

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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MAY - 8 2013

S.C. Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Case No. 2012-CP-08-2329

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 Gunn, Respondents.

**REPLY OF SOUTH CAROLINA STATE ELECTION COMMISSION
TO APPELLANT’S RETURN TO THE SOUTH CAROLINA STATE ELECTION
COMMISSION’S MOTION TO DISMISS APPEAL AS MOOT**

Respondent South Carolina State Election Commission (Marci Andino, as Executive
Director, and Chris Whitmire as Director of Public Information and Training) (collectively, SEC)
hereby offer this Reply to Appellant’s Return to the SEC’s Motion to Dismiss the Appeal as
Moot.

DISCUSSION

As a preliminary matter, the SEC takes exception to Appellant’s assertion on pages 1
through 2 of his Return that certain facts were before the circuit court. As to the assertions in
numbers 2.a through 2.e on page 2 of Appellant’s Return, these were not facts before the court,
they were statements made during legal argument. See Tr. 11:1–3, 35:7-25. No witness testified

under oath to these statements, and “[i]t is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence.” Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006). Further, the assertions contained in numbers 4 and 5 on pages 2 through 3 of Appellant’s Return are not facts that were before the circuit court, but are legal conclusions on the issues immediately before this Court in Appellant’s appeal. Accordingly, the SEC requests this Court not consider those assertions as “facts before the circuit court.”

I. The Appeal Is Moot Because The Election Has Been Held.

As argued in the SEC’s Motion to Dismiss Appeal as Moot, because the November 6, 2012 general election has occurred, Appellant’s requested relief is moot. In Sasser v. South Carolina Democratic Party, 277 S.C. 67, 282 S.E.2d 602 (1981), the appellant sought the Democratic party nomination to the House of Representatives District 106, lost the June 1980 primary election, and protested the results of that primary. By the time the appellant was before this Court, the general election had already been conducted. This Court held,

As a general rule, courts have held they are without power to grant substantial relief once the time passes for the name of a contestant to be certified for the election of officer to be placed on the official ballot. . . . In the instant case, **the election has already occurred**. It is therefore our determination **the issues raised by this action have been rendered moot**. Accordingly, the appeal is dismissed with prejudice.

Sasser, 277 S.C. at 69, 282 S.E.2d at 603–04 (emphasis added). In Willis v. Wukela, 379 S.C. 126, 665 S.E.2d 171 (2008), this Court, relying in part on Sasser, again dismissed an appeal as moot because insufficient time remained to hold another primary election and have the candidates name certified by the August 15 statutory deadline contained in Section 7-13-350 of the South Carolina Code.

In the instant case, the statutory deadline to certify the candidates’ names had passed two days prior to the hearing before the circuit court judge. The matter was moot then and certainly

is moot now that the general election has been held. Accordingly, Appellant's appeal should be dismissed.

II. Appellant's Newly Requested Relief Is Against the Public Interest.

Appellant contends "a new election should be held" because "noncompliance with [Section 8-13-1356 of the South Carolina Code] requires the removal of the candidate from the ballot before the election." (App. Return 4.) Appellant's newly requested relief is inequitable because it harms the public and because Appellant could have avoided the alleged necessity of holding a new election by prosecuting his claims in a timely manner. The November 6, 2012 general election mooted Appellant's claims and his appeal should be dismissed.

As noted in the SEC's Motion to Dismiss Appeal as Moot, Appellant never requested a new election be held—not from this Court in his Initial Brief, nor from the circuit court in his Complaint. Appellant's newly requested relief ignores the unnecessary and extraordinary inconvenience and expense to the public in setting aside the November 6, 2012 election results and holding a new election, particularly when Appellant took no steps to obtain a final resolution of his claim and appeal prior to the November 6 election. Even after receiving an unfavorable ruling on the SEC's Motion to Dismiss at the August 17 hearing, Appellant continued to sit on his hands. Appellant filed his Notice of Appeal exactly two months before the November 6 general election—ample time within which to seek a order enjoining the election—and did not file his Initial Brief until March 15, 2013, more than four months after the date of the election. Appellant could have sought a supersedeas from this Court, requested an expedited appeal, or at a minimum requested a stay of the election from the circuit court or this Court pending review of his claims. In the Willis case, for example, this Court issued its opinion less than two months after the protested primary election was held. It is not unreasonable to expect a plaintiff and appellant to bring his claims to resolution during a timeframe within which the courts may grant substantial relief.

