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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, Willie Mae Muldrow and Ken Currie,

Appellants,

v.

Craig Nesbit and John Y. Latimer,

Respondents.

REPLY BRIEF OF APPELLANTS

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ARGUMENT IN REPLY

Respondents' Brief focus on two points: First, the standard of review in municipal election cases does not allow the appellate courts to extend their review to findings of fact unless those findings are wholly unsupported by the evidence. (R. Brief, page 4.) Second, that "an election contest does not have to establish that the purported irregularity rendered the outcome doubtful where the irregularity was either a constitutional violation or where statute provides that such irregularity invalidates the election." (R. Brief, page 6.) Respondents misinterpret the facts, law, and argument of Appellants.

I. IT IS THE DUTY OF THE CHALLENGER TO CREATE A DOCUMENTED RECORD OF ALLEGED WRONGDOING.

"In municipal election protests, this Court reviews the judgment of the circuit court upholding or overturning the decision of a municipal election commission only to correct errors of law." *George v. Mun. Election Comm'n of the City of Charleston*, 335 S.C. 182, 186, 516 S.E.2d 206, 208 (1999). This review extends to findings of fact when those findings are wholly unsupported by the evidence. *Id.* "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." *Id.; Cole v. Town of Atl. Beach Election Comm'n*, 393 S.C. 264, 712 S.E.2d 440 (S.C., 2011); *Dukes v. Redmond*, 357 S.C. 454, 593 S.E.2d 606 (S.C. 2004). In the absence of fraud, a constitutional violation, or a statute providing that an irregularity or illegality invalidates an election, the Court will not set aside an election for a mere irregularity. *E.g. Broadhurst v. City of Myrtle Beach Election Commn.*, 342 S.C. 373, 379, 537 S.E.2d 543, 546 (2000); *George v. Mun. Election Commn. of Charleston*, 335 S.C. 182, 186, 516 S.E.

2d 206, 208 (1999); *Sims v. Ham,* 275 S.C. 369, 271 S.E.2d 316 (1980); *May v. Wilson,* 199 S.C. 354, 19 S.E.2d 467 (1942); *State v. Jennings*, 79 S.C. 246, 60 S.E. 699 (1908). "Voters who have done all in their power to cast their ballots honestly and intelligently are not to be disfranchised because of an irregularity, mistake, error, or even wrongful act, of the officers charged with the duty of conducting the election, which does not prevent a fair election and in some way affect the result." *Berry v. Spigner*, 226 S.C. 183, 190, 84 S.E.2d 381, 384 (1954) (internal quotes omitted). *Taylor v. Town of Atlantic Beach Election Com'n*, 363 S.C. 8, 609 S.E.2d 500 (S.C., 2005). Every reasonable presumption will be indulged to sustain an election. *Rawl v. Mccown*, 97 S.C. 1, 81 S.E. 958 (S.C., 1914)

> Irregularities . . . will not justify rejecting the whole vote of a precinct where it does not appear that the result was affected thereby . . . voters who have done all in their power to cast their ballots honestly and intelligently are not to be disfranchised because of an irregularity, mistake, error, or even wrongful act, of the officers charged with the duty of conducting the election, which does not prevent a fair election and in some way affect the result.

29 C.J.S., Elections, § 214, pp. 308, 309; *Cf. Smith v. Save*, 130 S.C. 20, 125 S.E. 269 (1924); *Berry v. Spigner*, 226 S.C. 183, 84 S.E.2d 381 (S.C. 1954).The scope of appellate review of the State Board's order "is limited to corrections of errors of law; findings of fact will not be overturned unless wholly unsupported by the evidence." *Knight v. State Board of Canvassers*, 297 S.C. 55, 57, 374 S.E.2d 685 (1988); *Sims v. Ham*, 275 S.C. 369, 271 S.E.2d 316 (1980); *Berry v. Spigner*, 226 S.C. 183, 84 S.E.2d 381 (1954). Every reasonable presumption in favor of sustaining a contested election will be employed and irregularities or illegalities which do not appear to have affected the result of the election will not be allowed to overturn it. *Id.* In *Berry*, *supra*, this Court

found that general allegations of illegal activity will not support the burden of establishing that the irregularity flawed the election.

