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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

Appellate Case No.: 2021-000165

Glenn Odom, Respondent,

v.

McBee Election Commission,
Charles Short, Charles Sutton, and Hewitt Dixson, Appellants.

RESPONDENT’S RETURN TO PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent Glenn Odom respectfully submits this Return to Appellants’ Petition for Rehearing. Appellants have requested that the Court rehear its decision in *Odom v. McBee Election Commission*, Op. No. 28133 (S.C. Sup. Ct. filed Feb. 8, 2023) (Howard Adv. Sh. No. 6 at 13-22). For the following reasons, the Court should deny Appellants’ request for rehearing.

FACTUAL AND PROCEDURAL BACKGROUND

Odom incorporates the Appellants’ representation of the factual and procedural background of this Appeal in its Petition for Rehearing with the following exception. Odom’s arguments, the Circuit Court’s findings, and this Court’s February

8, 2023 Opinion have never truly involved whether Sydney Baker properly or improperly assisted voters in the absentee voting process or touched a ballot. That has never been what this case is about. Instead, this case concerns the propriety of a citizen assisting other voters with **requesting an application** for an absentee ballot, which entails a completely different set of statutes and procedures than the subsequent absentee ballot voting process.

By muddling the distinction between requesting an absentee ballot application, applying for an absentee ballot, and voting with an absentee ballot, Appellants seek to extend the statutory guidance for absentee ballot voting to the application request process, when the two procedures are governed by separate statutes and separate oaths. As noted by the majority in its Opinion, Baker's uncontroverted testimony demonstrates that she only helped voters request the application for an absentee ballot, and did not assist with the absentee voting process itself. Therefore, an accurate framing of the argument, and the majority's Opinion, is that S.C. Code Ann. § 7-15-330 does nothing to prohibit a citizen from assisting another voter with requesting an application for an absentee ballot.

ARGUMENT

- I. Appellant's arguments concerning S.C. Code Ann. §§ 7-13-770(A) and 7-15-380(A) are not preserved because they were not ruled on by the Circuit Court and Appellants failed to raise the issues in their Motion for Reconsideration.

Appellants correctly cite to this Court's prior precedents in stating that it is not always necessary for a respondent to present his issues and arguments to the lower court and obtain a ruling on them to preserve the issues and arguments for

appellate review. What Appellants fail to recognize is that after the Circuit Court reversed the Commission's decision, they were no longer respondents. It matters little if they prevailed with the Commission, because they did not prevail with the Circuit Court. If Appellants wished to preserve their arguments concerning the statutes, they were required to raise the arguments in their Motion for Reconsideration to give the Circuit Court a fair opportunity to rule upon the arguments, as the Circuit Court's Order did not specifically address or rule upon those issues. "When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion." *See Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009).

The two statutes concern procedures for in-person voting by blind, disabled, or illiterate voters and the absentee ballot **voting** process, as opposed to the procedure for requesting an absentee ballot application:

A person other than a voter preparing his ballot is not allowed within the guard rail, except as provided in this section. A voter who requires assistance to vote by reason of blindness, disability, or inability to read or write shall make the fact known to the managers. The chairman of the managers shall appoint one of the managers and a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union to assist the voter in preparing his ballot. After the voter's ballot has been prepared, the person chosen by the voter to assist him immediately shall leave the vicinity of the guard rail. Instead of the above assistance, a person may have a member of his family or, in the case of a blind voter, a person of his choosing render him assistance in voting without the presence of a manager. The term "family" means spouse, father, mother, son, daughter, brother, sister, grandfather, grandmother, grandson, granddaughter, aunt, uncle, niece, or nephew.

S.C. Code Ann. § 7-13-770(A).

The oath, which is required by Section 7-15-370 to be imprinted on the return-addressed envelope, furnished each absentee ballot applicant, must be signed by the absentee ballot applicant and witnessed by a person who is at least eighteen years of age. The address, printed name, and signature of the witness shall appear on the oath. In the event the voter cannot write because of a physical handicap or illiteracy, the voter must make his mark and have the mark witnessed by someone designated by the voter. The oath must be in the following form:

"I hereby swear (or affirm) that I am duly qualified to vote at this election according to the Constitution of the State of South Carolina 1895, that I have not voted during this election, **that the ballot or ballots contained in this envelope is my ballot and that I have received no assistance in voting my ballot** that I would not have been entitled to receive had I voted in person at my voting precinct."

