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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

Case No. 2018-CP-13-00621

Appellant Case No. 2019-000147

Glenn Odom, ... Respondent,

v.

Town of McBee Election Commission and
Shilon Green, ...Appellants.

BRIEF OF APPELLANTS

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March 12, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONS

STATEMENT OF ISSUES ON APPEAL

I. **Did the Court err in in declaring Glenn Odom won the election without counting the contested votes?**

II. **Did the Court err in finding that Odom preserved the request to declare him winner of the election under S.C. Code Ann. § 7-13-810 in his Notice of Election Contest by indicating the results of his contest "will affect the outcome and results of the election?"**

III. **Did the Court err in finding that S.C. Code Ann. § 7-13-830 creates a separate procedure allowing Odom to contest the election after the results of the election were declared and that the MEC did not comply with S.C. Code Ann. §7-13-830?**

IV. **Did the Court err in finding that the MEC's decision that four votes should have counted in an election with a one vote margin did not invalidate the election?**

V. **Did the Court err in finding that the Town of McBee Municipal Election Commission had statutory authority allowing it to do anything other than issue an order for a new election?**

STATEMENT OF THE CASE

The underlying case concerns a Contest of a Municipal Election for the Town of McBee town council. The candidates for two open seats on the Town of McBee Town Council on the September 5, 2018 town council election were: Kemp McLeod ("McLeod"), Glenn Odom ("Odom"), Shilon Green ("Green"), Don Robinson ("Robinson"), and Sim Tyner ("Tyner"). After the counting of absentee and provisional ballots, Town of McBee Municipal Election Commission ("MEC") declared the results of the election to be: McLeod 212, Green 209, Odom 208, Robinson 182, and Tyner 8.

Glenn Odom filed a notice and amended notice to contest the results of the McBee Town Election for Town Council. (R. p. 166). The MEC conducted a hearing on the contest that began on September 10, 2018, and concluded on September 25, 2018 at the Town of McBee Town Hall. (R. p. 50). Testimony was taken from four witnesses – Simone Bracey ("Bracey"), Sabrina De Jesus ("De Jesus"), Cindy Kirk ("Kirk"), and Robert Liles ("Liles") – whose provisional ballots were not counted due to challenges on the date of the election and when the ballots were considered and the results declared by the MEC. (R. pp. 54-72; 75-81; 91-102; 103-113; 166).

After considering the testimony presented at the hearing, the MEC found Bracey, De Jesus, Kirk, and Liles were domiciled in the Town of McBee more than thirty (30) days before the September 5, 2018 election as required by S.C. Code Ann. § 7-5-610, S.C. Code Ann. § 7-5-230(B) and S.C. Code Ann. § 7-1-25, and therefore, were voters eligible to vote in the September 5, 2018 election. (R. p. 16). At the hearing, each of these voters testified that they voted for Glenn Odom in the election, but their ballots were never opened and counted. (R. pp. 72, 78, 94, 105). Because these four votes were not counted, and because adding the four votes to the total for Odom would have

changed the outcome of the election, the MEC invalidated the September 5, 2018 election and ordered a new election as required under S.C. Code Ann. § 5-15-130. (R. p. 16).

After the MEC Decision ordering a new election, Odom filed an appeal with the circuit court in which he requested that the circuit court overturn the MEC and declare him the winner because the four voters testified they had voted for him.

A hearing on Odom's appeal was held before the Honorable Roger E. Henderson on October 17, 2018. At the hearing, Odom argued S.C. Code Ann. § 7-13-810 required the votes be counted and requested the circuit court send the case back to the MEC to allow the MEC to count the votes. (R. pp. 145-146). Counsel for the MEC and Green argued that S.C. Code Ann. § 5-15-130 limits the MEC to invalidating the election and ordering a new election. (R. p. 146-152). On November 13, 2018, Judge Henderson denied Odom's appeal, noting "[t]he South Carolina Supreme Court has declared that the 'only relief the Commission may order is a new election as to the parties concerned.'" (R. p. 2).

