THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2005-CP-23-7572

Robert Gecy ……. Respondent,

v.

Tammy Bagwell …….. Appellant.

FINAL BRIEF OF APPELLANT

Timothy E. Hurley
(S.C. Bar No. 72267)
306 Ashford Avenue
Greenville, SC 29609
(864) 233-8289

Keith D. Munson
(S.C. Bar No. 13400)
Womble Carlyle Sandridge & Rice, PLLC
P.O. Box 10208
550 South Main Street, Suite 400
Greenville, SC 29601
(864) 255-5412

ATTORNEYS FOR APPELLANT TAMMY BAGWELL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF THE ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN OVERTURNING THE FINDING OF THE SIMPSONVILLE ELECTION COMMISSION THAT AT LEAST TWO INVALID VOTES WERE CAST IN THIS ELECTION, PUTTING THE RESULT OF THE ELECTION INTO DOUBT AND NECESSITATING A NEW ELECTION?

2. DID THE CIRCUIT COURT ERR IN OVERTURNING THE FINDING OF THE SIMPSONVILLE ELECTION COMMISSION THAT THE PROTEST DOCUMENT, BY WHICH THE ELECTION CONTEST WAS INITIATED, WAS LEGALLY SUFFICIENT?

STATEMENT OF THE CASE

The November 8, 2005 city council election for Ward Four in Simpsonville was originally declared a victory for Respondent Robert Gecy over Appellant Tammy Bagwell by a margin of just two votes. Ms. Bagwell contested the election before the Simpsonville Election Commission by a Protest filed November 10, 2005. Following a full evidentiary hearing held on November 12, 2005, the Commission found that at least two illegal votes had been cast, putting the result in doubt and requiring a new election. On appeal by Mr. Gecy, the Circuit Court reversed, holding that the votes in question were valid and further holding that the Protest document, by which an election contest is commenced, was legally insufficient. (R. pp. 39-49.) Ms. Bagwell duly filed a Motion

for Reconsideration, which was overruled. (R. pp. 50-52.) Ms. Bagwell brings the present appeal directly to this Court pursuant to S.C. Code Ann. § 14-8-200(b)(5) (Supp. 2005) and Rule 203(d)(1)(E), S.C.A.C.R. Her Notice of Appeal was filed on March 10, 2006.

SUMMARY OF ARGUMENT

The Circuit Court's rulings were erroneous. The ballots were invalid for at least two reasons. First, they were cast by persons who, by failing to provide legally required information for the voter rolls, were not legally registered to vote. Second, those same ballots were cast in precincts in which the persons did not reside, in plain violation of legal requirements for a valid vote. Because the patent illegality of these votes puts the result of the election in doubt, a new election must be ordered.

The Circuit Court also erred in its hypertechnical ruling that the original Protest document was insufficient, legally barring the protest entirely. Because that document was drafted to allege, and does allege, precisely the invalidity of the ballots at issue in this contest, this Court should hold that it provided the "concise statement" of the grounds for the protest required by S.C. Code Ann. § 5-15-130 (2004) and is therefore sufficient.

The Election Commission's ruling that a new election must be held therefore should be reinstated.

STANDARD OF REVIEW

The standard of review is clear. Taylor v. Town of Atlantic Beach Election Commission, 363 S.C. 8, 609 S.E.2d 500 (2005) was procedurally indistinguishable from the present case. Like the present case, it involved a municipal council election, the protest was heard before the municipal election commission, appeal was taken to the Circuit Court, and a further appeal directly to this Court pursuant to S.C. Code Ann. § 14-8-200(b)(5) and Rule 203(d)(1)(E), S.C.A.C.R. This Court stated:

> The circuit court, sitting in an appellate capacity, does not conduct a *de novo* hearing or take testimony. The circuit court must examine the decision for errors of law, but it must accept the factual findings of the commission unless they are *wholly unsupported by the evidence*. (363 S.C. at 14, 609 S.E.2d at 503 (emphasis added).)

Naturally the same deference to the factual findings of the Election Commission applies on appeal to this Court. Douan v. Charleston County Council, 357 S.C. 601, 607, 594 S.E.2d 261, 264 (2003); Fielding v. South Carolina Election Commission, 305 S.C. 313, 317, 408 S.E.2d 232, 234 (1991).

The facts supporting the Election Commission's holding that a new election must be ordered are not seriously in dispute. Certainly in no respect can they be said to be "wholly unsupported by the evidence."

FACTS AND PROCEDURAL BACKGROUND

1. The Election and Its Aftermath

Elections for three city council seats in Simpsonville were held on Tuesday, November 8, 2005. The city is divided into wards, with one council member from each ward who must reside in that ward, but the election is at-large, with all voters in the city

allowed to cast ballots in all races. *See* Simpsonville Election Ord. §16(b), (c). Initial results in the Bagwell-Gecy race in Ward 4 showed 426 votes for Gecy, 424 for Bagwell, and one write-in vote for a third person. (R. p. 4, ¶ 4.) A run-off is called unless one candidate receives a majority of all votes cast, so at that point Gecy in effect was ahead by exactly one vote. There were however seven "challenge" ballots not yet counted. A challenge ballot is a paper ballot a person is allowed to cast when the person's right to vote is for some reason in doubt. S.C. Code Ann. § 7-13-830 (Supp. 2005). They are not initially counted with the rest but are set aside for later consideration by the Election Commission. With a margin of only one vote and seven challenge ballots still outstanding, the Commission's decision on these ballots could leave the result unchanged, render the race a tie, or give the victory to Ms. Bagwell.

