THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Special Circuit Court Judge

Appellate Case No. 2016-002134

Robert Gantt and Edward K. White,.....Respondents

v.

Samuel J. Selph as Director, and Majorie Johnson, Adell Adams, E. Peter Kennedy, Sylvia Holley and Jane Emerson as the Members of the Board of Voter Registration and Elections of Richland County, The Board of Voter Registration and Elections of Richland County and Kim Murphy,.....Defendants

Of whom Kim Murphy is the.....Appellant

INITIAL REPLY BRIEF OF APPELLANT KIM MURPHY

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ARGUMENTS IN REPLY

I. Jurisdictional argument is preserved for judicial review.

Appellant can raise the issue of a jurisdictional defect anytime including appeal. Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court. S.C. Dep't of Soc. Servs. v. Tran, 418 S.C. 308, 314, 792 S.E.2d 254, 257 (Ct. App. 2016); Badeaux v. Davis, 337 S.C. 195, 205, 522 S.E.2d 835, 840 (Ct. App. 1999). Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court. In re Nov. 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 637, 686 S.E.2d 683, 686 (2009) Anderson v. Anderson, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989). A court without subject matter jurisdiction does not have authority to act. Dove v. Gold Kist, Inc., 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994).

Furthermore, the trial court plainly ruled against Respondent on the issue of jurisdiction and conclusivity of the Board's resident decision. The trial court—at the urging of the Respondents—explicitly discounted the finding of the Board that Appellant is an elector in Richland County:

> Murphy argues that her status as an "elector" registered by the officials of the Board of Elections and Voter Registration of Richland County is dispositive of her residence. She also argues that the *ad valorem* taxation of the residence and her vehicles in Richland County prove that she is a Richland County resident. Both of these factors are matters of Richland County's administration of its internal duties, and not within the purview of this matter. While they also may reflect Murphy's intentions and perhaps even her domicile, the [sic] do not establish her residence in Richland County.
>
> (Amended Trial Order, pgs 21-22)

A Rule 59(e) motion is unnecessary to preserve an argument for appeal where the issue was raised to, and ruled upon by the circuit court. Hardaway Concrete Co. Inc. v. Hall Contracting

Corp., 374 S.C. 216, 225, 647 S.E.2d 488, 493 (Ct.App.2007). An appellant is required to file a Rule 59(e) motion only when an issue or argument has been raised but not ruled on the by the trial court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)

II. There is no final order determining Appellant is a Lexington County resident.

Respondent raises the issue of *res judicata* and/or collateral estoppel as to the issue of whether Appellant is a Lexington County resident. However, there is no unappealed final order which is binding on Appellant that determined her residency for qualification. The trial court did not rely or even cite these other cases as binding upon it. Respondent raised the issue of *res judicata*/collateral estoppel to the trial judge and she apparently rejected that argument by its omission from her order. Additionally, the adverse decisions of the Circuit Court were automatically stayed as a result of the appellant court rule. The exception cited by Respondents does not apply to those actions, and the exception does not act as collateral estoppel even if the exception did apply.

A. No final order binding upon Appellant

There are no final, unappealed order binding upon Appellant to which either *res judicata* and/or collateral estoppel would apply.

The orders cited by Respondents have all been appealed and are currently on appeal. When an issue of fact or law is actually litigated and determined by a **valid and final judgment**, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Carman v. S.C. Alcoholic Beverage Control Comm'n, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994). Holmes v. E. Cooper Cmty. Hosp., Inc., 408 S.C. 138, 149, 758 S.E.2d 483, 489 (2014)(emphasis added.) A final judgment for the purposes of *res judicata* and/or collateral estoppel is one that is either has not been appealed or

that an appeal has been taken and decided with finality by this Court. Argoe v. Three Rivers Behavioral Health, L.L.C., 392 S.C. 462, 471, 710 S.E.2d 67, 72 (2011).

The two cases referenced by Respondent, 2016-00198 and 2016-000211, have been fully briefed and are awaiting consideration by the Court of Appeals. Therefore, no decision made the Circuit Court in those cases that have been made final so to be binding as either *res judicata* or collateral estoppel.

