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 REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Respondent's Brief betrays a fundamental misunderstanding of certain facts in this case and of the legal principles governing it. At the same time it fails to refute or even in many cases to address the legal authorities put forth by Ms. Bagwell. In order to avoid redundancy, this Brief will concentrate on the errors contained in the Respondent's Brief. The Court may refer to Ms. Bagwell's original Brief for the substance of her argument, which remains untouched by anything the Respondent has to say.

1. TWO ILLEGAL BALLOTS WERE CAST, REQUIRING A NEW ELECTION.

The Respondent begins by mischaracterizing the fundamental problem with the votes at issue in this case. (Resp. Br. p. 13.) Though it is true that the votes in question were cast in the wrong precinct, they are invalid for a deeper reason. As Ms. Bagwell has maintained from the filing of her Protest to the appeal before this Court, the ballots in question were cast by persons who had not provided accurate, legally required information for the voter rolls, and who nonetheless were allowed to cast full ballots rather than challenge ballots. The legal effect of these facts is that the persons were not properly registered to vote at all. And although one of them might have been allowed to follow a specific statutory procedure (S.C. Code § 7-5-440 (Supp. 2005)) in order to provide that information and be allowed to vote on election day, that procedure was not followed. Therefore the ballots are clearly invalid.

Most of the authorities Ms. Bagwell cites on the merits of this case the Respondent simply ignores. When he does address them he gives them a most tortured reading. He characterizes S.C. Code § 7-13-810 as saying that a protest *must* be based at least in part on after-discovered evidence—but the word in the statute is "may." (E.g., Resp. Br. p. 26.) More importantly, he insists that the statute be read to allow a protest only when the votes were cast by persons whose place of residence was outside the voting district entirely, which would mean that they were not entitled to vote in the election under any circumstances. (Resp. Br. p. 14.) But the statute says that a protest may be based on evidence of votes 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 Respondent asks this Court to restrict the applicability of the statute to the latter case, where the voter cast a ballot for the wrong district office. This would write the "precinct" language out of the statute entirely, in violation of the rule of statutory construction that all parts of a statute must be given meaning. Davenport v. City of Rock Hill, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993) ("It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning."). The clear meaning of § 7-13-810 is that votes cast in the wrong precinct are grounds for an election protest. Because both parties agree that the ballots in this case fit that description (though in fact there are other problems with them as well), this statute alone disposes of the merits of this case. Other misunderstandings of this statute by Respondent will be addressed below.

The Respondent's attempt to distinguish the important case of James v. Bartlett, 359 N.C. 260, 607 S.E.2d 638 (N.C. 2005) is also unsuccessful. He argues that James involved provisional ballots whereas the ballots in the present case were challenged in a post-election protest. While this is true, any fair reading of James reveals that by far the Court's primary concern was simply that the ballots were cast outside the proper precinct, not that they were provisional. Because the ballots in the present case were cast in the wrong precinct *and* were invalid on other grounds as well, and because the statutory scheme in James was less clear in its implications than that in South Carolina, the present case calls even more plainly for invalidating the votes.

Mr. Gecy also complains that the handling of the vote of a Ms. Poe, whose ballot was challenged at the polls and then held valid at the certification hearing, was inconsistent with the Commission's treatment of the ballots at issue before this Court. (Resp. Br. pp. 15 n.7, 35.) In fact the cases differed substantially. The Respondent fails to mention that Ms. Poe gave election officials her correct address on election day, as required by § 7-5-440. Those officials directed her to a polling place, where she cast a "challenge" ballot, also in conformity with the statute. If there was any failure to comply with the law—and the Commission held that there was not—it was on the part of election officials, not Ms. Poe. That would bring her case within the rule of Berry v. Spigner, 226 S.C. 183, 190, 84 S.E.2d 381, 384 (1954) that votes will not be invalidated where the voter did everything possible to cast a valid vote and election officials erred. In the present case, by contrast, the persons in question made *no* attempt to follow the law in order to become properly

registered and to cast a valid vote. The Commission rightly treated the cases differently.

