

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Honourable J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-08-2329
Appellate Case No. 2012-212872

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S.C. SUPREME COURT

Robert O. Call, Jr.,Appellant,

v.

Berkeley County Republican Party (Timothy Callanan, as Chairman); South Carolina
Republican Party (Matt Moore, as Executive Director, and Chad Connolly, as Chairman);
Berkeley County Election Commission; South Carolina State Election Commission (Marci
Andino, as Executive Director, and Chris Whitmire, as Director of Public Information and
Training); Timothy Callanan and Kenneth E. Gunn,Respondents.

INITIAL BRIEF OF RESPONDENT
BERKELEY COUNTY BOARD OF ELECTIONS AND VOTER REGISTRATION

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court correctly grant the State Election Commission's Motion to Dismiss?

STATEMENT OF THE CASE

On August 10, 2012, Plaintiff-Appellant Robert O. Call Jr. (“Call”) filed his Complaint for declaratory judgment, writ of mandamus, injunction and spoliation. Call alleged that non-incumbent Republican candidate Kenneth Gunn (“Gunn”), the winner of the Republican Party Primary Election for Berkeley County Council’s District 3 seat, did not properly file his statement of economic interest (“SEI”) and statement of intention of candidacy (“SIC”). Call sought to decertify Gunn as the Republican nominee for the November 6, 2012 General Election for Berkeley County Council District 3 based on S.C. Code § 8-13-1356 et seq., Anderson v. S.C. Election Comm’n, 397 S.C. 551, 725 S.E.2d 704 (2012), and Florence Cnty. Democratic Party v. Florence Cnty. Republican Party, 398 S.C. 124, 727 S.E.2d 418 (2012) which require a candidate to simultaneously file a SEI and SIC.

South Carolina State Election Commission (“SEC”) responded to Call’s Complaint by filing a Motion to Dismiss on August 17, 2012; a hearing was held on the Motion that same day.

On August 21, 2012, the Honourable J.C. Nicholson found that Call unreasonably delayed in bringing suit and granted SEC’s Motion to Dismiss based upon the equitable doctrine of laches.

On September 6, 2012, Call appealed to this Court.

On February 15, 2013, this Court issued an Order granting an extension to Call to serve and file the Initial Brief of Appellant.

On March 6, 2013, this Court issued an Order granting a Motion to File Out of Time to Call.

On March 16, 2013, Call filed his Initial Brief of Appellant.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE CIRCUIT COURT'S DECISION TO DISMISS BECAUSE APPELLANT'S FAILURE TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES PRECLUDES HIS ACTION IN CIRCUIT COURT.

One must pursue an administrative remedy to determine a question of fact if an adequate administrative remedy is available or be precluded from seeking relief in the courts. Hyde v. S.C. Dep't of Mental Health, 314 S.C. 207, 442 S.E.2d 582 (1994). The General Assembly of South Carolina has provided an adequate administrative remedy for protests and contests of primary elections of county officers through S.C. Code § 7-17-520 and 7-17-550. Additionally, administrative remedy is available for protests and contests that arise out of general elections in the case of county officers under South Carolina Code § 7-17-30. Where one has failed to exhaust remedies set forth by the General Assembly he is precluded from challenging primary results in circuit court.

Here, the Appellant ignored the administrative remedies available to him, and instead immediately sought relief in circuit court. Because Call did not pursue the correct adequate administrative channels of relief available to him, he is precluded from seeking relief in court.

I. Appellant is precluded from seeking relief in court where he failed to pursue administrative remedy following the primary election.

S.C. Code Ann. § 7-17-520 (Supp. 2011) provides that:

“[t]he protests and contests in the case of county officers and less than county officers shall be filed in writing with the chairman of the county party executive committee, together with a copy for each candidate in the race not later than noon Monday following the day of the declaration by the county committee of the result of the election.”

South Carolina law additionally provides a process to appeal executive committee decisions under S.C. Code Ann. § 7-17-550 (Supp. 2011). Call failed to follow the plain

language of the statute and did not pursue this adequate administrative remedy set forth by the General Assembly.

