THE STATE OF SOUTH CAROLINA
In the Supreme Court

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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

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Jackie Harris ..... Appellant,

v.

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

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**RESPONDENT LINDA BLACKMON-BRACE'S MOTION FOR COSTS AGAINST APPELLANT AND LANCASTER COUNTY ELECTION COMMISSION**

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Pursuant to Rules 222(d), 240(a), and 269, SCACR, as well as section 7-17-275(b) of the South Carolina Code (Supp. 2016), Respondent Linda Blackmon-Brace (Respondent) hereby moves that the Court award her the costs and fees she incurred as a result of (1) defending Appellant Jackie Harris's (Appellant) election protest and (2) responding to Respondent Lancaster County Election Commission's (the Commission) frivolous appellate filings in this matter. For the reasons set forth below, Respondent respectfully requests that the Court grant her motion.

## BACKGROUND

This appeal stemmed from a protest of the November 8, 2016, election results for Lancaster City Council District Three. Appellant, the incumbent for the District Three seat, filed the protest on November 10, 2016, after losing the election by forty-six votes to Respondent. In her written

notice of protest, Appellant raised numerous grounds on which she wished to challenge the election results. After the parties were given notice, the Commission held a hearing on Appellant's protest. At 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. The Commission entered a written order detailing its findings on November 24, 2016.

Thereafter, Appellant filed a notice of appeal to the circuit court on December 9, 2016. 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. 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. The circuit court did not discuss or rule upon the merits of the protest in its Order, and Appellant never filed a Rule 59(e), SCRCP, motion to alter or amend its judgment. Instead, Appellant immediately filed a notice of appeal in this Court on February 22, 2017.

On appeal, Appellant sought to raise the following issues: (1) whether the circuit court "erred in affirming the Commission's use of a Standard of Review that required Ms. Harris to produce evidence of enough irregularities that would have changed the result of the election, where there was clear evidence of fraud and other illegalities on the part of Blackmon-Brace"; (2) whether the circuit court "erred in affirming the Commission's finding that Harris did not produce evidence of enough irregularities that would have changed the result of the election, where there was a difference of only 46 votes and Harris presented over 100 requests for paper absentee ballots filed by Linda Blackmon-Brace or her assistants on behalf of voter, the vast majority of which were in District 3, and where 48 of those District 3 paper ballots were sent to Blackmon-Brace's own

address"; and (3) whether the circuit court erred in affirming "the Commission's finding that it did not have authority to give Appellant additional time to gather evidence, where Appellant had approximately two hours' notice of the protest hearing, which occurred immediately after certification of election results." App. Br. at i (emphasis omitted).

Respondent subsequently filed her brief with the Court, arguing (1) Appellant's issues were not preserved for appellate review, (2) the circuit court properly concluded the Commission did not abuse its discretion in denying Appellant's motion for a continuance, (3) the Commission's protest hearing was held in accordance with the law and did not violate Appellant's procedural due process rights, and (4) the circuit court applied the proper standard of review in affirming the Commission's decision denying the protest. Resp. Br. at 1.

The Commission, a prevailing party in the circuit court, then filed its own brief arguing that "the time limits imposed by section 5-15-130 of the South Carolina Code on completing the procedure for hearing and deciding an election contest violate the parties' due process rights and the Commission's responsibility to conduct a fair and thorough hearing." Comm'n Br. at 1. The Commission further asked this Court to reverse the circuit court's ruling and remand the matter to the Commission. Id. at 12.

In response to the Commission's brief, Respondent filed a motion to strike the Commission's improper filing and dismiss its cross-appeal. In support of its return, the Commission submitted a conclusory one-page affidavit sworn out by the County Attorney in which he expressed his opinion that he complied with the South Carolina Appellate Court Rules in filing the Commission's brief. Respondent then filed a reply. Thereafter, the Court issued an Order striking the Commission's brief and giving it ten days to file a new brief. The Commission, disregarding the Court's Order, proceeded to file an almost indistinguishable brief and, again,

asked this Court to reverse the circuit court's order. Thus, Respondent filed a motion to strike the Commission's second improper filing, referring to the numerous authorities she cited in previous filings with the Court demonstrating the Commission had no basis in law or fact for filing its brief. The Court again struck the Commission's brief.