On November 26, 2018, Odom filed a Motion to Reconsider, arguing again that S.C. Code Ann. § 7-13-810 requires the four votes be counted and that he be declared the winner after the counting of the votes. (*See* R. p. 26-30). Green and the MEC filed memorandums in opposition, making similar arguments to the ones made in the October 17, 2018 hearing, and further arguing that Odom had not preserved the question of declaring himself the winner as he did not request that relief in his notice. (*See* R. p. 37-41; 43-46). On January 22, 2019, Judge Henderson entered an Order granting Odom's Motion to Reconsider and remanded the proceedings to the MEC to not only count the contested votes but to also "declare Odom the winner of the Town Council Election consistent with the provisions of this Order." (R. p. 9). This appeal follows.

FACTS

In May of 2018, Kirk moved into a mobile home within the town limits of the Town of McBee. (R. p. 92). In July of 2018, De Jesus, Bracey, and Liles moved into trailers owned by Odom that were within the Town of McBee town limits. (R. pp. 54, 73, 78-79, 107, 119). The election was held on September 5, 2018. After the election, there were 17 ballots that were challenged or provisional. (R. p. 111). After considering the provisional and challenged ballots, six votes, including those of De Jesus, Bracey, Liles and Kirk were rejected and were not counted. (R. p. 112; 166). After the counting of absentee ballots and provisional ballots, the results were: McLeod 212, Green 209, Odom 208, Robinson 182, and Tyner 8. Odom then challenged the results of the election. (R. p. 166). This challenge would necessarily have been filed under S.C. Code Ann. § 5-15-130 as the provisional ballots had already been considered and decided upon.

In the Notice of Contest, Odom challenged that Bracey, De Jesus, Liles, Kirk, and Gloria Sumner's ("Sumner") provisional ballots were not counted, and that Shirley Sullivan and Frank Johnson were not allowed to vote. (R. p. 166). He also challenged that a Cornelius Green was allowed to vote although he was a resident of Columbia, South Carolina, and that Mr. Mendoza and Mr. DeWitt's provisional votes were allowed. (*Id.*). In his Notice of Contest, Odom simply stated that "[t]hese contested votes will affect the outcome and results of the election." (*Id.*)

At the Contest Hearing, Odom presented evidence that Kirk, De Jesus, Bracey, and Liles resided in homes within the town limits of the Town of McBee more than 30 days before the election. (R. pp. 54-72; 75-81; 91-102; 103-113). He further argued that these votes should have been counted, should be counted, and Odom declared the winner. (R. p. 124-125, 131-132).

Green presented evidence that while Kirk, De Jesus, Bracey, and Liles may claim to live in their homes in the town limits, but they did not actually reside there. To support his argument, Green

presented evidence that the homes did not have electricity, that the homes did not have certificates of occupancy when the voters claimed to have lived in the home, and that the homes were not legally connected to the water system when the voters claimed to be living in the homes. (R. pp. 62-66, 80, 99, 107-108). Green further argued that the results of the election should stand. (R. pp. 126-130). After considering the testimony of the witnesses, the MEC ultimately concluded that the provisional ballots of Bracey, De Jesus, Kirk, and Liles should have counted, and ordered a new election under S.C. Code Ann. § 5-15-130. (R. p. 16).

Odom then took the unusual step of appealing a ruling favorable to him, alleging that the ballots of De Jesus, Bracey, Liles, and Kirk should be counted and he declared the winner. A hearing on Odom's appeal was held before the Honorable Roger E. Henderson on October 17, 2018. At the hearing, Odom argued S.C. Code Ann. § 7-13-810 required the votes be counted and requested the circuit court send the case back to the MEC to allow the MEC to count the votes. (R. pp. 145-146). Counsel for the MEC and Green argued that S.C. Code Ann. § 5-15-130 limited the MEC to invalidating the election and ordering a new election. (R. pp. 146-149). On November 13, 2018, Judge Henderson denied Odom's appeal, noting "[t]he South Carolina Supreme Court has declared that the 'only relief the Commission may order is a new election as to the parties concerned.'" (R. p. 2).