B. The prior orders have been automatically stayed.

Respondent misstates the need for a stay to allow Appellant to file as a candidate. However, these orders were automatically stayed as a result of the appeal of those orders pursuant SCACR Rule 241(a). SCACR 241(b) exceptions to the general rule which are:

> (1) Money judgments as provided in S.C. Code Ann. § 18-9-130.
> (2) Judgments directing the assignment or delivery of documents or personal property as provided in S.C. Code Ann. § 18-9-150.
> (3) Judgments directing the execution of conveyances or other instruments as provided in S.C. Code Ann. § 18-9-160.
> (4) Judgments directing the sale or delivery of possession of real property as provided in S.C. Code Ann. § 18-9-170.
> (5) Judgments directing the sale of perishable property as provided in S.C. Code Ann. § 18-9-220.
> (6) Family court orders regarding a child or requiring payment of support for a spouse or child as provided in S.C. Code Ann. § 63-3-630.
> (7) Worker's compensation awards as provided in S.C. Code Ann. § 42-17-60.
> (8) An appeal from an order granting an injunction or temporary restraining order.
> (9) Family court orders awarding temporary suit costs or attorney's fees as provided in S.C. Code Ann. § 63-3-530(A)(2).
> (10) Ejectment orders as provided in S.C. Code Ann. § 27-37-130 and S.C. Code Ann. § 27-40-800.
> (11) Appeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600(G)(5).
>
> SCACR 241(b)

None of the exceptions apply to the judgment issued by the trial court in the instant action or the two actions referenced by Respondent. The trial court in the 2013 action (2016-000198)

upheld a determination by the school board to remove Appellant. The trial court in the 2014 action (2016-000211) granted summary judgment to Respondents in a separate civil action on for civil conspiracy. Therefore, none of the exceptions set forth in Rule 241(b) apply to the prior actions.

Moreover, it really does not matter if those actions were not stayed. They have been appealed and that is the important criteria in determining whether these orders are final for the purposes of *res judicata* and/or collateral estoppel.

III. The Circuit Court plainly used a Declaratory Judgment action to conduct an impermissible judicial review of election board's residency decision.

Despite Respondent strenuous protestations to the contrary, the Circuit Court plainly used a Declaratory Judgment action to review and reverse the residency decision made by the Board of Voter Registration and Elections of Richland County (hereinafter "the Board.")

Respondents' counsel asked the trial court to decide the following:

> The simple issue that's before the court is, is Ms. Murphy a qualified elector in this Springhill precinct, and if she is a qualified elector in the Springhill precinct, then she was properly allowed to file to run for School District 5 board from Richland County. If she's not a qualified elector of the Springhill precinct but, as we believe the record and facts show, is actually a qualified elector who should properly be in the Chapin precinct of Lexington County, then she is not eligible to run, and she's not a qualified elector in, in Richland County who's eligible to serve in that seat.
>
> (Transcript of September 29, 2016 hearing, pg. 19, lines 12-22)

The Respondents also stated something similar in their amended complaint as follows:

> This is a declaratory judgment action seeking a declaration as to the residence status and eligibility of Kim Murphy under applicable law to be a qualified candidate to serve as a member of the Board of Trustees of School District Five of Lexington and Richland Counties holding a seat which requires a party seeking and serving in the office be a resident of Richland County.
>
> Plaintiffs seek a declaration that Kim Murphy is a non-resident of Richland County for the reasons enumerated herein, and the Board [of Voter Registration and Elections of Richland County] be required to utilize the official state precinct maps and determine that Kim Murphy is not a resident of the Springhill Precinct in Richland County as she claims, but rather, a resident of the Chapin Precinct in

