

RECEIVED

Feb 03 2025

S.C. SUPREME COURT

EXHIBIT

“F”

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF HORRY) FOR THE FIFTEENTH JUDICIAL CIRCUIT

Civil Action No. 2024-CP-26-02537

Josephine Isom,)
)
 Appellant,)
)
 v.)
)
 Town of Atlantic Beach Municipal)
 Election Commission,)
)
 Respondent.)

**INTERVENOR JOHN DAVID’S
 MOTION IN OPPOSITION TO
 APPELLANT JOSEPHINE
 ISOM’S APPEAL**

Intervenor¹ John David respectfully submits this Memorandum in Opposition to Appellant Josephine Isom’s appeal of the April 3, 2024, decision of the Town of Atlantic Beach Municipal Election Commission (“MEC”) regarding the November 7, 2023, mayoral election (“Mayoral Election”).

To be sure, John David disagrees with the conduct of the MEC in handling this election. Even still, this Court should reject Isom’s appeal and uphold the decision of the MEC to invalidate the Mayoral Election and call for a new election because i.) there were adequate grounds in the MEC’s record to support the MEC’s factual findings; ii.) the MEC correctly applied S.C. Code Ann. § 5-15-130 and other law in making its decision; iii.) there was no evidentiary support presented to the MEC for Isom’s foundational factual contention; and iv.) there are no other grounds supporting Isom’s position that this Court should unilaterally declare her the winner of the Mayoral Election.

¹ On April 12, 2024, Appellant filed her appeal. On April 24, 2024, John David filed his Motion to Intervene. While understanding his intervention motion remains pending, John David files this brief today so as not to unduly delay or prejudice the adjudication of this case and is thus referred to herein as “Intervenor.”

FACTUAL & PROCEDURAL BACKGROUND

To place Isom's appeal in its proper context, it is appropriate to first provide the Court with a brief factual recitation. The most recent Town of Atlantic Beach Mayoral Election occurred on November 7, 2023. At the polls, several voters' ballots were challenged based on the voter's residency. This was perhaps unsurprising given that "[n]early every Atlantic Beach municipal election held in recent history has found its way [to the Supreme Court]." *Cole v. Town of Atl. Beach Election Comm'n*, 393 S.C. 264, 275, 712 S.E.2d 440, 446 (2011); *see also Isom v. Town of Atl. Beach Mun. Election Comm'n*, No. 2024-MO-004, 2024 WL 181168 (S.C. Jan. 17, 2024) (rejecting protest challenge by Appellant Josephine Isom's son to the residency qualifications of Intervenor John David).

In any event, S.C. Code Ann. § 7-13-830 provides the MEC with the authority to resolve such challenges to "provisional ballots" cast in an election. On November 9, 2023, the MEC held a hearing to resolve these challenges and received testimony and other evidence as required under S.C. Code Ann. § 7-13-830. ("At the [provisional ballot hearing] the [MEC] must hear all objections to these votes [i.e., provisional ballots], and when no person appears or offers evidence before the meeting to sustain an objection made at the polls, the ballot is no longer a provisional ballot. When the challenger appears or produces witnesses or evidence in support of the challenge, the authority in charge must proceed to hear and determine the question. Its decision is final.").

At the beginning of the November 9, 2023, provisional ballot challenge hearing, the-then Chairman of the MEC, Joe Montgomery, opened the proceedings by stating:

You may have seen an article in the Sun News this morning be [*sic*] declaring certain winners. Well, nothing is official. Nothing. And I say that through tonight. Nothing is official until today. After we certify the election today, that will be official. . . .