The Respondent's main argument is based on the plainly inapplicable principle that irregularities will not be allowed to overturn an election where they did not affect the outcome. Ms. Bagwell has already explained why this principle does not control this case or overcome the mountain of legal authority dictating the proper result. (App. Br. p. 14.) The principle in question is legitimate and has a proper place in our election law. It would apply, for instance, where the irregularities in question were insignificant. It would apply as well where invalid votes were cast but they were too few to affect the result—where, say, one candidate was ahead by ten votes and only five illegal votes were found. It does not turn plainly invalid votes into valid votes, and it does not overturn clearly controlling statutory authority. In the present case it is clear that two illegal votes were cast. Because Mr. Gecy was ahead by exactly two votes, subtracting those votes from his total changes the result from a victory for him to a tie, which is of course a different result, and requires a new election.

2. THE PROTEST IS NOT BARRED BECAUSE BROUGHT AFTER THE ELECTION; NOR IS THERE ANY REQUIREMENT OF "DUE DILIGENCE."

Throughout these proceedings the Respondent has tried to resurrect the overruled case of Hill v. South Carolina Election Commission, 304 S.C. 150, 403 S.E.2d 309 (1991). That case held that evidence of illegalities that in some theoretical sense could have been discovered before the election could not be used

in a post-election contest. Ms. Bagwell already has explained that Hill was overruled by the later amendment of § 7-13-810, and that this was acknowledged in Dukes v. Redmond, 357 S.C. 454, 593 S.E.2d 606 (2004). At present she will limit herself to observing that the facts in Hill and Dukes were indistinguishable, but that the court in Dukes *reached exactly the opposite holding from* Hill. Obviously Hill is no longer good law.

The Respondent also argues that the present protest is barred because brought after the election, on the basis of serious misreadings of § 7-13-810. First he points to the fact that the statute says that any "challenge" of a ballot must be made before the vote is cast. (Resp. Br. p. 25.) From this he infers that a post-election *protest* concerning that ballot must be barred. But the terms "challenge" and "protest" are terms of art, and they refer to completely different animals. A "challenge" is brought at the polls when there is reason to doubt the right of a person to vote; it can result in the casting of a "challenge" ballot which is set aside for later consideration by the election commission. A "protest," of course, is by its nature a post-election proceeding brought before an election commission or other responsible body. To confuse the two—to hold that a *protest* is barred because the time for a *challenge* has passed—would result in logical absurdity. It would be to require a *protest* to be pursued *while the voting was still in progress*. But every statute governing election *protests* allows them to be filed after the election. *See, e.g.*, S.C. Code § 5-15-130 (2004). And § 7-13-810 goes on to explicitly permit a protest based on evidence discovered *after* the election when there have been illegal

votes of *exactly the character at issue in this case*. The Respondent's argument here is simply confused.

The Respondent's other argument based on § 7-13-810 is equally bad. He argues that the reference in the statute to "after-discovered evidence" includes by definition a requirement that the evidence could not in the exercise of due diligence have been discovered before the election. (Resp. Br. pp. 24, 27.) This position is wrong for at least three reasons.

The Respondent argues that in other contexts the Court has *defined* the phrase "after-discovered evidence" to include intrinsically a duty of due diligence. (Resp. Br. p. 27.) His authorities make it clear that this is not so. After-discovered evidence is just that: evidence discovered *after* some event. Whether there is a duty of due diligence to discover it before that event is, of course, a separate question. The Respondent relies on cases where relief from a judgment was sought, and of course in such cases the parties already have had pretrial and trial proceedings in which they are expected to conduct factual inquiries as a matter of course. Raby Construction, LLP v. Orr, 358 S.C. 10, 594 S.C. 478 (2004) involved a motion for relief from a judgment under Rule 60(b), S.C.R. Civ. P., which requires that the evidence be *both* "newly discovered" *and* such that it could not by "due diligence" have been discovered in time to move for a new trial. State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999) was a criminal case in which the Court noted that in order to receive a new trial the defendant had to "show that the after-discovered evidence … has been discovered since the trial…" *and* that it "could not in the exercise of due diligence have been discovered prior to the trial." 334 S.C. at

619, 513 S.E.2d at 99. These cases—Respondent's own authorities—make it clear that "after-discovered evidence" and "due diligence" are distinct concepts.

