

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2020-001232

Jeffery Wilder,

Appellant,

v.

Charleston County Bd. of Voter Registration & Elections, Charleston County Democratic Party, Dorchester County Bd. of Voter Registration & Elections, Dorchester County Democratic Party, SC Democratic Party, South Carolina Election Commission, Deon Tedder & Deon Tedder, LLC,

Respondents.

APPELLANT'S REPLY BRIEF

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October 14, 2020

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Appellant Wilder submits this Reply to Respondents Deon Tedder, Deon Tedder for SC House, LLC, Charleston County Democratic Party, Dorchester County Democratic Party and South Carolina Democratic Party's brief. Wilder incorporated the arguments made in his initial Brief and responds here to the arguments and the implications thereof made by the Respondents in their briefs. Respondents assert that Appellant may have confused the two actions that were on appeal. Appellant wishes to ensure the Court there is no mistake – when Judge Cothran adopted the Findings of Fact & Conclusions of Law from the Respondent's Board of Voter Registration Appeal he brought in the relevancy of the claim and those actions for which that claim was based and thus, subject to discussion herein. (R. 14).

ARGUMENT

I. THE APPELLANT WAS NOT PRECLUDED FROM SEEKING DECLARATORY RELIEF DUE TO EXHAUSTION OF ADMINISTRATIVE REMEDIES SUCH AS PRIMARY & RUN-OFF ELECTION CONTEST.

The issue of exhaustion of administrative remedies is first presented here on appeal and thus not preserved below. Nevertheless, there is nothing that requires a candidate to challenge an election before seeking intervention in the Court of Common Pleas. Further, this argument is not applicable to the case at hand because this case is and always has been a constitutional challenge to Respondent Tedder's ability to be a Candidate in the House District 109 race. The Appellant does not assert any impropriety in the conduct of the election of June 9 or June 23 and so an election protest was not ever proper in this matter. The determination of Constitutional matters is a judicial function, not a function for an administrative agency so Appellant would never have been required to begin his seek redress under §7-17-560.

“The doctrine of exhaustion of administrative remedies is generally considered a rule of ‘policy, convenience and discretion, rather than one of law, and is not jurisdictional.’” Vaught v. Waites, 300 S.C. 201, 205, 387 S.E.2d 91, 93 (Ct. App. 1989) (quoting Andrews Bearing Corp. v.

Brady, 261 S.C. 533, 536, 201 S.E.2d 241, 243 (1973)). Although our appellate courts have “rather consistently applied the doctrine of exhaustion of administrative remedies to avoid interference with the orderly performance of administrative functions,” the Court has “recognized that it is not an invariable rule.” Andrews Bearing Corp., 261 S.C. at 536, 201 S.E.2d at 243. Indeed, this Court’s “adoption of the view that the rule is discretionary in nature is a recognition that situations can exist where failure to exhaust administrative remedies may be excused.” Id.

Here, Respondent Tedder seems to imply that the state executive committee should hold exclusive jurisdiction to decide challenges to his constitutional qualifications such that Wilder was required to exhaust his administrative remedies prior to filing this action in circuit court. See Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (stating the exhaustion of remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute); Gantt v. Selph, 423 S.C. 333, 340, 814 S.E.2d 523, 527 (2018) (“In determining whether the [General Assembly] has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute.” (quoting Rainey v. Haley, 404 S.C. 320, 323, 745 S.E.2d 81, 83 (2013))). The answer here is a resounding NO.

The statutory provisions regulating elections “are mandatory in two instances: when the statute expressly declares that a particular act is essential to the validity of an election, or when enforcement is sought before an election in a direct proceeding.” George v. Municipal Election Comm’n of Charleston, 335 S.C. 182, 186, 516 S.E.2d 206, 208 (1999).

Wilder was not contesting or protesting the results of the primary election itself. This is not a disputed election. As this Court has recognized, when it is “not asked to judge a disputed . . . election but rather to interpret a statute,” it has the power to hear the case because “[t]he construction of a statute is a judicial function and responsibility.” Anderson v. S.C. Election

Comm'n, 397 S.C. 551, 555, 725 S.E.2d 704, 706 (2012) (per curiam). Appellant Wilder merely sought a declaration that Tedder does not meet the constitutional and statutory qualifications to run for and serve as the SC House District 109 representative. See id.

In Anderson, this Court acknowledged that the statute at issue “contemplate[d] a post-election primary remedy prohibiting a person whose name inadvertently appears on the ballot from being certified as a candidate for the general election,” but “discern[ed] no legislative intent that such remedy is exclusive.” 397 S.C. at 556, 725 S.E.2d at 706. The same is true here. Section 7-17-560 is directory, not mandatory. As the Court has noted, “[i]n the absence of exclusive authority vested in another branch of government,” an individual is “entitled to pursue relief pursuant to the Uniform Declaratory Judgment Act.” Gantt, 423 S.C. at 340, 814 S.E.2d at 527 (citing S.C. Code Ann. § 15-53-20); see also Rule 57, SCRCP (asserting that “[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate”).

