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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEE COUNTY COURT OF COMMON PLEAS
George C. James, Jr., Circuit Court Judge

Appellate Case No.: 2016-000299

Edward Byrd, Mike Morrow, Wille Mae Muldrow and Ken Currie,

Appellants,

v.

Craig Nesbit and John Y. Latimer,

Respondents.

BRIEF OF APPELLANTS

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On May 12th, 2015 the voters of the town of Bishopville, South Carolina, acting honestly and intelligently, cast their ballots and elected Ennis Bryant, Retta Tindal, Willie Mae Muldrow, Edward Byrd, Mike Marrow, and Kenneth Currie to the City Counsel. (R. p. 109). Respondents seek to disenfranchise these voters. This was an at-large election for six seats on the City Council. Ten candidates ran in the election. Of the ten, one was an uncontested Mayoral candidate with the remaining nine running for City Council. (R. p. 109). This appeal presents the following issue: was the evidence relied upon by the Bishopville Municipal Election Commission sufficient to overturn the election?

STATEMENT OF THE CASE

I. Procedural History

The City of Bishopville held a regular election for city council on May 12, 2015. Following the counting of the ballots, Respondents sent a letter to the City of Bishopville Municipal Elections Commission, hereafter referred to as MEC, alleging certain irregularities or illegalities in the conduction of the election. (R. p. 107-108). The MEC held a hearing on the protest filed by Respondents on May 15, 2015. (R. p. 10-12). Both Respondents presented witnesses, made arguments, and were given the opportunity to present other evidence in support of their allegations. (R. p. 10-12).

Following the hearing on this matter the MEC went into executive session, accompanied by the municipal attorney. (R. p. 104, lines 11-25). Following the conclusion of the executive session the MEC announced that they had not deliberated, made motions, or taken any votes during the closed door session. (R. p. 105, lines 3-10).

Instead, the MEC announced that they had formulated two questions, on which they would vote immediately, the answers of which would resolve the election protest. (R. p. 105, lines 3-10). First, the MEC voted on whether the "protest notice alleged irregularities and [brought] them to [their] attention with enough evidence to prove the case." (R. p. 105, lines 7-10). All three members of the commission voted in the affirmative. Next, the MEC addressed "whether the alleged irregularities render[ed] doubtful the results of the election for a constitutional violation." (R. p. 105, lines 13-22). Again, all three members of the MEC voted in the affirmative. After taking the vote on the second question the MEC found the election null and void and ordered a new election. (R. p. 105, lines 18-22).

The MEC issued its Order on May 19, 2015. (R. p. 10-12). In its Order, the MEC reasoned that all of the irregularities and/or illegalities alleged by Respondents were without merit, with the exception of the allegation that the door at Ward 2 was locked during the counting of the ballots. (R. p. 11). This finding was based on the assertion that one of the Respondents and one additional witness testified that they were unable to open the door after the closing of the polls. (R. p. 11). The MEC cites to S.C. Code §5-15-120 and Article II Section I of the South Carolina Constitution for the proposition that ballots must not be counted in secret. (R. p. 11). Further, the MEC cites the precedent established that a new election must be held when votes are counted in secret. *McKnight v. Smith*, 182 S.C. 378, 189 S.E. 361 (1937). (R. p. 11).

Appellants were never served with a copy of the MEC's Order. However, Appellants timely filed their Notice of Appeal on May 29, 2015. (R. p. 2). The Circuit

Court for Lee County affirmed the ruling of the MEC on February 12, 2016. (R. p. 2-9). This matter is brought directly to the Supreme Court under SCACR 203(d)(1)(E).

II. STATEMENT OF FACTS

The subject election was an at large election for six city council seats. The polls opened at 7:00 a.m. and closed at 7:00 p.m. (R. p. 75, lines 9-12). Respondent Craig Nesbit testified that at some point after 7:00 p.m. he went to Ward 2 and found the door locked. (R. p. 72, lines 6-15). He was unable to state, with certainty, when he found the door locked or when Ward 2 reported their vote count. (R. p. 72, lines 16-20). Additionally, Respondent Craig Nesbit called Tyler Wilson who testified that at some point after 7:00 p.m. he found the door to Ward 2 locked as well. (R. p .89, line 3). No poll workers nor the poll manager from Ward 2 were called to testify by either Respondent. No assertion as to when the counting at Ward 2 began or ended was made. No witness stated whether the door in question truly was locked and both witnesses who testified regarding the stuck door failed to mention that it was not the only entrance into Ward 2. Finally, given the conspicuous and conscience decision of Respondents not to call the poll workers from Ward 2 at the hearing, the number of members of the public present during the counting of the votes at Ward 2 is not certain. What is certain, is the presumption that with two other unlocked doors by which one could gain access, the count was conducted publicly.

At the hearing, Willie Mae Muldrow asserted that in the past she had experienced difficulty opening the door in question when she knew the door to be unlocked. (R. p. 80, lines 2-7). Edward Byrd, an employee of the city, stated that he had been called out

several times to work on the door in question and that the door is hard to open. (R. p. 82, lines 9-14). The only evidence presented in support of a constitutional violation was the testimony of two individuals who claimed that they were unable to gain entry into Ward 2 while the poll workers may or may not have been counting the votes. This does not amount to votes being counted in secret. *McKnight v. Smith*, 182 S.C. 378, 189 S.E. 361 (1937).