Exhibit 5(f) to the Town of Atlantic Beach’s Record of Proceedings (“ROP”) at 3:11-16.²

At the conclusion of the November 9, 2023, hearing, the challenge to each provisional ballot “was decided in favor of the voter[s]” and the provisional ballots were “mingled, and counted and the totals added to the previously counted regular ballot total” as § 7-13-830 requires. See *id.* at 110:3-5. In other words, all the the votes cast in the Mayoral Election (including the previously challenged, now intermingled provisional ballots) were counted and the MEC determined that John David received 65 votes and Josephine Isom received 64. *Id.* at 112:18. As the record reflects, this was the only count of the votes ever conducted by the MEC. The MEC recessed and scheduled a hearing for the next day, November 10, 2023, to re-count the votes as S.C. Code Ann. § 7-17-280 requires, and certify the election. *Id.* at 118.³

Later on the afternoon of November 9, 2023, Josephine Isom filed a written notice challenging the results of the Mayoral Election. See ROP, Exh. 1; see also S.C. Code Ann. § 5-15-130 (“Within forty-eight hours after the closing of the polls, any candidate may contest the result of the election as reported . . . by filing a written notice of such contest . . .”). Therefore, state law required the MEC to “[w]ithin forty-eight hours after the filing of” Isom’s protest, “conduct a hearing on the contest, decide the issues raised, file its report together with all recorded and testimony and exhibits . . . notify the parties concerned of the decisions made, and when the decision invalidates the election the [Town] [C]ouncil shall order a new election as the parties concerned.” S.C. Code Ann. § 5-15-130.

But rather than conduct a hearing on Isom’s appeal within the forty-eight hours contemplated by § 5-15-130, the Town of Atlantic Beach needlessly delayed proceedings relating

² Filed on May 16, 2024, apparently by Appellant Josephine Isom.

³ S.C. Code Ann. § 7-17-280 requires a mandatory recount of votes when, like here, the results are less than 1% apart.

to the November 7, 2023, election, and as a result no recount or certification of the election results has yet occurred. As further detailed in John David's April 24, 2024, motion to intervene, the Town Council of Atlantic Beach first "dissolved" the MEC. After Town Council acknowledged it was without power to do so, several weeks later it dismissed the Chair of the MEC, Joe Montgomery, without cause or due process, in favor of a replacement putative "commissioner," Derrick Stevens, who was appointed without the required quorum of Town Council.

These unlawful acts resulted in unnecessary delays and were but the latest attempt by some in the Town of Atlantic Beach "to interfere with the full and fair expression of the voters' choice." *Cole*, 393 S.C. at 275, 712 S.E.2d at 446.

Even still, once reconstituted with a different membership, the MEC finally held another hearing on April 3, 2024, to resolve Isom's protest of the election's results that she filed late on November 9, 2023. In this April 3, 2024, hearing, the MEC reached a decision, later memorialized in a written ruling on or about May 2, 2024, (ROP, Exh. 6, i.e. the "MEC Decision"), ruling that several ballots for the November 7, 2023, Mayoral Election were cast by those "not residents in the Town of Atlantic Beach and therefore not qualified to vote in the Election." *See id.* at 9-10.

Accordingly, the MEC "decline[d] to include those votes in the final count for the Mayoral Election" Even so, because "[t]he ballots cast . . . were inextricably commingled with the other remaining and validly cast ballots in the Election" and "[b]ecause the challenged [and later rejected] provisional ballots d[id] not entirely overlap with the voters challenged by Isom" the MEC concluded "that the prior stated results of the Election are, in the least, significantly doubtful, and are likely to be completely inaccurate." *Id.*

As such, the MEC "declare[d] the [Mayoral] Election invalid and request[ed] that Town Council order a special election, specific to Mayoral Candidates Josephine Isom and John David, as soon as such a special election can be scheduled in accordance with state law." *Id.*

On April 12, 2024, Josephine Isom filed her appeal and asked that she “be declared the winner of the Election for the Town of Atlantic Beach.” ROP, Exh. 1.

STANDARD OF REVIEW

S.C. Code Ann. §5-15-140 provides that “[w]ithin ten days after notice of the decision of the municipal election commission, any party aggrieved thereby may appeal from such decision to the court of common pleas.” “The circuit court, in this situation, is by statute an appellate court.” *Butler v. Town of Edgefield*, 328 S.C. 238, 248, 493 S.E.2d 838, 843 (1997).