> Lexington County. Moreover, that Kim Murphy is not a resident of Richland County and is qualified to seek the office for which she has filed to be elected. Plaintiffs further seek a declaration of the Court that her name should be removed from the ballot as a candidate for a seat from Richland County on the Board of Trustees for School District Five of Lexington and Richland Counties in the November 2016 election.
>
> Plaintiffs seek this declaration and a further declaration of relief determining whether the Defendant Voter Registration and Election Board has properly included her on the 2016 Richland County Ballot for a Richland County seat on the School Board for School District Five of Lexington and Richland County.
>
> (Amended Complaint, pgs. 1-2 ¶ 1,3)

The exact relief sought by the Respondents was pled as follows:

> Should the Court find, as Plaintiffs allege and believe as enumerated herein, that Murphy is not a resident of Richland County, Plaintiffs seek further relief pursuant to S.C. Code Ann. § 15-53-120 (2016) in the form of an Order directing Defendant Voter Registration and Election Board to remove Murphy from the 2016 Ballot for the office that she seeks.
>
> (Amended Order, pg. 2, ¶4)

The Board and its members were included as defendants and participated in the hearing. (Amended Complaint, pg. 3, ¶¶ 8-9) The Respondents cited the provision in the South Carolina that a candidate must be a qualified elector. (Amended Complaint, pg. 4, ¶ 13-14) The Respondents pled that an elector is required to be a resident of the precinct in which they vote. (Amended Complaint pg. 11, ¶49) That is what they had initially asked the Board to decide. (Petitions of Robert Gantt and Edward K. White.) The trial court then used the record developed before the Board and supplemented it with additional testimony. (Amended Order pg. 1)

The trial court summarizes the relief sought by Respondents this way:

> This is an election controversy as to whether an individual candidate for the Board of Trustees of Richland-Lexington School District 5, Defendant Kim Murphy, is property on the ballot as a resident of Richland County.
>
> Plaintiffs aver that Murphy resides in Lexington County and therefore is not statutorily qualified to be elected from or serve as a representative in the Richland

County seat on the Richland County School District 5 Board of Trustees ("District 5"). Plaintiffs further seek a declaration compelling the defendants in their official capacities as Director and members of the County Board of Voter Registration and Elections ("Board of Elections") to remove Murphy from the November 8, 2016 ballot because she is not qualified to seek or serve in the office for which she is currently running.

(Amended Order, pg. 2)

The trial court's finding of facts include the following paragraph:

Plaintiffs followed the process outlined in the statute by making their challenge to Murphy's standing as a qualified elector utilizing a written petition as required by S.C. Code Ann. § 7-5-230(A). The Richland County Voter Registration and Election Commission held a hearing on August 30, 2016 on the Appellants' separate petition to disqualify Murphy.

(Amended Order, pg. 11, ¶ 36.)

The trial court then orders the following:

(4) Kim Murphy is not a qualified candidate to appear on the 2016 Ballot for the Office of Board of Trustee representing Richland County on the School Board of School District Five of Lexington and Richland Counties as she fails to meet the "must reside in Richland County" requirement of S.C. Act No. 326 of 2002, § 9.
(5) Kim Murphy's name cannot legally appear on the Richland County Ballot for the Richland County Seat for the Board of Trustees of School District Give of Lexington and Richland Counties and her name should be removed from the 2016 ballot.

(6) The Defendant Board of Voter Registration and Elections for Richland County is Ordered to remove Murphy's name from the 2016 ballot for the Office of School Board Trustee from Richland County on the School Board for School District Five of Lexington and Richland Counties as she fails to meet the statutory qualifications of that office.

(Amended Trial Order, pgs. 22-23)

The trial court clearly used the Declaratory Judgment to overrule the Board. That is what she was asked by the Respondents to do in their pleadings and statements of counsel. The trial court's use of Declaratory Judgment action in the instant action nullifies S.C. Const. art. II, § 9, S.C. Const. art. XVII, § 1A and Title Seven of the South Carolina Code. The General Assembly

has given the power to determine residency to the county boards of election in general and to the Board in particular. The trial court violated the rules of statutory construction when she rendered two separate provisions of the constitution and an entire title of the South Carolina code superfluous. Lightner v. Hampton Hall Club, Inc., 419 S.C. 357, 364, 798 S.E.2d 555, 558 (2017), In re Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995).

