

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM Horry COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

**RECEIVED**

MAY 14 2013

**S.C. Supreme Court**

---

Case No.: 2012-CP-26-4403  
Appellate Case No.: 2012-213489

---

Windy Price ..... Appellant,

v.

Horry County Election Commission,  
South Carolina Election Commission ..... Respondents.

---

**BRIEF OF RESPONDENT  
SOUTH CAROLINA ELECTION COMMISSION**

---

Alan Wilson  
John W. McIntosh  
J.C. Nicholson, III  
Office of the South Carolina Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
Telephone: (803) 734-9916

May 14, 2013

ATTORNEYS FOR RESPONDENT SOUTH CAROLINA  
ELECTION COMMISSION

**TABLE OF CONTENTS**

TABLE OF CONTENTS .....1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUES ON APPEAL.....4

STATEMENT OF THE CASE .....5

STATEMENT OF FACTS .....6

ARGUMENT

    I.    Does the failure of Appellant to properly present argument on most of the issues involved in this case prevent this appeal? .....8

    II.   Was the Circuit Court correct in ruling that Appellant did not raise any claims regarding notice in her protest letter?.....12

    III.  Was the Circuit Court Order based on errors of law regarding mandatory statutory provisions? ..... 13

    IV.  Was the Circuit Court correct in ruling the protest hearing was in compliance with the Freedom of Information Act?.....15

    V.   Was the Horry County Election Commission correct in its evidentiary rulings during the protest hearing? .....17

CONCLUSION .....18

## TABLE OF AUTHORITIES

### Cases

|                                                                                                                     |           |
|---------------------------------------------------------------------------------------------------------------------|-----------|
| <u>Bakala v. Bakala</u> , 352 S.C. 612, 576 S.E.2d 156 (2003) .....                                                 | 11, 18    |
| <u>Butler v. Town of Edgefield</u> , 328 S.C. 238, 493 S.E.2d 838 (1997).....                                       | 12, 15    |
| <u>Cole v. Town of Atlantic Beach</u> , 393 S.C. 264, 712 S.E.2d 440 (2011).....                                    | 14        |
| <u>Dixon v. Dixon</u> , 362 S.C. 388, 608 S.E.2d 849 (2005) .....                                                   | 10        |
| <u>Fielding v. S.C. Election Comm'n</u> , 305 S.C. 313, 408 S.E.2d 232 (1991).....                                  | 8         |
| <u>Gecy v. Bagwell</u> , 372 S.C. 237, 642 S.E.2d 569 (2007).....                                                   | 8, 16     |
| <u>George v. Municipal Election Comm'n of City of Charleston</u> , 335 S.C. 182, 516 S.E.2d 206<br>(1999).....      | 8, 14, 15 |
| <u>Hickman v. Hickman</u> , 301 S.C. 455, 392 S.E.2d 481 (Ct.App.1990) .....                                        | 11        |
| <u>Holy Loch Distribs., Inc. v. Hitchcock</u> , 340 S.C. 20, 531 S.E.2d 282 (2000).....                             | 10, 17    |
| <u>Johnson v. Sonoco Prods. Co.</u> , 381 S.C. 172, 672 S.E.2d 567 (2009) .....                                     | 11        |
| <u>Kiawah Prop. Owners Group v. Public Serv. Comm'n</u> , 359 S.C. 105, 597 S.E.2d 145 (2004)<br>.....              | 11        |
| <u>Kolle v. State</u> , 386 S.C. 578, 690 S.E.2d 73 (2010) .....                                                    | 10        |
| <u>McClurg v. Deaton</u> , 380 S.C. 563, 671 S.E.2d 87 (Ct.App.2008) .....                                          | 11        |
| <u>Peterson v. Porter</u> , 389 S.C. 148, 697 S.E.2d 656 (Ct.App.2010) .....                                        | 11        |
| <u>Poch v. Bayshore Concrete Products/South Carolina, Inc.</u> , 386 S.C. 13, 686 S.E.2d<br>689 (Ct.App.2009) ..... | 10        |
| <u>Pye v. Estate of Fox</u> , 369 S.C. 555, 633 S.E.2d 505 (2006).....                                              | 10, 17    |
| <u>Spreeuw v. Barker</u> , 385 S.C. 45, 682 S.E.2d 843 (Ct.App.2009) .....                                          | 11        |

Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000) .....10, 18

Taylor v. Roche, 271 S.C. 505, 248 S.E.2d 580 (1978).....16

Taylor v. Town of Atlantic Beach Election Comm'n, 363 S.C. 8, 609 S.E.2d 500 (2005) ..8

**South Carolina Constitution**

S.C. Const. art II, § 10.....16

**Statutes**

S.C. Code Ann. § 5-15-130 .....12, 16

S.C. Code Ann. § 7-7-910 .....14, 15

S.C. Code Ann. § 7-7-1000.....13, 15

S.C. Code Ann. § 7-13-35.....13, 15

S.C. Code Ann. § 7-13-1170.....9

**Court Rules**

Rule 220(c), SCACR .....18

## STATEMENT OF ISSUES ON APPEAL

- I. **Does the failure of Appellant to properly present argument on most of the issues involved in this case prevent this appeal?**
- II. **Was the Circuit Court correct in ruling that Appellant did not raise any claims regarding notice in her protest letter?**
- III. **Was the Circuit Court Order based on errors of law regarding mandatory statutory provisions?**
- IV. **Was the Circuit Court correct in ruling the protest hearing was in compliance with the Freedom of Information Act?**
- V. **Was the Horry County Election Commission correct in its evidentiary rulings during the protest hearing?**

### **STATEMENT OF THE CASE**

This is an appeal from the Circuit Court's Order dated August 15, 2012 that dismissed Appellant's appeal of her election protest. Appellant, a candidate for mayor of the Town of Atlantic Beach, filed an election protest of the May 22, 2012 election for mayor in which she was a losing candidate. The protest hearing for that election was held May 25, 2012, before the Horry County Election Commission which denied Appellant's protest by written order dated May 29, 2012. Appellant appealed her protest denial to the Circuit Court on June 4, 2012 which held a hearing on July 26, 2012. Appellant filed a motion to alter or amend the Circuit Court's decision. The Circuit Court denied the motion to alter or amend on November 2, 2012. Appellant timely filed her Notice of Appeal to this Court on November 27, 2012.

## STATEMENT OF FACTS

On May 22, 2012, the Town of Atlantic Beach held an election for mayor and for two town council seats. The election was held pursuant to Executive Order 2012-03 issued by Governor Haley and filed with the Secretary of State on March 16, 2012. Pursuant to S.C. Code § 7-13-1170, Governor Haley's Order designated the Horry County Election Commission as the body to conduct the May 22<sup>nd</sup> election and handle any election protests. (R. p. 171, lines 14-24 & p. 178, lines 2-8). The State Election Commission was mentioned in the Governor's Order as an entity to conduct the election but the State Election Commission does not conduct elections. (R. p. 2)

The transfer of election authority to conduct the election was precleared by the U.S. Department of Justice prior to the May 22<sup>nd</sup> election. (R. p. 185, line 17- p. 186, line 6). Initially, the May 22<sup>nd</sup> election was to take place at the Atlantic Beach Community Center. However, due to the annual bike fest taking place that week, the Community Center was unavailable as a polling place location. The election was then held at the First Missionary Baptist Church. Horry County applied for preclearance for the change in polling location before the May 22<sup>nd</sup> election but it wasn't until after the election that preclearance was granted. (R. p. 184, lines 3-23). The Horry County Election Commission had published two notices in the Sun News concerning the May 22<sup>nd</sup> election. After the polling place location change, the Horry County Election Commission sent out postcards to the Atlantic Beach electorate notifying them of the change in polling place. (R. p. 273, lines 1-10 & p. 274, line 2 – p. 275, line 23 & p. 280, lines 12-24). The Executive Director of the Horry County Election Commission communicated

with officials from Atlantic Beach about the change in location for the polling place. (R. p. 279, lines 8-21). On the date of the election a sign was placed at the Community Center notifying voters of the change in location. (R. p. 282, line 19 – p. 283, line 1).

