619, 513 S.E.2d 98, 99 (1999) ("after-discovered evidence" is evidence that "could not in the exercise of due diligence have been discovered prior to" the event in question). These constructions are powerful evidence of the proper construction here.

on "after-discovered" evidence. For those reasons, the Supreme Court reversed a decision of the State Board of Elections and held that the election results should stand.

Ms. Bagwell contends that the rule in *Hill* has been modified. We do not believe that is true, at least in any fashion that would save Ms. Bagwell's protest. *Hill* is based on S.C. Code Ann. § 7-13-810, and while that statute has been amended since *Hill* was decided, it retains the requirement that a protest be based at least in part on "after-discovered" evidence.

At the outset, it is important to underscore that *Hill* is different from the instant case, because it involve the allegation that votes were cast by someone who resided completely outside the electoral area – not votes by residents who simply were in the wrong physical location.

Moreover, *Hill* involved a particular, and somewhat unique, form of election protest. *Hill* involved an "over-vote" situation – that is, a situation in which the aggregate number of votes cast in an election exceeds the total number of registered voters. The specific holding in *Hill* was that this "over-vote" could have been determined before the election, and so did not form a proper basis for a challenge. We submit that the best understanding of the 1996 amendment to § 7-13-810 was that this amendment was concerned specifically with the unique issues presented by "over-vote" challenges. We submit that the amendment was designed to clarify (to the extent that *Hill* might be read to the contrary) that the ballot challenge procedure is not the sole vehicle for a protest in such circumstances – *not* to eliminate entirely and in all circumstances the requirement that protests be based on information that was not known, or could not have been known with due diligence, before the election.

Indeed, the 1996 amendment does not eliminate the "after-discovered evidence" requirement. As currently codified, § 7-13-810 still allows a protest only "when the protest is *based in whole or in part* on evidence discovered after the election. This evidence may include, but is not limited to, *after-discovered evidence* of voters who have voted in a precinct or for a district office other than the one in which they are entitled by law to vote." (Emphasis added.) Thus, the material added by the 1996 amendment simply describes one specific type of after-discovered evidence that may be considered; it does not alter the "after-discovery" requirement. In other words, the amendment to § 7-13-810 retains the limitation on protests to those that are based, at least "in part," on "after-discovered" evidence. The 1996 amendment, did not, as Ms. Bagwell contends, open the gates to election protests based on readily obtainable information that the candidate simply did not bother to obtain, or verify, until after the election.[13]

Dukes v. Redmond, 357 S.C. 454, 593 S.E.2d 606 (2004), relied on by Ms. Bagwell, actually confirms that the after-discovered evidence rule still has vitality. Indeed, *Dukes* actually acknowledges and applies the "after-discovered" evidence rule. *Dukes* turns on a factual holding that certain evidence was "after-discovered." Thus, *Dukes* confirms that the statute, as amended, still requires "after-discovered" evidence. And, as noted, *Hill* and *Dukes* deal with the situation, very different from the one

[13] Ms. Bagwell takes the Court of Common Pleas to task for relying on *Hill*. (App. Br. 15) This is inaccurate. The lower court merely correctly observed that the standard for throwing out election results is high, and that a post-election protest must be treated differently from a pre-election challenge to an individual ballot. We submit that principle appears not only in *Hill*, but throughout this Court's jurisprudence in its admonitions that all inferences must be drawn in favor of sustaining the election result, and that even illegalities that do not affect the result will not overturn the election.

presented here, of votes cast from outside the electoral area. They do not involve votes by city residents who were in the wrong physical location.

Dukes is also noteworthy because the *Dukes* Court specifically mentions *Hill* and *Greene* (another decision of this Court recognizing that protests may not be based on information that could have been known before the election) in footnote four of its opinion, and notes the statutory amendment; this Court pointedly did not, however, conclude that the statutory amendment had the effect of overruling *Hill* or *Greene*. 357 S.C. at 457, 593 S.E.2d at 608, n.4. We understand that if this Court concluded two of its decisions had been overruled by the legislature, it would have said so.[14]

As we discuss below, Ms. Bagwell's protest fails the after-discovered evidence requirement. The record contains no showing that the information on which she based her protest could not have been discovered earlier. To the contrary, no new information came to light after the election.

