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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas
Brian Gibbons, Circuit Court Judge

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Appellate Case No. 2017-000423
Case No. 2016-CP-29-1418

Jackie Harris .... Appellant,

v.

Lancaster County Election Commission, Lancaster Municipal Election Commission, and Linda Blackmon-Brace .... Respondents.

FINAL BRIEF OF RESPONDENT LINDA BLACKMON-BRACE

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TABLE OF CONTENTS

Table of Authorities ii

Counterstatement of Issues on Appeal 1

Counterstatement of the Case 2

Standard of Review 3

Argument 5

Conclusion 34

TABLE OF AUTHORITIES

Cases

Bayne v. Bass, 302 S.C. 208, 394 S.E.2d 726 (Ct. App. 1990) 7

Berry v. Spigner, 226 S.C. 183, 84 S.E.2d 381 (1954) 4, 23

Boyle v. McCown, 97 S.C. 15, 81 S.E. 310 (1914) 8, 16, 18

Butler v. Town of Edgefield, 328 S.C. 238, 493 S.E.2d 838 (1997) 16, 32

Cole v. Town of Atl. Beach Election Comm'n, 393 S.C. 264, 712 S.E.2d 440 (2011) 14, 19, 30

First Union Nat'l Bank of S.C. v. Hitman, Inc., 306 S.C. 327, 411 S.E.2d 681 (Ct. App. 1991) 7

Gecy v. Bagwell, 372 S.C. 237, 642 S.E.2d 569 (2007) 3, 30

George v. Mun. Election Comm'n of City of Charleston, 335 S.C. 182, 516 S.E.2d 206 (1999) 5, 30

Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 698 S.E.2d 612 (2010) 6, 7

Home Med. Sys., Inc. v. S.C. Dep't of Revenue, 382 S.C. 556, 677 S.E.2d 582 (2009) 5, 6

I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) 5, 6, 7, 8, 32

In re Amir X.S., 371 S.C. 380, 639 S.E.2d 144 (2006) 22

In re Nov. 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 686 S.E.2d 683 (2009) . 4, 14, 19, 20, 23, 32

Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999) 21

Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 564 S.E.2d 322 (2001) 6

Keyserling v. Beasley, 322 S.C. 83, 470 S.E.2d 100 (1999) 20

Knight v. State Bd. of Canvassers, 297 S.C. 55, 374 S.E.2d 685 (1988) 4, 29

Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 656 S.E.2d 346 (2008) 15, 18

Lee v. Clark, 224 S.C. 138, 77 S.E.2d 485 (1953) 13

Matthews v. Eldridge, 424 U.S. 319, 334 (1976) 15

May v. Wilson, 199 S.C. 354, 19 S.E.2d 467 (1942) 4, 29

Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008) 15

Rothschild v. Richland Cty. Bd. of Adjustment, 309 S.C. 194, 420 S.E.2d 853 (1992) 13

S.C. Dep't of Labor, Licensing & Regulation v. Girgis, 332 S.C. 162, 503 S.E.2d 490 (Ct. App. 1998) 8

S.C. Dep't of Soc. Servs. v. Wilson, 352 S.C. 445, 574 S.E.2d 730 (2002) 15

S.C. Dep't of Transp. v. M&T Enters. of Mount Pleasant, LLC, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008) 5,6

Schnellmann v. Roettger, 373 S.C. 379, 645 S.E.2d 239 (2007) 25

Segars-Andrews v. Judicial Merit Selection Comm'n, 387 S.C. 109, 691 S.E.2d 453 (2010) 21

Smith v. Scioto Cty. Bd. of Elections, 918 N.E.2d 131, 133 (Ohio 2009) 11

State ex rel. Howell v. State Bd. of Canvassers, 101 S.C. 513, 86 S.E. 81 (1915) 8, 16, 18, 23

State v. Cottingham, 224 S.C. 181, 77 S.E.2d 897 (1953) 11

State v. Legg, 416 S.C. 9, 785 S.E.2d 369 (2016) 13, 15

Taylor v. Town of Atl. Beach Election Comm'n, 363 S.C. 8, 609 S.E.2d 500 (2005) 4, 23, 25, 26, 28, 29

Town of Hilton Head Island v. Kigre, Inc., 408 S.C. 647, 760 S.E.2d 103 (2014) 20

Trotter v. Trane Coil Factory, 393 S.C. 637, 714 S.E.2d 289 (2011) 8, 13

Statutes

S.C. Code Ann. § 5-15-20 (2004) 7

S.C. Code Ann. § 5-15-120 (2004) 34

S.C. Code Ann. § 5-15-130 (2004) 11, 14, 16, 18

S.C. Code Ann. § 5-15-140 (2004) 14, 18

S.C. Code Ann. § 5-15-145(A) (2004) 2, 14

S.C. Code Ann. § 7-15-330 (Supp. 2016) 7, 9, 17, 26, 28

S.C. Code Ann. § 7-15-340 (2004 & Supp. 2016)........ 28

S.C. Code Ann. § 7-15-380 (2004 & Supp. 2016)........ 29

S.C. Code Ann. § 7-15-385 (Supp. 2016)........ 29

S.C. Code Ann. § 7-5-610 (1976 & Supp. 2016)........ 7, 27

S.C. Code Ann. § 7-5-620 (1976 & Supp. 2016)........ 7, 27

S.C. CONST. art. I, § 3 15

S.C. CONST. art. II, § 10 14

U.S. CONST. amend. XIV, § 1 15

Other Authorities

17 C.J.S. Continuances § 5 (2011)........ 8

26 AM. JUR. 2D Elections § 434 (1996) 32

Lancaster County, S.C., Code of Ordinances § 8-43(a) (2016)........ 12

Rules

Rule 203(d)(1)(iv), SCACR........ 3

Rule 208(b)(1)(C), SCACR 2

Rule 208(b)(2), SCACR........ 2

Rule 210(h), SCACR 3

Rule 45(b)(1), SCRCP 9

Rule 45(c)(3)(A), SCRCP 10

Rule 802, SCRE........ 10

Opinions

Retail Servs. & Sys., Inc v. S.C. Dep't of Revenue, Op. No. 27709 (S.C. Sup. Ct. filed Mar. 29, 2017) (Shearouse Adv. Sh. No. 13) 21

Dictionary

BLACK'S LAW DICTIONARY (10th ed. 2014) 25

COUNTERSTATEMENT OF ISSUES ON APPEAL

I. As a threshold matter, given that Appellant failed to file a Rule 59(e), SCRCP, motion to alter or amend judgment with the circuit court, are all the issues raised in her brief properly before this Court?

II. Did the circuit court properly find the Lancaster County Election Commission did not abuse its discretion in denying Appellant's motion for a continuance?

III. Did the circuit court properly conclude the protest hearing before the Lancaster County Election Commission satisfied the parties' procedural due process rights?

IV. Did the circuit court, sitting in its appellate capacity, apply the appropriate standard of review in affirming the decision of the Lancaster County Election Commission?

COUNTERSTATEMENT OF THE CASE[1]

This appeal stems from a protest of the November 8, 2016, election results for Lancaster City Council District Three. (See R. pp. 9–11). Jackie Harris (Appellant), the incumbent for the District Three seat, filed the protest on November 10, 2016, after losing the election by forty-six votes to Linda Blackmon-Brace (Respondent). (R. p. 7). In the District Three election, Respondent received 281 votes and Appellant received 235 out of a total of 518 votes cast. Id. In her written notice of protest, Appellant raised numerous grounds on which she wished to challenge the election results. (See R. pp. 9–11).