The results of the May 22<sup>nd</sup> election for mayor were as follows: Jake Evans, 84 votes; Retha Pierce, 5 votes; and Windy Price, 1 vote. (R. p. 163, lines 21-23). The Horry County Election Commission then certified Jake Evans as the winner of the mayoral election. Appellant filed her election protest and the protest hearing was held in front of the Horry County Election Commission in Conway, SC on May 25, 2012. The Chairman of the Horry County Election Commission made a statement about the public notice of the protest hearing indicating they notified the media of the protest hearing even before they received an actual protest. (R. p. 172, line 19 – p. 173, line 8). The Horry County Election Commission (hereinafter the “Commission”) denied the protest of Appellant. (R. p. 306, lines 11-19).

## ARGUMENT

### Standard of Review

Circuit court decisions on municipal election cases are reviewed to correct errors of law. Findings of fact are not reviewed unless those findings are wholly unsupported by evidence. *See Gecy v. Bagwell*, 372 S.C. 237, 241, 642 S.E.2d 569, 571 (2007); *relying on Taylor v. Town of Atlantic Beach Election Comm'n.*, 363 S.C. 8, 609 S.E.2d 500 (2005). Every reasonable presumption to sustain a contested election will be employed and an election will not be set aside due to mere irregularities or illegalities unless the result is changed or rendered doubtful. *See George v. Municipal Election Comm'n of City of Charleston*, 335 S.C. 182, 516 S.E.2d 206 (1999). Specifically, “a protest cannot be granted unless the protestant establishes the effect on the election results with certainty because an election cannot be overturned on the basis of conjecture or speculation.” *Fielding v. S.C. Election Comm'n.*, 305 S.C. 313, 317, 408 S.E.2d 232, 234 (1991).

#### **I. THE FAILURE OF APPELLANT TO PROPERLY PRESENT ARGUMENT BELOW ON MOST OF THE ISSUES INVOLVED IN THIS CASE PREVENTS THIS APPEAL.**

##### Appellant's Issues on Appeal

Appellant challenges the denial of her appeal. However, Appellant's initial protest letter, arguments at the protest hearing and initial appeal to circuit court written by her first attorney all focus on the legality of the Governor's Order. The gravamen of Appellant's protest letter and hearing statements is that the Governor's Order was based on false information and therefore everything that occurred subsequent to the Governor's Order was legally insufficient because of the alleged infirmities with the Governor's Order. Appellant's initial protest letter mentions three points: 1) the vote count; 2) federal preclearance; and 3) violation of state law [meaning

voter intimidation, secrecy of the ballot, and fraud]. (R. pp. 117-118). Appellant discusses her three issues in her statements to the Horry County Election Commission at the election protest hearing. She specifically limits the “violation of state law” to the three sub-issues of voter intimidation, ballot secrecy, and fraud. (R. p. 188, lines 20-24 & p. 211, lines 16-22).

Appellant’s initial attorney, Gary White, filed her protest appeal with the circuit court. The first issue raised is an attack on the Governor’s authority under S.C. Code § 7-13-1170 to order an election. The second and third issues are mixed together in the protest appeal. The federal issue that both the Appellant and Appellant’s initial counsel discuss relates to preclearance of the May 22<sup>nd</sup> election by the U.S. Department of Justice and preclearance for the polling place change. It appears as though the preclearance issue is the most important to Appellant as she emphasized it in her statements during the protest hearing and her protest appeal. She did not participate in the May 22<sup>nd</sup> election because she was not comfortable with the preclearance issues. (R. p. 261, lines 23-25). However, this preclearance issue has not been appealed to this Court. The only issue that Appellant presented at the protest hearing and at the protest appeal that survives preservation is the Freedom of Information Act 24-hour notice provision regarding the timing of the protest hearing itself (identified as issue II in Appellant’s Initial Brief). This issue is dealt with below.

The state issues presented by Appellant’s initial counsel were limited and not the same as the state issues raised by Appellant’s current counsel. The initial protest appeal state issues relate to public notice of the election and the protest hearing, the vote count resulting from ballot counting at the challenged ballot hearing, and the secrecy of the ballot and voter intimidation issues both relate to the Governor’s appearance on television asking the voters to get out and vote. The public notice argument also continues the attack on the legality of the Governor’s Order.