S.C. Code Ann. § 7-15-380(A) (emphasis added).

Appellants argue that these statutes would preclude Baker from assisting voters with requesting an absentee ballot application. Appellants contend that they did raise these arguments in their Motion for Reconsideration, citing to page 431 of the Amended Record on Appeal. However, a review of Appellants' Motion for Reconsideration reveals that no mention of either of the statutes, or their applicability to the procedure for requesting an application for an absentee ballot, can be found anywhere in the Motion or its supporting Memorandum. (R. pp. 421-40). Appellants could not force the Circuit Court to rule upon the arguments, but as the losing party, they were required to raise them in a motion for reconsideration since the arguments were not addressed by the Circuit Court's Order, and Appellants failed to do so. The majority was correct in finding that these issues were not preserved for review.¹

¹ And even if Appellants' arguments concerning the two statutes were preserved for review, by their plain language they have no applicability to the process of requesting an application

II. The majority correctly found that Baker's conduct did not violate S.C. Code Ann. § 7-15-330, and nowhere within the absentee voter statutes does it prohibit assistance in requesting and completing absentee ballot applications.

Appellants argue that the majority's opinion is at odds with the legislative intent behind section 7-15-330. However, as the majority correctly noted, there is nothing in that section that prohibits anyone, including a campaign worker or paid volunteer, from assisting someone with requesting an application for an absentee ballot in that voter's presence and with that voter's consent; the plain language of the statute only prohibits individuals from unilaterally requesting an absentee ballot application for another voter without their permission. The intent behind the statute is clear. The statute is designed to prohibit campaigns and other interested entities or individuals from combing through any publicly available voter registration records or rolls and unilaterally requesting absentee ballot applications without permission for any voter whom they might deem favorable to their interests. It was obviously not designed to frustrate a helpful citizen from providing the means for and assisting another community member with requesting an absentee ballot application themselves.

The dissent's reasoning behind why Baker's conduct was impermissible goes too far, would logically support an argument that any involvement in the absentee ballot request process by a third person, no matter their intent, would be in violation of section 7-15-330, and could potentially disenfranchise voters unless the third

for an absentee ballot. One statute pertains to in-person voting, and the other pertains to the actual process of absentee ballot voting by mail, which is subsequent to the completion of a request for an absentee ballot application.

person had previously registered as a qualified representative, an unnecessary and unjustified task under circumstances where the voter is requesting the third person's assistance in requesting and receiving an absentee ballot application. One can easily envision scenarios such as the following:

An individual lacking internet services, decent transportation and reliable phone service is visiting with a more fortunate friend. While there, the discussion of an upcoming election ensues and the friend asks the individual if they are going to vote. The individual expresses a desire to vote but states that she does not believe she will have a realistic chance of voting due to the aforementioned difficulties. The friend, sitting at her computer, pulls up the online absentee ballot application request tool, and at the behest and direction of the individual, enters the individual's name and identifying information, then clicks submit.

The friend does nothing more to assist with completing the application or absentee ballot when it is received. In this scenario, is it logical or reasonable to propose that the individual's vote should be eradicated simply because she had an acquaintance, at her direction, assist her with filling in the blanks on the absentee ballot application request? The only reasonable response is "No". However, under Appellants' arguments and the dissent's reasoning, this conduct would be prohibited by section 7-15-330, when the plain language of the statute does not go that far and does not prohibit assistance in completing an absentee ballot application or a request for one.

Despite the previously addressed flaws in issue preservation, Appellants point to section 7-15-380 and the oath it imposes on an absentee ballot voter after voting, which states: “the ballot or ballots contained in this envelope is my ballot” and “I have received no assistance in voting my ballot” to argue that the General Assembly has sought to prohibit assistance in the process of requesting an absentee ballot application. If anything, section 7-15-380 supports that the General Assembly did not intend to prohibit assistance under 7-15-330.