Second, the statutory and case authorities governing election contests make no reference to such a duty. Section 7-13-810 says nothing of a duty of due diligence; that is why the Respondent had to argue that the phrase "after-discovered" *includes* the notion of due diligence. More importantly, the crucial Dukes decision makes no reference to it either. As regards this issue, Dukes is indistinguishable from the present case. If there were a duty of due diligence the Court surely would have discussed it, yet the phrase "due diligence" appears nowhere in the opinion, nor is such a duty addressed in some other language. The Court simply held that the evidence was grounds for a protest because it was discovered after the election, and ordered a new election. This holding was of course inevitable given the absolutely unambiguous language of § 7-13-810.

Finally, even if the Court were tempted to create such a duty, it should consider what would be entailed by a finding that Ms. Bagwell had breached it. The Respondent repeatedly suggests that it would have been a simple matter to discover any problems before the election; he goes so far as to imply that Ms. Bagwell's case rests on "readily obtainable information that the candidate simply did not bother to obtain, or verify, until after the election." (Resp. Br. p. 29.) Common sense shows that this is untrue. If the Respondent's reasoning prevailed, then if all of the hundreds of candidates for public office each year in our State were duly diligent, they each would conduct exhaustive investigations into the citizenship, age, residency, proper precinct, criminal records, and so forth of

everyone appearing on the voter rolls—something it is doubtful that any candidate, from the Presidency on down, ever does. But any duty of due diligence should be understood in light of what ordinarily prudent persons typically do, and impossibly onerous duties that will never be fulfilled should not be imposed.

3. THE PROTEST DOCUMENT WAS ENTIRELY ADEQUATE.

Throughout these proceedings the Respondent has made assertions concerning the drafting of the Protest document that range from the blithely speculative to the simply unreal. While it is true that one of the things counsel for Ms. Bagwell relied on in drafting the Protest was his experience in other election contests, it is flatly false—and finds no support in the record of this case or in common sense—to assert that the Protest "was drafted to be as broad as possible, and to encompass all the usual grounds upon which an election might be overturned …" (Resp. Br. p. 20.)

The truth about the Protest already has been recounted in Ms. Bagwell's original Brief. (App. Br. pp. 20-22.) She made allegations based on the information she had at the time the document had to be filed, just 48 hours after the close of the polls. In the time available between then and the hearing less than two days later, it not surprisingly proved impossible to substantiate some of these allegations, whereas in the professional judgment of counsel others would be held inadequate and therefore were not pursued at the hearing. In regard specifically to the contents of the voter rolls, Ms. Bagwell faced a Catch-22 situation because the custodian of those rolls would not allow them to be examined until *after* the Protest had been filed. Ms. Bagwell therefore made allegations in good faith about the

likely contents of those rolls, in order to protect her rights. Those allegations in general turned out to be true, but the Commission found the evidence insufficient to invalidate any votes, a conclusion not at issue on this appeal.

As to the ground of the Protest that *is* at issue on this appeal, namely the third ground, it was drafted to allege and does allege precisely the illegal ballots which led the Commission to order a new election. The Respondent makes the odd claim that in the entire Protest there appears "no statement of *facts* whatsoever …" (Resp. Br. p. 20.) In fact, the third ground alone alleges at least three facts: (1) that persons cast ballots (2) without providing accurate information for the voter rolls and (3) that they were allowed to cast full (rather than provisional) ballots. If these are not allegations of fact it is hard to see what they might be. The Respondent further wants this Court to believe that in trying to cover all conceivable grounds for a protest Ms. Bagwell included by guesswork this very specific allegation—including a reference even to the type of ballot cast—while omitting such obvious grounds as violation of the secrecy of the ballot, denial of access to polling places, or malfunctions of voting machines. That is simply not what happened.