The strong policy preference embodied in § 7-13-810 for diligence before the election, and for ballot challenges over general election protests, makes very good sense.[15] In a ballot challenge, only the questioned ballot is put in jeopardy. Whether or not it is upheld, the rest of the election remains intact. S.C. Code Ann. § 7-13-830. Moreover, the ballot challenge process ensures due process for each challenged voter.

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[14] Ms. Bagwell states in a footnote that the Westlaw database indicates *Hill* has been "overruled." Aside from the fact that this is a hearsay opinion, it is noteworthy that the *Shepard's* service available through LEXIS does not indicate that *Hill* is no longer good law. In addition, the Westlaw notation we have reviewed does not say that *Hill* was "overruled," but rather that it was "superseded by statute," which is at most ambiguous as to the precise effect on the ruling and reasoning of *Hill*.

[15] The election laws give candidates the right to monitor the integrity of the election before and during the election. For instance, candidates may inspect voter rolls for irregularities at any time before the election, and they may station poll watchers at every polling place who have the ability to challenge voters.

By contrast, a protest makes no effort to determine the validity of the individual votes alleged to be "questionable," and creates the risk of tossing out the "baby" of several thousand unquestionably valid votes with the "bathwater" of speculation about what might have been wrong with a small number of votes. Because of this dramatic result, candidates have certain responsibilities to exercise due diligence before and during the election, rather than waiting until after, when the greatest harm to the electoral process will result.

2. With Diligence, Ms. Bagwell Could Have Identified the Two Instances on Which She Relies; Ms. Bagwell Made No Showing That This Information Was Unavailable Earlier

There was nothing *in* the voter books that indicated that Ms. Estes and Mr. Killian voted in the wrong precinct. Somehow – and the record is completely silent on how – Ms. Bagwell determined this information by other means. As a matter of logic, this means that Ms. Bagwell could have taken the same steps before the election, or at the polls, and developed this information *before* these two citizens cast ballots that Ms. Bagwell now seeks to have thrown out. Moreover, Ms. Bagwell made no showing whatsoever of any efforts that she made before or during the election to identify problems, and so did not carry her burden of demonstrating due diligence.

This lack of diligence is strikingly evident in the case of Mr. Killian. Within three or four days of the close of the polls, Ms. Bagwell had secured an affidavit from Mr. Killian reciting that he had not used the address at which he was registered *since 1998*. (R. pp. 55, 141) Thus, according to the affidavit submitted by Ms. Bagwell, this information had been knowable for seven years. (And, during that time, it is a matter of public record that Ms. Bagwell twice ran for City Council in Simpsonville, losing once and winning once.) Beyond this, Ms. Bagwell's evidence tended to suggest that the fact

that Mr. Killian did not reside at his registration address would have been very simple to discern. (*E.g.*, R. p. 145) This is the kind of information that can be the subject of a ballot challenge before a vote is cast. (R. pp. 156-57) Yet Ms. Bagwell took the trouble to ferret it out only when it could work to her advantage to invalidate an election which she had lost.[16]

A similar point applies to Ms. Estes. She testified that she had the address on her driver's license changed. (R. p. 149) Thus, a poll watcher could have examined that driver's license and determined that it did not match the address at which Ms. Estes was registered. This would have resulted in a ballot challenge, or more likely in allowing Ms. Estes to vote precisely where she was, pursuant to S.C. Code Ann. § 7-5-440(B)(1).[17] Ms. Bagwell offered no evidence as to whether she had poll workers for the election, but it was her right to have them.

These failures by Ms. Bagwell to exercise due diligence, and to make challenges to individual ballots rather than seeking to throw out the entire election, bar her protest.

A challenge like Ms. Bagwell's presents a true threat of mischief. Under Ms. Bagwell's approach, a candidate losing a close race could ask her *supporters* to come forward to acknowledge voting in the wrong location. Because an after-the-fact protest would not inquire into the content of the ballot, a candidate could ground a successful protest on the testimony of supporters who wanted the election thrown out, and on the invalidation of ballots that were in fact cast for that losing candidate. Moreover, it would

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[16] As we discuss elsewhere, reversal of the Commission with respect to only one of the two votes deemed invalid by the Commission would result in upholding the election of Mr. Gecy. Thus, a determination of lack of diligence with respect to *either* Mr. Killian *or* Ms. Estes would call for reversal of the Commission.