Appellant's statement at the protest hearing do not relate to the public notice of the election but rather the public notice of the protest hearing and the challenge ballot hearing. (R. p. 172, line 19- p. 174, line 25). Indeed, the protest appeal by Appellant's first counsel concedes that the two notices of the May 22<sup>nd</sup> election in the Sun News was "in compliance with the law" but instead takes issue with the lack of a specific notice for Atlantic Beach as is the custom in Atlantic Beach to place the notice on town hall. (R. p. 67). However, this argument is simply a backdoor attack on the Governor's Order that gave the authority to conduct the election to the Horry County Election Commission which utilized its normal public notice methodology for elections in compliance with the law.

Appellant presented three of the first four issues in the appeal to this Court in her Motion to Alter or Amend the Circuit Court Order. (R. pp. 105-115). The fifth issue presented by Appellant in this appeal was presented for the first time in Appellant's initial brief to this Court. The failure to present arguments at the proper time is fatal to the appeal in this case. "It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505 (2006); *quoting* Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000); Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000).

"A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." Poch v. Bayshore Concrete Products/South Carolina, Inc., 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct.App.2009); *relying on* Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (finding issue raised for first time in Rule 59, SCRPC, motion is not preserved for review); Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010) (standing issue not properly before the Court where the State did not

raise issue at PCR hearing but only in its motion for reconsideration); *see also Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (recognizing that an issue may not be raised for the first time in a motion to reconsider); *Kiawah Prop. Owners Group v. Public Serv. Comm'n.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating an issue raised for first time in petition for rehearing not preserved); *see Peterson v. Porter*, 389 S.C. 148, 152, 697 S.E.2d 656, 658 (Ct.App.2010) (holding that failure of Peterson to raise employer-employee argument during summary judgment proceedings but raising argument in motion to reconsider insufficient to preserve issue for review); *Spreeuw v. Barker*, 385 S.C. 45, 69, 682 S.E.2d 843, 855 (Ct.App.2009) (holding an argument presented to the court for the first time during post-trial motions pursuant to Rule 59 and Rule 60 are not preserved for appellate review); *see McClurg v. Deaton*, 380 S.C. 563, 579-80, 671 S.E.2d 87, 96 (Ct.App.2008) (holding a party may not raise an issue for the first time in a motion to reconsider, alter or amend a judgment); *see Hickman v. Hickman*, 301 S.C. 455, 456-67, 392 S.E.2d 481, 482 (Ct.App.1990) (“A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not”).

Thus, four of the five issues raised by Appellant in this appeal were raised for the first time in post-judgment motions and are not properly preserved for review before this Court. Respondent, on this ground alone, is entitled to the affirmation of the Circuit Court’s Order and the dismissal of this appeal as to these unpreserved issues. *See Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003) (husband’s decision to forego participation in the family court proceedings inevitably resulted in his failure to properly preserve for appeal any complaint regarding those proceedings). However, notwithstanding the preservation issue, Respondent presents below its arguments in opposition to the issues presented by Appellant in this case.

**II. THE CIRCUIT COURT WAS CORRECT IN RULING APPELLANT DID NOT RAISE ANY CLAIMS REGARDING NOTICE IN HER PROTEST LETTER.**

**Public Notice**

Appellant's protest letter did not mention any defects with any public notice. The Circuit Court correctly ruled that because her protest letter did not raise any claims with regard to public notice that issue was not before the Commission. *See* S.C. Code § 5-15-130 (1976) (requiring a "concise statement of the grounds" for the protest) and Butler v. Town of Edgefield, 328 S.C. 238, 248, 493 S.E.2d 838, 843 (1997) (holding that circuit court could not consider issues not presented to the Commission). The paragraph in Appellant's protest letter to show "notice" as a valid claim does not provide any sort of idea that it relates to the public notice of the election. "The confusion for candidates and voters was a direct result of the actions taken by specific individuals to orchestrate a winning election for specific candidates." (R. p. 117). This phrase impugns unnamed individuals regarding alleged conduct but it has nothing to do with the public notice of the election.

"Evidence will show that more people stayed away from the polling place on May 22, 2012 as a result of information that was not provided to all candidates and all voters." (R. p. 117). This phrase does not indicate it is about the public notice for the election. This phrase is directed toward the voter turnout and voter intimidation allegation as opposed to public notice. Actually, during the protest hearing, Appellant's witness Carolyn Cole, testified that she didn't think people were held away from the polls and that people made their own decisions. (R. p. 253, lines 14-18).