Under Section 5-15-130, any protest of the election had to be filed within 48 hours of the close of the polls, or by 7:00 p.m. Thursday, even though the Commission would not meet to consider the challenge ballots and announce a winner until noon Friday. Ms. Bagwell filed her Protest at 6:00 p.m. Thursday, within the 48-hour period. The ground for the Protest most relevant to this appeal was the third, alleging that "Persons who had not provided accurate information for the voter rolls were nonetheless allowed to cast full ballots." (R. p. 53, ¶ 3.) Contrary to respondent's claim, this ground specifically asserts precisely the illegality at issue on this appeal, and was drafted with such illegalities in mind. It was the failure of at least two voters to provide accurate information so that they might be eligible to vote that rendered their votes invalid.

The Commission met on Friday and ruled that all seven challenge ballots should be counted. Those votes split four for Gecy and three for Bagwell. At that point, then,

the totals stood at 430 for Gecy, 427 for Bagwell, and one write-in vote. (R. p. 159, lines 11-22.) Because of the requirement of an absolute majority of all votes cast, Mr. Gecy was in effect ahead by two votes. Section 5-15-130 requires that the Commission fully resolve a contest such as this one within 48 hours of the filing of the Protest, in this case by 6:00 p.m. Saturday. (Therefore the entire elapsed time from the close of the polls to the issuance of the Commission's Order would be no more than 95 hours.) The Commission therefore reconvened at 9:00 the next morning, Saturday, to consider whether all votes were legally valid. Given the secrecy of the ballot, it is of course impossible to determine for whom an illegal vote was cast. *See* S.C. Const. art. II, § 1. Therefore it is settled law that any illegal vote is assumed to have been cast for the candidate with the greater reported vote total, and if the number of illegal votes is at least as great as the number by which that candidate is ahead, the result of the election is rendered doubtful and a new election must be held. Broadhurst v. City of Myrtle Beach Election Commission, 342 S.C. 373, 382, 537 S.E.2d 543, 547 (2000). The Commission took evidence and found that at least two illegal votes had been cast, rendering the result of the election doubtful and requiring a new election to determine the electorate's true preference.

2. *Mr. Killian's Vote*

One of the illegal votes was cast by Steven Killian. A mountain of evidence established the facts concerning Mr. Killian's vote. There was, first, the sworn affidavit of Mr. Killian himself, who was unavailable to testify in person because he was out of

town.[1] Mr. Killian's affidavit showed that he had not provided his correct address for the voter rolls, and that he cast a ballot in Precinct 1 in which he had *previously* maintained a *business* address, when in fact he resided in Precinct 6.[2] (R. p. 55).

Further evidence redundantly established essentially the same facts. The voter rolls themselves confirmed that Mr. Killian had voted in Precinct 1, and showed his address as the one that other evidence established as his former business address. (R. p. 231.) Witness William Chapman had at one time owned the property at which Mr. Killian had maintained his business, and as of the date of the hearing he still held a mortgage on it. He knew that the address was an auto parts store without residential facilities. (R. p. 150, lines 24-25.) Revonda Floyd testified to much the same effect. (R. p. 145.) Witness Donald Floyd had conducted a search at greenvillecounty.org, a government website, which also showed the address listed on the voter rolls for Mr. Killian to be an auto parts store (R. pp. 60-63, 229.), and showed Mr. Killian's mailing

---

[1] The Commission's action in admitting the affidavit was in accord with longstanding practice that has been explicitly endorsed by this Court. Four times at least this Court has heard appeals in election contests where affidavits have been used at the hearing, without once disapproving the practice. Greene v. South Carolina Election Commission, 314 S.C. 449, 451, 445 S.E.2d 451, 452 (1994); Berry v. Spigner, 226 S.C. 183, 186, 84 S.E.2d 381, 383 (1954); Laney v. Baskin, 201 S.C. 246, 254, 22 S.E.2d 722, 724 (1942); Zimmerman v. Bennett, 154 S.C. 116, 121, 151 S.E. 214, 216 (1930). In one of those cases, Laney, the Court expressly considered the question of the use of affidavits and concluded that it rested with the discretion of the hearing body "whether the testimony should have been given by affidavits or by witnesses who were present in person." 201 S.C. at 254, 22 S.E.2d at 722. Mr. Gecy objected to the use of the affidavit at the hearing and before the Circuit Court, but that Court failed to rule on the issue even after Ms. Bagwell also requested a ruling on it. At any rate, even if the admission of the affidavit was error, it was harmless. As shown below, the facts about Mr. Killian were established redundantly by other evidence to which there was no objection. The Commission therefore stated explicitly in its Order that even without the Killian affidavit, it would have found the same facts. (R. pp. 22-23).