STANDARD OF REVIEW

This Court reviews the decision below for errors of law. It will not disturb findings of fact that are supported in the record. *Fielding v. South Carolina Election Comm'n*, 305 S.C. 313, 317, 408 S.E.2d 232, 234 (1991). However, "every reasonable presumption in favor of sustaining a contested election will be employed." *Berry v. Spigner*, 226 S.C. 183, 84 S.E. 2d 381 (1954). When two factual inferences are both reasonable "it becomes clear that the choice between the two inferences must be made in favor of the validity of the contested election." *Trapp v. South Carolina Bd. of State Canvassers*, 255 S.E.2d 670, 273 S.C. 163 (S.C., 1979).

The deference does not extend, as the Circuit Court's order directs, to the inferences and legal conclusions of the Election Commission. This Court has held consistently that all *inferences* are to be drawn in favor of upholding the result of the challenged election. This means that protestants like Mr. Nesbit and Mr. Latimire face a stiff burden of providing unambiguous proof of a material impropriety that affected the result of the election:

> 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*. In the absence of fraud, a constitutional violation, or a statute providing that an irregularity or illegality

> invalidates an election, we will not set aside an election for a mere irregularity.

Taylor v. Town of Atlantic Beach Election Comm'n, 363 S.C. 8, 12, 609 S.E.2d 500, 502 (2005) (emphasis added); *see also Fielding*, 305 S.C. at 317, 408 S.E.2d at 234 ("irregularities or illegalities which do not appear to have affected the result of the election will not be allowed to overturn it").

SUMMARY OF ARGUMENT

Respondents seek to portray their challenge as supporting the integrity and inviolability of the electoral process. (R. p. 57, lines 1-3). In fact, theirs is precisely the sort of challenge that should not be allowed to proceed because it turns the electoral process into a post-election scavenger hunt for any perceived irregularities. This undermines the integrity of the election process. The Transcript of the hearing indicates that of all ten candidates, only one raised any concern about their inability to access Ward 2 during the counting of the ballots. (R. p. 107-108). Only two witnesses testified as to their firsthand knowledge of the door being locked. (R. p. 79, line 25-p. 26, line 1; R. p. 89, lines 1-5). Respondent Nesbit did not testify that he took any action to attempt entry other than attempting to open the door. He failed to indicate if there were other entry ways through which he could have gained access. In fact, the MEC asserts that the **doors** to Ward 2 were locked. (R. p. 11). The Transcript indicates that only one door was in question when, in fact, there are three doors by which one can gain access to Ward 2. Respondent Craig Nesbit did not indicate that he called or otherwise attempted to locate anyone on the MEC, any of the poll workers at Ward 2, or the poll manager of Ward 2. In

fact, it appears from the transcript that Respondent Nesbit did not even knock on the door.

The Transcript contains many occurrences of Respondent Nesbit asserting that he cannot demonstrate that the alleged irregularities affected the outcome of the election. (R. p. 78, lines 8-17; R. P. 64, lines 15-21). Alternatively, at least two witnesses testified that they had difficulty entering the building in question in the past when the door was knowingly unlocked. (R. p. 80, lines 2-7; R. p. 82; lines 9-14). Taken in total, the evidence presented at the hearing leaves unanswered the factual questions of whether or not the door was in fact locked; who may have locked it; what the intent of the offending party would have been; and who was present within the Ward during the counting of the ballots. Additionally, our Constitution, the relevant S.C. Code Sections, and the case law leave opened the essential legal question of what constitutes the counting of ballots in secret. Appellants assert a jammed door with two other alternative and easily accessible entrances does not constitute a secret ballot.

The one relevant question to which we do have an answer is who the voters chose to lead their city. (R. p. 109). The voters honestly and intelligently chose Ennis Bryant, Retta Tindal, Willie Mae Muldrow, Edward Byrd, Mike Marrow, and Kenneth Currie to serve on the City Counsel. (Respondents came in last and second to last, respectively, in both the election at large and Ward 2) (R. p. 109). Respondents' failure to exercise "self help" and seek entry into Ward 2 through any of the means mentioned above in large part resulted in the uncertain factual situation presented to the MEC. This situation was exacerbated by Respondents' conscience decision not to call the Manager and workers

who were present at Ward 2 to testify. The record lacks all but the most circumstantial evidence that the votes were being counted when Respondent Nesbit and Mr. Wilson attempted to gain entry through a door known to jam when unlocked. (R. p. 80, lines 2-13). In short, Respondents fail to carry their burden and the MEC abused its discretion in overturning the election and refusing to recognize the will of the people.