In sum, the circuit court and thus this Court have jurisdiction to decide the Appellant’s issues, and he was not required to ask any other entity to rule upon this question of statutory and constitutional interpretation prior to filing an action in circuit court. Appellant Wilder could have potentially filed this action with the state executive committee, that is not dispositive. What is important for purposes of this appeal is that he was not required to do so. See Gantt, 423 S.C. at 340, 814 S.E.2d at 527 (asserting that, “[i]n the absence of exclusive authority vested in another branch of government,” an individual is “entitled to pursue [declaratory] relief” (citing S.C. Code Ann. § 15-53-20)); Rule 57, SCRCP (stating that “[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate”).

In the alternative, even if Appellant Wilder were required to exhaust his administrative remedies prior to challenging Tedder’s qualifications as a candidate in circuit court, the Court

should disregard Respondent Tedder's assertion of this requirement on the basis of futility. "[A] generally recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act." Ward v. State, 343 S.C. 14, 19, 538 S.E.2d 245, 247. A party must demonstrate futility "by a showing comparable to the administrative agency taking a 'hard and fast position that makes an adverse ruling a certainty.'" Brown v. James, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010) (quoting Law v. S.C. Dep't of Corr., 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006)).

In the present case, filing a challenge with any of the Respondents would have been futile - Charleston County Democratic Party Chair, Colleen Condon, Esq. and SC Democratic Party Chair Trav Robertson were notified via email and with documentation on April 1, 2020 before candidates had to be certified that Respondent Tedder did not reside in District 109. No action was taken. (R.56). Colleen Condon, Esq. appeared at the Voter Challenge Hearing on May 29, 2020 and was present when the Charleston County Board of Voter Registration ruled that Respondent Tedder was not a valid elector at 2629 Orchid Ave., North Charleston, SC. Shortly after the hearing, Condon advised Appellant's counsel that she had spoken with Mr. Robertson and because Tedder planned to appeal the decision, no action would be taken to disqualify his candidacy and they had no authority to remove him from the June 9 ballot. The SC Election Commission would not be bound to action until an Order of the Board was in place and with the assertion that an appeal would follow in circuit court the parties would be in a circular motion trying to ultimately reach this Court for finality. In any event, bringing the issue before any entity other than a judicial body would have been futile because it was made clear at the May 29, 2020 hearing that even the Charleston County Board of Voter Registration could not address the candidacy of Tedder and his posture on the ballot, only his voter registration status as of May 29, 2020. (R. p. 142, ll. 5-18).

The Charleston, Dorchester & State Democratic Parties had determined the candidate they most desired to represent House District 109 and nothing short of judicial intervention would redirect this position. This proved evident by having recruited the Respondent as plaintiff in an action in the federal court regarding the impact of absentee ballot witnessing. He was selected as a party even after being put on notice that there were concerns about his ability to meet the constitutional requirements of the office. Removing him from the ballot would be counterintuitive to their agenda. (R. 299-303).

II. THE APPELLANT'S ISSUES ON APPEAL WERE PRESERVED FOR APPELLATE REVIEW.

Respondent Tedder has averted the true issue of this case, the validity of his candidacy in light of S.C. CONST. art. III, 7 and continues to grapple for any possible means to not squarely compare apples to apples.

Respondent Tedder should be precluded from asserting this argument because collateral estoppel is an affirmative defense. No Respondent asserted and pled collateral estoppel as a defense in their answer. Tedder nor Tedder, LLC raised this in their Motion to Dismiss in Lieu of an Answer which was filed on July 17, 2020. (R. 34-41). In Respondent Tedder's Memo in Support of Motion to Dismiss filed on August 21, 2020 is the first time the issue of collateral estoppel is raised. (R. p.309-313). Appellant Wilder did defend the issue of collateral estoppel below. While the word collateral estoppel may not have been articulated the response and rationale address the distinctions in the declaratory action and the appeal from the Board of Voter Registration. (R. p. 225, 226 & 227, ll. 1-6). The same was supported from Sam Howell, Esq., the Board's counsel that the scope of the review of not exactly the same as the matter for which we were being heard. (R. p.230, ll. 1-4).

Respondent also argues that this claim should not proceed due to procedural matters such as not filing for reconsideration of Judge Cothran's order under Rules 59 and or 60, SCR. He also asserts that the lower court was not properly noticed of the appeal under SCACR 203(d)(1). There is nothing that requires Appellant to file a reconsideration in order to move on to the Supreme Court for relief. This is yet another attempt to put barriers towards the Appellant's attempt to gain answers on the true issue in this claim. As to the other red-herring of not noticing the lower court of this appeal is blatantly false. Confirmation of the court noticing all parties of the filing is herein.