After the parties were given notice, the Lancaster County Election Commission[2] (the Commission) held a hearing on Appellant's protest at 2:30 P.M. on November 11, 2016. (R. p. 7). The following members of the Commission were present: Rick Crimminger, Elvira Faulkner McIlwain, and Marshall Benson. (See R. p. 8). At the start of the hearing, Appellant moved for a continuance, arguing she did not have enough time to prepare her protest. (R. p. 19). After lengthy discussion, the Commission denied her motion. (R. pp. 19–28). Appellant was represented by counsel. (See R. p. 18). During the three hour hearing, Appellant's attorney gave lengthy opening and closing remarks; offered nine exhibits totaling approximately 187 pages into evidence; presented, questioned, and cross-examined multiple witnesses; and Appellant testified before the Commission. (R. pp. 18–75, 89–91, 95–98, 100–03, 109–11, 116–17). Respondent, who appeared pro se, then presented her defense. (R. pp. 75–88, 91–95, 105–08, 111–16). At

[1] Respondent respectfully could not adopt Appellant's statement of the case as written. See Rule 208(b)(1)(C), SCACR (providing that the appellant's "statement [of the case] shall not contain contested matters"); Rule 208(b)(2), SCACR (noting "that a statement . . . of the case need not be made unless the respondent is dissatisfied with the statement . . . of the case by appellant").

[2] By way of background, Lancaster County has assumed the administrative responsibility of voter registration and elections for the City of Lancaster for years. See S.C. Code Ann. § 5-15-145(A) (2004) (providing that "[m]unicipalities are authorized to transfer authority for conducting municipal elections to the county elections commission").

the conclusion of the hearing, the Commission voted unanimously to deny Appellant's protest, finding that the evidence presented during the hearing, even if truthful in all respects, was insufficient to invalidate the certified results of the election. (R. p. 117–23). The Commission entered a written order detailing its findings on November 24, 2016. (R. pp. 7–8).

Appellant filed a notice of appeal to the circuit court on December 9, 2016. (R. p. 2). Although Respondent filed a motion to dismiss for improper service on January 13, 2017, she later withdrew the motion. Id. The circuit court heard arguments on the merits at a hearing on February 2, 2017, and issued an order affirming the decision of the Commission on February 15, 2017. (R. pp. 164–207; R. pp. 1–6). In its order, the circuit court concluded (1) the Commission did not abuse its discretion in denying Appellant's motion for a continuance and (2) the protest hearing before the Commission satisfied the parties' procedural due process rights. (R. pp. 4–5). This appeal followed. See Rule 203(d)(1)(iv), SCACR (noting this Court has exclusive jurisdiction to hear appeals from "[a]ny final judgment from the circuit court pertaining to elections and election procedure").[3]

STANDARD OF REVIEW

"In municipal election cases, [the Court] review[s] the judgment of the circuit court upholding or overturning the decision of a municipal election commission to correct errors of law." Gecy v. Bagwell, 372 S.C. 237, 241, 642 S.E.2d 569, 571 (2007) (per curiam). This "review does not extend to findings of fact unless those findings are wholly unsupported by the

[3] Respondent takes issue with many of Appellant's characterizations and insinuations throughout her eight-page Statement of Facts in her brief. App. Br. at 3–10. Appellant is not permitted to go outside the record on appeal and raise new "facts" that were not before the Commission. See Rule 210(h), SCACR (stating "the appellate court will not consider any fact which does not appear in the Record on Appeal"). Because the only issues before the Court are questions of law concerning the procedure of the protest hearing, Respondent declines to respond to each allegation raised in Appellant's Statement of Facts. As explained in greater detail below, the vast majority of her Statement of Facts concerns legal matters that are not preserved for appellate review.

evidence." Taylor v. Town of Atl. Beach Election Comm'n, 363 S.C. 8, 12, 609 S.E.2d 500, 502 (2005); see also In re Nov. 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 636, 686 S.E.2d 683, 685 (2009) (asserting that the court "will not overturn findings of fact unless those findings are wholly unsupported by the evidence"). Moreover, it is well settled that "[e]rrors 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." Berry v. Spigner, 226 S.C. 183, 189, 84 S.E.2d 381, 384 (1954).

> There is absolute unanimity in the decisions of this court and elsewhere[] that, in the absence of fraud, it is incumbent upon a contestant to show, not only that there were irregularities or illegalities in the conduct of an election, but that such irregularities or illegalities were either such as to produce an erroneous result or leave that question in doubt. But . . . whe[n] an election can be purged of such improper votes, and it is demonstrated that the result is the same as if they had not been cast, the election will not be disturbed.

May v. Wilson, 199 S.C. 354, 361, 19 S.E.2d 467, 471 (1942).

This Court "will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful." Taylor, 363 S.C. at 13, 609 S.E.2d at 502. "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." Id. When reviewing "the procedures for submitting and counting absentee ballots" in an election protest, this Court has squarely rejected the invitation to apply a "strict scrutiny standard," concluding that the "General Assembly has specified that statutes concerning absentee registration and absentee voting shall be liberally construed." Knight v. State Bd. of Canvassers, 297 S.C. 55, 57, 374 S.E.2d 685, 686 (1988) (per curiam). "This Court, like many others, recognizes that perfect compliance in every instance is unlikely, and the Court is loathe to nullify

an election based on minor violations and technical requirements." George v. Mun. Election Comm'n of City of Charleston, 335 S.C. 182, 186, 516 S.E.2d 206, 208 (1999).

Having set forth the lens through which the Court must analyze this municipal election protest, Respondent now proceeds to the issues that properly are before the Court with these principles in mind.

ARGUMENT

I. Appellant's issues are not preserved for appellate review because she failed to file a Rule 59(e), SCRCP, motion to alter or amend the judgment of the circuit court.

As a threshold matter, several of the issues and arguments raised in Appellant's brief are not preserved for appellate review.

"It is well settled that an issue must have been raised to and ruled upon by the [circuit] court to be preserved for appellate review." S.C. Dep't of Transp. v. M&T Enters. of Mount Pleasant, LLC, 379 S.C. 645, 658, 667 S.E.2d 7, 14 (Ct. App. 2008). Under our preservation rules, a "losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." Id.

"Although a Rule 59(e)[, SCRCP,] motion may effectively seek a reconsideration of issues and arguments, this type motion is often required for issue preservation purposes." Home Med. Sys., Inc. v. S.C. Dep't of Revenue, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009). Indeed, this Court has long recognized that "[a]n appellate court may not . . . reverse for any reason appearing in the record." I'On, LLC, 338 S.C. at 421–22, 526 S.E.2d at 724. "[T]he

circuit court has the authority to hear motions to alter or amend when it sits in an appellate capacity and such motions are required to preserve issues for appeal when the circuit court fails to rule on an issue." Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 22 n.11, 698 S.E.2d 612, 623 n.11 (2010). "Put simply, Rule 59(e) motions serve a vital purpose for proper issue preservation." Home Med. Sys., Inc., 382 S.C. at 562, 677 S.E.2d at 586.

> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

I'On, LLC, 338 S.C. at 422, 526 S.E.2d at 724.

Thus, when a "losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment . . . to preserve the issue for appellate review." I'On, LLC, 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added). "Without an initial ruling by the [circuit] court, a reviewing court simply would not be able to evaluate whether the [circuit] court committed error." M&T Enters., 379 S.C. at 658–59, 667 S.E.2d at 15; see also Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) (stating the appellant has "the responsibility to identify errors on appeal, not the Court").

In the instant case, Appellant failed to afford the circuit court an opportunity to reconsider the issues upon which it ruled or rule upon the issues the court did not address in its order. Instead of first filing a Rule 59(e) motion to give the circuit court a chance to review its order and correct any perceived errors, Appellant immediately filed a notice of appeal with this Court. As the Court clarified in Hill, even when the circuit court is sitting in its appellate capacity, a party must file a motion to alter or amend to preserve issues for appellate review. 389

S.C. at 22 n.11, 698 S.E.2d at 623 n.11. In its February 15, 2017 order, the only issues upon which the circuit court ruled were (1) whether the Commission erred in denying the motion for a continuance and (2) whether section 5-15-130 affords procedural due process to the parties in a contested municipal election. (R. pp. 4–5).