On November 26, 2018, Odom filed a Motion to Reconsider, arguing again that S.C. Code Ann. § 7-13-810 requires the four votes be counted and that he be declared the winner after the counting of the votes. (*See* R. pp. 26-30). Green and the MEC filed memorandums in opposition, making similar arguments and further arguing that Odom had not preserved the question of declaring himself the winner as he did not request that relief in his notice. (See R. pp. 37-40; 43-45). On January 22, 2019, Judge Henderson entered an Order granting Odom's Motion to Reconsider and

remanded the proceedings to the MEC to not only count the contested votes, but to also "declare Odom the winner of the Town Council Election consistent with the provisions of this Order." (R. p. 9).

ARGUMENTS

I. The Circuit Court erred in ordering the MEC to declare Odom the winner regardless of the vote count.

The MEC ruled, and the circuit court affirmed, that the votes of Bracy, De Jesus, Kirk, and Liles should have been counted in the September 5, 2018 election. These votes were not counted and to this day have not been counted. Rather, Odom argued, and the circuit court held, that the Commission should declare Odom the winner based on the testimony of these witnesses at the contest hearing alone. This does not conform with South Carolina statutory or case law on how votes are to be counted.

"Immediately upon the closing of the polls at any municipal election, the managers ***shall count publicly the votes cast*** and make a statement of the whole number of votes cast in such election together with the number of votes cast for each candidate for mayor and councilman and transmit this information to the municipal election commission." S.C. Code Ann. § 5-15-120 [emphasis added]. "When all councilmen are to be elected at large, the persons receiving the highest number of votes in number equal to the number to be chosen shall be declared elected." S.C. Code Ann. §5-15-120(a).

In the Order on Motion to Reconsider, the circuit court ordered the MEC to not only count the challenged ballots, but also ordered the MEC to declare Odom the winner, regardless of whether the votes were counted. Indeed, the Order on Motion to Reconsider already declares Odom as the

winner of the election multiple times.[1] This does not conform with South Carolina law. South Carolina law does not authorize voting by testifying at a hearing. There is no statute or case law whatsoever supporting the circuit court's decision to declare one candidate a winner based on the public testimony of voters who live in trailers owned by the candidate they claimed to have voted for. Indeed, the South Carolina Constitution requires "[a]ll elections by the people shall be by secret ballot . . . ." S.C. Const. Art. II § 1. If the Order on Motion to Reconsider is allowed to stand, the MEC would have no choice but to both count the votes and declare Odom the winner, regardless of the vote count. This directly conflicts with S.C. Code Ann. § 5-15-120(a), which requires the MEC to declare the winner based on the vote count. To have a judge declare the winner of an election before even the votes are counted does not comport with any case law or statute in South Carolina and is an unprecedented invasion into not only the election process as established by the Constitution and the legislature, but the basic principles of democracy.

Because the circuit court has declared Odom the winner of the election based upon the public testimony as opposed to counting their ballots, the Order on Motion to Reconsider should be reversed and the MEC's decision ordering a new election upheld.

II. Odom did not preserve his request to protest the election under S.C. Code Ann. § 7-13-810 because it was not referenced in his notice of contest.

[1] Several times the Order on Motion to Reconsider declared Odom the winner even though the votes of the four voters have not even been counted. *See* R. p. 2 ("[T]he Court grants the Motion to Reconsider for the reasons stated below and remands these proceedings to the McBee Election Commission to declare Odom the winner of the Town Council election."); R. p. 5 ("Instead of counting the votes and declaring Odom the winner, the Commission invalidated the election . . . ."); R. p. 8 ("The result of following this plain language is that Odom is the election winner and the Commission erred in ordering a new election rather than declaring him a winner."); R. p. 9 ("Odom was the winner of the Town Council Election. The Court remands these proceedings to the [MEC] to count the contested votes ***and*** declare Odom the winner of the Town Council Election . . . .") [emphasis added].

In Odom's Motion to Reconsider, Odom requested that the circuit court order that Odom was the winner of the election based on the testimony from the contest hear. (R. p. 166). The circuit court held that merely because the MEC "knew Odom asked it to declare him the winner and that those opposing him wanted a new election . . . ." that the issue was preserved for appeal. (R. p. 6).