[2] Both Mr. Killian and the other voter, Ms. Estes, testified not in terms of precincts but addresses. Pamela Bodkins, Simpsonville City Clerk, established the location of the addresses in the relevant precincts. (R. p. 152, lines 66-67).

address as being in Precinct 6, at the same address Mr. Killian had affirmed as his true residence. (R. p. 151, lines 4-10, p. 226.) The Commission therefore stated in its Order that it would have found the same facts concerning Mr. Killian even had his affidavit been excluded. (R. pp. 22-23).

3. *Ms. Estes' Vote*

The vote cast by Sheila Estes also was illegal. Ms. Estes testified at the hearing. Her testimony established without contradiction that she had once lived in Precinct 4, but had moved to Precinct 6 without informing election officials. She had voted in Precinct 4 without providing election officials her true address. (R. p. 148, lines 7-21.) At the polls she used her voter's registration card for her identification, which of course would show her old address.[3]

[3] Ms. Estes had changed her address for her driver's license, but did not recall having specified that that change of address was to be used for voter registration purposes. (R. p. 149, lines 13-17.) Respondent would have this Court speculate, and find as a fact, that Ms. Estes used the provisions of S.C. Code Ann. § 7-5-320(D) (Supp. 2005), the "Motor Voter" Bill, to inform election officials of her address change. Under that law it is optional whether the voter uses a change of address on her driver's license to also change her address for voter registration purposes. Ms. Estes had no recollection of having done so. The Commission found that she had *not* done so. The Commissioners reasoned that they should not assume that state officials had ignored the dictates of Section 7-5-320(D), and that since the address had not been changed on the voter rolls, Ms. Estes had not asked to have it changed. (R. pp. 14-15.) The Commission clearly was correct to do so; this Court has held that absent proof to the contrary it is to be assumed that election officials have fulfilled their duties. Gardner v. Blackwell, 167 S.C. 313, 166 S.E. 338 (1932). It is also worth noting that Ms. Estes returned to her old precinct to vote; had she been aware of having changed her address she would have proceeded to her new precinct. The Commission's finding in this regard seems the only reasonable one. At the very least that finding cannot be said to be "wholly unsupported by the evidence," which under Taylor and other decisions, *supra*, is plainly established as the standard of review.

The Commission further correctly noted that even if Mr. Gecy was right that Ms. Estes had changed her address for voter registration purposes, it would not help his case. If Ms. Estes had informed election officials of the address change, Ms. Estes' correct precinct would have been Precinct 6, where she resided, and where she did *not* vote. (R. pp. 29-30.)

Thus, Mr. Killian was shown on the voter rolls as residing at a business address in a precinct in which he did not reside, and he voted in that precinct. Ms. Estes had moved from one precinct to another, and returned to vote at her old precinct in which she did not reside. Crucially, neither person provided their correct address for the voter rolls.

ARGUMENT

1. AT LEAST TWO ILLEGAL BALLOTS WERE CAST, NECESSITATING A NEW ELECTION.

After the certification hearing on Friday, Mr. Gecy was reported ahead by two votes. Under Broadhurst, *supra*, and other cases, any illegal votes are assumed to have been cast for him and are subtracted from his total. Therefore if at least two illegal votes were cast, the result of the election is in doubt and a new election must be ordered. It is clear that at least the two ballots described above were illegal.

A single sentence in a single statute disposes of the merits of this case in terms as plain and unambiguous as the English language can convey:

> 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.*** (S.C. Code Ann. § 7-13-810 (Supp. 2005) (emphasis added).)

That the evidence in this case was "after-discovered" will be addressed below. For the present what is important is that ballots are invalid and grounds for overturning an election if they are cast **either** "*in a precinct*" **or** "*for a district office*" "other than the one in which [the voters] are entitled by law to vote." The facts obviously establish that

the ballots in question were cast in the wrong precinct, and indeed respondent himself does not seriously dispute this. That alone disposes of the issue at the heart of this case. But the illegality of the ballots in question goes much deeper: because they had not provided accurate information for the voter rolls, the "voters" in question *were not registered to vote at all*. They therefore voted *both* in a precinct *and* for a district office other than the one in which they were entitled by law to vote.

Even absent such explicit statutory authority, the result in this case would be clear. This Court has held that in interpreting the election laws the entire statutory scheme should be considered. Broadhurst, *supra*, 342 S.C. at 385, 537 S.E.2d at 549. Doing so in this case yields but one possible conclusion.[4] S.C. Code Ann. § 7-5-110 (1976) provides that "No person shall be allowed to vote at any election unless he shall be registered as herein required." The "herein" refers to Chapter 5 of Title 7, and both that Chapter and other parts of the Code clarify the legislative intent. Section 7-5-120(A)(3) (Supp. 2005), addressing "Qualifications for registration," provides that the prospective voter be a resident of both the county *and the precinct* in which he intends to vote. An application to register by mail "must" be rejected if the election board is unable to determine from it the voter's proper precinct. S.C. Code Ann. § 7-5-155(a)(3)(iii) (Supp. 2005). The Executive Director of the State Election Commission is required to "delete the name of any voter … who is no longer qualified to vote in the precinct where currently registered." S.C. Code Ann. § 7-3-20(C)(2)(b) (Supp. 2005). A voter who has moved to a new precinct "must notify the board of registration of the county," who then

[4] Some of the provisions governing a municipal election contest like the present appear in Chapter 15 of Title 5. Others are in Title 7 which, when not in conflict with Chapter 15 of Title 5, is to apply to municipal elections *mutatis mutandis* (i.e. with appropriate adjustments). S.C. Code Ann. § 5-15-10 (2004).

inform the voter of his new, correct precinct. S.C. Code Ann. § 7-7-940 (Supp. 2005). And an address change by a voter is regarded as under oath, and subject to criminal penalties for falsehood. S.C. Code Ann. § 7-5-325 (Supp. 2005). These provisions collectively make it clear that our Legislature takes quite seriously the requirement of proper registration at the correct address in the proper precinct, and that compliance with that requirement is essential to valid registration and a valid vote.