Appellant could have had his issues determined prior to the November 6 election, but chose not to take any of the measures available to him. Appellant's underlying claim is an equitable one, and the old equitable maxim "one who seeks equity must do equity" especially is apt in this case. Appellant's case in the circuit court has been mooted by the November 6, 2012 general election. Because Appellant's claim is moot, primarily because of the manner in which Appellant chose to prosecute his Complaint and appeal, Appellant's appeal should be dismissed.

III. The Circuit Court Judge Considered the Merits During the August 17 Hearing.

Appellant's argument the August 17, 2012 hearing strictly was on the SEC's Motion to Dismiss and Appellant's Motion for Injunctive Relief misapprehends what occurred during the hearing. Appellant ignores the circuit court judge's clear intention to determine Respondent Gunn's compliance with Section 8-13-1356.

As is evidenced from the transcript of the August 17 hearing and discussed in the SEC's Motion to Dismiss Appeal as Moot, the parties presented evidence relating to the central issue in Appellant's Complaint: whether Respondent Gunn complied with Section 8-13-1356 of the South Carolina Code. The circuit court judge made it clear he intended to determine the ultimate issue in Appellant's Complaint. At the end of the hearing, after all the evidence and testimony had been given, the judge framed the issue he was determining for the parties:

"The question is whether he filed the paper form . . . at the same time he filed his Statement of Intent of Candidacy."

(Tr. 90:24–91:3); and

"—does the Court believe he filed it simultaneously or at the same time he filed his Statement of Intent of Candidacy or did he not."

(Tr. 92:9–11). If Appellant understood the hearing solely to be regarding his motion for injunctive relief and the SEC's motion to dismiss, he did not raise his concern to the court, either at the hearing or in a Rule 59(e) motion to alter or amend the judgment.


Although the circuit court judge heard the merits of the case, he did not make factual findings regarding the merits because he determined it was appropriate to grant the SEC's motion to dismiss. Thus, he did not need to reach the merits in his August 23, 2012 Order, and a lack of factual findings in the Order does not establish a merits hearing was not held. Because the circuit court judge conducted a hearing on the merits of Appellant's Complaint, Appellant already has received the relief he requests and this appeal should be dismissed as moot.

CONCLUSION

Appellant's appeal is moot because the general election has been held and because Appellant received a trial on the merits. Therefore, any decision by this Court will not have a practical legal effect and Respondent South Carolina State Election Commission respectfully requests this Court dismiss Appellant's appeal as moot.

Respectfully submitted,

M. Elizabeth Crum, S.C. Bar No. 1486
lcrum@mcnair.net
Ariail B. Kirk, S.C. Bar No. 71101
akirk@mcnair.net
Amber B. Carter, S.C. Bar No. 78706
acarter@mcnair.net
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

By: 

Attorneys for Respondent South Carolina
State Election Commission (Marci Andino as
Executive Director and Chris Whitmire as
Director of Public Information and Training)

May 8, 2013

Columbia, South Carolina

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Training); Timothy Callanan and Kenneth Gunn, Respondents.

PROOF OF SERVICE

I certify that I have served the attached Reply of South Carolina Election Commission to
Appellant’s Return to the Motion to Dismiss Appeal as Moot on the below-named parties, at the
addresses given, by depositing a copy in the United States Mail, postage prepaid, and addressed
as follows:

James E. Smith, Jr., Esquire
James E. Smith, Jr., P.A.
1422 Laurel Street
Columbia, SC 29201
(803) 933-9800
firm@JamesSmithPA.com

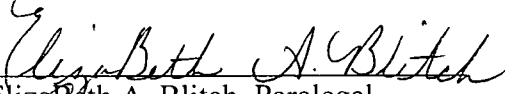
Samuel W. Howell, IV, Esquire
Howell Linkous & Nettles, LLC
106 Broad Street
Charleston, SC 29401
(843) 266-3800
samhowell@bond-law.com

Robert Bolchoz, Esquire
Robert Bolchoz, LLC
P.O. Box 6989
Columbia, SC 29260
(803) 790-7474
robert@bolchoz.com

M. Todd Carroll, Esquire
Womble Carlyle Sandridge & Rice, LLP
1727 Hampton Street
Columbia, SC 29201
(803) 454-7730
Todd.Carroll@wcsr.com

Kenneth E. Gunn
212 Palmetto Village Circle
Moncks Corner, SC 29461

Timothy Callanan
7009 Schooner Street
Daniel Island, SC 29461


Elizabeth A. Blicht, Paralegal
McNair Law Firm, P.A.
P.O. Box 11390
Columbia, SC 29211
(803) 799-9800

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Columbia, South Carolina