In considering an appeal from an election commission, “[t]he circuit court, sitting in an appellate capacity, does not conduct a *de novo* hearing or take testimony. The circuit court must examine the decisions for errors of law, but it must accept the factual findings of the commission unless they are wholly unsupported by the evidence.” *Taylor v. Town of Atl. Beach Election Comm’n*, 363 S.C. 8, 14, 609 S.E.2d 500, 503 (2005). “If there is any evidence that supports the commission’s finding, [a reviewing court] must uphold the finding.” *Odom v. McBee Mun. Election Comm’n*, 440 S.C. 367, 372, 891 S.E.2d 663, 665 (2023) (“*Odom II*”) (citing *Odom v. Town of McBee Election Comm’n*, 427 S.C. 305, 307, 831 S.E.2d 429, 430 (2019) (“*Odom I*”).

ANALYSIS

Isom’s appeal should be denied. The MEC’s May 2, 2024, Decision “invalidate[d] the election.” While John David disagrees with many of the factual and legal conclusions set forth by the MEC in its May 2, 2024, Decision, they are not “wholly unsupported by the evidence.” *Taylor*, 363 S.C. at 14, 609 S.E.2d at 503. Far from it, the MEC’s decision to “invalidate the election” is supported by a lengthy factual record, and its detailed analysis and explanation for its ruling is outlined in a 10-page Decision.

Nor can it be said the MEC erred in applying the law in reaching its ruling to invalidate the election and call for a new election for the mayoral seat. Late on November 9, 2023, Isom protested

the results of the election under S.C. Code Ann. § 5-15-130. Isom’s protest asserted that several ballots were not cast by “resident[s] of the Town of Atlantic Beach.” ROP, Exh. 1.

In its Decision, the MEC largely agreed with the allegations set forth in Isom’s appeal in rejecting votes cast by those the MEC ultimately concluded were not residents of Atlantic Beach. However, the MEC also correctly noted that “the challenged provisional ballots” rejected by the MEC were “inextricably commingled with the other remaining and validly cast ballots in the [Mayoral] Election.” MEC Decision at 9.

This is because “[a]fter reviewing the evidence,” in its earlier provisional ballot hearing on November 9, 2023, “the MEC denied each challenge to the provisional ballots” and “commingled the challenged provisional ballots with the remaining ballots to determine the final Election Count.” *Id.* Moreover, as further support for its decision, the MEC noted that the votes it rejected “d[id] not entirely overlap with the voters challenged by Isom.” *Id.* Accordingly, the MEC Decision correctly observed that it was impossible to distinguish rejected ballots from the “intermingled” and still valid remaining ballots. *Id.* at 9-10.

Still, even though the valid votes could not be segregated from the “invalid” votes, in calling for a new decision, the MEC correctly applied the Supreme Court’s holding in *Broadhurst v. City of Myrtle Beach Election Comm’n*, that “[i]n determining whether an irregularity in the conduct of an election is sufficient to render the result doubtful, the rule deducible from the decisions is that all illegally cast ballots shall be deducted from the total number counted for the declared winning candidate . . .” Decision at 9 (citing *Broadhurst v. City of Myrtle Beach Election Comm’n*, 342 S.C. 373, 382, 537 S.E.2d 543, 547 (2000)).

In *Broadhurst*, the Supreme Court ordered a new election where due to an electronic vote machine malfunction “[t]here was no way to tell for which candidate(s)” 231 votes had been cast. *Odom I*, 427 S.C. at 314, 831 S.E.2d at 433 (citing *Broadhurst*, 342 S.C. at 378, 537 S.E.2d at

545). The Supreme Court of South Carolina has upheld the invalidation of a questionable election and calling for a new election in at least two other cases.