Additionally, as noted above, Appellant's first attorney admitted in her protest appeal that the publication of the May 22<sup>nd</sup> election twice in the Sun News did comply with the law. (R. p. 67). The notice of the polling place change was accomplished through the mailing of postcards to the

registered voters informing them of the change in location from the community center to the church and on election day a sign was put up at the community center to notify voters of the change in location. (R. p. 274, lines 14-20 & p. 280, lines 18-24 & p. 282, line 25-p. 283, line 1). Appellant put forth no evidence that the postcard notice of the polling place change was legally insufficient. Thus, Appellant failed to meet her burden of establishing that the public notice for the May 22<sup>nd</sup> election was insufficient.

**III. THE CIRCUIT COURT ORDER WAS NOT BASED ON ERRORS OF LAW REGARDING MANDATORY STATUTORY PROVISIONS.**

**Polling Place change and mandatory statutes**

The Appellant contends the polling place change did not comply with S.C. Code § 7-7-1000 as a mandatory statutory provision. As noted above, this issue is not preserved for appeal as Appellant did not raise it until she filed her Motion to Alter or Amend the Circuit Court Order. However, even if it had been properly raised, this claim still fails as a matter of law. This statute addresses situations where a municipality pools precincts in a municipal election if certain conditions are met, such as the number of registered voters in a precinct, the number of registered voters within the municipality, and the distance between polling locations between pooled precincts. This issue is not remotely applicable in this case because the Town of Atlantic Beach only has one precinct and Appellant put forth no evidence to the contrary.

Appellant contends that the polling place change failed to comply with S.C. Code § 7-13-35 as well. As noted above, this issue is also not properly preserved for appeal. Additionally, the initial protest appeal does not mention any violation of that particular statute with regard to the polling place change but instead focuses on the preclearance of the polling place change. As noted above, the initial protest appeal concedes that the polling place change notification complied with state law. (R. pp. 66-67). It is patently unfair to the Respondents in this case to

allow Appellant's current counsel to reverse the position of Appellant's initial counsel in this case regarding compliance with statutory provisions related to the polling place change.

Furthermore, Appellant did not introduce any evidence that the polling place change was legally insufficient at the protest hearing. This evidence would have consisted of determining the number of voters who did not receive this polling place change notice and did not cast a ballot because of the lack of notification. The burden to produce this type of evidence was on the Appellant. Since she did not produce any evidence on this point, she failed to meet her burden regarding the sufficiency of the notice of the polling place change.

Appellant contends the Circuit Court erred in not considering an alleged violation of S.C. Code § 7-7-910 (B)(2) as well. As noted above, Appellant failed to properly raise this issue and thus it is not preserved for appeal. However, even if this issue were properly raised, it would still fail as a matter of law. Appellant did not produce any evidence at the protest hearing regarding whether the designation of the new polling place was within seven days of the election or not. Under the statute, if the designation occurs more than seven days prior to the election, the legislative delegation must give approval. However, if the designation is made less than seven days before the election, it is sufficient to simply give notification to the legislative delegation. *See* S.C. Code Ann. § 7-7-910 (B)(2) (1976). However, this statute is not mandatory for purposes of this case. Provisions of statutes are mandatory in elections if the statute declares that its provisions are "essential to the validity of an election" or if enforcement of the statutory provisions is sought before the election is conducted. *See* George v. Municipal Election Comm'n of City of Charleston, 335 S.C. 182, 186, 516 S.E.2d 206, 208 (1999); Cole v Town of Atlantic Beach Election Comm'n., 393 S.C. 264, 273-74, 712 S.E.2d 440, 445-46 (2011).

Neither S.C. Code § 7-7-1000 nor S.C. Code § 7-7-910 (B)(2) nor S.C. Code § 7-13-35 declare their provisions to be essential to the validity of an election. Therefore, the preconditions necessary under George are not established in this case and Appellant failed to establish them either before the election or during her protest post-election proceedings.