More specific statutory authority is even clearer. The general rule is that a voter must register at least thirty days before the election. S.C. Code Ann. § 7-5-150 (Supp. 2005). There are a few narrow exceptions, however. S.C. Code Ann. § 7-5-440 (Supp. 2005) gives a person who has moved to a different precinct and failed to inform election officials one last chance to become properly registered and cast a valid vote on election day.[5] He must give the accurate information (i.e. his true address) to election officials. He can do this either at the main office of the county board of registration, § 7-5-440(B)(2), or at his old polling place, § 7-5-440(B)(1). When he has given this information and thus become properly registered, he will not be given access to a voting machine. Rather he will be given a paper "fail-safe" ballot containing only certain races which will be set aside for later consideration. Under no circumstances will he be allowed to cast a regular, full ballot.

None of these provisions was complied with. Ms. Estes, at least, could possibly have taken advantage of Section 7-5-440, but she completely failed to do so. She simply appeared at her old precinct, in which she did not reside, and cast a regular, full ballot. (R. p. 14, ¶¶ 25-27.) As to Mr. Killian, it seems clear that he had no right to vote at all

[5] Compare Section 7-5-150, which allows registration on election day by military servicemen who have been discharged from service too late to meet the 30-day deadline.

that day no matter what he did. He had not "moved" from one address to another within the meaning of the statute; the address he gave to election officials was a former business address at which he had never lived. Both votes therefore are obviously invalid.[6]

If the Circuit Court's logic prevailed, it is hard to see what the Legislature could have had in mind in enacting Section 7-5-440. The section clearly is intended to give a person who otherwise would have no right to cast a ballot a last chance to follow a very specific procedure and thereby become eligible to vote. But if the Circuit Court is right and ballots cast by such persons already are perfectly valid, the statute would have no point. It should not be supposed that any statute, and especially one as specific and detailed as this one, was passed for no purpose.

It is not difficult to see why the Legislature has chosen to make it perfectly clear that votes such as those in the present case are invalid. An orderly system of registration by precincts, with voters providing accurate information as to their residence, is important to avoid confusion that could open the door to various forms of mischief, including fraud. *See* George v. Municipal Election Commission of the City of Charleston, 335 S.C. 182, 187, 516 S.E.2d 206, 209 (1999), *quoting* May v. Wilson, 199

[6] Respondent has complained that the Commission was inconsistent in its treatment of the votes at issue in this case and the vote of a Ms. Poe, whose challenge ballot was considered and accepted at the certification hearing. (R. pp. 71-72.) In fact the cases differed substantially. Ms. Poe *had* informed election officials of her address change and if there was any departure from the statute—and the Commission said that there was not (R. p. 6, n.7.)—it was the fault of election officials, not the voter. This would bring Ms. Poe's case within the reasoning of Berry v. Spigner, 226 S.C. 183, 190, 84 S.E.2d 381, 384 (1954), that a vote will not be invalidated when the voter did everything possible to cast a valid vote and it was election officials who erred. Killian and Estes, on the other hand, did *nothing* to comply with statutory requirements for a valid vote. At any rate, the validity of Ms. Poe's ballot is not before this Court. *See* Section 7-13-830 (decision of election commission concerning provisional ballots is "final."). If it were before this Court, and the Court held that her vote was invalid, it would of course be subtracted from Mr. Gecy's total. Broadhurst, *supra*.

S.C. 354, 360, 19 S.E.2d 467, 470 (1942) ("The Court … will not sanction practices which circumvent the plain purposes of the law and open the door to fraud."). If the respondent's understanding of the law prevailed, a voter could move to a new precinct and simply continue voting indefinitely at the old one, with a greatly reduced incentive or none at all to comply with the laws relating to proper registration. By respondent's logic a voter could move from Simpsonville to Charleston and continue voting in Simpsonville in any statewide or national race. (*See* the Election Commission's Order, R. p. 27.) The Legislature has made the policy decision not to allow such disarray to enter our voting process.