In *Gecy v. Bagwell*, [the Supreme Court] invalidated a Simpsonville City Council election in which two candidates sought one open seat. 372 S.C. 237, 239, 245, 642 S.E.2d 569, 570, 573 (2007). A total of 858 votes were cast. *Id.* at 239, 642 S.E.2d at 570. Of that sum, two votes were illegally cast. *Id.* at 240, 642 S.E.2d at 570. The original winner received 430 votes, the original second-place finisher received 427 votes, and one vote was cast for a write-in candidate. *Id.* at 239, 642 S.E.2d at 570. The winner was required to receive a majority of the votes cast to be elected. *Id.* at 240, 642 S.E.2d at 570. With the two illegal votes being set aside, a total of 856 legal votes were cast, thereby requiring the winner to have received at least 429 votes. **Because the two illegal votes had not been identified and separated from the legal votes, there was no way to tell for which candidate(s) the two illegal votes had been cast; it was therefore possible the winner received only 428 votes out of the 856 legal votes cast, which was exactly 50% and not a majority.** *See id.* Because this would have resulted in the top finisher not receiving the required majority of the votes cast, we held the outcome of the election was in doubt, invalidated the election, and ordered a new election. *Id.* at 242-43, 642 S.E.2d at 571-72.

Odom I, 427 S.C. at 312–13, 831 S.E.2d at 433 (emphasis added).⁴

Similarly, in *Easler v. Blackwell* after “consider[ing] the closeness of the vote tally . . . [and] because **there was no way to determine for whom the illegal votes had been cast**” the Supreme Court concluded “the election must be invalidated and a new election held.” *Odom I*, 427 S.C. at 313, 831 S.E.2d at 433 (citing *Easler v. Blackwell*, 195 S.C. 15, 19-23, 10 S.E.2d 160, 162-64 (1940) (emphasis added)).

As solitary legal support for her position, Appellant Isom relies on the Supreme Court’s ruling in *Odom I*. In *Odom I*, the Supreme Court overturned an election commission’s decision to invalidate an election and order a new election. In *Odom I* “[four] people attempting to vote were

⁴ In *Gecy*, like here, the candidate’s protest was filed “[a]fter a hearing to determine the validity of provisional ballots,” but by the time of the protest in *Gecy* “a mandatory recount pursuant to S.C. Code Ann. § 7-17-280” had already taken place. *Gecy*, 372 S.C. at 239, 642 S.E.2d at 570.

challenged as nonresidents of” the Town of McBee, South Carolina. *Odom I*, 427 S.C. at 308, 831 S.E.2d at 430. “During a called meeting after the election, the [McBee Election] Commission decided to not count these votes.” *Id.* at 308, 831 S.E.2d 429, 431.⁵ The McBee Election Commission determined Odom lost by three votes. Odom timely protested asserting that “the four votes should be counted.” *Id.* at 309, 831 S.E.2d at 431.

Following a hearing on Odom’s protest, the McBee Election Commission found that the “four voters were eligible to vote in the election.” And that, “[b]ecause adding the four votes to the total for [Odom] would have changed the election” the McBee Election Commission “invalidate[d]” the election and called for a new election under S.C. Code § 5-15-130. *Odom I*, 427 S.C. at 309, 831 S.E.2d at 431.

But, meanwhile, the four challenged votes remained sealed, not counted, and in the possession of the McBee Election Commission. *Odom I*, 427 S.C. at 308, 831 S.E.2d at 431. On appeal, “the sole issue” before the Supreme Court was “whether the four votes should now be unsealed and counted or whether the election should be invalidated and a new election held.” *Odom I*, 427 S.C. at 310, 831 S.E.2d at 432.

In *Odom I*, the Supreme Court observed that “the plain language of [S.C. Code Ann. §] 5-15-130 required the Commission to convene a hearing and ‘decide the issues raised’ in the contest.” The Supreme Court continued,

The “issues raised” in Odom's contest were (1) whether the four voters who cast the challenged votes were truly eligible to vote and, (2) if they were, whether their votes should be counted. However, the Commission decided only the first of those two issues when it determined the four voters were eligible to vote; instead of then deciding whether it was feasible to count the four votes—which were sealed, set aside, and available for counting—the Commission skipped that inquiry . . .

