

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2020-_____

Case No. 2020-CP-10-02729

Campaign to Elect Elder J. Johnson, III and
Elder J. Johnson, III, Individually, Respondents,

v.

Charleston County Board of Voter Registration & Elections;
Charleston County Democratic Party; South Carolina
Democratic Party; South Carolina Election Commission;
Deon Tedder & Deon Tedder for SC House, LLC,Defendants,

Of whom

South Carolina Election Commission is the Appellant.

EMERGENCY PETITION FOR WRIT OF SUPERSEDEAS TO VACATE THE *EX*
PARTE TEMPORARY RESTRAINING ORDER AND TO DISMISS THE CASE

This is a Petition for Writ of Supersedeas from an order granting the Respondents' Motion for an *Ex Parte* Temporary Restraining Order (*Ex Parte* TRO) issued June 24, 2020, preventing the South Carolina State Election Commission (SEC) and the Charleston County Board of Voter Registration & Elections (CCBVRE) "from certifying votes cast on behalf of the candidate Deon Tedder in the Democratic Primary of June 24, 2020 (sic)."¹ (App. 21.) Although the SEC has not been properly served (as discussed below) and it preserves any arguments on jurisdiction, review of the *Ex Parte* TRO cannot wait. Thus, the SEC submits to this Court's jurisdiction for this Petition, and this Court has jurisdiction under S.C. Const. art. V, § 5, Rules 241(a)(8) and (d)(1), SCACR, and S.C. Code § 14-3-330(4).

By law, any political party runoff has to be held two weeks after the first primary election. S.C. Code § 7-13-50. The results of that runoff have to be certified on the Thursday immediately following the runoff and by the SEC no later than the following Saturday at noon. S.C. Code § 7-17-510. To prevent electors who cast votes for candidate Deon Tedder from being disenfranchised by the improvidently granted *Ex Parte* TRO that on its face enjoins the SEC and the CCBVRE from certifying the results of all electors who cast votes in the South Carolina House District 109, this Court should supersede the *Ex Parte TRO* and allow the SEC and the CCBVRE to carry out their statutory duties.

¹ This Court may take judicial notice of the fact that the Democratic Party Primary was held June 23, 2020. *See* Rule 201, SCRE.

BACKGROUND

Elder Johnson and Deon Tedder both filed to run in the Democratic Party Primary to be the Democratic candidate for South Carolina House District 109 (District 109) for the General Election scheduled for November 3, 2020 (General Election). Both were on the ballot for the June 9, 2020 Democratic Party Primary (DP Primary). In addition to Johnson and Tedder, Jeff Wilder was also on the DP Primary ballot for District House 109. No candidate got a majority of the vote. Johnson and Tedder, as the top two vote getters, were on the ballot for the June 23, 2020 Democratic Primary Runoff (Runoff).

On May 20, 2020, Tiffany Spann-Wilder (Jeff's wife) sent a challenge to the CCBVRE, alleging that Tedder was not a qualified candidate because he was not a resident of House District 109. (App. 12.) On May 28, 2020, Spann-Wilder amended her challenge, challenging Tedder's voter registration qualification. (App. 13.) The CCBVRE held a hearing the next day. (App. 14.) After the primary election, the CCBVRE concluded that Tedder was not a registered voter in District 109. (App. 18–19.) Based on the CCBVRE Order, the SEC sent Tedder a letter notifying him that his name had been removed from the voter rolls. (App. 20.)

On June 24, 2020, the Respondents filed a summons and a motion for emergency temporary restraining order and preliminary injunction. (App. 1, 3.) The SEC have not been served with the summons or any complaint. The Respondents purported to serve the SEC by sending an email to a general email account

(elections@elections.sc.gov) on the SEC's web site. See S.C. Election Comm'n, *About the SEC*, <https://www.scvotes.org/index.php/about-sec> (last visited June 25, 2020).

The State Board of Canvassers is scheduled to meet at 10:00 AM on Friday, June 26, 2020 to certify the results of, among other things, the runoff for District 109. The CCBVRE met today (June 25) and certified the results of other races not involving the House of Representatives.

LEGAL STANDARD

An order granting an injunction is not automatically stayed by noticing an appeal. Rule 241(b)(8), SCACR; see also Rule 62(a), SCRCP. Nevertheless, a “party may move for an order imposing a supersedeas” to stay an injunction pending an appeal. Rule 241(c), SCACR. Unless “extraordinary circumstances make it impracticable,” this relief should be sought first from the court that entered the injunction. Rule 241(d)(1), SCACR. After that, a party may seek a writ of supersedeas from the appellate court. Rule 241(d)(2), SCACR.

To supersede an injunction pending an appeal, the party seeking to stay the injunction must clearly show that allowing the injunction to remain in effect would cause “an irreparable injury or the miscarriage of justice.” *Kuhn v. Elec. Mfg. & Power Co.*, 92 S.C. 488, 75 S.E. 791, 791 (1912) (emphasis added).

REASONS FOR GRANTING THE PETITION

The Court should supersede and vacate the *Ex Parte* TRO for two reasons. *First*, the Respondents have not filed and served a complaint along with the summons, as required by the South Carolina Rules of Civil Procedure. That renders

all other documents filed or served in this purported action a nullity, so leaving the injunction in place would be a miscarriage of justice. *Second*, the *Ex Parte TRO* will disenfranchise all voters who voted for Tedder in the DP Primary and Runoff, leading to an irreparable injury.