Respondents are simply trying to confuse this Court about what they asked the trial court to do in the instant action when they claim the trial court did not review the decision of the Board or that this is not a ballot challenge. To paraphrase Hamlet, the Respondents doth protest too much, methinks.

IV. CASE LAW CITED BY RESPONDENTS HAVE BEEN ABROGATED BY STATUTE

The case law cited by Respondent has been abrogated by the adoption of Title Seven. Ravenel v. Dekle, 265 S.C. 364, 373–74, 218 S.E.2d 521, 526 (1975) was decided before the adoption of the current version of S.C. Code Ann. § 7-5-230 in 2011. This Court has already ruled that S.C. Code Ann. § 7-5-230 is the proper method to challenge the residency of a candidate and not before the Circuit Court in a Declaratory Judgment Action. S.C. Pub. Interest Found. v. Judicial Merit Selection Comm'n, 369 S.C. 139, 144, 632 S.E.2d 277, 279 (2006). Respondents simply ignore S.C. Pub. Interest Found. and do not make any arguments why it should not be decisive in the instant case.

V. STATUTE CONTAINS EXCLUSIVITY PROVISIONS

The General Assembly's use of mandatory language sets out its clear intent that S.C. Code Ann. § 7-5-230 is the exclusive means for challenging the residency of a candidate. S.C. Code Ann. § 7-5-230 states a county election board "shall be the judges of the legal qualifications of all

applicants for registration." S.C. Code Ann. § 7-5-230(A). The use of the words "shall be the judges" in a statute means the action referred to is mandatory. Grimsley v. S.C. Law Enf't Div., 396 S.C. 276, 284, 721 S.E.2d 423, 427 (2012); TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 n. 3 (1998).

S.C. Code Ann. § 7-5-240 provides a right of appeal to the circuit court only for "[a]ny person denied registration or restoration of his name on the registration books...." Pursuant to the rules of statutory construction, section 240's expression of a right only for a denial of registration/restoration means there is no right of appeal for a person who files an unsuccessful challenge. "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' " Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000). If a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. If the words are unambiguous, this Court must apply their literal meaning. CFRE, LLC v. Greenville Cty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). This court "must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." Id.

The clear intent of the General Assembly was to give county election boards the sole authority to determine residency and to limit the scope of appeals to the circuit courts from county board to denials as required by S.C. Const. art. II, § 9. The General Assembly foreclosed a wide-ranging judicial review by providing the right of appeal only for the circumstance of someone denied the right to vote or to be restored to the voter rolls.

CONCLUSION

For the reasons set forth herein, Appellant Kim Murphy hereby requests this Court REVERSE the decision of the Circuit Court and reinstate her status as an elector in Richland County.

Respectfully submitted,

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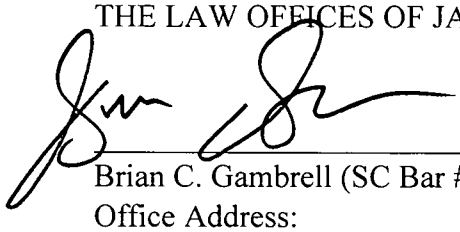

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PROOF OF SERVICE

I, Brian C. Gambrell, the attorney for Appellant, do hereby certify that I served the initial reply brief on Respondents' counsel via U.S. Mail on August 28, 2017.

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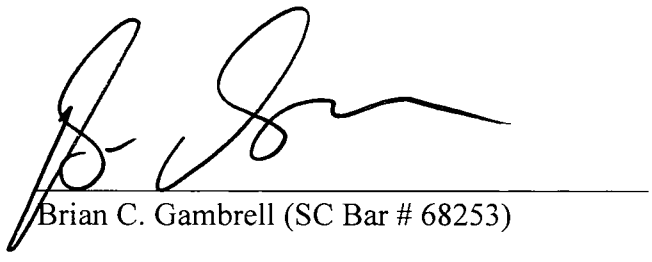

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