South Carolina case law, albeit in a different context, also has made it clear that a ballot cast outside the proper precinct is not a valid vote. This holds true even if the voter *is* properly registered, which the voters in the present case were not. In Burgess v. Easley Municipal Election Commission, 325 S.C. 6, 478 S.E.2d 680 (1996) the Court was presented with the question whether Burgess was an eligible candidate in a mayoral race. To be an eligible candidate, he had to be a "qualified registered elector." 478 S.E.2d at 681. Unlike in the present case, Burgess had properly registered to vote. However, he appeared at the wrong precinct on election day. The Court held that Burgess was a qualified *elector* because of his registration. He was *not*, however, qualified to *vote* at the wrong precinct: "…Burgess was not a qualified *voter* because he presented himself at the wrong precinct for voting …" *Id.*

The law of South Carolina considered above disposes of the substantive issue on this appeal. However, it is worth noting persuasive authority from elsewhere. In James v. Bartlett, 359 N.C. 260, 607 S.E.2d 638 (2005) election officials had allowed voters to

cast ballots outside their proper precincts. Though the statutory scheme in North Carolina was not nearly as unambiguous on the issue as ours is, the Court held that such ballots were invalid and should not be counted. The Court noted that "The precinct voting system is woven throughout the fabric of our election laws." 359 N.C. at 267, 607 S.E.2d at 642. It went on to say:

> To permit unlawful votes to be counted along with lawful ballots in contested elections effectively "disenfranchises" those voters who cast legal ballots, at least where the counting of unlawful votes determines an election's outcome.
>
> …Additionally, we note that our State's statutory residency requirement provides protection against election fraud and permits election officials to conduct elections in a timely and efficient manner.
>
> …If voters could simply appear at any precinct to cast their ballot, there would be no way under the present system to conduct elections without overwhelming delays, mass confusion, and the potential for fraud that robs the validity and integrity of our elections process. (359 N.C. at 267, 607 S.E.2d at 642.)

James is especially relevant to the present case because North Carolina, like South Carolina, has a statutory "last chance" provision for voters who have moved and not informed election officials of that fact. However, because its terms had not been complied with, the Court in James held that the votes were invalid and should not be counted. 359 N.C. at 269, 607 S.E.2d at 643. This Court should do the same.[7]

In the present case the Circuit Court virtually ignored the mountain of legal authority dictating the proper result. Instead, in Orders ghostwritten by counsel for Mr.

[7] Respondent has tried to distinguish James on the ground that James involved "provisional" ballots that had been challenged at the polls. (R. pp. 119-20, n.1.) But any fair reading of James reveals that by far the Court's predominant concern was that the votes had been cast outside the proper precinct.

Gecy, that Court focused almost exclusively on a single, plainly inapplicable legal principle. That principle is that a Court

> … will not set aside an election due to mere irregularities 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, *supra*, 363 S.C. at 12, 609 S.E.2d at 502.)

The first thing to notice about this rule is that on its face it has no relevance to this case. It applies only "in the absence of … a statute providing that an irregularity or illegality invalidates an election …". In our case, of course, we *do* have such a statute in S.C. Code § 7-13-810, which in the plainest possible terms says that illegal votes such as those in this case are grounds for overturning an election.

Beyond this, though, the rule is simply being applied outside its proper context. The rule articulates the commonsense idea that because few elections will be perfect, minor problems should not invalidate the result. Patently illegal votes are not a minor problem, and in this case they placed the result of the election in doubt. The rule cited does not turn plainly illegal votes into legal votes. Nor should it be allowed to override the clear implications of an entire statutory scheme for voter registration, as well as specific, controlling statutory authority.

To sum up, even the respondent admits that the votes in question were cast outside the proper precinct, and it is clear beyond rational dispute that § 7-13-810 makes such votes a legitimate ground for overturning an election. But the illegality of the ballots goes much further than this. In fact the persons in question were not registered to vote at all. Their failure was in not providing *legally required, accurate information for the voter rolls*, specifically their true address. In the Protest document she filed to begin

the election contest, Ms. Bagwell specifically alleged precisely such illegal votes. The Commission rightly saw the Protest document as wholly adequate, but the Circuit Court held that it was not. Section 2 below therefore will address that issue.

Note on the Use of "After-Discovered" Evidence.

In its original Order the lower Court, over strong objection from Ms. Bagwell, relied on the rule of the plainly overruled case of Hill v. South Carolina Election Commission, 304 SC. 150, 403 S.E.2d 309 (1991), which held that evidence that theoretically could have been discovered before an election cannot be used in a post-election contest. (R. pp. 42-43.) Later, in overruling Ms. Bagwell's Motion for Reconsideration, the Court backed away from this approach, saying merely that there was a "substantial question" whether such evidence may be used. (R. p. 51.) In fact there is no serious issue relating to after-discovered evidence at all; it is pellucidly clear that it may be used to overturn an election. Because a statute central to this case, S.C. Code § 7-13-810, refers to such evidence, and to avoid any ambiguity, a brief discussion of this subject may be helpful.

First, it is clear that the Election Commission was right to find that the evidence in this case was discovered after the election. (R. pp. 16, 22.) Without examining the voter rolls, it is impossible even to determine who is registered to vote, what address is shown as their residence, and whether they in fact voted in an election in which most eligible voters did not go to the polls. The testimony showed without contradiction that examination of those rolls took place on the Friday after the election. (R. p. 153.) And witness Donald Floyd, for instance, conducted his search of government records Friday evening. (R. p. 150, lines 12-17.) At any rate, here again the Commission's factual

finding cannot be said to be *wholly* unsupported by the evidence, which is the appellate standard in election contests.[8]

That evidence discovered after the election is a legitimate basis for a protest is perfectly clear. In Hill it was alleged that voters had cast ballots outside their proper voting districts. The Court held that a challenge to the election on such grounds was barred, because "The discrepancies between the district where a voter actually resided and the district designation on the voter registration lists could have been discovered prior to the election." 304 S.C. at 152, 403 S.E.2d at 309-310. After Hill, the Legislature in 1996 amended Section 7-13-810 to say that evidence used in an election contest "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." Obviously this language overrules Hill by allowing election contests based on precisely the sort of evidence that Hill excluded.