So as to not disenfranchise the choice of voters in all elections (including municipal elections) this Court has long held that "every reasonable presumption will be indulged to sustain [the election]," *Berry v. Spigner*, 226 S.C. 183, 192, 84 S.E.2d 381, 385 (1954). In fact, the burden remains on the challenger to ensure "a documented record be established upon which alleged wrongdoing may receive appellate review." *Id.* Further, this Court requires that the record established must be comprised of more than "conjecture, speculation, and surmise." *Id.* Moreover, "findings of fact by the [MEC] are not conclusive where there is no evidence to support the finding, or where it is <u>against the necessary inference from the facts</u>. *Easler v. Blackwell*, 195 S.C. 15, 10 S.E.2d 160 (1940) (emphasis added); *see also Callison v. Peeples,* 102 S.C. 256, 86 S.E. 635. In other words, on review the Court will make every reasonable presumption in favor of sustaining the election results and the burden to establish an illegality has occurred is solely on the challenger and the record cannot call for speculation by the Court to make the inferences needed to overturn the election. *Id.*

Throughout the entire protest no documentation of the above allegations was obtained or preserved for appellate review and, likewise, no challenges were made to any votes at Ward 2. It is noteworthy that not a single vote was challenged; that of six people called for testimony in support of the protest, only two, Craig Nesbit and Tyler Wilson, testified to irregularity or illegal conduct directed toward the polls. Only Craig Nesbit testified that he was deprived of entry into Ward 2; and it is remarkable that Mr. Nesbit

voiced no protest at the time and called no immediate attention to the situation until after the choice of the voters was announced. (R. p. 17-18). The showing made in support of the protest is insufficient. In view of the indefiniteness of the evidence, this Court should not find that the evidence supports the protest.

Much of the complaint concerning the conduct in Ward 2 centers about the alleged "closed door". SC Code § 5-15-120 (2013), as amended, reads as follows:

> Immediately upon the closing of the polls at any municipal election, the managers shall count publicly the votes cast and make a statement of the whole number of votes cast in such election together with the number of votes cast for each candidate for mayor and councilman and transmit this information to the municipal election commission.

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011). The statutory language must be construed in light of the intended purpose of the statute. *Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 398 S.C. 124, 727 S.E.2d 418 (S.C., 2012).Throughout the transcript, Protestant Nesbit asserts constitutional violations, but continually fails to show, when and how this is true. *Black's Law Dictionary* defines "immediate" as "present; at once; without delay; not deferred by any interval of time." In this sense, the word, without any very precise signification, denotes that action is or must be taken either instantly or without any considerable loss of time. Blacks Law Dictionary, (10th Ed. 2014).

The return of Ward 2 shows the high voter recipient to be ninety (90). (R. p. 109). Common sense would suggest that it would take a short amount of time to tabulate these ninety (90) votes. The transcript reflects that Mr. Nesbit offers conflicting testimony as to

when he attempted to access the door in question. He asserts it was around 8:30 P.M. (R. p. 72, lines 16-17), and then later suggests it could have only been as early as 7:30 P.M. (R. p. 87, line 24-p. 88, line 1). We must presume it was somewhere in between, but this remains uncertain. What is certain is the time to calculate ninety (90) votes is minimal and the law requires, and the Court must infer that the votes were tabulated immediately and publicly, because the record does not establish otherwise. Speculation and conjecture about the door being closed, jammed or even locked after the counting of these ninety votes is a red herring.

Adverting to the record here, it is patently clear that the evidence relied upon by the MEC falls far short of that required for the invalidation of an election. The evidence rises, at best, to the level of conjecture, speculation, and surmise: no poll manager or poll watcher testified; and the testimony concerning a secret count is totally without substantiation as to either the time of commencement or completion; the testimony concerning inability to gain entry was based upon the subjective and self-serving opinion of the losing candidate; and, finally, no documentation whatsoever of any of the alleged closed door was presented, only the uncorroborated opinions of self serving testimony.