The circuit court, however, did not discuss in its order[4] the following issues Appellant seeks to raise on appeal: (1) whether Respondent's legal residence was within Lancaster City Council District Three at the time of the election per section 5-15-20 of the South Carolina Code (2004), (2) whether Respondent allegedly completed paper absentee ballot applications for others in violation of section 7-15-330 of the South Carolina Code (Supp. 2016), and (3) whether individuals who voted for Respondent via paper absentee ballot violated sections 7-5-610 and 7-5-620 of the South Carolina Code (1976 & Supp. 2016). In the absence of a ruling, it was incumbent upon Appellant—the losing party—to file a motion to alter or amend and ask the circuit court to pass upon these issues. At the hearing, Appellant clarified that "[a]ll of [her] arguments are based on errors of law." (R. p. 174). Because Appellant failed to file a Rule 59(e) motion to give the judge the opportunity to correct or rule upon any of these perceived errors of law, the above-mentioned issues are not preserved for appellate review. See S.C. Dep't of Labor, Licensing & Regulation v. Girgis, 332 S.C. 162, 170 n.1, 503 S.E.2d 490, 494 n.1 (Ct.

[4] Throughout Appellant's brief, she uses several oral statements of members of the Commission and the circuit court as examples of how the Commission and, later, the circuit court erred in ruling upon certain issues. The oral statements of the commissioners and the circuit court did not constitute final rulings. See, e.g., I'On, LLC, 338 S.C. at 421–22, 526 S.E.2d at 724 (stating "[a]n appellate court may not . . . reverse for any reason appearing in the record"); First Union Nat'l Bank of S.C. v. Hitman, Inc., 306 S.C. 327, 329, 411 S.E.2d 681, 682 (Ct. App. 1991) ("No order is final until it is written and entered. Until written and entered, the trial judge retains the discretion to change his mind and amend his oral ruling accordingly." (internal citations omitted)); Bayne v. Bass, 302 S.C. 208, 210, 394 S.E.2d 726, 727 (Ct. App. 1990) (concluding that an oral ruling "is not a final ruling on the merits nor is it binding on the parties until it has been reduced to writing, signed by the [j]udge[,] and delivered for recordation"). To the extent Appellant felt the Commission erred in making certain statements, or the circuit court's order was based upon faulty reasoning, she was required to bring these issues to the circuit court's attention in a Rule 59(e) motion and obtain a ruling. Because Appellant failed to do so, the only issues before this Court are those that were addressed in the final written order of the circuit court.

App. 1998) (holding that, although the appellant raised an issue "at all appropriate times below, th[e] issue was never ruled on by either the Board, the Administrative Law Judge, or the Circuit Court Judge" and, therefore, it was "not preserved for review"); I'On, LLC, 338 S.C. at 421–22, 526 S.E.2d at 724 (stating "[a]n appellate court may not . . . reverse for any reason appearing in the record").

Accordingly, the only issues properly before the Court on appeal are those pertaining to the motion for a continuance and procedural due process.

II. The circuit court properly concluded the Commission did not abuse its discretion in denying Appellant's motion for a continuance.

Turning to the merits, Appellant first contends the circuit court erred in finding the Commission acted within its discretion in denying her motion for a continuance, arguing the Commission did not afford her enough time to prepare her election protest.

The decision of whether to grant a motion for a continuance is addressed to the sound discretion of the election commission and will only be reversed on appeal for an abuse of discretion. See State ex rel. Howell v. State Bd. of Canvassers, 101 S.C. 513, 515, 86 S.E. 81, 81 (1915). "A tribunal necessarily exercises wide discretion in managing a case, and decisions denying a request for a continuance are 'rarely' overturned." Trotter v. Trane Coil Factory, 393 S.C. 637, 650, 714 S.E.2d 289, 295 (2011). "Every reasonable presumption in favor of a proper exercise of the [tribunal's] discretion will be made." Id. (quoting 17 C.J.S. Continuances § 5 (2011)). Our courts have long recognized that "[t]he law requires more than ordinary diligence on the part of those who . . . contest an election." State ex rel. Howell, 101 S.C. at 515, 86 S.E. at 81 (quoting Boyle v. McCown, 97 S.C. 15, 19, 81 S.E. 310, 311 (1914)). A review of the record, however, demonstrates Appellant acted with mere "ordinary diligence" in seeking to prove her case before the Commission.

Appellant's main argument as to why she did not have enough time to prepare her case centers on the fact that she did not receive a response to her subpoena request and was unable to subpoena witnesses. Nevertheless, the statute provided that all absentee ballot information Appellant sought became a matter of public record at 9:00 A.M. the Monday prior to the election. See S.C. Code Ann. § 7-15-330 (providing that "[t]he board of registration and elections shall serially number each absentee ballot application form and keep a record book in which must be recorded the number of the form, the name, home address, and absentee mailing address of the person for whom the absentee ballot is requested; the name, address, voter registration number, and relationship of the person requesting the form, if other than the applicant; the date upon which the form is requested; and the date upon which the form is issued," and "[t]his information becomes a public record a 9:00 a.m. on the day immediately preceding the election" (emphasis added)). In other words, subpoenas were not necessary for obtaining information concerning absentee ballots. The statutes governing municipal election protests also do not require that Appellant be afforded time to issue subpoenas.

Moreover, it was unreasonable for Appellant to have relied upon the South Carolina Rules of Civil Procedure regarding subpoenas in the municipal election protest setting because she could not have possibly given Respondent ten days' notice or expected the Lancaster County Voter Registration Department to comply with a subpoena request within forty-eight hours of service. See Rule 45(b)(1), SCRCP ("Unless otherwise ordered by the court, prior notice in writing of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b) at least 10 days before the time specified for compliance."); Rule 45(c)(3)(A), SCRCP (stating the court "shall quash or modify the subpoena if it . . . fails to allow a reasonable time for compliance"). Appellant has

failed to cite any relevant statute, ordinance, or case law to support her proposition that "the law allowed for discovery and the issuance of subpoenas." Contrary to her assertions, the rules of civil procedure governing subpoenas were simply not applicable to this municipal election protest.

Additionally, Appellant had longer than forty-eight hours, three hours, or even fifteen minutes to gather evidence in support of her theory for overturning the results of the November 8, 2016, election. The written protest, on its face, shows Appellant had plenty of time to write a lengthy notice of protest with some very specific allegations.[5] Given the nature of the allegations in her protest, it is somewhat difficult to believe that Appellant had no knowledge of the alleged absentee ballot application irregularities prior to the date of the hearing. Indeed, Appellant's own testimony refutes this contention. During the hearing, Appellant confirmed that she learned of the information about which she complained through "contacts made to [her], getting ready for the election, going out and meeting with voters." (R. p. 60). When asked whether, "before the election," she "encounter[ed] people who talked to [her] about absentee balloting," Appellant replied, "Yes, I did." (R. p. 61). Further, if all the folks Appellant mentioned at the hearing, via hearsay testimony,[6] were calling her prior to the election and in the days following the election to report the alleged irregularities, then Appellant should have enlisted their help and asked them to be prepared to testify.

[5] For instance, Appellant alleged that one "voter was given a bribe to vote in the election," one "voter indicated that . . . [Respondent] gave him a paper absentee ballot and told him to vote for President and she would fill out the rest," and "two votes were cast by the same person." (R. p. 10 ¶¶ 3, 4, 7). Notably, she failed to prove any of these allegations at the hearing. The alleged bribe was never even brought up. The man who only voted for President was not present to corroborate her account. And Appellant failed to show that any individual voted twice.

[6] See Rule 802, SCRE (providing that "[h]earsay is not admissible," unless an exception applies). As one commissioner cogently noted during the protest hearing, almost all of Appellant's "evidence" of irregularities—particularly those concerning Velmar Izzard's change of address and the gentleman who "only voted for president"—came in the form of hearsay testimony.