If there remained any question about this, Dukes v. Redmond, 357 S.C. 454, 593 S.E.2d 606 (2004) would answer it. In Dukes a mayoral contest had been decided by three votes. A protest was filed, and at the hearing it was shown that three voters who were listed on the voter rolls and who cast ballots in the election in fact resided outside city limits. This is precisely the sort of discrepancy between residence and registration that a court applying Hill would have rejected on the ground that it should have been discovered before the election. And indeed the Board of Canvassers that heard the contest did exactly that, and denied the challenge. The Supreme Court reversed and

[8] It should be noted too that Section 7-13-810 allows a protest based "in whole or in part" on evidence discovered after the election. That the evidence in this case was at least *in part* discovered after the election admits of no dispute.

ordered a new election, relying on the language of the 1996 amendment to Section 7-13-810. The Court made no mention whatsoever of any supposed duty of due diligence to uncover such evidence before election day. In a footnote the Court mentioned the Hill decision, 357 S.C. at 457 n.4, 593 S.E.2d at 608 n.4, noting the later 1996 amendment. It is true that the Court did not state explicitly that the amendment overruled Hill. This was not because Hill remains good law, but rather because the overruling of Hill was so *obvious* that the Court felt no need to spell it out.[9] Since the evidence in the present case is of the same character as that in Dukes, having been developed after the election, under Dukes it is perfectly proper after-discovered evidence.

On this question Ms. Bagwell will gladly rely on the Court's own reading of the statute and of its own recent case law.

2. THE PROTEST DOCUMENT WAS ENTIRELY SUFFICIENT.

Nearly as puzzling as its ruling on the merits of this case was the Circuit Court's ruling that the Protest document itself was insufficient, thus barring the protest entirely. An election contest is commenced by the filing of a Protest document with the appropriate authority, in this case the municipal election commission. S.C. Code § 5-15-130. By statute the document is to contain a "concise statement" of the grounds for the protest. *Id*. As we have seen, the essence of this case is that persons who failed to provide accurate information for the voter rolls were allowed to vote, and that they were allowed to cast a full ballot rather than the "fail-safe" ballot that at least one of them might have been allowed to cast had she provided that information. The third ground of the Protest document concisely alleges precisely such illegalities:

[9] No doubt this is why, in the Westlaw database, the Hill decision carries a red flag, showing that it has been overruled.

> Persons who had not provided accurate information for the voter rolls were nonetheless allowed to cast full ballots. (R. p. 53, ¶ 3).

This ground covers exactly the evidence at the heart of this case, and that alone should dispose of the question of the Protest's adequacy.

Nonetheless, in an Order ghostwritten by counsel for Mr. Gecy and parroting the arguments of his brief, the lower Court held the Protest document to be inadequate. The Court said that the Protest did not allege the sort of irregularities shown at the hearing. (R. pp. 46-47.) At the same time it portrayed the Protest as a scattershot affair, drafted to cover any conceivable irregularity (though somehow missing the ones at issue on this appeal) and followed by a fishing expedition to see if any of those irregularities happened to have occurred. (R. pp. 46-48.) As the Election Commission found, neither of these claims is true. What *is* true is that in a case where Ms. Bagwell was able to procure counsel only 48 hours before the start of the hearing, not surprisingly it proved impossible to develop sufficient evidence on several of the grounds in the Protest. Other grounds, though proven, were found by the Commission insufficient to justify invalidating votes.

The requirement of a "concise statement" of the grounds for the Protest should be read in light of the circumstances of a case such as the present. The polls closed at 7:00 p.m. Tuesday. Ms. Bagwell retained counsel on Thursday morning. The Protest document had to be filed by 7:00 p.m. that day and the hearing concluded and a decision rendered within 48 hours after that filing. S.C. Code § 5-15-130. To impose hypertechnical pleading requirements in such a context would be unreasonable.

S.C. Code Ann. § 7-17-50 (Supp. 2005) provides that protest hearings be conducted "as nearly as possible in accordance with the procedures and rules of evidence

observed by the circuit courts of this State." Counsel for appellant has always believed that both this section and fundamental fairness demand a sort of informal discovery process. Mr. Gecy clearly agrees, because he served discovery on counsel for appellant on Friday morning. This Court need not decide whether discovery is required under the statute; Mr. Gecy filed it and should not now be heard to say that it was improper. While a formal reply to the discovery was not practicable under the hectic circumstances, counsel for Ms. Bagwell provided opposing counsel more detailed information by email as it became available to him during the day, including the names of the two voters at issue, the substance of Mr. Killian's affidavit, and an indication of other documents that might be used at the hearing. (R. p. 77.) Both lawyers saw almost all of the documents for the first time on the morning of the hearing.