"A notice of contest filed pursuant to Section 5–15–130 should briefly state facts or a combination of facts sufficient to apprise the election commission and winning candidate of the reason for the challenge." *Taylor v. Town of Atl. Beach Election Comm'n*, 363 S.C. 8, 17, 609 S.E.2d 500, 504 (2005). "The circuit court, sitting in an appellate capacity, may not consider issues which were not raised to the election commission." *Id.* To be preserved for review, issues in an election contest must be raised in the contest letter. *Id.* at 18, 609 S.E.2d at 505 ("These issues are not preserved for appellate review. Appellants failed to raise either issue in their notice of contest letters.") [emphasis added].

"The right to ***contest*** an election exists only under the [state] constitutional and statutory provisions, and the procedure prescribed by statute must be strictly followed." *Taylor v. Roche*, 271 S.C. 505, 509, 248 S.E.2d 580, 582 (1978) [emphasis added]. "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 . . . ." S.C. Code Ann. § 5-15-130 [emphasis added]. Pleadings in an election ***contest*** case should be sufficiently specific to give reasonable information for the grounds for the contest. *See Butler v. Town of Edgefield*, 328 S.C. 238, 247, 493 S.E.2d 838, 843 (1997) [citations omitted] [emphasis added].

"It is the duty of the managers of election to, and any elector or qualified watcher may, ***challenge*** the vote of a person who may be known or suspected not to be a qualified voter." S.C. Code Ann. § 7-13-810 [emphasis added]. "However, the ***challenges*** by persons other than a manager

must be addressed to the manager and not directly to the voter." S.C. Code Ann. § 7-13-810 [emphasis added]. "A candidate may ***protest*** an election in which he is a candidate pursuant to Section 7-17-30 when the protest is based in whole or in part on evidence discovered after the election." S.C. Code Ann. § 7-13-810 [emphasis added].

In Odom's Notice of Contest, Odom wrote that "I would like to ***contest*** the official results of the September 4th, 2018 Town Council election on the following grounds . . . ." (R. p. 166) [emphasis added]. He then proceeded to list several reasons for the contest. At the end of the letter, he wrote "These ***contested*** votes will affect the outcome and results of the election." (*Id.*) [emphasis added].

The statutes are clear that candidates "contest" an election under S.C. Code Ann. § 5-15-130 and they "challenge" and "protest" elections under S.C. Code Ann. § 7-13-810 *et seq.* By using the term "contest" in his Notice of Contest, Odom clearly indicated that he was contesting the election under S.C. Code Ann. § 5-15-130. In his Notice of Contest, he never referenced S.C. Code Ann. § 7-13-810 or S.C. Code Ann. § 7-13-830. He also never requested that the votes be counted and he declared the winner, only noting that "these contested votes will affect the outcome and the results of the election." (R. p. 166). While Odom did request he be declared the winner at the hearing, this was too late. (R. pp. 124-125, 131-132).

The circuit court's decision that the issue had been preserved because the MEC "knew Odom asked it to declare him the winner and that those opposing him wanted a new election" was incorrect. Before the hearing, there was no indication that Odom was filing the appeal under S.C. Code Ann. § 7-13-830. Furthermore, Green did not want a new election. Rather, Green sought to uphold the results of the election as he won by one vote. (R. pp. 132-133). By failing to include any reference to declaring him the winner or to S.C. Code Ann. § 7-13-810 *et seq.*, and using the term "contest" in

the Notice of Contest, the only issue that Odom preserved for appeal was whether he was entitled to a new election under S.C. Code Ann. § 5-15-130.

Because neither his request to be declared the winner or his belief that he was challenging the election under S.C. Code Ann. § 7-13-810 *et seq.* were referenced in his Notice of Contest, these issues were not preserved for appeal and cannot be considered. Because these issues were not preserved for appeal, the circuit court could not consider them in its Order on Motion to Reconsider, and, therefore, the Order on Motion to Reconsider should be reversed.