Respondents incorrectly assert that the MEC Order makes the finding that the ballots (Ward 2) were counted in secret. Actually, the MEC held that the "protest grounds as to the doors at Ward 2 being locked during counting does have merit." (Order p. 2). This finding relates solely to the viability of the pleading of the protest, not the factual findings of the hearing as the law requires by written protest. *Gecy v. Bagwell*, 372 S.C. 237, 642 S.E.2d 569 (2007). The MEC Order makes no finding that the ballots

were being counted at the time the witnesses allege they were unable to open the door. (R. p. 11). Further, the MEC Order makes no finding that the ballots were counted in secret. (R. p. 11). Instead, the Order holds "the ballots at Ward 2 were counted behind closed doors, [and] that this irregularity constitutes a constitutional violation." (R. p. 11). The MEC Order concludes and creates the legal proposition that a closed door counting is in fact a constitutional violation. (R. p. 11). There is no finding of secrecy and thus, there cannot be a finding of any act that amounts to a constitutional violation. *McKnight v. Smith*, 182 S.C. 378, 189 S.E. 361 (1937). As such, the Court's finding that a new election is required or even warranted is an error of law. *Id.* The MEC's unwillingness to make this step in finding a valid constitutional violation is emblematic of the lack of evidence supporting Respondents' claims and the inadequacy of the record in this matter. *Taylor v. Town of Atlantic Beach Election Comm.*, 363 S.C. 8, 609 S.E.2d 500 (S.C. 2005). Respondents need this Court to make the inference that the MEC meant to find that the ballots were counted in secret, even though there was no actual finding of secrecy.

Respondents' protest fails because Respondents did not meet their burden to establish a record devoid of only conjecture. Respondents cite two instances where individuals were unable to open the door to Ward 2. (R. p. 71, line 41). Respondents fail to demonstrate that the door in question was the only means of entry into the polling place, that the parties who found the door closed actually attempted to turn the knob, that the ballots were actually being counted when the parties attempted entry, and that various members of the public were not inside the polling place observing the counting. Further, the testimony of those who claim that they were unable to gain admission does not reference any attempt to gain entry, more than simply trying the door and leaving.

Respondent Craig Nesbit's testimony indicates that upon meeting with resistance at the door he left and did not seek admission by the simple act of knocking. (R. p. 71-73). Had Respondent Nesbit knocked or otherwise attempted to contact the workers who may or may not have been counting the ballots, many of the unanswered questions, necessary to determine if the ballots were counted in secret, would have undoubtedly been answered. All of this is where the challengers failed to meet their burden as required. *Trapp v. S.C. Bd. of State Canvassers,* 255 S.E.2d 670, 273 S.C. 163 (S.C., 1979). Because these issues were not properly raised at the hearing before the MEC, we are only left to guess at what actually happened on the day of the election when Respondents claim they were barred from entry.

II. THERE MUST BE A SHOWING THAT AN IRREGULARITY OCCURRED IN AN ELECTION THAT RENDERED THE ELECTION DOUBTFUL IN ORDER TO OVERTURN THE ELECTION.

"Errors which do not appear to have affected the result will not be allowed to overturn an election, and every reasonable presumption will be indulged to sustain it." *Hyde v. Logan*, 113 S.C. 64, 101 S.E. 41, 44. *Smoak v. Rhodes*, 201 S.C. 237, 22 S.E.2d 685 (S.C., 1942) *Harrell v. City of Columbia,* 216 S.C. 346, 58 S.E.2d 91. With particular reference to irregularities in the form of ballot in such a case as this, see 18 Am.Jur. 298, sec. 180, Elections, Submission of Propositions, and authorities cited in the footnotes; and 29 C.J.S., Elections, § 173 a (2), p. 251, Submission of questions or propositions. *Bolt v. Cobb*, 225 S.C. 408, 82 S.E.2d 789 (S.C., 1954)