The scope of the information the Protest document itself must provide should be understood in light of both the statutory requirement of *conciseness* and the parties' opportunity to benefit from informal discovery. This is not, as the lower Court suggested, a matter of "curing" a defective Protest by later action. (R. p. 48.) It is a matter of reading the statutory scheme and the circumstances of a case such as the present as a whole in order to determine what constitutes an adequate Protest in the first instance. Given that the Protest document does plainly identify the illegality at issue in this case, and against the background of the procedural history noted above, it is clear that respondent had as good an opportunity to prepare a defense as the circumstances would permit, and that the Protest document was sufficient. This is especially clear because the facts in this case are not seriously in dispute.

The lower Court's other argument concerning the Protest was not that it gave too little information but that it gave too much, indiscriminately alleging all manner of irregularity for which Ms. Bagwell supposedly had no support. This baseless assertion necessitates examination of some of the other grounds stated in the Protest:

- Ground 2, that persons disqualified by criminal convictions were allowed to vote, was based on information given to counsel by an elected official of the City of Simpsonville that at least one felon in fact had voted. It proved impossible to establish this claim in the time available.

- Ground 4, concerning improper conduct of Mr. Gecy's representatives at the polling places, was based on information that one of Mr. Gecy's poll watchers had taken a seat with the poll workers in violation of rules governing poll watchers' conduct and was speaking to voters as they came in to vote. Counsel for Mr. Gecy was aware of the factual basis of this ground and brought witnesses to the hearing to meet it. Yet the Court's Order suggests that Ms. Bagwell did not know the grounds of her own Protest. (R. p. 47.) Because it did not appear that there was proof that the conduct of the poll watcher had affected the outcome of the election, counsel for Ms. Bagwell made the professional judgment that this ground would fall under the rule of Taylor, *supra*, that irregularities that do not change the outcome or place it in doubt will not be grounds for overturning an election. Therefore it was not pursued at the hearing.

- Ground 5 (and to some extent 6(b)), relating to absentee ballots, concern information suggesting that absentee ballots had been taken in bulk to a nursing home where they were passed out and signed, in violation of election procedures, and possibly in some cases cast by persons not mentally competent. Though it did appear that several ballots from residents of a nursing home were all witnessed by the same person, it was not possible to substantiate any wrongdoing. For that reason this ground too was not pursued at the hearing.

- Ground 6(a), relating to absence of proper voter signatures, was proven at the hearing but only in the sense that some signatures appeared on the wrong lines and in one case two voters appeared to have signed for each other. (R. pp. 145-146.) The Commission ruled that these irregularities were insufficient to invalidate any votes. (R. p. 23).

- Ground 6(d), relating to inaccurate record-keeping, also was proven at the hearing in that in at least two cases the poll workers had not initialed the voter roll to verify that they had fully checked the identity of the voter. (R. pp. 145-

146.) Again, the Commission held that these irregularities were insufficient to invalidate the votes in question. (R. p. 23.)

- Ms. Bagwell faced a peculiar difficulty concerning the contents of the voter rolls themselves, and any irregularities that they might show on their face. (These are the rolls used at the polling places; they show who voted, voter's signatures, poll workers' verification of voters' identity, etc.) The custodian of these records took the position that he would not allow anyone access to them *until the Protest document had been filed*. But of course, any irregularities should be addressed *in* the Protest document. In this Catch-22 situation, Ms. Bagwell made allegations in good faith about what she believed those documents would contain, based in part on counsel's experience in previous contests. This was necessary in order to protect her rights in a difficult situation. The next day the records were examined and, as seen above in relation to Grounds 6(a), (b), and (d), did show irregularities of the kinds alleged. However, the Commission ruled that these irregularities were not sufficient to invalidate any votes.

What happened, then, was that Ms. Bagwell filed her Protest based upon the information available to her at that point, and then over the next day focused her case on the areas that could be proven in the tremendously compressed time frame of this contest. This was perfectly proper, was in conformity with statutory requirements, and worked no prejudice on the respondent.[10] Any difficulties faced by either party were the result of the extremely compressed time frame, which of course would weigh more heavily on Ms. Bagwell as the party bearing the burden of proof.

Should this Court rule that the Protest document was insufficient because some of its grounds were not pursued at the hearing, the effect on election contest procedure would be predictable and pernicious. With so little time, it is inevitable that some

[10] If appellant truly had sought to make just any allegation imaginable, there was a great deal more that she could have said. For instance, she made no allegation of problems with voting machines of the sort that have figured in other protests. Nor was there any allegation that persons entitled to vote had been *denied* that right, as sometimes happens. Nor was there any allegation of infringement of the right to a secret ballot, which has figured in some contests. Nor was there any allegation of fraud by her opponent personally or by election officials, etc. Such allegations were not made because there was nothing to suggest that these things had happened.

grounds will be stated in the Protest which on further investigation prove inadequate. But in order to avert a charge of "kitchen sink" pleading, a party who decided that a particular ground was not worth pursuing would have to bring forth whatever evidence he could regardless. The hearing in this case started at nine o'clock in the morning and by law the Commission had to deliberate and render its decision by six o'clock that afternoon. To lengthen such proceedings by forcing parties to adduce evidence on grounds unlikely to succeed would make a difficult process nearly impossible.