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Respondent Tedder filed a Rule 12(b)(6) Motion to Dismiss to end the Appellant's pursuit of declaratory action. However, the presentation to the lower court was truly a Rule 56 Summary Judgment. Under Rule 12(b)(6) the court only looks at the complain and any documents incorporated by reference. In the Memo in Support of Dismissal documents were added to include the Order of Judge Dennis from July 2, 2020 and the SC Democratic Party Committee's Order regarding the other House 109 Candidate, James Johnson who is not a party to this action. With

the Respondent having added pleadings outside of the complaint, in order to defend what had become a Summary Judgment action, Appellant submitted various documents to include tax records to show the owner of the home where Tedder alleges to live (R. p. 78) and an Affidavit of the property manager at the home confirming that Tedder is not the renter or occupant at the property and that their tenant does not have the legal ability to extend such a status to Tedder.

The conversion of the Motion to Dismiss to a Summary judgment action placed a greater burden on the lower court to not dismiss if there were genuine issues of material fact. Summary judgment is available in declaratory actions. See Rule 56(a), SCRCP. The Affidavit of Kenneth Barnes met every essential evidentiary threshold for admissibility to include competency of the affiant, personal knowledge and the absence of hearsay. Id. at Rule 56(e). The lower court erred in it's dismissal of the action no matter the Rule it believed to have followed all of these matters are ripe for this Court's adjudication.

III. THE LOWER COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS PURSUANT TO THE DOCTRINE OF COLLATERAL ESTOPPEL.

Collateral estoppel is not applicate to this claim for a variety of reasons. For a party to successfully establish this preclusion one must show (1) the issue previously decided is identical with the one presented in the action in question; (2) the prior action has been finally adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

As to the first element, the issues were not the same in the two matters despite Respondents assertion that it was the same. Appellant made clear statements that the issue at hand was a constitutionality of Tedder's candidacy and not solely his elector status as the constitution requires

a strict construction on whether he was a resident at the time of filing. The Board of Voter Registration was clear that their process did not afford that determination – they could only determine his elector status on the day of that hearing. (R.p. 141, ll. 22-25, p.142, ll. 1-18). As to the second element, the action for which Respondent Tedder relied upon had NOT been finally adjudicated on the merits. Judge Dennis filed his order on July 2, 2020, however, on July 11, 2020 Appellant (as the Intervenor) made a request for reconsideration of the decision under Rules 59 & 60, SCRPC. Until there was a ruling on this motion, there was no final order in that claim. The hearing before Judge Cothran was held on August 25, 2020 and the ruling on the reconsideration by Judge Dennis was entered on August 28, 2020. (R. p. 227, ll.7-25). The third element applies, but in a limited capacity because Appellant was allowed to intervene in the appeal action, but that was it. As to the fourth element, the Appellant was granted the ability to intervene in Respondent Tedder’s appeal before Judge Dennis. However, he did not have a full and fair opportunity to litigate the issues in the prior action. Judge Dennis did not grant a hearing de novo as required by S.C. Code Ann. 7-5-240 and as such, Appellant, who was not a party to the Voter Challenge hearing was not afforded any opportunity to cross examine Tedder (who did not appear at the voter challenge hearing). (R. p.195, ll. 10-19, p. 198, ll. 20-25, p. 199). Judge Cothran was apprised of there being no de novo review before Judge Dennis and thus the Appellant had no opportunity to fully address Respondent Tedder. (r. 232, ll.16-25 & p. 233). Three (3) of the four (4) elements to an effective collateral estoppel challenge were not met.

IV. RESPONDENT TEDDER’S FRAUD SHOULD INVALIDATE HIS CANDIDACY.

This court has stated that it will not nullify an election based on minor violations of technical requirements. George v. Mun. Election Comm’n of City of Charleston, 335 S.C. 182, 186, 516 S.E.2d 206, 208 (1999). In the absence of fraud, a constitutional violation, or a statute

providing that an irregularity or illegality invalidates an election, we will not set aside an election for a mere irregularity. Taylor v. Town of Atlantic Beach Election Comm'n, 363 S.C. 8, 609 S.E.2d 500 (S.C. 2005). However, the Court is not inclined to allow for fraud to prevail in our election process and erode the public trust. The Court will not sanction practices which circumvent the plain purposes of the law and open the door to fraud. Gecy v. Bagwell, 372 S.C. 237, 642 S.E.2d 569 (S.C. 2007) *citing* May v. Wilson, 1999 S.C. 35, 19 S.E.2d 467 (1942). In this instance there is both a constitutional violation and fraud.