[17] *See supra* p. 17; *infra* note 20.

be perverse to create a system under which candidates have no incentive to raise readily discoverable problems when they can be fixed with little or no impact on the process, and where instead a candidate is encouraged to wait until she has lost and then to pull out all the stops to find problems. To guard against these sorts of result, the law requires reliance on due diligence and challenges at the polls in preference to after-the-fact protests, whenever possible.

If the "after-discovered evidence" requirement of § 7-13-810 and its corollary of diligence mean anything, they mean that this challenge must fail. According to Ms. Bagwell's own evidence, Mr. Killian's situation was stale information. The record is completely devoid of any evidence that his situation could not have been discovered sooner. An election protest that relies on information that could have been discovered years before cannot be upheld.

B. It Is Reasonable to Infer that Ms. Estes' Registration in the Wrong Precinct Was the Result of Official Error

Because Mr. Gecy's margin of victory was three votes, and there was one write-in vote, if this Court were to conclude that the Election Commission was in error as to *either* of these two votes (or both, of course), the popular result electing Mr. Gecy to City Council would be upheld.

Ms. Estes should not be disenfranchised, because any error in her registration is attributable to potential official error.

Ms. Estes testified that she had submitted an address change form for her driver's license. South Carolina law is clear that submitting such a change of address form "serves as notification of change of address for voter registration unless the qualified elector states on the form that the change of address is not for voter registration

purposes." S.C. Code Ann. § 7-5-320.[18] There is no evidence that Ms. Estes said her driver's license change of address was not for voter registration purposes. The record is simply silent on this point. (Accordingly, the Election Commission's finding on the point is due no deference, because it is not supported by evidence.)

There are thus two possibilities: either her driver's license change was intended to change her voter registration, or it was not. We contend that, because of the rule that all inferences must be drawn in favor of the validity of the election, and because Ms. Bagwell bears the burden of showing the invalidity of the election, it must be inferred that Ms. Estes' driver's license change of address should have, by statute, served as notice of her change of address for voter registration. This, in turn, would have resulted in a change in her address on the voter rolls and provision to her of a new registration card, which would have made it clear that she had arrived at the wrong precinct polling place. All of this, in turn, means that the appearance of Ms. Estes' name in the wrong precinct roll book can reasonably be inferred to be the result of official error: the failure of the appropriate authorities to carry out her address change after it was submitted.[19]

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[18] Ms. Bagwell's brief characterizes this coupling of changes of address for driving and voting as "optional." (App. Br. 7 n.7) This is misleading. The changes occur together unless the voter *affirmatively* opts out.

[19] Ms. Bagwell argues that the opposite inference should be drawn under *Gardner v. Blackwell*, 167 S.C. 313, 166 S.E. 338 (1932). (App. Br. 7 n.7) Ms. Blackwell's argument mischaracterizes *Gardner*. That case does not hold that there is a presumption that election officials have fulfilled their duties. Instead, in *Gardner* the Supreme Court was faced with a request to issue a specific instruction to commissioners of election advising them to ensure the secrecy of the ballot. In the absence of any showing of a threat of violation, the Court simply declined to give such an advisory instruction, or to assume in advance that election officials would violate the law. 167 S.C. at 326-27, 166 S.E. at 342-43. Even if *Gardner* did stand for the proposition advanced by Ms. Bagwell, it would not require throwing out Ms. Estes' vote. The failure to transmit her change of address could have as easily involved computer or mechanical error as some failure of official discretion.

This is significant because the Supreme Court has held that a voter is not to be disenfranchised by virtue of the error or omission of a state official. *See Taylor*, 363 S.C. at 12, 609 S.E.2d at 502 (voters "are not to be disenfranchised because of an irregularity, mistake, error, or even wrongful act, of the officers charged with the duty of conducting the election"). Indeed, Ms. Bagwell has acknowledged this proposition ((App. Br. 11 n.6; R. pp. 102 n.5), and it is the law of the case in this proceeding. *See Ross v. Medical University of S.C.*, 328 S.C. 51, 492 S.E.2d 62 (1997) (law of the case applies both to issues explicitly decided and to those that were necessarily decided).