As noted above, Appellant did not need to subpoena records because, pursuant to the statute, the absentee ballots were available at 9:00 A.M. on Monday prior to the election. She likewise erred in trying to subpoena witnesses to appear for a hearing she knew, as a matter of law, had to be held within forty-eight hours. See S.C. Code Ann. § 5-15-130 (2004). Either way, Appellant's arguments are unavailing because she knew of these purported irregularities prior to the election and did nothing to act upon them until after she lost. See, e.g., Smith v. Scioto Cty. Bd. of Elections, 918 N.E.2d 131, 133 (Ohio 2009) ("Laches may bar an action for relief in an election-related matter if the persons seeking this relief fail to act with the requisite diligence."); id. at 134 (holding that "[t]he alleged irregularity . . . [was] not so substantial that relators should be permitted to sleep on their rights until after an adverse election result," and "they should have raised their claims in a pre-election protest or proceeding rather than in a postelection contest").

Turning to the legal grounds upon which Appellant purportedly relies to argue the Commission erred in denying her motion for a continuance, Appellant does not fare any better. First, Appellant's argument that the Commission should have moved the hearing to Monday, November 11, 2016, to comport with the time calculation set forth in Rule 6, SCRCP, is without merit. Rule 6 is irrelevant in this case because a specific statute setting forth a time requirement trumps a general procedural court rule. See, e.g., State v. Cottingham, 224 S.C. 181, 187, 77 S.E.2d 897, 900 (1953) ("Statutes override rules of court, if in conflict."). Title 5 set forth a very specific procedure for conducting municipal election protests. Under that scheme, section 5-15-130 required the Commission to hold the protest within forty-eight hours. The statute left no procedural out for holidays and weekends, and Appellant's attempt to read a conflicting court rule into the statute's mandatory 48-hour timeframe is unavailing.

Second, Appellant's quote of the Lancaster City Ordinance leaves out the most important part for purposes of the notice issue. The ordinance, in full, provides that "[w]ithin forty-eight hours after the filing of such notice, the municipal election commission shall, after due notice to the parties concerned, conduct a hearing on the contest." Lancaster County, S.C., Code of Ordinances § 8-43(a) (2016) (emphasis added). Thus, not only did section 5-15-130 put Appellant on notice that the hearing had to be held within 48 hours, but the city ordinance upon which she relies tracked the language of the statute and included the same notice requirement.

Finally, Respondent wishes to address the extent to which the Commission's order gave the impression that Appellant's motion for a continuance was "not even considered," a point she reiterates several times in her brief. Simply put, the Commission's order does not square up with the protest hearing transcript or the reasons offered at the hearing before the circuit court. (See R. pp. 26–27; R. p. 189). A review of the record reveals that the Commission members held the hearing at the specific time they did—within the 48 hours required by law as confirmed by the South Carolina State Election Commission—at least in part due to conflicting schedules. (See R. p. 189). In other words, it appears they held the protest hearing at the only time the members could establish a quorum within the 48-hour statutory timeframe. See id. Also, denying a motion is simply not the same as not even considering it, and Respondent would submit that the confusion surrounding this language stems from nothing more than inartful drafting. That said, the Commission members, through the County Attorney, have made it clear throughout the record that they do not like the statute that requires them to hold a hearing within 48 hours. Fair enough. But their opinion on the statute is irrelevant. The statute says what it says. Further, the Commission can cast blame on the State Election Commission all it wants, but the State Election Commission was simply following the law in offering its interpretation that the hearing had to be

held within forty-eight hours and the Commission had to rule upon the protest at the end of the hearing. Regardless, it is not the Commission's fault that Appellant did not gather evidence for her case in an expeditious manner, and the Commission acted within its discretion in denying her an additional opportunity to do so.

In short, the Court should not disturb the Commission's ruling on Appellant's motion for a continuance because she has failed to show the denial of her motion was based upon an error of law or amounted to an abuse of discretion. See Trotter, 393 S.C. at 650, 714 S.E.2d at 295 ("A tribunal necessarily exercises wide discretion in managing a case, and decisions denying a request for a continuance are 'rarely' overturned.").

III. The election commission's protest hearing was held in accordance with the law and did not violate Appellant's procedural due process rights.

Appellant appears to contend that the statute pursuant to which the Commission conducted the municipal election protest hearing violated her procedural due process rights.[7]

The South Carolina Constitution vests the authority to regulate elections and election contests in this state with the General Assembly:

> The General Assembly shall provide for the nomination of candidates, regulate the time, place and manner of elections, provide for the administration of elections and for absentee voting, insure secrecy of voting, establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process.

[7] Initially, Respondent would submit that the more appropriate avenue for challenging the constitutionality of a statute would be via a declaratory judgment action filed in circuit court, not in an election protest hearing before the Commission. See generally Lee v. Clark, 224 S.C. 138, 143, 77 S.E.2d 485, 487 (1953) (stating "the determination of the constitutionality of a statute is a proper subject of judicial decision by declaratory judgment"). Respondent cannot determine whether Appellant is mounting a facial challenge to section 5-15-130 or arguing the statute, as applied, violates her procedural due process rights. See State v. Legg, 416 S.C. 9, 13–14, 785 S.E.2d 369, 371 (2016) (stating "[a] facial challenge is an attack on the statute itself as opposed to a particular application"). Regardless of the nature of the challenge, Appellant must overcome the presumption that the statute is constitutional and prove its unconstitutionality is clear and beyond a reasonable doubt. See Rothschild v. Richland Cty. Bd. of Adjustment, 309 S.C. 194, 198, 420 S.E.2d 853, 856 (1992).

S.C. CONST. art. II, § 10. Acting pursuant to this grant of authority, the General Assembly enacted laws governing the manner in which municipal election protests are conducted. The statutes within this scheme provide that municipal election disputes traditionally are adjudicated by municipal election commissions and appeals are heard by the circuit court. S.C. Code Ann. § 5-15-130; S.C. Code Ann. § 5-15-140 (2004).

Nevertheless, "municipalities that choose not to establish their own election commissions" have the authority "to transfer the authority to conduct their municipal elections to the county election commission." In re Bluffton Town Council Election, 385 S.C. at 637, 686 S.E.2d at 686 (citing S.C. Code Ann. § 5-15-145(A)). In the situation of a transfer of authority, as is the case here, the Court has held "the proper appellate court for any petitioner seeking review of a county board's decision made pursuant to a transfer of authority from a municipality is the circuit court." Id. at 640, 686 S.E.2d at 688. In any event, the procedures for a municipal election protest hearing conducted by a county election commission remain the same:

> Section 5-15-130 requires the municipal election commission to take a number of actions within forty-eight hours of the candidates filing protests—conduct a hearing, decide the issues, file a report that includes the transcribed testimony and exhibits with the county clerk, notify the parties of the decision, and order a new election, if necessary.

Cole v. Town of Atl. Beach Election Comm'n, 393 S.C. 264, 274, 712 S.E.2d 440, 446 (2011). As the Court noted in Cole, "the main purpose of this law is to expeditiously finalize protested municipal elections in the interest of realizing the voters' will and seamlessly transitioning governmental offices." Id. Notwithstanding these sound policy considerations, Appellant contends the process for contesting municipal elections violates her procedural due process rights.

Both the U.S. Constitution and the South Carolina Constitution guarantee that "[n]o person shall be deprived of life, liberty, or property without due process of law." Moore v. Moore, 376 S.C. 467, 472, 657 S.E.2d 743, 746 (2008) (quoting U.S. CONST. amend. XIV, § 1; S.C. CONST. art. I, § 3). "Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). Procedural due process, however, "is not a technical concept with fixed parameters unrelated to time, place, and circumstances; rather, it is a flexible concept that calls for such procedural protections as the situation demands." State v. Legg, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016) (citing Matthews v. Eldridge, 424 U.S. 319, 334 (1976)). "The requirements in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur." S.C. Dep't of Soc. Servs. v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 733–34 (2002). "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." Kurschner, 376 S.C. at 171, 656 S.E.2d at 350 (emphasis added). "Procedural [d]ue [p]rocess contemplates a fair hearing before a legally constituted impartial tribunal." Legg, 416 S.C. at 13, 785 S.E.2d at 371. "Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest." Kurschner, 376 S.C. at 171, 656 S.E.2d at 350.