III. The Circuit Court erred in finding that S.C. Code Ann. § 7-13-810 created another way to contest municipal elections, that such contests under S.C. Code Ann. § 7-13-810 could be conducted after the declaration of the results of the election, and that the MEC did not comply with S.C. Code Ann. § 7-13-810.

"Municipal primary, general and special elections shall be conducted pursuant to Title 7, *mutatis mutandi*, except as otherwise provided for specifically in Chapters 1 through 17" of Title 5. S.C. Code Ann. § 5-15-10. "Municipal elections must be conducted pursuant to the South Carolina Election Law contained in Title 7, with any necessary changes in points of detail." *George v. Mun. Election Comm'n*, 335 S.C. 182, 190, 516 S.E.2d 206, 210 (1999) (citing S.C. Code Ann. § 5-15-10).

S.C. Code Ann. § 7-13-810 and 830 outline the procedure whereby an election manager, elector, or qualified watcher may challenge a vote of a person known or suspected not to be a qualified voter. S.C. Code Ann. §§ 7-13-810, 830. After receiving the challenge, "[t]he manager shall then present the challenge to the voter and act in accordance with the provisions provided in this section." S.C. Code Ann. § 7-13-810. After a voter is challenged and he insists he is qualified

to vote, he may vote by utilizing a provisional ballot. S.C. Code Ann. § 7-13-830. After receiving the provisional votes, the election authority is to keep the votes separate and apart from the other votes. *Id.* Then, "at the meeting specified in either Section 7-17-10 or 7-17-510, whichever is applicable, this authority must hear all objections to these votes, and when no person appears or offers evidence before the meeting to sustain an objection made at the polls, the ballot is no longer a provisional ballot." *Id.* Additionally, if the challenger were to appear and produce evidence that shows the voter was not qualified, the authority must hear the testimony and make a determination as to whether the vote counts. *Id.* The "meeting" specified in S.C. Code Ann. § 7-17-510 is to "canvass the vote and declare the results of the primaries and the runoffs . . . ." S.C. Code Ann. § 7-17-510.

The circuit court held in the Order on Motion to Reconsider that S.C. Code Ann. § 7-13-830 applied to this case. Appellants do not dispute that S.C. Code Ann. § 7-13-810 and 830 apply to this election. Rather, their position is that: A) S.C. Code Ann. § 7-13-830 does not create a separate mechanism by which elections are contested; B) S.C. Code Ann. § 7-13-830 challenges must be conducted before the declaration of the election results; and C) the MEC did comply with S.C. Code Ann. § 7-13-830 when it decided upon the provisional and challenged ballots before the declaration of the election results.

A. S.C. Code Ann. § 7-13-830 does not create a separate procedure by which an election may be contested.

"The right to contest an election exists only under the state constitutional and statutory provisions, and the procedure proscribed by statute must be strictly followed." *Taylor v. Town of Atl. Beach Election Comm'n*, 363 S.C. 8, 14, 609 S.E.2d 500, 503 (2005) (quoting *Taylor v. Roche*, 271 S.C. 505, 509, 248 S.E.2d 580, 582 (1978)). S.C. Code Ann. § 5-15-130 governs contests in

municipal elections while S.C. Code Ann. § 7-17-30 governs contests in county elections. In election contests under S.C. Code Ann. § 5-15-130, there is a specified procedure by which municipal election contests are to be conducted. *Taylor v. Town of Atl. Beach Election Comm'n*, 363 S.C. 8, 15, 609 S.E.2d 500, 503 (2005) ("Section 5–15–130 requires an election commission conduct a hearing, decide the issues raised, file a report with the testimony and exhibits, and notify the parties of the decision.").

There is no mechanism under S.C. Code Ann. § 7-13-830 to allow a candidate a separate procedure by which to contest election results. Odom's position, adopted by the circuit court in Order on Motion to Reconsider, is that S.C. Code Ann. § 7-13-830 authorizes yet a third way to contest the results of an election. Candidates would be able to file a contest under S.C. Code Ann. § 7-17-30 for county elections, under S.C. Code Ann. § 5-15-130 for municipal elections, and under S.C. Code Ann. § 7-13-830 for both municipal and county elections. This interpretation of S.C. Code Ann. § 7-13-830 would undermine the exacting rules for how the legislature proscribed a municipal election contest to be conducted in S.C. Code Ann. § 5-15-130.