The contrast between the present case and the case law relied on by the Circuit Court is instructive. In Butler v. Town of Edgefield, 328 S.C. 238, 493 S.E.2d 838 (1997) the Protest document contained two purported grounds for contesting the election. The first related to a newspaper article containing false information about the election. Naturally this Court held that this ground failed to allege any irregularity in the conduct of the election itself. The second ground was "why it would take several hours to count votes for an election." 328 S.C. at 245, 493 S.E.2d at 842. This Court held such a vague question also to be inadequate. It therefore upheld the decision of the Election Commission not to hold a hearing. In the present case, by contrast, the Protest complies with the requirement of a *concise* statement of the grounds for the protest: it alleges that persons who had not provided legally required information for the voter rolls had nonetheless been allowed to cast full ballots.[11]

In contrast to Butler, in the present case the Election Commission, familiar with the course of the proceedings, held the Protest to be adequate and held a full evidentiary

[11] It is worth noting in this context that the only information the voter provides for the voter rolls is his name, age, and address. Neither the name nor the age is likely to be called into question.

hearing. The Commission was best situated to judge whether substantial justice to the parties was upheld by such a course. It would be extraordinary for this Court to overturn a ruling in favor of a new election, rendered after a full hearing, on the ground that the Protest was insufficient.

At the hearing Ms. Bagwell made a motion in the alternative that should the Commission find the Protest document insufficient, she be allowed to amend it to conform to the evidence. (R. p. 165, lines 12-21-p. 166, lines 9-14.) The Commission held that the Protest was adequate and so did not reach this motion, but stated in its Order that it would have granted it if necessary. (R. pp. 35-37.) Because Section 7-17-50 provides that contest hearings be conducted in general in accordance with the procedures of our Circuit Courts, this motion should be held proper by analogy with Circuit Court procedure, and would cure any deficiency in the Protest. *See* Rule 15(b), S.C.R. Civ. P. (amendments to conform to the evidence).

"All pleadings shall be so construed as to do substantial justice to the parties." Rule 8(f), S.C.R. Civ. P. Under Section 7-17-50 this principle is applicable to election contests, and it alone should dispose of the question of the Protest document's adequacy. The Protest document in this case does concisely describe exactly the illegal votes at issue in this case and was drafted to cover them because Ms. Bagwell had evidence, nonspecific at the time, that such votes had been cast. Though some grounds of the Protest were not pursued at the hearing, this resulted not from scattershot pleading but from extreme time constraints and counsel's judgment that some of the grounds would prove inadequate. There was no prejudice to the respondent, who had all relevant

information almost as soon as appellant did. The Election Commission held the Protest document to be adequate, and this Court should reinstate that finding.

CONCLUSION

An election that does not gauge the public will is no election at all. Such an election is entitled to no deference; to overturn it and order a new vote does not undermine but rather upholds our democracy. In this case there is no serious question but that illegal votes were cast, placing the result of the election in doubt. Ms. Bagwell followed legal procedures by alleging in her Protest precisely such illegality. The appellant Tammy Bagwell respectfully requests that this Court reverse the ruling of the Circuit Court, reinstate the ruling of the Election Commission, and order a new election so that the true will of the people may be determined.

Respectfully submitted,

Timothy E. Hurley (S.C. Bar No. 72267)
306 Ashford Avenue
Greenville, SC 29609
(864) 233-8289

Keith D. Munson (S.C. Bar No. 13400)
Womble Carlyle Sandridge and Rice, PLLC
P.O. Box 10208
550 South Main Street, Suite 400
Greenville, SC 29601
(864) 255-5412

ATTORNEYS FOR APPELLANT TAMMY BAGWELL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

C.A. No. 2005-CP-23-7572

Robert Gecy, ...Respondent,

vs.

Tammy Bagwell…….....Appellant.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on Robert Gecy by depositing a copy of it in the United States Mail, postage prepaid, on September ___, 2006, addressed to his attorney of record, James Theodore Gentry, Wyche Burgess Freeman & Parham, PA, P.O. Box 728, Greenville, SC 29602-0728.

September ___, 2006

_____
Keith D. Munson (S.C. Bar No. 13400)
Womble Carlyle Sandridge & Rice, PLLC
550 S. Main St., Ste. 400
Greenville, SC 29601
(864) 255-5412
Attorney for Appellant Tammy Bagwell

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2005-CP-23-7572

Robert Gecy ……. Respondent,

v.

Tammy Bagwell …….. Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

September ___, 2006.

Timothy E. Hurley (S.C. Bar No. 72267)
Keith D. Munson (S.C. Bar No. 13400)

Keith D. Munson (S.C. Bar No. 13400)
Womble Carlyle Sandridge and Rice, PLLC
P.O. Box 10208
550 South Main Street, Suite 400
Greenville, SC 29601
(864) 255-5412

Timothy E. Hurley (S.C. Bar No. 72267)
306 Ashford Avenue
Greenville, SC 29609
(864) 233-8289

ATTORNEYS FOR APPELLANT TAMMY BAGWELL