⁵ The Court noted that “the reasoning behind this decision [not to count these four votes] is not in the record but is irrelevant to the issues before us.” *Id.*

Odom I, 427 S.C. at 311, 831 S.E.2d at 432.

In overturning the McBee Election Commission’s decision to invalidate the results and call for a new election, the Supreme Court relied on the fact that the “four [previously challenged] votes were placed in envelopes, the envelopes were sealed, and the envelopes were set aside and delivered to the [McBee Election] Commission [and remained] available for counting.” *Odom I*, 427 S.C. at 314, 831 S.E.2d at 434.

In distinguishing its holding in *Odom I* from its prior rulings in *Easler*, *Gecy*, and *Broadhurst*, the Supreme Court observed that “all three of those cases involved elections in which **there was no way to tell for whom the disputed votes were cast; consequently**, the only conceivable conclusion was that the results of the election were in doubt, and **the only remedy in those cases was a new election.**” *Id.* (emphasis added).

Here, like in *Easler*, *Gecy*, and *Broadhurst*, the MEC concluded, as the facts plainly reflect, that there was no way to segregate the disputed votes from the remaining, still valid votes. And, further distinguishing *Odom I*, here, the MEC did not “skip” the question of whether it was “feasible to count” the remaining, valid votes in reaching its ultimate conclusions. Instead, the MEC squarely addressed this issue in its 10-page Decision and found that the “fraudulently cast” votes were “inextricably commingled with the other remaining and validly cast ballots” and “[b]ecause the challenged provisional ballots d[id] not entirely overlap with the voters challenged by Isom” the election was declared invalidated. MEC Decision at 9. There was ample evidence in the record to support this conclusion. That the MEC exercised its “only remedy,” *Odom I*, 427 S.C. at 314, 831 S.E.2d at 434, in the face of these well documented facts is a decision that this Court should not disturb.

Cole v. Town of Atl. Beach Election Comm’n, 393 S.C. 264, 712 S.E.2d 440 (2011) provides one additional instance of the Supreme Court overturning an election commission’s decision to

invalidate the results of an election. But, the Supreme Court’s ruling in *Cole* does not aid Isom here. In *Cole*, the Supreme Court’s decision to overrule the MEC’s invalidation on an election was based on extensive delay and “astonishing” misconduct by those within Town leadership “who worked diligently to obstruct the . . . election process.” *Id.* at 275, 712 S.E.2d at 446. There, because of such misconduct and appurtenant delay, the Supreme Court “vacate[d] the MEC’s decision to de-certify and order a new election, and conclude[d] **that the original certification of the election . . . should be restored.**” 393 S.C. at 275, 712 S.E.2d at 446. (emphasis added).⁶

But, unlike in *Cole*, here there has been no “certification of the election.” *Id.*⁷ Instead, to putatively discern the results of the Mayoral Election, Isom’s brief purports to rely solely on “votes . . . counted on the night of the election,” Isom Brief at 4, which perhaps is a reference to “news media report[ing]” from the day of the Election predicting her to win “with 56% of the votes.” Isom Appeal at 3.

But South Carolina law provides that it is the “Municipal Election Commission” that “shall . . . supervise and conduct all municipal, special and general elections” and the MEC and the MEC alone is granted the authority to “declare the results” of an election. S.C. Code Ann. § 5-15-100— as MEC Chairman Montgomery correctly remarked on November 9, 2023, under South Carolina law “[n]othing is official” until the MEC says it is. ROP, Exh. 5(f) at 3:11-16.

⁶*Cole* has other similarities that bear noting. That case, like here, was spurred on a protest by Josephine Isom asserting that “voting irregularities merited overturning the election.” 393 S.C. at 264, 712 S.E.2d at 443. And there, like here, significant delays contributed to Isom and others remaining in their incumbent seats on Town Council during a time-consuming appellate process. *See id.* at 273, 712 S.E.2d at 445. At the conclusion of *Cole*, the Supreme Court threatened “sanctions if the election laws of this State continue to be blatantly disregarded” in Atlantic Beach, *Id.* at 275, 712 S.E.2d at 446, but apparently this admonition has fallen largely on deaf ears.