Respondents rely on the South Carolina Supreme Court's ruling in *McKnight*. In *McKnight,* the South Carolina Supreme Court addressed the issue of what constitutes a

secret ballot. *McKnight v. Smith* 189 S.E. 361 (S.C. 1937). In that case, a deputy sheriff testified that he barred the door by use of a "night latch." *Id.* The same deputy sheriff further testified that multiple parties knocked either at the doors or the windows of the precinct and that their attempts to gain admission were ignored. Additionally, the deputy testified that only two individuals other than the poll workers were present during the counting. Finally the Court found:

> Only six persons were on the inside and saw the votes counted: The managers, a deputy sheriff, and one other. The door to the building was closed and securely fastened on the inside, and no other persons, either voters or watchers, were permitted to enter the polling place at the time, although it appears that some sought to do so. By no process of reasoning, however ingenious, can it be said that this was a substantial compliance with the law.

Id. The immediate case is easily distinguishable from *McKnight* and such distinguishing differences go far beyond the semantic distinction between a locked door and a stuck door, as suggested by the Respondents in their Brief. First, in *McKnight* there were multiple witnesses who testified not only to the fact that the door was intentionally and actually locked, but also that multiple parties who sought admission were intentionally denied the same by those inside. Here, the only evidence supporting a finding that the ballots were counted in secret is the testimony from respondent and his friend that they could not open the door. Neither witness testified that they otherwise sought admission. Next, in *McKnight* the record was clear that the ballots were being counted during the time that the public was denied admission. No such finding was made here and no such finding could be sustained by the record. In *McKnight*, at most, two individuals other than the poll workers were present for the counting. Here no such finding can be made due to

the insufficient record created by the Respondents, which goes against the Respondents position and in favor of sustaining the vote of the people of Bishopville.

Both witnesses who testified that they were unable to enter Ward 2 were unable to state with certainty at what time they attempted to access Ward 2. Their testimony only indicates that it was after the polls closed at 7:00 pm. Additionally, no sworn testimony was admitted which indicates when the workers at Ward 2 finalized their vote count. Respondents were free to compel the testimony of any witnesses. However, they failed to call a single worker from Ward 2. In short, Respondents failed to show that the door was in fact locked, they did not present evidence supporting that the votes were actually being counted when they approached the door, and they failed to show that there were not members of the public present during the counting. Instead, they provided some evidence that two individuals, one of whom is a Respondent herein, may have been unable to open a door, that it may have occurred during the vote counting, and that had they bothered to actually seek entry to the polling place, they may not have been allowed to enter. Respondent Nesbit, being a current member of city counsel, and with the door being known to stick, created a contestable issue. This is the same Ward 2 used when Respondent Nesbit was initially elected.

The MEC's Order here found only that the ballots were counted behind closed doors. (R. p. 11). The necessary finding to overturn an election is not that votes were counted with doors closed, or even with doors locked, but rather <u>in secret</u>. *See McKnight*. A closed door does not amount to the counting of ballots in secret. Article 1, Section 2 of the South Carolina Constitution requires that "elections shall never be held where the

ballots are counted in secret." The first burden that Respondents must overcome is proving that at the time they were allegedly denied access the ballots were being counted. This is a relatively simple task. Respondents were free to call any of a number of poll workers or managers whom could have testified to the counting process and when it was completed. However, Respondents failed to call any such witnesses. Again, failing to create the record of which is the challengers duty. *Taylor v. Town of Atlantic Beach Election Comm.*, 363 S.C. 8, 609 S.E.2d 500 (S.C. 2005).