The Simpsonville Election Commission, in resolving ballot challenges including the challenge to the ballot of Ms. Poe, counted Ms. Poe's ballot despite the fact that she was not registered within the city at all. The Commission based this ruling primarily on the proposition that Ms. Poe should not be disenfranchised – despite the fact that she voted in the wrong place – by virtue of an official error. (R. p. 6 n.7,) *See generally supra* note 7. This established as law of the case that official error will not disenfranchise a voter.

The proper inference in the face of uncertainty in the record is that Ms. Estes took the proper steps, and that any error is attributable to the State; this results in upholding the election. Because there is a reasonable inference that Ms. Estes was affected by official error, and because all inferences must be drawn in favor of upholding the election, it was improper to invalidate her vote. [20]

[20] Furthermore, the proper statutory outcome would have been for her to vote at her former polling place – that is, *precisely where she did vote.* S.C. Code Ann. § 7-5-440(B)(1) (voter who has moved precincts may vote at former polling place). Ms. Bagwell acknowledges that Ms. Estes could have voted pursuant to S.C. Code Ann. § 7-

In addition, Ms. Estes' driver's license change is also relevant to the inadequacy of Ms. Bagwell's notice of protest. Ms. Bagwell argues that her notice was adequate because it relied on "[p]ersons who had not provided accurate information for the voter rolls." Unless it can be found that Ms. Estes expressly directed that her driver's license change *not* be used for voter registration purposes, then there is no argument that she did not provide accurate information for the voter rolls. Thus, the casting of her ballot in the wrong precinct would *not* be adequately described by Ms. Bagwell's notice – even on Ms. Bagwell's own interpretation of that document.

As we have noted above, the invalidation of only one vote leaves the election result intact. Thus, the validity of Ms. Estes' vote alone means the election result should be upheld.

Conclusion

Mr. Gecy won this election by three votes. As the Court of Common Pleas correctly held, Ms. Bagwell's protest is both substantively and procedurally inadequate. Ms. Bagwell seeks the invalidation of the votes of two registered Simpsonville voters, because these two cast their ballots in the wrong physical location. This is a technicality that did not affect the result of the election, and so it cannot serve as a basis for upholding Ms. Bagwell's protest.

Furthermore, Ms. Bagwell's protest falls short of the "strict" requirement that a notice of protest contain facts sufficient to inform Mr. Gecy of the nature of the protest. Instead, she provided a notice of broad generalities, and then set about to find facts that

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5-440. (App. Br. 9, 18) This further underscores that we are dealing here with the invalidation of votes that should be counted.

would support the protest she wished to bring. What Ms. Bagwell did is not in accord with the statute, and it is not good policy to allow such protests.

It is – and should be – a very difficult thing to overturn an election. Ms. Bagwell has failed to make the kind of clear showing of material irregularity required by law to throw out an election. The decision of the Court of Common Pleas reinstating Mr. Gecy's electoral victory should be affirmed.

Respectfully submitted,

WYCHE, BURGESS, FREEMAN & PARHAM, P.A.

J. Theodore Gentry (No. 64038)
44 E. Camperdown Way
Post Office Box 728
Greenville, SC 29602-0728
Direct Dial: 864-242-8270
Telephone: 864-242-2800
Telecopier: 864-235-8900
E-Mail: tgentry@wyche.com

COUNSEL FOR RESPONDENT ROBERT GECY

October __, 2006

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM THE GREENVILLE COUNTY
COURT OF COMMON PLEAS

Edward W. Miller, Circuit Court Judge

Docket No. 2005-CP-23-7572

Robert Gecy .....Respondent,

v.

Tammy Bagwell.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

J. Theodore Gentry (No. 64038)
WYCHE, BURGESS, FREEMAN & PARHAM, P. A.
44 E. Camperdown Way
Post Office Box 728
Greenville, SC 29602-0728
864-242-8270

COUNSEL FOR RESPONDENT

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CERTIFICATE OF SERVICE

I hereby certify that I have this __ day of October, 2006, served three (3) copies of the final Brief of Respondent on counsel for Appellant by causing same to be deposited in the United States mail, first-class postage prepaid, addressed as follows:

Timothy E. Hurley
306 Ashford Avenue
Greenville, SC 29609

_____
J. Theodore Gentry (No. 64038)