First, when the entirety of section 7-15-380 is read, it clearly does not have general applicability to the entire absentee ballot voting, application, and application request process, and specifically applies to the process of filling out the absentee ballot itself and placing the ballot into the envelope for mailing, and prohibits any assistance in that process that a voter would not have been entitled to receive if they had voted in person.

The General Assembly plainly wished to forbid certain types of assistance in the process of voting itself and clearly addressed this intent in the language of the section 7-15-380 by requiring absentee voters to take such an oath prohibiting assistance. This is due to the heightened protections inherent to the actual process of voting and selecting candidates, as the process is meant to be secret and necessarily must be free of any undue or improper influence in the selection of those candidates. However, such protections and interests are not implicated by the simple filling in of personal information on a pre-election request for an absentee ballot application.

Second, while section 7-15-380 by its terms does not specifically apply to the absentee ballot application request process, S.C. Code Ann. § 7-15-340 does, and it specifically contemplates the process of receiving and completing an absentee ballot application. The oath that a voter applying for an absentee ballot is required to take states the following:

I do swear or affirm that I am a qualified elector, that I am entitled to vote in this election, and that I will not vote again during this election. The information above is true in all respects, and I hereby apply for an absentee ballot for the reason indicated above.

S.C. Code Ann. § 7-15-340. Notice that the General Assembly deliberately chose not to include any reference to or prohibition on “assistance” in this oath, and so long as the voter is a qualified elector, is entitled to vote, has provided accurate information, and promises not to vote more than once, it satisfies the General Assembly’s requirements for a valid absentee ballot application. In contrast to section 7-15-380, the oath does not require the voter to attest that they have not received assistance in requesting and completing their absentee ballot application.

By contrasting the language of section 7-15-340 with that of section 7-15-380, it becomes apparent that while absentee voters may only receive prescribed forms of assistance in actually voting their absentee ballot, these constraints do not apply to the process of requesting an absentee ballot application, and consequently, voters are permitted to receive assistance in requesting absentee ballot applications, so long as the request is not independently made by a third party without express prior permission from the voter, as prohibited by section 7-15-330. The prohibited scenario encompassed by section 7-15-330 does not conform to the facts of this case, where

every witness has testified that Baker was only helping or assisting the voter with requesting the absentee ballot application with the voter's consent and permission, and that Baker was not requesting the application of her own volition.

Regardless of whether the majority read section 7-15-330 "in a silo", as argued by Appellants, the majority's interpretation of the statute when examined alongside the aforementioned statutes does not create absurd results. Instead, it is Appellants' argument that would displace common sense and good reason when it comes to the absentee ballot application process. Appellants would have the Court needlessly disenfranchise voters by making it even more burdensome for voters of difficult means to obtain absentee ballot applications, or by possibly striking their votes if they are challenged by an election loser. Such an interpretation of the absentee voter statutory scheme is unfair and would work an injustice on our election system. It is not fraudulent for an individual to permit a voter to borrow their technological devices in order to request an application for an absentee ballot, and if anything, it is a good service to the community.

III. The majority's statement that "[n]o factfinder may take the denial of a fact, find the denial not credible, and treat its credibility finding as evidence of the fact" is supported by authorities.

Citing South Carolina law, Appellants correctly point out that it is the factfinder's role to determine credibility, and that uncontradicted evidence does not have to be accepted as establishing the truth. However, it does not logically follow, and South Carolina law does not provide, that just because the factfinder does not accept evidence as credible and true, that it is then empowered to infer that the

disbelieved testimony establishes that the opposite of what it proposed to support must be true. Other jurisdictions adequately explain why Appellants' argument is erroneous.

While the factfinder is at liberty to discredit the testimony of witnesses, "the mere fact that the testimony of a witness as to a fact is not believed does not of itself warrant a finding to the direct opposite of such testimony." *Miller v. Smith*, 20 A.D. 507, 510-11, 47 N.Y.S. 49, 51 (N. Y. App. Div. 1897). "Disbelief of denials of facts which a party must prove is not the equivalent of affirmative testimony in support of those facts." *Chapman v. Troy Laundry Co.*, 87 Utah 15, 47 P.2d 1054, 1062 (Utah 1935). "It is well settled that the jury's disbelief of a non-party witness does not permit the jury to find the opposite of what the witness testified to is true." *Grimm v. State*, 447 Md. 482, 510-11, 135 A.3d 844, 861 (Md. 2016). In this case, the Commission was entitled to discredit Baker's testimony when she stated that she did not request absentee ballot applications for any voters, and that she only assisted them with requesting their absentee ballot applications. The majority recognizes this.

