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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
William H. Seals, Jr., Circuit Court Judge
Case No. 2024-CP-26-02537

Appellate Case No. 2024-002023

Josephine Isom.......................................................................................... Appellant,

v.

Town of Atlantic Beach Municipal
Election Commission .......................................................................... Respondent,

And

John David, .......................................................................................... Intervenor.

**RESPONDENT'S FINAL BRIEF**

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## STATEMENT OF ISSUE ON APPEAL

WHETHER THE TRIAL COURT ERRED IN FINDING THERE EXISTED SUFFICIENT EVIDENCE IN THE RECORD TO UPHOLD THE DECISION OF THE MUNICIPAL ELECTION COMMISSION.

## STATEMENT OF THE CASE

This Appeal arises from the November 7, 2023, Town of Atlantic Beach election for mayor and two council seats. Appellant, Josephine Isom, appeals the Honorable William H. Seals, Jr.'s Order Denying Appellant's Appeal and Affirming the Order and Report of the Town of Atlantic Beach Municipal Election Commission ("Respondent" or "MEC"), dated November 13, 2024.

The Town of Atlantic Beach held a General Election on November 7, 2023. A provisional ballots hearing was held on November 9, 2023. Josephine Isom filed a protest of the election results, and, as a result, the MEC held a hearing on April 3, 2024. At the hearing, the MEC decided to order a new election, memorializing its decision in a written ruling (hereinafter, the "Decision") on or about May 2, 2024.

On April 3, 2024, Josephine Isom filed a Notice of Civil Appeal in the Court of Common Pleas for Horry County. A motions hearing for the appeal was held on September 18, 2024, with the Honorable William H. Seals, Jr. presiding, and on November 13, 2024, the Circuit Court entered an Order denying Josephine Isom's appeal and affirming the Decision of the MEC.

Josephine Isom filed a Notice of Appeal and served a copy on the MEC on November 27, 2024.

## STATEMENT OF THE FACTS

After the polls closed on November 7, 2023, Appellant asserts that the unofficial election results showed Josephine Isom received 62 votes while Intervenor John David received 49 votes. After additional votes were accepted and counted at the provisional ballot hearing on November 9, 2023, the MEC concluded John David received 65 votes, while Josephine Isom received 64. Two (2) other votes were cast for write-in candidates for the seat. Late in the afternoon of November 9, 2023, Josephine Isom filed her protest with the MEC.

On the morning of November 10, 2023, the MEC met once again to hear Appellant's protest. Given the close results of the election, S.C. Code Ann. § 7-17-280 requires the MEC to conduct a recount of the mayoral votes and, depending on the results of the recount, perhaps direct a runoff election pursuant to S.C. Code Ann. § 5-15-62(b). However, that meeting of the MEC was cut short.

Despite S.C. Code Ann. § 5-15-130 requiring the MEC to hear the mayoral election protest within forty-eight hours of the protest being filed, the MEC did not meet to hear the protest until April 3, 2024. In this meeting, the MEC voted to reject several provisional ballots it previously accepted. Following this meeting, the MEC memorialized its Decision in a written ruling on or about May 2, 2024 (ROA, 18-27). In reaching its Decision, the MEC relied on an extensive factual record (ROA 23-69, 312-406, 410-898) (hereinafter, the "Record").

The Decision found 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." (ROA 21). Accordingly, the MEC "decline[d] to include these votes in the final vote for" mayor. (ROA 21). 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

[first accepted, then 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." (ROA 21-22).

As such, relying on S.C. Code Ann. § 5-15-130, 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." (ROA 21).

Thereafter, Appellant Josephine Isom filed her appeal to the Circuit Court (ROA 70-74) and a memorandum in support of her position (ROA 253-275). Intervenor John David moved to intervene (ROA 75-252) and filed a memorandum in opposition to Appellant Isom's appeal to the Circuit Court (ROA 276-288).

On October 30, 2024, the Circuit Court heard arguments from Appellant Isom and Intervenor John David, whom the Circuit Court granted intervention. (ROA 1, n. 1). On November 13, 2024, the Circuit Court filed its Order ruling that the MEC's decision to invalidate the November 7, 2023, mayoral election was supported by sufficient facts and that no error of law justified disturbing the decision. (ROA 1-9). Thereafter, Appellant Isom appealed the Circuit Court's order to this Court.