### **Challenge Ballot Hearing and Protest Hearing location**

Appellant argues the Circuit Court erred in not considering the location of the challenge ballot hearing and protest hearing affecting the election process. However, both of these hearings take place after the election so the location of the hearings does not seem to be relevant to whether they caused any irregularities or illegalities regarding the election itself. Appellant's argument on this issue in this Court focuses entirely on an alleged lack of preclearance for the specific location of these two hearings. However, preclearance issues are federal issues that may not be raised as part of an election protest proceeding. *See Butler*, 328 S.C. at 249-50, 493 S.E.2d at 844-45 (rejecting consideration of Voting Rights Act claims on appeal from municipal election protests on grounds of jurisdiction as well as standing to raise such claims in the protest context). Therefore, Appellant's arguments on this issue in this Court are improper and should not be allowed.

#### **IV. THE CIRCUIT COURT WAS CORRECT IN RULING THE PROTEST HEARING WAS IN COMPLIANCE WITH FOIA.**

### **FOIA and the Protest Hearing**

The Circuit Court Order does address the Appellant's arguments regarding the 24-hour requirement of the Freedom of Information Act and the timing of holding the protest hearing. Appellant did make unsworn statements about this issue at various points during her protest hearing. The initial protest appeal addresses the 24-hour provision of FOIA regarding public meetings as well. However, the Circuit Court was correct in ruling that the Commission fully

complied with FOIA's provisions regarding the 24-hour notice of the protest hearing as the Chair of the Commission stated they gave 24-hour notice via the news media. (R. p. 172, line 19 – p. 173, line 8 & p. 175, lines 10-22). In any event, an alleged FOIA violation is not a proper issue for an election protest as the public notice requirement for an election protest hearing does not have anything to do with whether an election was conducted illegally or illegitimately in violation of state election laws. An alleged FOIA violation is a question for a different forum under a different set of statutes.

For purposes of a municipal election protest, the controlling statute for notice of interested parties is S.C. Code § 5-15-130. That statute simply requires “due notice to the parties involved” be given and that the protest hearing be held within 48 hours after the written notice of the protest is filed. Appellant was given due notice of when and where the protest hearing would be held after she asked those questions as she stated during her protest hearing. (R. p. 179, lines 2-7).

Appellant's arguments on this issue indicate that the timing of the protest hearing prevented her from having counsel present and this somehow was a violation of the election laws. However, the election process is exclusively controlled by statute. Gecy v. Bagwell, 372 S.C. 237, 241, 642 S.E.2d 569, 571 (2007); *relying on* S.C. Const. art. II, § 10. Under the common law there is no right to contest an election. The right to contest an election exists only under the constitutional and statutory provisions, and the procedure proscribed by statute must be strictly followed. Taylor v. Roche, 271 S.C. 505, 509, 248 S.E.2d 580, 582 (1978). Thus, Appellant's argument that the lack of an attorney at her protest hearing is somehow an illegal or irregular procedure resulting in an unfair election is not a valid ground for overturning an election because there is no statutory right to have an attorney present at an election protest

hearing. Therefore, this issue as raised by Appellant is insufficient to overturn the Circuit Court Order upholding the May 22<sup>nd</sup> election in Atlantic Beach.

**V. THE RULING OF THE COMMISSION ON EVIDENCE WAS PROPER.**

**Excluded Evidence**

Appellant raises the issue of excluded evidence by the Commission for the first time at the appeal hearing in Circuit Court but it was not included in her Motion to Alter or Amend the Circuit Court Order. She attempts to revive those issues in her Initial Brief to this Court. The initial protest appeal filed by Appellant's first attorney did not mention the evidentiary rulings of the Commission at all. Appellant's current counsel briefly mentioned only one piece of excluded evidence in the appeal protest hearing in Circuit Court. The evidence Appellant argued was improperly excluded was the testimony of a police officer at the challenge ballot hearing. (R. p. 324, lines 10-24). Appellant attempted to introduce this evidence at the challenge ballot hearing, not the election protest hearing. Appellant's argument on this evidence appears to be that the Commission at the protest hearing should have ruled on evidence presented in a different hearing altogether. There is no provision in the election law for such a situation. Appellant's current counsel mentioned this one piece of evidence in oral arguments before the Circuit Court but, as noted above, this evidence was not mentioned at all in the initial written protest by Appellant's first counsel. The Circuit Court Order on the protest appeal does not rule on the evidentiary exclusion from the challenge ballot hearing. The Motion to Alter or Amend also does not raise this evidentiary issue for the Circuit Court. Thus, this issue is not preserved for review and should not be considered by this Court. *See* Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505 (2006); *quoting* Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d


282 (2000); Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000); *see also* Bakala v. Bakala, 352 S.C. 612, 576 S.E.2d 156 (2003).