Because there are no election contest procedures outlined under S.C. Code Ann. § 7-13-830, the contest must be conducted pursuant to S.C. Code Ann. § 5-15-130.

B. S.C. Code Ann. § 7-13-830 only applies to challenges that are made before the MEC declares the results of the election.

Even if the Court were to find that there were a separate mechanism by which a candidate may contest an election under S.C. Code Ann. § 7-13-830, contests under this section must occur before the final results of the election are declared. S.C. Code Ann. § 7-13-830 outlines a procedure whereby election authorities must "hear all objections to [provisional] votes . . . [and] hear and determine the question. Its decision is final." S.C. Code Ann. § 7-13-830. This procedure

is to occur "at the meeting specified in either Section 7-17-10 or 7-17-510." *Id.* The "meeting" specified in S.C. Code Ann. § 7-17-510 is to "canvass the vote and declare the results of the primaries and the runoffs . . . ." S.C. Code Ann. § 7-17-510. After the declaration of the election results, parties may contest or protest the results under either S.C. Code Ann. §7-17-30 or § 5-15-130. *See* S.C. Code Ann. § 7-17-30 ("Any protest or contest must be filed in writing . . . by noon Wednesday following the day of the declaration of the board of the result of the election."); 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.").

It is undisputed that the MEC declared the final result of the election on the Thursday following the September 5, 2018 election. (R. pp. 111-112 ("At the end on Thursday at the certification, it was one vote."); R. p. 166 ("I would like to contest the official results of the September 4th, 2018 Town Council election . . . ."); R. p. 16 ("Shilon Green was initially determined to be the winner by a vote of 209 votes for Shilon Green and 208 votes for Glenn Odom.")). Once the election results were declared on September 7, 2018, the only statutory authority by which Odom could have filed the contest would have been under S.C. Code Ann. § 5-15-130. Because S.C Code Ann. § 7-13-830 only applies to challenges made before the final vote total was declared and Odom did not contest the election until after the election results were declared, S.C. Code Ann. §7-13-830 cannot apply to Odom's contest.

C. The MEC complied with S.C. Code Ann. § 7-13-830.

As noted *supra*, S.C. Code Ann. § 7-13-830 allows a voter who is challenged to have his or her provisional ballot decided upon prior to the declaration of the results of the election. The

MEC complied with S.C. Code Ann. §7-13-830 by considering the provisional ballots on the evening of September 4, 2018 and making its final decisions.

Odom testified at the Contest Hearing that he first learned that certain votes were being challenged on the night of the election. (R. p. 111). He went on to state that there were seventeen ballots that were challenged or provisional. (*Id.*). Finally, after the provisional and challenged votes were considered and ruled upon by the MEC as required by S.C. Code Ann. § 7-13-830, Odom was leading by one vote. (R. p. 16; 112; 166). Indeed, one of Odom's bases for contesting the election were that the MEC had already considered and allowed two provisional ballots to count that should not have. (R. p. 166).

Because the MEC did consider and rule upon the validity of the challenged and provisional ballots before certifying the final election, the MEC complied with S.C. Code Ann. § 7-13-830 and, therefore, the Order on Motion to Reconsider should be reversed.

IV. By making a decision that enough votes should have counted that could have changed the outcome of the election, the MEC invalidated the election.

In its Order on Motion to Reconsider, the circuit court held that S.C. Code Ann. § 5-15-130 does not require a new election in this case. Rather, it held that S.C. Code Ann. § 5-15-130 only requires a new election when the MEC's decision invalidates the election. (R. pp. 8-9). It went on to hold since the MEC's decision was four votes should have counted that were not counted, its decision did not invalidate the election. (R. p. 9). This does not comport with either S.C. Code Ann. § 5-15-130 or established precedent.