## STANDARD OF REVIEW

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).

In other words, "[i]f there is any evidence that supports the commission's finding, [the 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").

"'The Court 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.'" Cole v. Town of Atl. Beach Election Comm'n, 393 S.C. 264, 271–72, 712 S.E.2d 440, 444 (2011) (quoting George v. Mun. Election Comm'n of the City of Charleston, 335 S.C. 182, 186, 516 S.E.2d 206, 208 (1999)).

But in considering appeals of an election commission, "it is … essential that … a documented record be established upon which alleged wrongdoing may receive appellate review." Fielding v. S.C. Election Comm'n, 305 S.C. 313, 318, 408 S.E.2d 232, 235 (1991).

## LAW/ANALYSIS

### I. The Circuit Court Applied the Correct Standard in Upholding the MEC's Decision to Direct a New Election for the November 7, 2023, Mayoral Election.

The Circuit Court correctly applied the "any evidence" standard in upholding the MEC's Decision to direct a new election for the November 7, 2023, mayoral election. Odom II, 440 S.C. at 372, 891 S.E.2d at 307. Put another way, because the MEC's Decision was not "wholly unsupported by the evidence", the decision of the MEC and Circuit Court should not be disturbed. Taylor, 363 S.C. at 14, 609 S.E.2d at 503.

There was sufficient evidence in the MEC's extensive factual record to support its Decision finding that the "prior stated results" of the November 7, 2023, mayoral election were "in the least, significantly doubtful, and are likely to be completely inaccurate." (ROA 21-22). Although the MEC used the phrase "prior stated results", the results of the November 7, 2023, mayoral election were never effectively **certified** by the MEC. Cf. Cole, 393 S.C. at 275, 712 S.E.2d at 446 ("vacat[ing] the MEC's decision to **de-certify** the election" based on significant election delay and misconduct, and "order[ing] the original **certification** … restored.") (emphasis added). Instead, the Record reflects that the mayoral election results were never lawfully certified following the disqualification of commingled ballots, leaving no reliable vote total upon which a declaration of a winner could rest. Thus, the MEC, in effect, determined that without a special election, it would never be able to discern and thus certify who won the mayoral election on November 7, 2023.

In reaching this conclusion, the MEC cited and adhered to this Court's holding in Odom I telling an election commission what it should do when "'there [i]s no way to tell for whom the disputed votes were cast.'" (ROA 22, quoting Odom I, 427 S.C. at 314, 831 S.E.2d at 434). When confronted with that situation here, the MEC correctly recognized that its "'only conceivable

conclusion was that the results of the election were in doubt, and the only remedy … was a new election.'" (ROA 22, quoting Odom I, 427 S.C. at 314, 831 S.E.2d at 434).

That the MEC could not reach any other result here is explained by the procedural history of the November 7, 2023, mayoral election, why no "results" of that election were ever certified, and how this led to the MEC pursuing the only "conceivable . . . remedy" available under the law—a special election.

First, the MEC found that "[t]he poll managers initially determined that, excluding the provisional ballots, [Appellant] Isom received sixty-two (62) votes and [Intervenor] David received forty-nine (49) votes." (ROA 5, ¶ 3). But in considering this "finding" of the MEC (the Record's sole citation to the poll manager's "initial determin[ation]") the Circuit Court correctly contrasted this "finding" with what constitutes "evidence" presented to an MEC:

> The "evidence" on the record required to support a "finding" by the MEC is very low. But it cannot be said that a "finding" *is* "evidence." This is because, as the Supreme Court has held, a court "must uphold [a] finding" of the MEC "if there is any evidence that supports the commission's finding," Odom II, 440 S.C. at 372, 891 S.E.2d at 665, but, on the other hand, a court cannot "accept the factual findings of the commission" that "are wholly unsupported by the evidence." Taylor, 363 S.C. at 14, 609 S.E.2d 503.

. . . .

> [W]ithin th[e] extensive Record, [Appellant] Isom does not cite (nor does the Court's review discern) evidence supporting the MEC's specific finding as to what the poll managers "initially determined." In its appellate capacity, the Court cannot go outside the bounds of the Record presented and "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).

ROA 6-7.

As such, this Court should conclude, like the Circuit Court, that the MEC's putative "finding" as to the "initial determine[ation]" of the poll watchers was not supported by the evidence.