With this rubric in mind, Respondent would note that "[t]he ability to contest elections is a privilege bestowed by state law." Butler v. Town of Edgefield, 328 S.C. 238, 247, 493 S.E.2d 838, 843 (1997). Indeed, an election protestor has "no common law or federal constitutional right to be afforded a hearing in an election contest." Id. Further, as noted above, our courts

have long recognized that "[t]he law requires more than ordinary diligence on the part of those who . . . contest an election." State ex rel. Howell, 101 S.C. at 515, 86 S.E. at 81 (quoting Boyle, 97 S.C. at 19, 81 S.E. at 311). Initially, the Court should reject Appellant's procedural due process argument because she failed to identify any specific liberty or property interest for which she was denied procedural due process. Assuming, arguendo, Appellant could articulate a property interest in the office she unsuccessfully sought in the November 8, 2016, election, she was afforded procedural due process protections in this case.

First, Appellant received adequate notice of the hearing as evidenced by the fact that she attended the hearing with counsel. Although Appellant contends that receiving verbal notice three hours prior to the hearing was insufficient, the statute put her on notice that the Commission was legally required to hold a hearing within forty-eight hours of her filing a timely written protest after the election. See 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 the managers by filing a written notice of such contest together with a concise statement of the grounds therefor with the Municipal Election Commission. Within forty-eight hours after the filing of such notice, the Municipal Election Commission shall, after due notice to the parties concerned, conduct a hearing on the contest . . . ." (emphasis added)). The fact that members of the local media were present during the Commission protest hearing further indicates the notice provided was sufficient under the law.

Second, Appellant had an opportunity to be heard in a meaningful way. Appellant's main complaint is that she allegedly did not have enough time to gather evidence because she did not receive subpoena responses. As noted above, the statute provided the absentee ballot information Appellant sought became a matter of public record at 9:00 A.M. on Monday,

November 7, 2016. See S.C. Code Ann. § 7-15-330 (providing that "[t]he board of registration and elections shall serially number each absentee ballot application form and keep a record book in which must be recorded the number of the form, the name, home address, and absentee mailing address of the person for whom the absentee ballot is requested; the name, address, voter registration number, and relationship of the person requesting the form, if other than the applicant; the date upon which the form is requested; and the date upon which the form is issued," and "[t]his information becomes a public record a 9:00 a.m. on the day immediately preceding the election" (emphasis added)). In other words, no subpoenas were necessary because the absentee ballot information, as matter of law, became a public record prior to the election. Therefore, contrary to Appellant's claims, she did not have only fifteen minutes to prepare her evidence—she had at least five days or, by her own testimony, several months.

During the three-hour election protest hearing before the Commission, Appellant was afforded ample due process. The commissioners were engaged throughout the hearing and asked multiple questions of both sides. Appellant made her legal arguments, introduced evidence, testified, and cross-examined witnesses during the lengthy hearing. (R. pp. 18–75, 89–91, 95–98, 100–03, 109–11, 116–17). Ironically, in her brief, Appellant boasts about how much evidence she was able to gather in a limited amount of time while simultaneously arguing she was not afforded due process. Appellant's inability to serve and wait for responses to subpoenas does not translate into a violation of due process. Our courts consistently have held that "[d]ue process does not require a trial-type hearing in every conceivable case of government impairment of a private interest." Kurschner, 376 S.C. at 171, 656 S.E.2d at 350. If the General Assembly wished to require commissions to convene a trial-like hearing in municipal election protests, then it would have provided for such a procedure in the pertinent statutes. But a trial-

like hearing was unnecessary because the municipal election at issue here consisted of only 518 votes. As Appellant concedes in her brief, the votes in this election could have "been counted in a matter of hours." App. Br. 23. Similarly, she could have gathered the ballots she wished to challenge in a matter of hours, and certainly within five days, had she acted in an expeditious manner. State ex rel. Howell, 101 S.C. at 515, 86 S.E. at 81 (asserting that "[t]he law requires more than ordinary diligence on the part of those who . . . contest an election" (quoting Boyle, 97 S.C. at 19, 81 S.E. at 311)). Under these circumstances, the notion that she was not given a meaningful opportunity to be heard when the commission gave her a fifteen-minute recess to gather more evidence is without merit, particularly when Appellant had notice of many of the issues she raised prior to the election. A review of the hearing transcript reveals Appellant was given a fair and meaningful opportunity to be heard—she just failed to prove her case.

Third, given the procedural posture in this case, Appellant hardly can take the position that the decision of the Commission is not subject to judicial review. Indeed, the statutes outlining the procedures for protesting municipal elections, and appealing those decisions, call for judicial review. S.C. Code Ann. § 5-15-130; S.C. Code Ann. § 5-15-140. Notwithstanding her numerous contentions that the Commission and the circuit court "did not even consider" her evidence, both tribunals have considered Appellant's case. The Commission, after hearing all the testimony and evidence, concluded that Appellant failed to carry her burden of demonstrating a sufficient number of irregularities or illegalities to overturn the election. On appeal, in applying the well-established standard of review, the circuit court affirmed the commission's decision, noting it was not permitted to conduct a de novo review. Although Appellant has been unsuccessful at each level, she nevertheless has been afforded the appropriate protections, and each decision has been and is presently subject to judicial review.

Because the three touchstones for procedural due process were satisfied in this case, Appellant's procedural due process challenge must fail. This case is somewhat unique in that a candidate who lost the election is arguing she was not given a meaningful opportunity to deprive an individual of the right to hold an office to which she was duly elected. Appellant, however, has not identified a cognizable property or liberty interest of which she was deprived in this case. To the extent she is able to adequately articulate one, the Court also must weigh the competing interests at stake. Certainly, as the Court noted in Cole, "the main purpose of [section 5-15-130] is to expeditiously finalize protested municipal elections in the interest of realizing the voters' will and seamlessly transitioning governmental offices." 393 S.C. at 274, 712 S.E.2d at 446. These sound policy justifications, coupled with the laudable goal of curbing the potential for disenfranchising voters via long, drawn-out election protests, outweigh any interest Appellant may have in obtaining a seat to which the voters of Lancaster City Council District Three chose not to reelect her.

Interestingly, much of Appellant's argument in this section of her brief is dedicated to how the Commission could not handle the municipal election protest along with its other duties stemming from the November 8, 2016, election. Even while acknowledging this Court's decision in In re Bluffton Town Council Election, Appellant contends the county election procedures should have applied in this municipal election protest, arguing this Court did not consider the "extreme hardship" its harmonization of the statutes created for the county commissions.[8] App. Br. at 23. It seems a might curious that Appellant's due process argument centers on the notion that the 48-hour timeframe was unfair to the Commission, and Respondent questions whether Appellant even has standing to make this argument. Moreover, Appellant

[8] In fact, Appellant argues "this was not a municipal protest, as it was heard by the County Election Commission." App. Br. at 22. This is a clear misunderstanding of the law and, more specifically, this Court's decision in In re Bluffton Town Council Election.

cites only to a memo from the State Election Commission and the Municipal Election Handbook as the authorities governing election protests like the one at issue in this case. Appellant ignores the fact that these secondary sources are not the authority; rather, they merely outline the statutory procedures which are the authority. Furthermore, these sources do not even support her position. Both the memo and the Municipal Election Handbook confirm that the Commission was to operate pursuant to the municipal election protest standards.

