

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM HORRY COUNTY
In the Court of Common Pleas

S.C. SUPREME COURT

William H. Seals, Jr. Circuit Judge

Appellate Case No. 2024-001908

Lower Court Case No. 2024-CP-26-07193 & 2024-CP-26-06062

William Booker, Lynda Booker, Elaine Finney, Sarah Blair, Linda Cheatham, Harold Cheatham, Respondents,

v.

Kenneth McIver, Caroline Gore, and Derrick Stevens in their official capacities as members of the Town of Atlantic Beach Municipal Election Commission Appellants.

RESPONDENTS' MOTION TO DISMISS

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Pursuant to Rule 240(a), SCACR, Respondents, by and through the undersigned counsel, hereby moves to dismiss this action, in full, as a matter of law, it is undisputed the election protest at issue in this appeal was untimely. For the reasons that follow, the Court should grant Respondent's motion.

BACKGROUND

This appeal comes before the Court after a long, drawn-out series of events stemming from the November 7, 2023 Town of Atlantic Beach election for mayor and two council seats. After the polls closed on November 7, 2023, the unofficial election results reflected Jaqueline Gore and Carla Taylor were the two winners of the council race with 69 and 53 votes, respectively. On November 9, 2023, Appellant MEC met to hear challenges to several provisional ballots cast in the November 7, 2023 election. After the hearing, Gore and Candidate Taylor were still the top two vote recipients with 71 and 69, respectively.

Also on November 9, 2023, a losing mayoral candidate filed a timely protest to the mayoral election pursuant to section 5-15-130 of the South Carolina Code. No candidate filed a protest in the town council election within the statutorily required forty-eight (48) hour period. Despite section 5-15-130 requiring Appellant MEC to hear the mayoral election protest within forty-eight (48) hours of the protest being filed, Appellant MEC did not meet to hear the protest until April 3, 2024. During this lengthy period, Carla Taylor could not serve on town council even though she was duly elected. After ruling on the mayoral protest at the April 3rd meeting, Appellant MEC unanimously certified the town council election results. The final votes certified that Jacqueline Gore, Carla Taylor, Jerry Finney, and Shaun Swinson each received 71, 69, 62, and 49 votes, respectively. Each of the three Municipal Election Commission members signed and certified the final results, certifying Gore and Carla Taylor as the winners of the November 7, 2023 council race.

On April 4, 2024, Carla Taylor was sworn into office and signed the Oath of Office. The Town Clerk, Cheryl Pereira, duly executed the Oath. The Town of Atlantic Beach transmitted Taylor's Oath of Office and the certified results of the election to the Horry County Election Commission. Sandy Martin, the Director of the Horry County Office of Voter Registration and Election Commission, certified that Carla Taylor and Jacqueline Gore were the winners of the Town Council election.

Thereafter, on either April 4, 2024 or April 5, 2024, Swinson—a candidate in the November 7, 2023 town council race—filed a protest of the certified election results for the town council election. Despite Carla Taylor being sworn into office and the Horry County Election Commission certifying the results, the Atlantic Beach Town Council failed to recognize Carla Taylor as a duly elected member of the Town Council, ostensibly due to Swinson's belated election protest. Appellant MEC, however, took no action to resolve Swinson's belated appeal, despite being statutorily required to do so and being advised by its legal counsel it needed to act on the untimely filed protest.

On August 19, 2024, Appellant MEC held an information meeting and decided not to act on Swinson's election protest. Counsel for Appellant MEC advised the Commission to not rule on Swinson's appeal until after the conclusion of the unrelated Town of Atlantic Beach mayoral election appeal and the completion of an alleged South Carolina Law Enforcement Division (SLED) investigation into alleged fraud of certain voters in the municipal election. At the time of this informational session, the Town had not asked SLED to investigate anything and subsequently had to recant this false representation made to the MEC and to the public.