As a result of this oversight the record does not clearly indicate that the ballots were being counted when the door was allegedly closed. The next hurdle that Respondents most overcome is proving that the ballots were counted in "secret." Again, because of Respondent's failure to call any poll workers or managers as witnesses it is unclear the number present during the counting of the ballots. From the record, it is more likely that most of the citizenry of Bishopville personally witnessed the counting of the ballots, as that they were counted by poll workers and managers behind barred doors. The South Carolina Supreme Court has recognized that while preventing corruption is "imperative to the very survival of the republic, it is equally essential that . . . a documented record be established upon which alleged wrongdoing may receive appellate review." *Fielding v. South Carolina Election Commission*, 408 S.E.2d 232, 305 S.C. 313 (S.C. 1991). Here, no such Record exists. It is important to note that as *Fielding* places the burden of establishing the record on the challenger *Trapp* and its progeny place a strong legal and factual presumption in favor of sustaining a contested election. *Taylor v. Town of Atlantic Beach Election Comm.*, 363 S.C. 8, 609 S.E.2d 500 (S.C. 2005).

Fielding v. S.C. Election Comm'n, 305 S.C. 313, 317, 408 S.E.2d 232, 234 (1991). *Trapp v. S.C. Bd. of State Canvassers,* 255 S.E.2d 670, 273 S.C. 163 (S.C., 1979).

The South Carolina Supreme Court in *Trapp* held "that all reasonable inferences must be drawn in favor of the validity of the contested election." *Id.* The MEC failed to do so. Evidence was presented which indicates that the door to Ward 2 would not open after the polls closed. In the alternative, evidence was presented that the door in question is difficult to open. No evidence was presented which indicates when the workers at Ward 2 finished counting the ballots and no evidence was offered indicating that various members of the public at large were not present during the counting or that the door was locked at all. The mandate in *Trapp* requires that the MEC infer that the door to Ward 2 was not locked, that the count was complete when Mr. Nesbit and Mr. Wilson attempted to enter the polling place, and that other members of the public were able to observe the count. *Trapp v. S.C. Bd. of State Canvassers,* 255 S.E.2d 670, 273 S.C. 163 (S.C., 1979). Had the MEC properly applied these inferences, they could not have found a constitutional violation.

Appellants contend, as discussed more fully above, that Respondents failed to meet their burden of proving that a constitutional violation occurred. Additionally, Respondents' assertion that any constitutional violation, regardless of how insignificant it may be, warrants a new election is simply incorrect. The South Carolina Supreme Court, in its holding in *Taylor,* found a constitutional violation of at least sixteen voters' right to cast a secret ballot. The voter's right to a secret ballot is enshrined in Article II, Section 1 of the South Carolina Constitution along with the requirement of public counting, which

is at issue here. However, the Court held that such a violation was not systemic and accordingly, did not "[g]ive rise to a constitutional violation sufficient to set aside the election results." *Taylor v. Town of Atlantic Beach Election Comm.*, 363 S.C. 8, 609 S.E. 2d 500 (S.C. 2005). Respondents' claimed inability to access the polling place after the winners of the election were announced and after they learned that the citizens of Bishopville did not elect them to their town counsel, without more, amounts to an insignificant irregularity of the kind illustrated therein. *Id.*

There is no doubt that the people may be disenfranchised by irregularities and constitutional violations in elections. However, this risk is just as great if those who protest elections are allowed to succeed without carrying the necessary burden. Allowing the ruling of the MEC to stand would disenfranchise the citizens of Bishopville in favor of the unsubstantiated claims of two candidates.

CONCLUSION

Based upon the foregoing arguments 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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April 12, 2016
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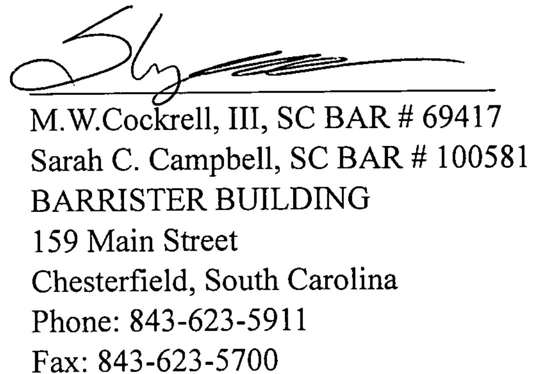
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply 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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