Mr. Gecy also complains about the way Ms. Bagwell worded the third ground, for instance because she did not refer explicitly to voting in the wrong precinct. (Resp. Br. p. 21.) Here too the Respondent shows a failure to grasp the true nature of this case. As we have already seen, the real problem with the votes is not the incorrect precinct *per se* but the failure to provide correct information, which is precisely what Ms. Bagwell alleged. What the Respondent wants this Court to do is to require a party drafting a Protest to anticipate the (erroneous) view of her

opponent as to the basic legal issue, and draft a Protest that corresponds to that view, on pain of having the Protest barred.

4. THIS COURT SHOULD DEFER TO THE FINDING OF THE COMMISSION THAT MS. ESTES DID NOT REQUEST TO HAVE HER ADDRESS CHANGED FOR VOTER REGISTRATION PURPOSES.

Faced with unfavorable fact finding by the Commission, the Respondent has asked this Court to assume the Commission's role as finder of fact. This flies in the face of this Court's repeated, emphatic statements that the facts as found below will not be disturbed *unless wholly unsupported by the evidence*.

A typical statement of this Court's role is the following:

> In municipal election cases, we review the judgment of the circuit court only to correct errors of law. Our review does not extend to findings of fact unless those findings are wholly unsupported by the evidence. 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. (Taylor v. Town of Atlantic Beach Election Commission, 363 S.C. 8, 12, 609 S.E.2d 500, 502 (2005).)

The language here is perhaps infelicitous; it has allowed the Respondent to seize on the term "presumption" to try to shift the fact-finding duties to this Court. Nonetheless the Court's meaning seems clear enough: it recognizes a general policy in favor of sustaining election results, while leaving factual determinations to the hearing body, in accord with general practice in numerous areas of law. It restricts the Court's role to that of reviewing questions of *law*, which the facts regarding Ms. Estes' vote surely are not.

It would be a departure from a mass of legal authority for this Court to reconsider the facts in an election contest. *See, e.g.*, Douan v. Charleston County

Council, 356 S.C. 602, 590 S.E.2d 484 (2003); George v. Municipal Election Commission of the City of Charleston, 335 S.C. 182, 516 S.E.2d 206 (1999); Redfearn v. Board of State Canvassers, 234 S.C. 113, 107 S.E.2d 10 (1959); Laney v. Baskin, 201 S.C. 246, 22 S.E.2d 722 (1942).

The only question regarding Ms. Estes' vote, then, is whether the Commission's findings were *wholly* unsupported by the evidence. It surely cannot be said that they were. The key factual question was whether she had asked authorities to change her address for voter registration purposes under the "Motor Voter" law. She had no recollection one way or the other. (R. p. 149 (Hearing Trans. p. 54 lines 13-17).) The Commission reasonably concluded that she had not asked to have her address changed, because if she had then it would have been changed, which it was not. To find otherwise the Commission would have had to assume, without evidence, that Ms. Estes *had* asked to have the address changed, and then make the further unsupported assumption that governmental officials had simply failed in their duty to record that address change. This the Commission sensibly declined to do. At the very least this Court should not step in and reverse the Commission's findings.[1]

[1] The Commission also correctly pointed out that even finding the facts differently would not help the Respondent's case. If Ms. Estes had informed election officials of the address change, the provisions of § 7-5-440 would not apply at all, and Ms. Estes' only correct precinct would have been Precinct 6, where she lived, and where she did *not* vote. (Cir. Ct. R. p. 28.)

CONCLUSION

The purpose of an election is to gauge the will of the people in accord with legal procedures established by the people through their representatives. When reported election results fail to do this, as in the present case, they should be set aside and a new election ordered. Problems in the process should not be swept under the rug lest the public become aware of them. To order a new election in this case would not undermine but rather uphold our democracy.

Respectfully Submitted,

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