"In the absence of fraud, a constitutional violation, or a statute providing an irregularity or illegality invalidates an election, the Court will not set aside an election for a mere irregularity. Irregularities or illegalities which do not appear to have affected the result of the election will not

be allowed to overturn it." *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 381-82, 537 S.E.2d 543, 547 (2000) (citing *In re Bamberg Ehrhardt School Bd. Election*, 337 S.C. 561, 524 S.E.2d 400 (1999); *George v. Municipal Election Comm'n of Charleston*, 335 S.C. 182, 516 S.E.2d 206 (1999); *Butler v. Town of Edgefield*, 328 S.C. 238, 493 S.E.2d 838 (1997); *Greene v. South Carolina Election Comm'n*, 314 S.C. 449, 445 S.E.2d 451 (1994); *Fielding v. South Carolina Election Comm'n*, 305 S.C. 313, 408 S.E.2d 232 (1991); *Bolt v. Cobb*, 225 S.C. 408, 82 S.E.2d 789 (1954); *Harrell v. City of Columbia*, 216 S.C. 346, 58 S.E.2d 91 (1950)). "In determining whether an irregularity in the conduct of an election is sufficient to render the result doubtful, 'the rule deducible from the decisions is that all illegally cast ballots shall be deducted from the total number counted for the declared winning candidate, ***and that all rejected (uncounted), legal ballots shall be added to the total number counted for the declared losing candidate***.'" *Broadhurst*, at 382, 537 S.E.2d at 547 (quoting *Easler v. Blackwell*, 195 S.C. 15, 19, 10 S.E.2d 160, 162 (1940)) [emphasis added].

In the present case, the results of the election as declared by the MEC were Greene received 209 votes and Odom received 208 votes. (R. p. 16). In its Decision, the MEC found four votes should have counted as the voters were domiciled in the Town of McBee for more than thirty days before the September 5, 2018 election, and were voters eligible to vote pursuant to S.C. Code Ann. §§ 7-1-25, 7-5-230, and 7-5-610. (R. p. 16). By adding the four uncounted ballots to Odom, the result would have changed as Odom would have received 212 votes while Greene received 209. As such, the MEC was proper in its determination that an irregularity in the conduct of the election occurred sufficient to render the election doubtful. In making a determination that would have affected the results of the election, the MEC was proper in invalidating the election. The circuit court's holding that adding four votes to Odom's total "does not invalidate the election but only

counts votes that were previously provisional" does not comport with established case law. The results of the election had been declared by the MEC. Provisional ballots had been considered and accepted or rejected. Four votes should have been counted an election where there was one vote difference between Odom and Greene. If this does not "render the result doubtful" sufficient to invalidate the election, then nothing will. The circuit court's holding in Order on Motion to Reconsider directly contradicts S.C. Code Ann. § 5-15-130 and established case precedent in *Broadhurst*, and should be reversed.

Because the MEC made a determination that an irregularity occurred sufficient to render the outcome of the election doubtful, the election was invalidated and the MEC was proper in overturning the election, and the circuit court's Order on Motion to Reconsider should be reversed.

V. Upon finding the result of the election was doubtful, the only action the MEC could have taken was to invalidate the election and order a new one.

In its Order on Motion to Reconsider, the circuit court held it is irrelevant that the present election involved a municipal election and held that the because both *Trapp v. S.C. Bd. of State Canvassers*, 273 S.C. 163, 255 S.E.2d 670 (1979) and the present election involve "challenged votes, and that procedure and remedy are provided for in Title 7." (R. p. 9). This is an incorrect holding because the remedy for election contests in municipal elections is not provided in Title 7, but Title 5. In Title 5, only authority the MEC has is to order a new election.