1. The *Ex Parte* TRO should be superseded because the circuit court lacked jurisdiction to enter that order.

As a threshold matter, the Respondents have failed to invoke the circuit court’s jurisdiction. No complaint has been filed. *See* Docket, *Campaign to Elect Elder J. Johnson v. Charleston Cty. Bd. Of Voter Registration & Elections*, No. 2020-CP-10-02729. Filing a complaint is a requirement to commence a civil action. *See* Rule 3(a), SCRCP (“A civil action is commenced when the summons *and complaint* are filed with the clerk of court” (emphasis added)). Thus, there is no civil action in which any injunctive relief—including this *Ex Parte* TRO—could have been entered.

More procedural problems provide reasons to supersede the *Ex Parte* TRO. For one, the Plaintiffs attempt to serve the summons and motion for a temporary restraining order fail. To serve a state agency like the SEC, service may be made only by “delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia.” Rule 4(d)(5), SCRCP. That did not happen here. These documents were sent to the SEC through a public email address on the SEC’s website. That would not even suffice as service by email under this Court’s Amended Operation of Trial Courts During the Coronavirus Emergency Order. *See* Order, 2020-04-22-01. This order allows service of some documents on Bar member’s primary

email address in AIS, but that method of service explicitly excludes service of a summons and complaint. *See id.* § (c)(13). Therefore, the SEC has not been served in this case.

For a second, the *Ex Parte* TRO purports to grant relief against the Dorchester County Board of Voter Registration and Elections (DCBVRE). That entity is not named as a party to this action. Rule 10 requires that “the summons and complaint the title of the action shall include the names of all parties.” Rule 10(a), SCRCF. Although the Respondents’ motion for emergency temporary relief mentions the DCBVRE, the caption on the summons does not. (App. 1.) Rule 65 authorizes a temporary restraining order only against a party, and any such temporary restraining order can be binding only on a party. *See* Rule 65(b), (d), SCRCF.

As another problem with Rule 65, that provision also prohibits issuance of an *ex parte* temporary restraining order unless an affidavit or verified complaint demonstrates why immediate and irreparable harm will result to the applicant before notice can be served. *See* Rule 65(b), SCRCF. The record here contains no such facts. The Respondents’ filings include no affidavit containing any such information or allegations of why *ex parte* relief is required. (App. 10–11.)

Finally, Rule 65(b) also lists specific content that a temporary restraining order must contain (defining the injury, why it is irreparable, etc.). *See* Rule 65(b), SCRCF. None of that is contained in the *Ex Parte* TRO. (App. 21.)

II. The *Ex Parte* TRO should be superseded because the Respondents will suffer no irreparable harm without it, but the voters who voted for Tedder will.

State law provides a procedure for challenges like this one, but the Respondents have not followed it. State law requires that the county boards of voter registration and election (County Boards) and the SEC meet at times certain to certify the results of elections. Section 7-17-510 provides, in pertinent part:

The board of voter registration and elections for the counties shall convene a meeting on the Thursday next following the primary, before one o'clock p.m. of that day and shall organize as the county board of canvassers for primaries. . . . Each county board of canvassers for primaries shall canvass the votes of the county and declare the results. The county board of canvassers for primaries shall make statements of the votes of the precincts of its county as the nature of the primary requires *not later than twelve o'clock noon* on the Saturday next following the primary and at that time transmit and certify to the Board of State Canvassers the results of its findings. *This procedure must be repeated following every primary runoff.*

S.C. Code § 7-17-510 (emphasis added).

The CCBVRE began meeting by than one p.m. today to certify candidates. But candidates for the House of Representatives are not certified by the political parties for the general election ballot until August 15, 2020. S.C. Code § 7-13-350. Assuming that the Respondents file the appropriate summons and complaint, they can have their claims heard and decided prior to that date.

In addition to the requirements of S.C. Code § 7-5-120, an elector must apply and register to vote. Section 7-1-170 requires, having completed the application, the applicant “swear (or affirm) that the present residence address listed. Herein is my sole legal place of residence and that I claim no other place as my legal residence.”

Id. § 7-1-170. The issue before the lower court should be whether Tedder is a qualified elector living in District 109.

On the other hand, if the CCBVRE is required to certify the results of the District 109 race without counting the votes that were cast for Tedder, voters will be disenfranchised without due process of law. The challenge before the CCBVRE involved S.C. Code § 7-3-230—a challenge to the legal qualifications of an elector. In response to the challenge of Tedder’s registration domicile, the CCBVRE found that Tedder did not reside in District 109. The remedy is to remove him from the voter registration list, not to disenfranchise voters who voted for him by not letting the votes be certified. Pursuant to S.C. Code § 7-5-240, the appeal regarding a legal challenge to a voter’s registration is to the court of common pleas. On information and belief, Tedder had filed an appeal, and it is scheduled to be heard in the near future.

Instead of this statutorily established procedure, the Respondents ask that the Tedder votes not be counted, which is a remedy sought in a protest based on the conduct of an election. This is not a remedy for challenging the qualifications of anyone who was on the ballot and received votes and certainly does not form the basis for granting an *Ex Parte* TRO. The votes must be tallied and counted under state law, and the certification process must be allowed to go forward and all votes be counted.

CONCLUSION

The writ should be granted. This is an important issue that should be decided immediately by this Court now. Delay in this Court's adjudication of the issue could be detrimental to the integrity of the mandated election process.

Respectfully submitted,

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