Berkeley County Election Commission, sitting as the Board of Canvassers, certified the results of the Berkeley County Primary on June 14, 2012. Per South Carolina Code, Call should have filed his protest or contest in writing with the chairman of the Berkeley County Republican Party executive committee (along with a copy for each candidate in the race) no later than noon on the Monday following the day of declaration by the committee of the result: Monday, June 16, 2012. Ignoring South Carolina law, Call instead filed his Verified Summons and Complaint in Berkeley County Court of Common Pleas on August 10, 2012.

A hearing was held by the Honourable J.C. Nicholson, Jr. on August 17, 2012, on the issue of the SEC's Motion to Dismiss; the court issued an Order on August 23, 2012, granting the Motion to Dismiss based upon the equitable doctrine of laches, citing the case of Sasser v. S.C. Democratic Party, 277 S.C. 67, 282 S.E.2d 602 (1981) (where Sasser sought relief through the courts only after first protesting primary election results to the South Carolina Democratic Executive Committee and where contests of a primary election brought after the election has occurred are moot). The Respondent Berkeley County Board of Elections and Voter Registration submit that the unreasonable delay in question should not be measured by Call's filing with Berkeley County Court of Common Pleas on August 13, 2012, but in Call's complete failure to seek administrative relief through the Berkeley County Republican Party executive committee before June 16, 2012, as is required by law under South Carolina Code § 7-17-520 (Supp. 2011).

Here, Call did not first pursue his administrative remedy through the Berkeley County Republican Party before filing his Compliant in Circuit Court, and should therefore be precluded from seeking relief in the courts.

II. Appellant is precluded from seeking relief in court where he failed to pursue administrative remedy following the 2012 General Election.

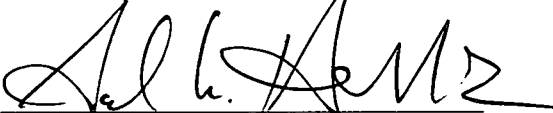
South Carolina law provides that: “[t]he county boards shall decide all cases under protest or contest that arise in their respective counties in the case of county officers and less than county offices, except for primaries and municipal elections.” S.C. Code Ann § 7-17-30 (Supp. 2011). Appellant failed to employ an available adequate administrative remedy through the Berkeley County Board of Elections and Voter Registration following the general election in 2012 and instead requested relief directly from the courts. In his Compliant, Call asked the circuit court to enjoin Gunn from being certified as the Republican Party candidate or to have Gunn decertified if he had already been certified. Because the general election has already occurred, this issue is not only moot under Sasser, but the court’s equitable power of laches must yield in light of section 7-17-30 and common law precedent set forth in Hyde. See also Johnson v. Lloyd, 732 S.E.2d 198 (S.C. Ct. App. 2012). Because the Call failed to seek available adequate administrative remedy he is precluded from seeking relief in court.

CONCLUSION

For the reasons stated above, this Court should dismiss the appeal.

Respectfully submitted:

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Charleston, South Carolina
15 April 2013

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PROOF OF SERVICE

PERSONALLY appeared before me the undersigned who, being duly sworn, on oath says:

1. That she is an employee in the office of Howell Linkous & Nettles, LLC, attorneys for the respondent herein;
2. That on the 15th day of April, 2013, she did via United States Postal Service give a true and correct copy of the foregoing Initial Brief of Respondent via United States Postal Service to:

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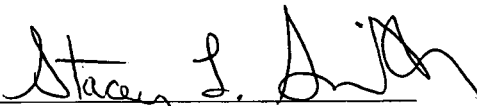
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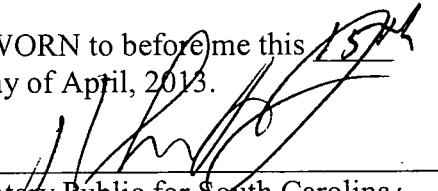
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3. That she is not a party to this action.



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Day of April, 2013.



Notary Public for South Carolina
My Commission Expires 3/12/18