This Court should decline Appellant's invitation to second-guess the prudence of the statutes at issue because doing so would violate the separation of powers doctrine. The General Assembly, of course, enacted the statutory scheme governing municipal election protests pursuant to its authority found in article II, section 10 of the South Carolina Constitution. Accordingly, all policy arguments for why, in practice, the system purportedly does not work for county election commissions to assume the lawful grant of authority from municipal election commissions and hear municipal protests would be better saved for next door at the Statehouse. See Town of Hilton Head Island v. Kigre, Inc., 408 S.C. 647, 649–50, 760 S.E.2d 103, 104 (2014) (per curiam) (asserting "it is not within [the Court's] province to weigh[] in on the wisdom of legislative policy determinations"); Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1999) (noting the Court does "not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly"). This Court is tasked with determining whether the statutes at issue afford the necessary procedural due process protections. For the reasons set forth above, Appellant was afforded due process in this case. In any event, to the extent Appellant contends the 48-hour hearing requirement is unconstitutional, whether it be on its face or as applied, she has failed to carry her burden as a matter of law. See Segars-Andrews v. Judicial Merit Selection Comm'n, 387 S.C. 109, 118, 691 S.E.2d 453, 458 (2010) (per curiam)

("A 'legislative act will not be overturned unless its repugnance to the constitution is clear and beyond a reasonable doubt.'" (quoting Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999))).

Finally, the County Attorney has expressed to the Commission and the circuit court, and presumably to this Court, his opinion that the 48-hour window within which a county election commission must hold a hearing on a municipal election contest is "unfair." The Lancaster County Election Commission, a fellow respondent, obtained a favorable ruling below—that the procedure it followed was lawful and satisfied due process. It is quite stunning for the Commission to take a position on appeal that encourages this Court to reverse the Commission's own decision. The Commission's only role in this election protest was to comply with the law and render a fair and impartial decision based upon the evidence presented at a hearing. As the circuit court concluded, the Commission fulfilled this duty. At bottom, it appears the Commission is trying to convince this Court to do what it has been unable to successfully lobby the General Assembly to do for the last several sessions: change the law governing municipal election protests handled by county election commissions. Cf. Retail Servs. & Sys., Inc v. S.C. Dep't of Revenue, Op. No. 27709 (S.C. Sup. Ct. filed Mar. 29, 2017) (Shearouse Adv. Sh. No. 13 at 63 n.17) (Kittredge, J., dissenting) (noting the appellant was apparently "attempting to accomplish through the Court what it has been unable to achieve properly through the General Assembly"). Additionally, the Commission has no liberty or property interest at stake in this litigation that would justify it coming before this Court to argue the law is unfair. See In re Amir X.S., 371 S.C. 380, 384 n.2, 639 S.E.2d 144, 146 n.2 (2006) ("The traditional rule of standing for facial attacks provides that one to whom application of a statute is constitutional may not attack the statute on grounds that it might be unconstitutional when applied to other people or

situations."). Indeed, the only parties who potentially have due process rights at issue in this case are Linda Blackmon-Brace and Jackie Harris. Given the posture of the case, as well as the roles of the respective parties, it is not appropriate for the Commission to argue against the favorable ruling it received from the circuit court.

Based upon the foregoing, this Court should affirm the circuit court's finding that Appellant was afforded notice, an opportunity to be heard in a meaningful way, and judicial review such that her procedural due process challenge must fail. As to the statute itself, Appellant failed to meet her burden of establishing its alleged unconstitutionality was clear and beyond a reasonable doubt. In any event, Respondent respectfully would submit that the policy decision on how best to implement procedures for municipal election protests that have the potential to disenfranchise voters is best left to the General Assembly.

IV. The circuit court applied the proper standard of review in affirming the Lancaster County Election Commission's decision denying the protest.

Last, Appellant contends the circuit court applied the wrong standard in reviewing the decision of the Commission. In arguing the circuit court used the wrong standard of review, Appellant seeks to rehash arguments raised at the protest hearing (and raise some new ones). However, because Appellant failed to file a Rule 59(e) motion to inform the circuit court it purportedly applied the wrong standard of review or erred in not reaching the merits, the arguments she made at the protest hearing are not preserved for appellate review.

As noted in the standard of review section, supra, a court "will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful." Taylor, 363 S.C. at 13, 609 S.E.2d at 502. "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." Id. "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." Spigner, 226 S.C. at 189, 84 S.E.2d at 384.

> When the polls can be purged of the illegal votes, this should be done, and only the illegal votes should be rejected, and the legal votes should be counted. But when this cannot be done, the entire polls must be thrown out, if it appears that enough illegal votes have been cast to affect the result at such poll, or to leave it in doubt.

State ex rel. Davis v. State Bd. of Canvassers, 86 S.C. 451, 457, 68 S.E. 676, 678 (1910).

Well aware of these principles, the circuit court applied the proper standard of review in this case. "The circuit court, sitting in an appellate capacity, may not consider issues which were not raised to the election commission." Taylor, 363 S.C. at 17, 609 S.E.2d at 504. Likewise, "[t]he circuit court has no authority to conduct a full hearing when one is denied by the election commission; nor does it have authority to take testimony or conduct a de novo hearing." Id. (emphasis omitted). As stated above in Part I and throughout this brief, none of the myriad allegations in Appellant's brief are properly before this Court because the circuit court did not rule upon the merits of the election protest, and Appellant did not file a motion to alter or amend for the court to rule upon whether the Commission's factual findings were wholly unsupported by the evidence. See, e.g., In re Bluffton Town Council Election, 385 S.C. at 636, 686 S.E.2d at 685 (asserting that a court "will not overturn findings of fact unless those findings are wholly unsupported by the evidence").

Assuming, arguendo, the Court finds these issues are preserved for its review and reaches the merits of the election protest, Respondent would submit that Appellant's numerous legal conclusions—which are couched as factual contentions—are as unproven as they are salacious.

In her brief, Appellant insinuates Respondent's legal residence is not within District Three in the City of Lancaster. By her own testimony, Appellant waived the right to raise this as

an issue at the protest hearing because she claimed she knew about it well before the election. (See R. pp. 60–61). Respondent also would submit that a challenge to a candidate's qualifications is not an appropriate ground for an election contest. The Commission agreed that a protest hearing was not the appropriate forum in which to raise this issue, and the circuit court never ruled upon that finding. Even on the merits, Appellant failed to carry her burden of proving Respondent did not live in the district. Notwithstanding Appellant's conclusory assertions, Respondent does live at 104 Rose Lane, and this address falls within the geographic boundaries of District Three. Appellant's contentions as to the residence located at 103 Rose Lane also are without merit because Respondent does not even own that property. Therefore, if the Court decides to address this issue, which was not expressly ruled upon by the Commission or the circuit court, Appellant's argument must fail.

Next, Appellant's brief alleges that Respondent's conduct amounted to fraud.[9] Specifically, Appellant argues Respondent impermissibly completed paper ballots for others in violation of section 7-15-330, and individuals who purportedly received assistance from Respondent violated sections 7-5-610 and 7-5-620.[10] These allegations of fraud could hardly be further from the truth. Election fraud is defined as "[i]llegal conduct committed in an election, usu[ally] in the form of fraudulent voting. Examples include voting twice, voting under another person's name (usu[ally] a deceased person), or voting while ineligible." Election fraud,

[9] Again, this issue is not preserved for appellate review because it is not referenced in the circuit court order and, as mentioned above, Appellant failed to file a motion to alter or amend.

[10] Appellant's allegations as to the voter who only voted for President and the voter who purportedly said Respondent must have altered her change of address form are not properly before the Court. Neither the Commission nor the circuit court made mention of these voters in their orders. Further, these individuals were not present to testify at the hearing before the Commission. As one of the commissioners cogently noted, Appellant's testimony about these particular instances amounted to nothing more than hearsay. (See R. p. 119). Although Appellant seeks to bring these allegations to the surface again, this Court cannot conduct a de novo hearing. She failed to prove these accounts of alleged voter disenfranchisement below and does not get a second bite at the proverbial apple on appeal.

BLACK'S LAW DICTIONARY (10th ed. 2014). When contesting an election, "[i]t is not sufficient to allege fraud generally or mere conclusions of the protesting person." Taylor, 363 S.C. at 17, 609 S.E.2d at 504; see also generally Schnellmann v. Roettger, 373 S.C. 379, 382, 645 S.E.2d 239, 241 (2007) (stating fraud must be proven by clear, cogent, and convincing evidence).