During the pendency of the appeal, Appellant was notified that she failed to comply with the South Carolina Appellate Court Rules—and this Court's Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 757 S.E.2d 421 (2014)—in submitting the record on appeal. In response, Appellant filed a motion to seal the entire record on appeal. Respondent filed a return opposing Appellant's motion to seal the whole record given that this is an election matter and, instead, proposed alternatives for protecting the voters' sensitive identifying information. In an Order issued on September 7, 2017, the Court denied Appellant's motion to seal and instructed her to file one copy of the record redacting the addresses of all nonparties. That same day, the Court issued an unpublished opinion affirming the decision of the circuit court and finding Appellant's first two issues were not preserved for appellate review.

Appellant, after realizing she failed to submit a final reply brief in this matter, filed a motion asking that the Court permit her to file a reply brief out of time. Simultaneously, Appellant filed a petition for rehearing that essentially mirrored her reply brief. Respondent submitted a letter indicating she did not oppose the Court allowing the reply brief out of time because it would have no practical effect on the outcome of the appeal. She further asserted that no response to the petition for rehearing was required and submitted that it was ripe for the Court's consideration. On September 28, 2017, the Court issued an Order in which it granted Appellant's motion to file the reply brief out of time and concluded that, after considering the reply brief and Appellant's

petition for rehearing, it was unable to find any basis for granting a rehearing. Accordingly, the Court denied the petition for rehearing and sent the remittitur to the circuit court that same day.

Appellant's continued pursuit of a meritless claim from the Commission all the way to this Court was interposed solely for the purpose of delaying Respondent being sworn into office. See S.C. Code Ann. § 5-15-120 (2004) (providing the incumbent, in this case Appellant, shall stay in office "until the [election] contest is finally decided"). Her delaying conduct, coupled with the Commission's frivolous filings, gave rise to the present motion for the costs and attorney's fees Respondent incurred as a result of defending this meritless matter.

## ARGUMENT

### I. Appellant's Meritless Election Protest

Respondent first requests all costs and attorney's fees she incurred defending Appellant's meritless appeals of the election protest hearing before the Commission because Appellant's protest was not warranted by existing law or the facts of the case, and she continued pursuing it to cause unnecessary delay. As the General Assembly has provided,

> Upon appeal from a decision of the board, the Supreme Court may award the costs and attorney's fees associated with the appeal to the party prevailing on appeal when the Supreme Court finds there were no reasonable grounds to appeal the decision of the board. In cases where the prevailing party is the party opposing the protest, the Supreme Court may award costs and attorney's fees associated with the entire defense of the protest if it finds that the protestant brought the protest for an improper purpose, such as to harass or to cause unnecessary delay, or that the protest was not warranted by existing law, the facts of the case, or that it was frivolous in nature.

S.C. Code Ann. § 7-17-275(b). At the outset, Respondent acknowledges that this statute contemplates appeals from a decision of the State Election Commission and does not specifically cover appeals from the circuit court. To the extent the Court believes the statute only applies to county election protests, and not in the context of a municipal election protest, Respondent would

submit that the policy behind the statute applies with equal force here. As discussed below, the General Assembly has determined, as a matter of public policy, that election protests should be decided in a swift manner, and meritless appeals that delay a final decision and ignore the will of the voters should be looked upon unfavorably. To curtail the potential for unnecessary litigation based upon unfounded allegations, as is the case here, the General Assembly authorized the recovery of the costs and attorneys' fees a candidate incurs defending the election protest. In this case, even if the statute is inapplicable, the Court has the authority—under Rule 269, SCACR—to provide the relief sought in this motion to give effect to this sound policy because (1) Appellant's appeal was without merit, and (2) she continued pursuing it solely to retain her City Council seat as long as possible and prevent Respondent from being sworn into office.