⁷ Indeed, as noted above, the only arguably “official” tabulation of the votes by the MEC here determined that John David secured 65 votes, to Isom’s 64. *See* ROP, Exhibit 5(f) at 112:18.

But, even assuming *ex arguendo* that Isom’s purported “unofficial” evidence could legally constitute a “certification of the election” (which in, truth, it cannot) Isom does not (because she cannot) cite to any evidence in the MEC’s lengthy record supporting her errant position. Accordingly, her argument is “wholly unsupported by the evidence,” *Taylor*, 363 S.C. at 14, 609 S.E.2d at 503, and her appeal should be denied.

Isom’s failure to provide the MEC with such evidence—after she had nearly six months to prepare from the date of her initial protest (November 9, 2023) until the MEC hearing on her protest on April 3, 2024—is telling. Like in almost any appeal, an “appellant bears the burden of convincing an appellate court,” like this Circuit Court, here “with an adequate record for review.” *Jackson v. Jackson*, 432 S.C. 415, 426, 853 S.E.2d 344, 350 (Ct. App. 2020). And, this Court “may not consider issues which were not raised to the [MEC].” *Armstrong v. Atl. Beach Mun. Election Comm’n*, 380 S.C. 47, 49, 668 S.E.2d 400, 401 (2008) (citing *Taylor*, 363 S.C. 8, 609 S.E.2d 500 (2005)). Moreover, in resolving disputed elections in the Town of Atlantic Beach in the past, the South Carolina Supreme Court has already specifically ruled that when a Circuit Court sits in an appellate capacity, its consideration of “media reports . . . not presented to the [MEC] in the election protest” is “improper[].” *Id.*

In sum, because Isom does not (because she cannot) cite to *any* evidentiary support for her fundamental factual contention (and this Court may not consider materials not presented to the MEC below), on these grounds, Isom’s appeal should be denied.

Outside of S.C. Code Ann. § 5-15-130, there are no other legal grounds to support Isom’s appeal here. “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 I*, 427 S.C. at 307-308, 831 S.E.2d at 430 (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.”). Statutes which are in derogation of the common law must be strictly construed. *See Doe v. Brown*, 331 S.C. 491, 496, 489 S.E.2d 917, 920 (1997); *see also Armstrong*, 380 S.C. at 49, 668 S.E.2d at 401 (in hearing a municipal election appeal, a circuit court is constrained by S.C.Code Ann. § 5–15–130 and “does not have the authority to order any further relief.”).

In closing, South Carolina provides that the Mayor of the Town of Atlantic Beach “shall be elected.” S.C. Code Ann. § 5-9-20, and the South Carolina Constitution “provides for a representative form of democracy.” *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 642, 528 S.E.2d 647, 651 (1999). For too long already, the will of the voters in the November 7, 2023, Mayoral Election has been denied.

Responsibility for this unfortunate situation is borne by many, but the MEC’s decision to render a ruling invalidating the November 7, 2023, and ordering a new election is supported by the law and facts. Accordingly, Isom’s appeal should be denied.

CONCLUSION

For these reasons, this Court should deny Josephine Isom’s appeal and affirm the MEC’s decision to invalidate the election and call for a new election and grant such other and further relief as is just and proper.

Respectfully submitted,

CALLISON TIGHE & ROBINSON

s/ Ian T. Duggan

Ian T. Duggan, SC Bar. No. 80074
Demetri K. Koutrakos, SC Bar No. 11318
P.O. Box 1390
1812 Lincoln Street, Second Floor (29201)
Columbia, South Carolina 29202
Ph: 803-404-6900
Fax: 803-404-6902
IanDuggan@callisontighe.com
JimKoutrakos@callisontighe.com

**ATTORNEYS FOR INTERVENOR
JOHN DAVID**

October 29, 2024
Columbia, South Carolina