Appellant failed to meet her burden of proving fraud to the Commission. In fact, the only competent evidence in the record demonstrates Respondent did not commit fraud. According to Mary Ann Hudson, the director of the Lancaster County Voter Registration Department, Respondent was in frequent contact with her about the absentee registration efforts at issue in this case. (R. p. 84). Ms. Hudson confirmed that Respondent called to ensure her practices were within the confines of the law, and Ms. Hudson told Respondent they were lawful. (R. pp. 85, 86). Additionally, Ms. Hudson indicated she called the State Election Commission office, and a staff member confirmed that the practices complied with the statute. (R. p. 86). Respondent's testimony confirmed these communications. Respondent would submit that Ms. Hudson's uncontroverted testimony, alone, disproves Appellant's allegations of fraud. It would defy reason for a court to find that a candidate, who acted in compliance with a local voter registration office's interpretation of the law, committed voter fraud absent some collusion with that office, which certainly is not the case here. Our courts consistently have imposed a higher burden of proof for claims of fraud and for good reason. It is easy for a party to attribute a nefarious purpose to the other side in contentious matters, particularly in election challenges in which politics rarely are divorced from the legal issues that are raised. But just because Appellant says Respondent committed fraud does not make it so. See Taylor, 363 S.C. at 17, 609 S.E.2d at 504 (asserting "[i]t is not sufficient to allege fraud generally or mere conclusions of the protesting

person"). Appellant was required to establish the alleged fraud by clear and convincing evidence, and she failed to carry that burden.

Based upon Ms. Hudson's testimony, as well as a plain reading of pertinent statutes, Respondent also would submit that the practices at issue in this case were not illegal. At the hearing, the Commission asked Denise Mills, an unpaid volunteer, if she received any compensation or reimbursement from Respondent for her assistance with the paper absentee ballot applications. (R. p. 104). Ms. Mills confirmed that she did not. (R. p. 104); see S.C. Code Ann. § 7-15-330 ("A candidate or a member of a candidate's paid campaign staff, including volunteers reimbursed for time expended on campaign activity, is not allowed to request applications for absentee voting . . . ." (emphasis added)). Further, Respondent did not return any absentee ballots on behalf of voters. Although she may have assisted voters in their requests for absentee ballots, Respondent never requested the ballots on their behalf. These persons made the decision to apply for an absentee ballot freely and voluntarily.

Likewise, Appellant failed to carry her burden of proving that any voters violated sections 7-5-610 and 7-5-620 by voting in the election when they did not live within the municipality. Appellant did not prove, nor could the Commission determine, if the changes of address were invalid because neither the Appellant nor the Commission could ascertain whether any of the voters' prior addresses were in the city limits of Lancaster. If the voters' prior addresses were within the city limits of Lancaster, then the changes of address were proper. In her brief, Appellant argues now that, for a voter's change of address to be valid, the voter's prior address must have been within District Three. Her interpretation of the law is simply wrong and is inconsistent with her argument to both the Commission and the circuit court that a voter must live in the municipality for thirty days prior to being able to vote in the election. (R. p. 43; R. p.

182). Section 7-5-610, in relevant part, provides that an individual "[w]ho has resided within the corporate limits of any incorporated municipality in this State for thirty days previous to any municipal election . . . is entitled to vote at all municipal elections of his municipality." S.C. Code Ann. § 7-5-610(3) (emphasis added). Similarly, section 7-5-620 requires that a voter show "proof of the residence of the elector within the limits of the municipality for thirty days preceding any election." (emphasis added). The word "district" cannot be found in either of these statutes, and Appellant's limiting construction is contrary to the General Assembly's legislative intent as expressed in the plain language of sections 7-5-610 and 7-5-620. The statutes unambiguously require only that the voter live in the municipality for thirty days, not a specific district. Rules of statutory construction aside, Appellant offered no evidence to show where any of the voters who submitted change of address forms purportedly resided prior to the election. The Commission had no way of knowing whether these individuals lived in District Three at any time or whether they even voted in the election. Appellant merely handed up a stack of change of address forms and represented that they were illegal. This was insufficient as a matter of law.

With both the local voter registration department and the State Election Commission agreeing that Respondent was in compliance with the law, Appellant's allegations, at the most, amount to mere irregularities. Thus, Appellant was required to prove a sufficient number of irregularities in voting that would render the election result doubtful. See Taylor, 363 S.C. at 13, 609 S.E.2d at 502 (noting the Court "will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful"). Appellant, however, has not challenged a single vote in this case. Instead, Appellant's allegations focus on the gathering of

absentee ballot applications. A review of the relevant statutes governing the absentee ballot application process is instructive. Section 7-15-330, in relevant part, provides the following:

> To vote by absentee ballot, a qualified elector or a member of his immediate family must request an application to vote by absentee ballot in person, by telephone, or by mail from the county board of voter registration and elections, or at an extension office of the board of voter registration and elections as established by the county governing body, for the county of the voter's residence. A person requesting an application for a qualified elector as the qualified elector's authorized representative must request an application to vote by absentee ballot in person or by mail only and must himself be a registered voter and must sign an oath to the effect that he fits the statutory definition of a representative. . . . A candidate or a member of a candidate's paid campaign staff, including volunteers reimbursed for time expended on campaign activity, is not allowed to request applications for absentee voting for any person designated in this section unless the person is a member of the immediate family. . . . The board of voter registration and elections shall serially number each absentee ballot application form and keep a record book in which must be recorded the number of the form, the name, home address, and absentee mailing address of the person for whom the absentee ballot application form is requested; the name, address, voter registration number, and relationship of the person requesting the form, if other than the applicant; the date upon which the form is requested; and the date upon which the form is issued. This information becomes a public record at 9:00 a.m. on the day immediately preceding the election . . . . A person who violates the provisions of this section is subject to the penalties provided in Section 7-25-170.

S.C. Code Ann. § 7-15-330. An absentee ballot "application must contain the following information: name, registration, certificate number, address, absentee address, election of ballot request, election date, runoff preference, party preference, reason for request, oath of voter, and voter's signature." S.C. Code Ann. § 7-15-340 (2004 & Supp. 2016). The oath "must be signed by the absentee ballot applicant and witnessed," and the witness's address "shall appear on the oath." S.C. Code Ann. § 7-15-380 (2004 & Supp. 2016). "In the event the voter cannot write because of a physical handicap or illiteracy, the voter must make his mark and have the mark

witnessed by someone designated by the voter." Id. "Upon receipt of the ballot or ballots, the absentee ballot applicant must mark each ballot on which he wishes to vote and place each ballot in the single envelope marked 'Ballot Herein' which must in turn be placed in the return-addressed envelope." S.C. Code Ann. § 7-15-385 (Supp. 2016). Under the statute, "[t]he applicant must then return the return-addressed envelope to the board of voter registration and elections by mail, by personal delivery, or by authorizing another person to return the envelope for him." Id.

"It is patent that the General Assembly in the enactment of the law relative to voting by absentees . . . intended to create a right very valuable to civic minded citizens who wished to vote but were prevented from doing so on account of illness." May, 199 S.C. at 360, 19 S.E.2d at 470. "Voters who have done all in their power to cast their ballots honestly and intelligently are not to be disenfranchised because of an irregularity, mistake, error, or even wrongful act . . . which does not prevent a fair election and in some way affect the result." Taylor, 363 S.C. at 12–13, 609 S.E.2d at 502. Therefore, when reviewing "the procedures for submitting and counting absentee ballots" in an election protest, this Court squarely has rejected the invitation to apply a "strict scrutiny standard," concluding that the "General Assembly has specified that statutes concerning absentee registration and absentee voting shall be liberally construed." Knight, 297 S.C. at 57, 374 S.E.2d at 686.

In addition to being liberally construed, the absentee ballot registration statutes at issue in this case also must be considered directory in nature. "As a general rule, statutory provisions are mandatory in two instances: when the statute expressly declares that a particular act is essential to the validity of an election or when enforcement is sought before an election." Gecy, 372 S.C. at 241, 642 S.E.2d at 571.