### A. Protest Was Without Merit and Pursued for Improper Purpose

Appellant's continued pursuit of the election challenge was without merit because the protest was not warranted by existing law or the facts of this case. Without rehashing her entire brief, Respondent wishes to make a few points that shed light upon Appellant's meritless contentions at each level of review.

As a preliminary matter, Appellant failed to preserve two of the three issues raised in her brief for appellate review. When confronted with this fact, Appellant tried to argue that the well-settled rules of issue preservation in South Carolina are inapplicable in the context of election appeals. This argument, of course, is without merit and finds no support in our case law or appellate court rules. A review of the order reveals the circuit court never discussed the conclusory legal arguments Appellant sought to raise on appeal. 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. Because she failed to do so, this Court properly found these issues were

not preserved for appellate review. See, e.g., 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. App. 1998); I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000).

Appellant's appeal of the only grounds upon which the circuit court ruled was likewise without merit. Appellant contended the circuit court erred in finding the Commission acted within its discretion in denying her motion for a continuance. According to Appellant, the Commission did not afford her enough time to prepare her election protest. 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 v. State Bd. of Canvassers, 101 S.C. 513, 515, 86 S.E. 81, 81 (1915) (quoting Boyle v. McCown, 97 S.C. 15, 19, 81 S.E. 310, 311 (1914)). Further, as the Court is aware, "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). Appellant, however, acted with mere "ordinary diligence" in seeking to prove her case before the Commission and she failed to demonstrate the denial of her motion was based upon an error of law.

More importantly, as the Court appeared to recognize in its unpublished opinion citing to the relevant authority, the Commission held the protest hearing in accordance with the law. See S.C. Code Ann. § 5-15-130; In re Nov. 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 637, 686 S.E.2d 683, 685 (2009) (citing S.C. Code Ann. § 5-15-145A (2004)); Cole v. Town of Atl. Beach Election Comm'n, 393 S.C. 264, 274, 712 S.E.2d 440, 446 (2011) (noting the statute requires the 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"). As the Court has observed, "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.

At the end of the day, Appellant was given a fair and meaningful opportunity to be heard at each level of review—she just failed to prove her case and then disregarded the rules for raising issues on appeal. Appellant never proved a sufficient number of alleged irregularities in votes cast. Rather, Appellant challenged what she perceived to be an irregularity in the absentee ballot application process. But she still never stated with any certainty which of the individuals who submitted the applications actually went and voted. In an election protest, a candidate is supposed to challenge votes. Because Appellant never did so in this case, and instead used her filings as a means to smear Respondent with conclusory allegations, this protest was without merit. The Court found two issues unpreserved and cited the familiar authorities governing the appropriate process for contesting municipal elections. Contrary to Appellant's assertions, she did not lose before the Commission, the circuit court, and this Court because no authority even looked at the evidence she provided. Appellant lost because she failed to prove her case and subsequently disregarded the rules governing appeals in this state.

As the Court is aware, Appellant occupied the Lancaster City Council District Three seat to which Respondent was elected throughout the duration of this election protest. See S.C. Code Ann. § 5-15-120. Respondent, of course, recognizes Appellant retained the seat pursuant to a statute, and that fact—in and of itself—is insufficient to make the required showing of an improper purpose. But the Court also should not turn a blind eye to this fact because it provides the relevant backdrop against which Appellant's conduct throughout this litigation should be adjudged. The General Assembly has decided, and this Court has recognized, that election matters are supposed to be decided in an expeditious manner as a matter of public policy. See S.C. Code Ann. § 5-15-

130; Cole, 393 S.C. at 274, 712 S.E.2d at 446. Appellant's actions at every step of this case were in direct contravention of this policy[1]

In light of the foregoing, the Court should award Respondent the costs and attorney's fees she incurred in defending this matter—as set forth in greater detail below—pursuant to section 7-17-275(b) or Rule 269, SCACR, because (1) Appellant's election protest, particularly the appeal, was manifestly without merit; and (2) Appellant's intentional efforts to prolong this case to ensure she remained in office as long as possible caused unnecessary delay.