On September 3, 2024, Carla Taylor filed a Writ of Mandamus requesting the Court to order Appellant MEC to perform its ministerial responsibilities. On September 4, 2024,

concerned Atlantic Beach citizens, William Booker, Lynda Booker, Elaine Finney, Terry Finney, Sarah Blair, Linda Cheatham, and Harold Cheatham (third parties), also filed a Writ of Mandamus requesting the Court order Appellant MEC to abide by the plain and unambiguous language of the South Carolina Code and require Appellant MEC to perform its ministerial obligations.

On October 14, 2024, the lower court granted Carla Taylor's and the Respondents' Writs of Mandamus and ordered Appellant MEC to perform its ministerial duties no later than October 19, 2024. The lower court expressed concern that Appellant MEC appeared to be intentionally utilizing delay tactics to stall the final resolution of Swinson's election protest. Additionally, the lower court noted that Swinson filed his protest approximately 149 days after the election, well outside of the time requirement pursuant to section 5-15-100.

On October 17, 2024, the Municipal Election Commission met and found Swinson's protest timely and voted to uphold Swinson's election challenge.¹ On October 21, 2024, Respondents filed a Notice of Appeal pursuant to section 5-15-140 of the South Carolina Code. That same day, counsel for Respondents and Appellant MEC agreed to argue the appeal before the lower court on October 30, 2024. The lower court acknowledged the parties' consent and scheduled the hearing on the Notices of Appeal for October 30, 2024.

On October 30, 2024, the lower court heard the parties' respective arguments. On November 5, 2024, the lower court filed its Order finding (1) Swinson's protest was untimely as a matter of law; (2) Appellant MEC's misapplied the concept of after-discovered evidence; and (3) Swinson was ineligible to run for office and therefore cannot legally protest an election under

¹ A review of the hearing transcript shows Swinson presented no evidence to support his election protest claims. In fact, the only evidence he presented was his own testimony that he was not qualified to be a candidate for the November 7, 2023 election pursuant to Article VI section 1 of the South Carolina Constitution. Thus, Candidate Swinson was also not eligible to bring an election protest since he was not qualified to be a candidate in the election.

South Carolina Code Section 5-15-130. The lower court ordered that Carla Taylor should immediately begin serving on the Atlantic Beach Town Council. Thereafter, Appellant MEC appealed this Order.

This matter comes before the Court on Candidate Taylor's Motion to Dismiss Appellant MEC's Notice of Appeal.

STANDARD

Pursuant to Rule 240(a), Respondents file a motion to dismiss Appellant's Notice of Appeal as the facts are undisputed that Candidate Swinson did not file his election protest within forty-eight hours of the polls closing on November 7, 2023 as required by South Carolina Code Section 5-15-130. Thus, there is no issue in controversy upon which this Court must review.

ARGUMENT

I. Candidate Swinson's election protest was untimely.

The Town of Atlantic Beach election at issue in this appeal occurred on November 7, 2023. Candidate Shaun Swinson filed his election protest on either April 4, 2024 or April 5, 2024. Approximately 149 days elapsed between the closing of the polls on November 7, 2023 and when Candidate Swinson filed his election protest.

South Carolina Code Section 5-15-130 states, "[w]ithin forty-eight hours after the closing of the polls, any candidate may contest the result of the election as reported by the managers by filing a written notice of such contest together with a concise statement of the grounds therefor with the Municipal Election Commission." "In South Carolina, the right to contest an election exists only under our constitutional and statutory provisions, and 'the procedure proscribed by statute must be strictly followed.'" *Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 831 S.E. 2d 429, (2019) (quoting *Taylor v. Roche*, 271 S.C. 505, 509, 248 S.E.2d 580, 582 (1978)); *see also* S.C.

CONST. art. II, § 10 (“The General Assembly shall . . . establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process.”). The plain language of section 5-15-130 clearly states a candidate must file an election protest within forty-eight hours of the polls closing. Candidate Swinson did not do so. Thus, Candidate Swinson’s April 4th election protest, was untimely. Therefore, this Court should dismiss Appellant MEC’s appeal of the lower court’s finding that Candidate Swinson’s election protest was untimely.