> The Court still may deem such provisions to be mandatory after an election—and thus capable of nullifying the results—when the provisions substantially affect the free and intelligent casting of a vote, the determination of the results, an essential element of the election, or the fundamental integrity of the election.

George, 335 S.C. at 187, 516 S.E.2d at 208. As the Court has noted, it "will not sanction practices which circumvent the plain purposes of the law and open the door to fraud." Gecy, 372 S.C. at 242, 642 S.E.2d at 571. Still, "[i]n the interest of avoiding the disenfranchisement of voters after an election has taken place, a statute that uses seemingly mandatory terms such as 'shall' or 'must,' will be considered directory if the party seeking enforcement . . . fails to prove fraud." Cole, 393 S.C. at 274, 712 S.E.2d at 445.

In this case, Appellant failed to prove Respondent committed fraud or engaged in illegal activities. Thus, the perceived issues with Respondent purportedly providing assistance to voters who wished to fill out applications for absentee ballots can only be considered an irregularity at best. These alleged irregularities, however, concern absentee ballot applications. The allegations do not touch upon actual ballots cast. Indeed, Appellant has failed to challenge a single vote in this election, and she did not demonstrate which applicants, if any, lived in District Three or even voted in the November 8, 2016, election.

The number of alleged irregularities has been somewhat of a moving target at each level of review in this case. But Appellant was required to demonstrate a sufficient number of irregularities that would have justified the Commission overturning the results of the election at the protest hearing. When asked by the circuit court how many votes she alleged were illegally cast, Appellant still could not provide a number. The following colloquy is instructive:

> THE COURT: All right, let me cut to the chase though, . . . you were able to, you believe, prove 14 incidences of voter fraud or what you allege. Is that correct?

> MS. HYATT: I don't – I said that we were able – we have 29 documents that we entered into one – one exhibit; we had 33 documents we entered into another 34 and another ---
>
> THE COURT: But how many votes do those translate to?
>
> MS.HYATT: I don't know. We were not able to -- we were only able to submit that as – as evidence of something that needed to be investigated.
>
> THE COURT: Who has the burden of proof?
>
> MS. HYATT: We do.
>
> THE COURT: Okay. Do you agree –
>
> MS. HYATT: But that's where my –
>
> THE COURT: --- that the election commission is a tribunal or an investigative body?
>
> MS. HYATT: I believe that they are a tribunal . . . .

(R. pp. 182–83). At the time of this filing, some six months after the election protest hearing, Appellant has now come up with the convenient number of 48 alleged irregularities.[11] Appellant, however, failed to prove a sufficient number of irregularities to the Commission and could not even give a number to the circuit court at a hearing three months later. And she still cannot state with any certainty which of the individuals who submitted the absentee ballot applications she is challenging actually went and voted. Regardless, this Court cannot conduct a de novo review. The Commission concluded Appellant failed to prove her case, and even a cursory review of both the protest hearing and circuit court transcripts demonstrates the Commission's decision was supported by the record. See In re Bluffton Town Council Election, 385 S.C. at 636, 686 S.E.2d at 685 (stating the Court "will not overturn findings of fact unless those findings are wholly unsupported by the evidence").

[11] Given that Respondent won the election by 46 votes, Appellant's alleged irregularities, if proven, would be sufficient to void the election results and order a new special election.

Moreover, Appellant's attempt to change the numbers after the fact is not proper because Respondent cannot adequately respond to these accusations for the first time on appeal. Appellant was required to give Respondent adequate notice of the nature of the challenge to afford Respondent the opportunity to present a defense. See Butler, 328 S.C. at 245–46, 493 S.E.2d at 842 (asserting that "[t]he notice in an election contest 'should briefly state facts or a combination of facts sufficient to apprise the contestee of the cause for which [her] election is contested, it being insufficient to allege generally that fraud was committed, or to allege mere conclusions of the pleader" (quoting 26 AM. JUR. 2D Elections § 434 (1996))). As to the numbers, the Court's review is confined to the record before the Commission, including the representations Appellant made at the hearing, to comport with the statutory protest notice requirement as well as our longstanding rules of preservation. See id. at 246, 493 S.E.2d at 842 ("The purpose of the notice requirement is to adequately inform the contestee as to the nature of the contest."); I'On, LLC, 338 S.C. at 422, 526 S.E.2d at 724 (recognizing the preservation requirement "serves as a keen incentive for a party to prepare a case thoroughly" and "prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case").

At the end of the day, even if the Court decides to dive into the merits of this election protest, a review of the record compels a finding that Appellant failed to meet her burden of proving any number of alleged irregularities that would be sufficient to overturn the results of the District Three election. As Appellant conceded to the circuit court, the Commission does not sit as an investigative body and she bore the burden of proof. She failed to carry that burden, and the Court should not afford her the opportunity to try to pull a new number of alleged

irregularities out of her hat for the first time on appeal. Appellant did not and still cannot prove a sufficient number of alleged irregularities in votes cast. For that reason, her protest fails and the circuit court's order must be upheld. Ordering a new election based upon the paltry record of unsubstantiated allegations before this Court would only serve to destabilize the local political process in Lancaster, disenfranchise voters who legitimately cast their votes in the election, and impose enormous costs on an already overburdened system with limited resources. Frankly, Appellant has not satisfied her burden of proof to support the Court imposing such a drastic remedy in this case.

CONCLUSION

Based upon the foregoing, the Court should affirm the circuit court's finding that the Commission correctly upheld the results of the November 8, 2016, election for Lancaster City Council District Three and decline to address the issues not properly before it. The circuit court appropriately concluded that the protest hearing afforded Appellant procedural due process, and the Commission acted within its discretion in denying her motion for a continuance. Therefore, the Court should uphold the will of the voters and order that Respondent be sworn in as the District Three representative on Lancaster City Council for the term prescribed by law.[12]

Respectfully submitted,

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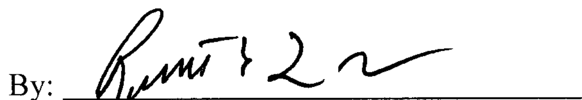
By: 

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[12] As the Court is aware, Appellant has occupied the seat to which Respondent was duly elected throughout the duration of this election protest. See S.C. Code Ann. § 5-15-120 (2004) (stating "in the case a contest is finally filed the incumbents shall hold over until the contest is finally determined"). Accordingly, Respondent would respectfully request that the Court expedite the remaining deadlines for this appeal in an effort to achieve a final resolution to this matter.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas
Brian Gibbons, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2017-000423
Case No. 2016-CP-12-1418

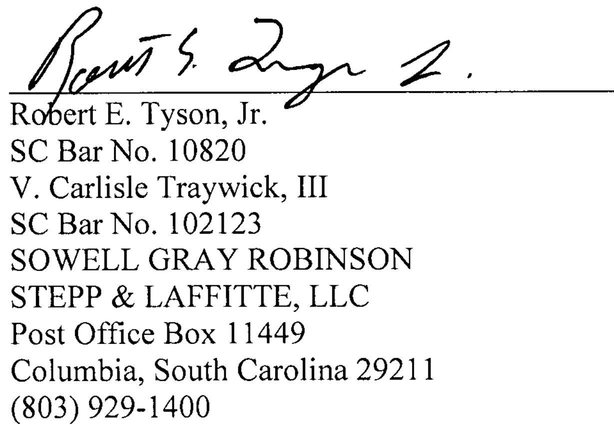
Jackie Harris..Appellant,

v.

Lancaster County Election Commission, Lancaster Municipal Election Commission, and Linda Blackmon-Brace ....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent Linda Blackmon-Brace complies with Rule 211(b) SCACR.



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PROOF OF SERVICE

I, the undersigned of Sowell Gray Robinson Stepp & Laffitte, LLC, attorneys for Respondent Linda Blackmon-Brace, certify that I have served a copy of the Final Brief of Respondent Linda Blackmon-Brace upon all parties by depositing a copy in the United States Mail, postage prepaid, on June 28, 2017, addressed as follows:

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