Appellant Wilder has not just alleged fraud, he has shown it to be factual. Most pointedly the Affidavit of Kenneth Barnes (R. p. 7) (which was presented to Judge Cothran) contradicts the sublease agreement Tedder presented to the Board of Voter Registration (R.82 & 287) and his own Affidavit to the Board of Voter Registration (R.284). Barnes' affidavit states that Tedder is not the named person on the lease, Tedder is not an occupant on the lease and the actual renter has no authority to extend residency to Tedder without prior consent and approval of the landlord. Tedder's sublease says that he and Edward Pasoquen are the only residents at the home and are roommates per Respondents brief. However, they have not explained the presence of Alana Lipscomb (Pasoquen's child's mother) whose car was just registered at the home in December 2019, two (2) months before Tedder became Pasoquen's "roommate" on February 28, 2020 and the infant child born between the couple on February 6, 2020. (R. pp. 180, ll. 5-11, 279 & 282).¹ Respondent Tedder purported a living arrangement that does not match with the factual evidence that only he and Pasoquen resided at the residence. This is even further supported by the Affidavit of Non-Service where the process server notes a man at the door holding a baby. (R. p.69).

¹ Edward Pasoquen and Alana Lipscomb were both served subpoenas to appear at the May 29, 2020 Board of Voter Registration Hearing. (R. p.149, ll. 14-25) Neither appeared. There were differing opinions as to whether there was actual subpoena power within the agency even though the matter was set as a court of record. (R. p. 178, ll. 10-25, p. 179 and p. 180, ll. 1-2).

Another fraudulent representation to the court were statements #7 and 8 of Tedder's affidavit. The implication of the affidavit was that due to his girlfriend's acceptance for a dental residency in Nashville, TN that he had to move immediately and find a new roommate. (R. p. 284). To the contrary is his FaceBook post in May 2020 celebrating her graduation from the Medical University of South Carolina and a posting from the University of Tennessee Dental Program showing that the course which his girlfriend was accepted into did not start until July 1, 2020. (R. pp. 152, ll. 2-12, 286, 274 & 275). Respondent Tedder's financial documents did not match up either – his filings with the SC Ethics Commission showed his address with the James Island address he shared with his girlfriend. (R. p. 255, 259 and 263). These reports are mandatory of all campaign contributions and the data of addresses are either imported from donation software that records the address from credit cards or it is entered by the candidate or a campaign worker. Either way, this is a major source of contradiction. Tedder would want one to believe that he was conscientious enough to immediately change his voter registration to his new address but not with his financial institution and still had the old address on his card; that he entered this information on two (2) occasions and did not remember where he had moved to and entered his old address or that his campaign worker pulled on address for him arbitrarily. Appellant would submit that it is none of these are the case and that the data on the report is the truth of the matter asserted as that report was to be submitted subject to Ethics provisions.

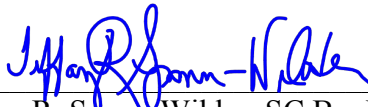
In his Affidavit, Tedder acknowledges living in Charleston since 2016, yet he does not explain why he had just obtained a SCDL in May 2020 after he had decided to file for elected office. Tedder also does not explain how he was ever able to become a South Carolina voter when his vehicles and drivers license were all North Carolina based. (R. pp. 250, 251 & 277). Respondent Tedder's facts do not add up. His mobile telephone number of (919) 699-3971 reflected his James Island address through May 4, 2020 billing cycle. (R. p. 253). When the

summation of what is stated and presented does not add up, deceit is what is left to explain. I implore this Court to read the transcript of the Board of Voter Registration's hearing closely and completely.

CONCLUSION

The Respondents state that the Appellant is seeking to bifurcate the Constitution issue. It is not so much of calling for bifurcation as it is that all parts must be adhered to; read and enforced in full. Appellant respectfully requests that this Court right a wrong premised on fraud and deceit. The South Carolina Constitution Article III, § 7 provides the basis for qualifications to run for the South Carolina Senate and House of Representatives. A candidate for the Senate or House of Representatives must be a *legal resident* of the district in which he is a candidate *at the time* he files for the office. (emphasis added). The Constitution also requires that to be eligible to hold the seat in the Senate or House of Representatives that the person must be a duly qualified elector in the district in which he may be chosen. Based upon the foregoing, the Court should reverse the circuit court's grant of Respondent Tedder's motion to dismiss and declare that Tedder did not timely meet the constitutional requirements of the office. Further, that the Court require a special primary in accordance with S.C. Code Ann. 7-11-55 of the candidates who were constitutionally qualified for the office as of March 30, 2020 when the filing period ended as Tedder should be disqualified from the nomination. Appellant and the other candidate for House District 109 deserve the opportunity to be represented by a true resident of their district who lives among them, knows and lives the issues of the community and not someone who has deceived them about something as simple as where he lives solely for the benefit of holding elected office and seeing a vastly low-income, under-educated minority community as a great target. This is a matter of public trust and equity must always be at work.

Respectfully submitted,
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