II. After discovered evidence does not extend the 48-hour statutory requirement for filing an election protest or election hearing.

Appellant MEC has intentionally misapplied the after-discovered evidence rule proscribed in South Carolina Code Section 7-13-810 and *Gecy v. Bagwell*, 372 S.C. 237, 241, 642 S.E.2d 569, 571 (2007). Appellant MEC’s strained legal position is that it could not act on Candidate Swinson’s untimely filed election protest until there was a final decision on the appeal of Appellant’s decision pertaining to the mayoral election and until SLED completed its supposed investigation into voter qualifications of some residents of Atlantic Beach. Under MEC’s view of the law, Candidate Taylor must wait until the mayoral race litigation is completed and/or until SLED completes its “investigation.” Either of these scenarios could take longer than Candidate Taylor’s term on council. Such a misinterpretation of the law should not be sanctioned. This is not what the law requires under these circumstances, nor how our courts have interpreted the law.

In *Gecy*, this Court addressed the proper use of the after-discovered evidence. The candidate challenging the voter qualifications filed a timely protest pursuant to section 5-15-130, which requires a candidate to file a protest within forty-eight hours after the polls close. *Id.* at 239, 642 S.E.2d at 570. The issue was whether the “after-discovered evidence” should be excluded from the protest hearing since such a challenge could have been brought prior to the election. *Id.* at 244, 642 S.E.2d at 572. This Court allowed this ‘after-discovered’ evidence at the protest hearing, but never

ruled that after-discovered evidence trumps the forty-eight hour protest filing requirement. *Id.* Again, the candidate in *Gecy* “filed a timely protest of the election.” *Id.* at 239, 642 S.E.2d at 570. “After-discovered evidence” must have some limitations, such as being discovered prior to the election protest hearing per the statutory deadlines; otherwise, losing candidates could use this as a mechanism to delay the inevitable, allowing the winning candidate to serve on the elected body. Further, in *Dukes v. Redmond*, 357 S.C. 454, 593 S.E.2d 606 (2004), this Court again dealt with this after-discovered evidence rule. In *Dukes*, this Court held that after-discovered evidence could be presented at the protest hearing. *Id.* at 457, 593 S.E.2d at 608. But, as in *Gecy*, the challenger in *Dukes* otherwise filed a timely protest. *Id.* It was not an open-ended period of wait and see what evidence might be discovered, as Appellant has argued. Our statutory scheme has specific short deadlines to support the General Assembly’s intent to finalize all elections and election protests. Our Supreme Court has held that timelines must be strictly complied with. *See Odom v. Town of McBee Election Comm’n*, 427 S.C. 305, 831 S.E. 2d 429, (2019)

Regardless of the outcome of the appeal in the mayoral race or the purported SLED investigation, Candidate Swinson’s protest was still untimely. The after-discovered evidence rule must be applied consistently with the time constraints set out in the municipal election code. *See* S.C Code Ann. § 5-15-130. *Gecy* did not provide otherwise. Thus, this Court should dismiss Appellant MEC’s appeal of the lower court’s finding that after-discovered evidence does not extend the time to file a timely protest or time to conduct a protest hearing.

III. Appellants did not have authority to act.

As an aside, it is questionable at best whether Appellants had the authority to appeal Judge Seals’ November 7, 2024 Order. First, Appellants did not meet and vote to appeal Judge Seals’ Order. Second, the Atlantic Beach Town Council did not vote to approve Appellants’ request to appeal Judge Seals’ Order. As a result, it is likely that Appellants do not have the authority to

appeal and this appeal should not be before this Court.

CONCLUSION

For these reasons, the Court should dismiss Plaintiff's Notice of Appeal pursuant to Rule 240(a), SCACR as there is no issue in controversy upon which this Court must review.

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