**B. Reasonable Costs and Attorney's Fees**

Robert E. Tyson, Jr. was admitted to the South Carolina Bar in 1995 and is in good standing. Mr. Tyson also is admitted to practice in Mississippi and maintains admissions to the U.S. District Court for the District of South Carolina, the U.S. District Court for the District of Mississippi, the U.S. Court of Appeals for the Fourth Circuit, and the U.S. Supreme Court. Mr. Tyson has practiced election law and handled appellate matters for over twenty years. His standard hourly rate is $350 per hour. This hourly rate is fair given the complexities of election law. Vordman Carlisle Traywick, III was admitted to the South Carolina Bar in 2015 and is in good standing. He is also admitted to practice in the U.S. District Court for the District of South Carolina. Mr. Traywick has practiced election law and handled appellate matters for over a year. Further, prior to entering private practice, Mr. Traywick clerked at the South Carolina Court of

[1] Appellant's motion to seal the entire record on appeal in an election case, which included orders and other documents that had already been made publicly available, is also noteworthy. A review of the motion reveals Appellant made no attempt to demonstrate the required factors for sealing the whole record in this case. See Rule 41.1, SCRCP; Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 10, 630 S.E.2d 464, 469 (2006). All Appellant had to do to remedy the situation was redact the voters' addressesnstead of further delaying the case by filing a motion on which she knew she had very little chance of succeeding. See generally Ex parte Capital U-Drive-It, Inc. 369 S.C. at 10, 630 S.E.2d at 469 (asserting that "[j]udicial proceedings and court records [in South Carolina] are presumptively open to the public under the common law, the First Amendment of the federal constitution, and the state constitution").

Appeals and the U.S. District Court for the District of South Carolina. Mr. Traywick's standard hourly rate is $175 per hour. The undersigned counsel seek $30,000 in fees and costs. This amount represents approximately 44 hours for Mr. Tyson and 84 hours for Mr. Traywick. Counsel would note that the total hours spent on this case far exceeds that which is sought in this motion. The undersigned counsel certify that the hourly rates, as well as the amount of time spent defending this appeal, are professionally reasonable given the issues presented in this case.[2]

## II. The Commission's Frivolous Filings

Finally, Respondent respectfully requests the unnecessary costs and attorney's fees she incurred responding to the Commission's frivolous filings in this case. See Rule 269, SCACR.

In the present case, the Commission presided over the election protest hearing, rendered a decision in favor of Respondent, asserted impartiality at a hearing before the circuit court, and then sought to endorse Appellant's position in an appeal from its own decision by asking for a reversal from this Court. As the Commission conceded, it had no right to appeal the circuit court's ruling. See Rule 201(b), SCACR; Rule 203, SCACR. Nevertheless, the Commission filed a brief asking this Court to reverse the circuit court's decision affirming its own ruling for the first time on appeal. Cf. I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000); 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).

After this Court granted Respondent's first motion to strike, the Commission ignored the Court's Order and filed a nearly identical brief asking the Court to reverse the circuit court's decision. Like its initial brief, the Commission's second brief failed to comply with the South Carolina Appellate Court Rules and the rules governing issue preservation. As a result of its

[2] In the alternative, Respondent requests the costs she incurred as well as the $1,000 attorney's fee allowed under Rule 222(b), SCACR. Per this rule, filing fees were $75.00 and printing costs for briefs were $139.75.

frivolous filings, the Commission wasted the time and resources of this Court and Respondent, causing Respondent to incur unnecessary expenses in this matter.