The majority also recognizes that for there to be a violation under section 7-15-330, the Commission was required to find positive evidence that Baker did not only assist the voters with their own requests for absentee ballot applications, but that she requested the absentee ballot applications herself. As noted by the majority, Baker consistently testified that she did not request the applications herself, but that she only assisted the voters with their own requests for an application. While the Commission was entitled to discredit or disbelieve the testimony, the Commission's

disbelief does not transmute the testimony into positive evidence supporting the Commission's finding that Baker requested absentee ballot applications herself in violation of the statute. And as noted by the majority, it is irrelevant whether Baker was a volunteer or employee of Odom's campaign, as the language of section 7-15-330 does nothing to prohibit such an individual from assisting voters with requesting an application for an absentee ballot: it only prohibits such volunteers or employees from making such requests themselves.²

The dissent contends that the majority discounted witnesses who admitted they were incapable of requesting their own ballots. There is no testimony in the record from the witnesses stating that they did not request their own ballot applications; the uncontroverted testimony, even that of June Wright, demonstrates that they needed assistance with making their own ballot application requests. The dissent and Appellants take this testimony out of context and parse words to put the form of the testimony over its substance.

Even the dissent's and Commission's findings, and Appellants' argument, that Baker's name appeared as a witness on up to 28 ballots is not supported by any evidence in the record. The origin of the myth that Baker's name appeared as a witness on 28 ballots does not come from any documentation or evidence that was

² Regardless, as discussed above, the Commission's disbelief of Baker's testimony that she was not a paid campaign worker or employee of Odom does not create positive evidence that she was an employee or worker. Odom maintains that there is no positive evidence demonstrating that Baker was employed by Odom or his campaign, other than a tenuous connection between the two purportedly demonstrated by an outdated website that it not even part of the record of this case. At most, the website demonstrates that Baker and Odom at one point both worked at Alligator Water Co. It is not probative of whether Baker was a volunteer or paid staff member of Odom's election campaign.

before the Court, the Circuit Court, or the Commission; instead, it comes from a single hypothetical question that was asked by Appellants' counsel at the November 13, 2020 protest hearing:

Q. Would it surprise you that your name appeared on at least 28 ballots?

(R. p. 581).³ Arguments and statements of counsel are clearly not evidence, and to the contrary of Appellants' contentions, there was and remains a complete absence of evidence before the Commission, the Circuit Court, and this Court that Baker's name was listed as a witness on over 28 ballots, or on any ballots for that matter. An honest reading of Baker's testimony reveals that she only assisted voters with requesting applications for absentee ballots and that she had nothing to do with voting on the absentee ballots. The majority was correct in finding that not a single piece of evidence supported that Baker requested an application for another voter of her own volition in violation of section 7-15-330.

CONCLUSION

The record for this case undisputedly shows that Appellants are incorrect as to all three of their arguments in support of rehearing. They did not preserve their arguments concerning sections 7-13-770 and 7-15-380 for review, they did not produce evidence to the Commission demonstrating that Baker had improperly

³ As noted in Odom's Brief, 28 was the magic number of votes needed to overturn the Town Council election.

requested absentee ballots and absentee ballot applications for a number of voters significant enough to have overturned the election, they did not produce any evidence that Baker had improperly assisted with or witnessed more than 28 absentee ballots, and the Commission's disbelief of Baker's testimony did not relieve Appellants of their burden to produce positive evidence that such violations occurred. Because the General Assembly prescribed restrictions on assistance in absentee ballot voting, while choosing not to prescribe such restrictions when describing the process for requesting applications for absentee ballots, it was entirely permissible for Baker to assist voters with making their own requests for absentee ballot applications, regardless of whether or not she was a campaign volunteer or employee. The Court should deny Appellants' Petition for Rehearing.

[SIGNATURE PAGE TO FOLLOW]

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By:  _____

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