I. The evidence relied upon by the Bishopville municipal election commission was insufficient to overturn the election.

The primary authority relied upon by the MEC is *McNight v. Smith* which provides in pertinent part that the exclusion of the public from a polling place during the counting of ballots justifies holding a new election. 182 S.C. 378, 189 S.E. 361 (1937). Even assuming that Respondents proved by clear and convincing evidence that Ward 2 was locked during the counting of the ballots, this case is easily distinguishable from the immediate one. In *McKnight* there is no question as to who barred the door. A Sheriff's Deputy testified that he barred the door and purposefully excluded a candidate and other members of the public that he knew were attempting to gain access. *Id.* In the immediate case no such factual finding can be made. Two gentleman, one of which is a named respondent herein, allege that one door to the building was locked. They allege no contact with those inside and cannot even identify who was inside. *McKnight* bears no factual similarities to the immediate case in that there is no indication that the door was actually locked or that anyone was turned away in an attempt to enter.

Before the MEC can assert that the election results must be abandoned and order a new election they must first find the standard established in *Fielding vs. S.C. Election Comm'n,* *305* S.C. 313, 317, 408 S.E.2d 232, 234 (1991), requiring that "where

corruption is charged, a documented record be established upon which alleged wrongdoing may receive appellate review" and that the documented record be comprised of more than just "conjecture, speculation, and surmise." Relying on *Berry v. Spinger*, 226 S.C.183, 84 S.E.2d 381 (1954), wherein the Court held "every reasonable presumption will be indulged to sustain [the election]." The *Fielding* Court relied upon this language to create a standard required by any persons challenging an election to create a record void of "conjecture, speculation, and surmise." *Fielding* at 235.

The MEC's finding of a constitutional violation was dubious at best. Respondents failed to prove a constitutional violation in the election in question and further failed to meet the burden established by *Fielding* to create a record devoid of conjecture. Instead, the only evidence presented was incomplete, required the MEC to make assertions and assumptions unsupported by the evidence, and resulted in an arbitrary decision unfounded in both law and fact. The South Carolina Supreme Court has held that "while corruption-free elections are imperative to the very survival of the republic, it is equally essential that, where corruption is charged, a documented record be established upon which alleged wrongdoing may receive appellate review." *Fielding v. South Carolina Election Com'n*, 408 S.E.2d 232, 305 S.C. 313 (S.C., 1991).

The Court set out a two prong test for maintaining an election protest in South Carolina: "1) The contest notice must allege irregularities or illegalities; and 2) the alleged irregularities or illegalities must have changed or rendered doubtful the result of the election in the absence of fraud, **a constitutional violation**, or a statute providing that such irregularity or illegality shall invalidate the election." *Taylor, et al. v. Town of*

Atlantic Beach Election Comm., 363 S.C. 8, 609 S.E.2d 500 (S.C. 2005) (emphasis added). The concept that in cases of constitutional violations a petitioner need not prove that the alleged behavior changed or brought into doubt the outcome of the election provides an important shield to protect one of the most important democratic institutions. However, when applied where the challenger has failed to provide adequate proof of the violation, this shield becomes a blunt instrument to defeat, rather than preserve, democracy.

The distinction in *Taylor* between irregularities and constitutional violations which provides that the election shall be invalidated in the case of the latter in no way modifies the presumption in favor of validity found in *Berry. 226 S.C. 183, 84 S.E. 2d 381 (1954).* The MEC ignored *Taylor* and its proposition that a Constitutional defect in an election can be so minuscule as to be rendered a simple irregularity. *See Taylor at* 8, 609 S.E.2d 500 (S.C. 2005). In *Taylor* the Court found that the secrecy of twenty-two ballots may have been violated in contradiction of our Constitution. However, the Court concluded that "there was no systemic invasion of privacy . . . which violated the fundamental integrity of the election and gave rise to a constitutional violation sufficient to set aside the election results." *Id.*

In the immediate case, Respondents did not overcome the burden found in *Berry. See Berry at* 183, 84 S.E. 2d 381 (1954). Considering the evidence in the light most favorable to the Respondents, the only inference that can be drawn is that a sticky door bared entrance to Ward 2 for two individuals, who failed to assert their right to be admitted, at a time during which the votes may or may not have been counted.

Precedence requires the MEC to accept this inference. If this inference is adopted, it follows that any violation of the State Constitution was not of the systematic character necessary to affect "the fundamental integrity of the election and give rise to a Constitutional violation sufficient to set aside the election results." *Taylor, et al. v. Town of Atlantic Beach Election Comm.*, 363 S.C. 8, 609 S.E.2d 500 (S.C. 2005).

Accordingly, the alleged constitutional violation must be rendered a simple irregularity. Since Respondents failed to demonstrate that the irregularity changed or brought into doubt the outcome of the election, the results must be upheld. *Id.*

CONCLUSION

Based upon the foregoing argument and citations of authority, the Appellants respectfully request that this Court reverse the ruling of the MEC, hold the May 12, 2015 election valid, and order the MEC to certify the results.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellants complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have this day served a copy of the Record on Appeal, Appellants' Final Brief and Appellants' Reply Brief upon counsel for all parties by depositing copies in the US Mail, postage pre-paid, and addressed to their counsel of record, respectively, as shown below:

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April 12, 2016
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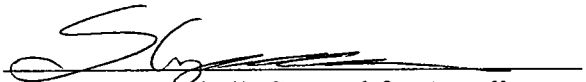

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