Second, the MEC found that on November 9, 2023, it conducted a provisional ballot hearing. (ROA 17, ¶ 4).[1] At the hearing on November 9, 2023, "the MEC denied each challenge to the provisional ballots . . . accepted the nineteen (19) provisional ballots and **commingled the challenged provisional ballots with the remaining ballots to determine the final Election count**." (ROA 17, ¶ 4) (emphasis added).[2] Accordingly, when the regular ballots and previously challenged ballots "decided in favor of the voter" were "mingled" and counted in the way S.C. Code Ann. § 7-13-830 requires, the MEC determined that [Intervenor] David received sixty-five (65) votes and Isom received sixty-four (64) votes." (ROA 17, ¶ 4). Later that afternoon, Appellant Isom timely protested the election. (ROA 17, ¶ 5). Despite Appellant Isom's protest being filed on November 9, 2023, and the requirements of S.C. Code Ann. § 5-15-130 that an election commission should "[w]ithin forty-eight hours after the filing" of such a protest "conduct a hearing on the" protest and "decide the issues raised," the Record reflects that a hearing on Appellant Isom's protest did not occur until April 3, 2024. (ROA 17, ¶ 7).

Most of the rest of the Decision's "Finding of Facts" putatively justify the MEC's decision at its April 3, 2024, hearing to reconsider its earlier "final" decision accepting the challenged provisional ballots. (ROA 18-20, ¶¶ 10-22). Based on these extensive findings of fact, the MEC concluded that votes by "14 individuals were fraudulently cast" and therefore, the MEC

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[1] See also S.C. Code Ann. § 7-13-830. ("At the [provisional ballot hearing] the [MEC] must hear all objections to these [provisional] votes, 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**.") (emphasis added).

[2] See also S.C. Code Ann. § 7-13-830. ("... each [provisional] ballot whose challenge was decided in favor of the voter must be removed from the envelope, **mingled** and counted and the totals added to the previously counted regular ballot total ....") (emphasis added).

"decline[d] to include these votes in the final count for the Mayoral Election for the Town of Atlantic Beach." (ROA 21).

But, in reaching this conclusion, the MEC also recognized that the 14 "fraudulent" votes it elected not to count "were inextricably commingled with the other remaining and validly cast ballots in the Election." (ROA 21). And because these now discounted votes "did not entirely overlap with the voters challenged by Isom," the MEC found that the "prior stated results of the Election are, in the least, **significantly doubtful**, and are likely to be **completely inaccurate**." (ROA 21-22) (emphasis added).

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

(ROA 22) (see also S.C. Code Ann. § 5-15-130 ("when the decision [of the MEC] invalidates the election, the council shall order a new election as to the parties concerned.")).

The Circuit Court affirmed the MEC's Decision and rejected Appellant Isom's request to be "declared the winner of an election" based "on an uncertain vote total." (ROA 9, lines 6-7). In further pointing out the futility of Appellant Isom's position, the Circuit Court observed:

> [T]he only count of votes evidenced in the Record occurred on November 9, 2023, when at the conclusion of the provisional ballot hearing, after *all* the ballots cast in the election were 'inextricably commingled,' John David was determined to have received 65 votes and Josephine Isom 64 votes … along with two apparent votes for write-in candidates. Such close results would have required a recount and assuming the count remained the same, a runoff election. See S.C. Code Ann. §§ 7-17-280; 5-15-62(b).

ROA at 7.

Here, the MEC, supported by ample evidence in the extensive Record, correctly recognized that the disruptions to the election count in the mayoral race of November 7, 2023, made the results

of the election impossible to discern and, as such, the MEC exercised the only "conceivable . . . remedy" available to it—the call for a new election. Odom I, 427 S.C. at 314, 831 S.E.2d at 434. Accordingly, the MEC's Decision was not "wholly unsupported by the evidence" and therefore should not be disturbed. Taylor, 363 S.C. at 14, 609 S.E.2d at 503. Furthermore, the Circuit Court correctly applied the "any evidence" standard in upholding the MEC's Decision. Odom II, 440 S.C. at 372, 891 S.E.2d at 307.

## CONCLUSION

For the reasons stated above, Respondent respectfully requests that this Court affirm the Circuit Court's ruling denying Appellant Josephine Isom's appeal and affirming the Decision of the MEC.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

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

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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