Appellant's arguments on the remaining excluded evidence by the Commission all relate to the other issues raised by Appellant in this case such as the public notice, preclearance, and attorney presence. Those remaining evidentiary issues were not raised to the Circuit Court at the appeal hearing at all. Thus, Appellant should not be allowed to raise them at this point. However, as noted above, those issues all fail as a matter of law and the inclusion of questionable evidence does not have any effect on whether the May 22<sup>nd</sup> election was conducted illegally or illegitimately under statutory election law for the purposes changing the result of the election for mayor of the Town of Atlantic Beach.

### **CONCLUSION**

As set forth above, the Circuit Court was correct to deny the election protest appeal and dismiss this case. Respondent, pursuant to Rule 220(c), SCACR, also requests this Court affirm the Circuit Court Order based upon any grounds appearing in the Record on Appeal. Therefore, for all of the foregoing reasons, Respondent respectfully requests this Court affirm the decision of the Circuit Court in this matter.

Respectfully Submitted,

  
\_\_\_\_\_  
Alan Wilson  
Attorney General of the State of South Carolina

John W. McIntosh  
Chief Deputy Attorney General

J.C. Nicholson, III  
Assistant Attorney General

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-9916

ATTORNEYS FOR RESPONDENT SOUTH CAROLINA  
ELECTION COMMISSION

March 27, 2013.

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

**RECEIVED**

MAY 14 2013

**S.C. Supreme Court**

---

Case No.: 2012-CP-26-4403  
Appellate Case No.: 2012-213489

---

Windy Price ..... Appellant,

v.

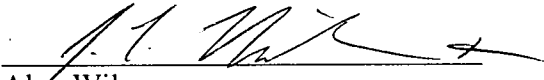
Horry County Election Commission,  
South Carolina Election Commission ..... Respondents.

---

**CERTIFICATE OF COUNSEL**

---

The undersigned certifies that this Brief of Respondent S.C. Election Commission complies with Rule 211(b), SCACR.

  
Alan Wilson  
John W. McIntosh  
J.C. Nicholson, III  
Office of the South Carolina Attorney  
General  
Post Office Box 11549  
Columbia, SC 29211  
Telephone: (803) 734-9916

May 14, 2013

ATTORNEYS FOR RESPONDENT  
S.C. ELECTION COMMISSION

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**RECEIVED**

MAY 14 2013

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

**S.C. SUPREME COURT**

Case No.: 2012-CP-26-4403  
Appellate Case No.: 2012-213489

Windy Price ..... Appellant,

v.

Horry County Election Commission,  
South Carolina Election Commission ..... Respondents.

**PROOF OF SERVICE**

I certify that on the 14<sup>th</sup> of May, 2013, I have served the Brief of Respondent S.C. Election Commission on Appellant and on Respondent Horry County Election Commission as shown below by depositing a copy of same in the United States Mail, postage prepaid, addressed to their attorney of record as follows:

Christine Companion Varnado, Esquire  
Seibels Law Firm, P.A.  
127 King Street, Suite 100  
Charleston, South Carolina 29401  
Telephone: (843) 722-6777  
Facsimile: (843) 722-6781

Robert E. Tyson, Jr., Esquire  
Sowell Gray  
Post Office Box 11449  
Columbia, South Carolina  
Telephone: (803) 929-1400  
Facsimile: (803) 929-0300

Attorneys for Appellant

Attorney for Respondent Horry County  
Election Commission



Alan Wilson

John W. McIntosh

J.C. Nicholson, III

Office of the South Carolina Attorney  
General

Post Office Box 11549

Columbia, SC 29211

Telephone: (803) 734-9916

May 14, 2013

ATTORNEYS FOR RESPONDENT  
S.C. ELECTION COMMISSION