A motion to strike the brief of another party is a rare tool used in appellate motions practice. The fact that Respondent had to file this motion twice within a matter of weeks is telling. Each time, the Commission responded with a conclusory one-page return. The Commission never cited a rule, statute, case, or any other legal authority that justified its actions. Cf. Rule 240(e), SCACR; Rule 240(c)(2), SCACR. And worst yet, the Commission blatantly disregarded an Order from the highest Court in this state. Because the Commission had no basis in law or fact for filing its briefs, and caused unnecessary delay and expense by continuing to mount a meritless defense of its ability to do so, Respondent respectfully requests that the Court issue an Order awarding her the costs and attorney's fees she incurred as a result of responding to the Commission's filings to discourage similar frivolous conduct in the future. See Rule 269, SCACR.

Specifically, Respondent requests attorney's fees for the time spent reviewing the Commission's initial brief, conducting legal research, drafting a motion to strike, reviewing the Commission's return, drafting a reply, reviewing the Commission's second brief, drafting a second motion to strike, reviewing the Commission's return, and drafting a reply. Respondent further requests that she be reimbursed for all costs associated with filing the two motions to strike and the replies to the Commission's returns. With respect to the first motion to strike and reply, Mr. Tyson spent 12 hours and Mr. Traywick spent 15.2 hours, incurring attorney's fees of $2,910. As to the second motion to strike and reply, Mr. Tyson spent 3.4 hours and Mr. Traywick spent 5.9 hours, incurring attorney's fees of $1,557.

Accordingly, the undersigned request a total of $4,467 in attorney's fees for the amount Respondent incurred responding to the Commission's frivolous filings in this case. As to costs,

Respondent requests the $512.65 she incurred while performing legal research on Westlaw to respond to the Commission's frivolous filings.

## CONCLUSION

Based upon the foregoing, Respondent respectfully requests that the Court award her the reasonable costs and attorney's fees she incurred as a result of defending the meritless appeal filed by Appellant and the frivolous briefs filed by the Commission.

Respectfully submitted,

SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC

By: _____

Robert E. Tyson, Jr.
SC Bar No. 10820
rtyson@sowellgray.com
Vordman Carlisle Traywick, III
SC Bar No. 102123
ltraywick@sowellgray.com
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

**Attorneys for Respondent Linda Blackmon-Brace**

Columbia, South Carolina
October 13, 2017

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In the Supreme Court

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APPEAL FROM LANCASTER COUNTY
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PROOF OF SERVICE

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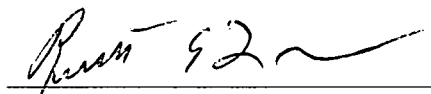
I, the undersigned of Sowell Gray Robinson Stepp & Laffitte, LLC, attorneys for Respondent Linda Blackmon-Brace, certify that I have served a copy of the Motion for Costs Against Appellant and Lancaster County Election Commission upon all parties by depositing a copy in the United States Mail, postage prepaid, on October 13, 2017, 2017, addressed as follows:

Elizabeth A. Hyatt, Esquire
Hyatt Law, LLC
105 W. Dunlap Street
Post Office Box 2252
Lancaster, SC 29721
*Attorney for Appellant*

John L. Weaver, Esquire
Lancaster County
Post Office Box 1809
Lancaster, SC 29721
*Attorney for Respondent Lancaster County Election Commission*

Mitchell A. Norrell, Esquire
Norrell & Powers Norrell LLC
Post Office Box 994
Lancaster, SC 29721
*Attorney for Respondent Lancaster Municipal Election Commission*



Robert E. Tyson, Jr.
SC Bar No. 10820
Vordman Carlisle Traywick, III
SC Bar No. 102123
SOWELL GRAY ROBINSON
STEPP & LAFFITTE, LLC
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

**Attorneys for Respondent Linda Blackmon-Brace**