In *Trapp*, there were several ballots that were challenged on the basis of residency. *Trapp*, at 167, 255 S.E.2d at 672. When the County Board of Canvassers met to consider the challenged ballots, it announced "it would sustain, solely on the basis of the information appearing on the challenge envelope, all residency challenges." *Id.* After this meeting, the County Board of Canvassers awarded the seat to one of the candidates. *Id.* at 165, 255 S.E.2d at 671. The losing

candidate then protested the award of the seat to the County Board of Canvassers, and then to the State Board of Canvassers. *Id.* After determining that the procedure under S.C. Code Ann. § 7-13-830 had not been followed in some precincts, the Supreme Court ordered that challenged ballots that were not properly challenged but had not been counted should be counted. *Id.* at 168, 255 S.E.2d at 672. While there are some similarities between *Trapp* and the present case, they are distinguishable as the *Trapp* case involved a county election and the present case involves a municipal election.

Protests in county elections are governed by S.C. Code Ann. § 7-17-30 *et seq*. The protest in *Trapp* was obviously filed under S.C. Code Ann. § 7-17-30 as the loser appealed the county election decision to the State Board of Canvassers, as is provided under S.C. Code Ann. § 7-17-60. No such option exists for contests in municipal elections.

S.C. Code Ann. § 5-15-130 and 140 govern contests in municipal elections. The Supreme Court has clearly stated on multiple occasions that in municipal election contests, "[t]he only relief the [MEC] may order is a new election as to the parties concerned." *Armstrong v. Atl. Beach Mun. Election Comm'n*, 380 S.C. 47, 49, 668 S.E.2d 400, 401 (2008) (citing S.C. Code Ann. § 5-15-130); *Broadhurst v. City of Myrtle Beach Election Comm'n*, 342 S.C. 373, 386, 537 S.E.2d 543, 549 (2000) (holding that circuit court erred by declaring one candidate a winner "[s]ince § 5-15-130 only authorizes a new election").

Armstrong is directly on point with this case- even down to the vote difference and votes that should have been counted. In *Armstrong*, the declared results of the election was a one vote difference. *Armstrong*, at 48, 668 S.E.3d at 401. The municipal election commission found that "four voters were denied the right to vote despite the fact they met the residency requirement of S.C. Code Ann. §7-5-610(3)." *Id.* In upholding the Atlantic Beach Municipal Election

Commission's decision to order a new election, the Supreme Court held "[b]ecause Pierce won the election by one vote, this renders the result of the election doubtful and ***requires a new election***." *Id.* [emphasis added]. In reversing the circuit court's decision to order the new election be conducted de novo and reopen the filing period for new elections, the Supreme Court went on to hold that "[t]he only relief the Commission may order is a 'a new election as to the parties concerned." *Id.* at 49, 668 S.E.2d at 401 (quoting S.C. Code Ann. § 5-15-130). It also noted that "[t]he circuit court does not have the authority to order any further relief." *Id.*

S.C. Code Ann. § 5-15-130 only authorizes the MEC to order a new election when the results of the election have been rendered doubtful based on irregularities. Neither the MEC nor the circuit court had the authority to do what the Court ordered in *Trapp*. The *Trapp* case involved an appeal of a county election, and an appeal conducted through an entirely different statute. The circuit court's decision that it does not matter that the election in *Trapp* was a county election directly contradicts S.C. Code Ann. § 5-15-130 and established precedent. *Armstrong* and *Broadhurst* make it clear that ordering a new election is the only remedy available to the MEC.

Because the only remedy available to the MEC is to order a new election, the circuit court's Order on Motion to Reconsider should be reversed.

CONCLUSION

For the reasons stated above, this Court should reverse the ruling of the circuit court and uphold the Town of McBee Municipal Election Commission's ordering a new election.

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THE STATE OF SOUTH CAROLINA

In The Supreme Court

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MAR 13 2019

S.C. SUPREME COURT

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

Case No. 2018-CP-13-00621

Appellant Case No. 2019-000147

Glenn Odom, ... Respondent,

v.

Town of McBee Election Commission and
Shilon Green, ... Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Final Brief of Appellants Town of McBee Election Commission and Shilon Green complies with Rule 211 (b) SCACR.

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PROOF OF SERVICE

I certify that I have served Appellants Town of McBee Election Commission and Shilon Green's Brief of Appelants by delivering a copy of each by electronic transmission on March 12, 2019 addressed to their attorney of record, listed as follows:

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