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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
J. Derham Cole
Circuit Court Judge

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

Windy Price. ..... Appellant,

v.

Horry County Election Commission,
South Carolina Election Commission,
Jake Evans, Josephine Isom, and
Charlene Taylor ..... Defendants.

Of whom Horry County
Election Commission and
South Carolina Election
Commission are ..... Respondents.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This an appeal from the Horry County Circuit Court's review of Rev. Windy Price's protest of the May 22, 2012, Town of Atlantic Beach municipal election for mayor.[1] This election has been voided once for gross misconduct by one election commission, re-scheduled by executive order of the Governor of South Carolina, and reviewed and wrongly affirmed by another election commission.

The protest hearing for this appeal took place on May 25, 2012, before the Horry County Election Commission ("HEC"), which denied the protest by written order dated May 29, 2012. Rev. Price timely appealed this order to the Circuit Court on June 4, 2012, which held a hearing on July 26, 2012, and affirmed the HEC by order dated August 15, 2012. Rev. Price filed a motion to alter or amend the Circuit Court's decision on September 10, 2012, which was denied by order dated November 2, 2012. Rev. Price timely filed her Notice of Appeal to this Court on November 27, 2012.

STATEMENT OF FACTS

Unfortunately, South Carolina courts, and especially this Court, are no strangers to the frequently-dysfunctional municipal election process in the Town of Atlantic Beach.[2] In order to put Rev. Price's election protest in its proper context, it is necessary to revisit the shameful history of prior elections, as well as examine the sordid events that preceded the May 22, 2012, election that is the subject of this appeal.

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[1] Retha Pierce, another candidate in this election, has also appealed her election protest to this Court: case no. 2012-212914.

[2] "Nearly every Atlantic Beach municipal election held in recent history has found its way to this court." (R. p. 338).

Since 2005, this Court has heard three appeals concerning Atlantic Beach elections: Cole v. Town of Atlantic Beach Election Comm'n, 393 S.C. 264, 712 S.E.2d 440 (2011); Armstrong v. Atlantic Beach Municipal Election Comm'n, 380 S.C. 47, 668 S.E.2d 400 (2008); Taylor v. Town of Atlantic Beach Election Comm'n, 363 S.C. 8, 609 S.E.2d 500 (2005). In its 2011 Cole opinion, this Court described as "deplorable" and "astonishing" the "shenanigans" of former town manager William Booker and former Atlantic Beach Municipal Election Commission ("MEC") members Linda Booker (William Booker's wife) and Alice Graham. Cole at 275, 712 S.E.2d at 446. Said "shenanigans" consisted of Booker's and Graham's attempts in 2009 to prevent Carolyn Cole and Rev. Price from establishing residency in the Town and their work "diligently to obstruct" and delay the election process to prevent Cole and Rev. Price from being sworn into office. Id. Ultimately, this Court vacated the MEC's decision to de-certify the 2009 election and ordered the restoration of the original certification of Cole and Price as winners. Cole at 275, 712 S.E.2d at 446.

As a result, Cole and Rev. Price took their seats on the town council in July of 2011. (R. p. 416). Thereafter, they joined Councilman Donnell Thompson in terminating William Booker as town manager.[3] In addition, they replaced Linda Booker and Alice Graham with new members on the MEC. (R. pp. 416-18).

[3] The Town of Atlantic Beach has a council-manager form of government as provided for under S.C. Code § 5-13-10, *et. seq.* (R. p. 57). Its council is composed of the mayor and four at-large council members. (R. p. 57). Elections in Atlantic Beach are generally conducted by the three-member Municipal Election Commission held in odd-numbered years. (R. p. 57). Under Atlantic Beach's council-manager form of government, the town manager holds the position at the pleasure of the town council. S.C. Code § 5-13-130(1). (R. p. 57). William Booker was hired by Jake Evans, Charlene Taylor and Josephine Isom as town manger. (R. p. 57).

On Tuesday, November 1, 2011, the Town of Atlantic Beach again held municipal elections for mayor and to fill two seats on its town council. (R. p. 3). Three names appeared on the ballot for mayor: Jake Evans, Retha Pierce, and Rev. Windy Price; five names appeared on the ballot for council: Josephine Isom, Monique Pointer, Charlene Taylor, Misty Umphries, and James Vanfleet. (R. pp. 3-4).

On election day, William Booker arrived at the Town of Atlantic Beach Community Center, which served as the sole polling place for the election, with Laura Best, whom he introduced as being from the Office of the South Carolina Attorney General ("SCAG"). (R. pp. 4, 6, 7, 418, 426). Ms. Best, who was not sent by the SCAG, continued her charade the entire day at the polling place, gaining unfettered access to the voting machines, poll managers, and voters. (R. pp. 6-7, 17-18, 426). On several occasions, she held up her cell phone and announced that she was in conversation with Sandy Martin, Executive Director of the HEC. (R. pp. 17-18, 181-2). The election managers and clerk lost control over the process. Ms. Best nested with William Booker and candidates Charlene Taylor and Jake Evans who spent most of the day inside the polling place. (R. pp. 17, 359). Linda Booker and Alice Graham arrived at the polling place and spent a short while with Ms. Best, as well. With Ms. Best's "blessing," supporters of Taylor, Evans, and Isom formed a virtual gauntlet through which voters were forced to pass before they could reach the registration desk and voting machines. (R. pp. 8, 18, 428-29). Persons known to be supporters of Taylor, Evans, or Isom were welcomed warmly and allowed to vote unobstructed. (R. p. 428). Residents believed to be supporters of candidates other than Taylor and Evans were greeted with hostility and intimidation and were made to vote in such a manner that their ballots could be seen by

the group hanging about the polls. (R. p. 428). Best stopped a poll watcher from challenging certain voters believed to be non-residents of the Town and threatened her with a lawsuit from the Attorney General. (R. pp. 7, 426-27). Later in the day, a phone conversation with the South Carolina Attorney General's office confirmed Best was not an employee on assignment from their office, but by that time it was too late to prevent much of the harm done to the process.[4] (R. p. 427).

The winners of the November 1, 2011 election were certified as Jake Evans (mayor – 55 votes), Charlene Taylor (council – 55 votes) and Josephine Isom (council – 53 votes). (R. p. 5). Following an election protest hearing held on November 5, 2011, the MEC overturned the election and ordered a new election to be held within 180 days, citing voter intimidation, violations of secrecy of the ballot, and fraudulent acts, including those related to the voting machines, and misconduct of William Booker, Joe Montgomery, Jake Evans, and Laura Best to disenfranchise resident voters in favor of non-resident voters to affect the outcome of the election. (R. pp. 5, 14-19, 219). The MEC found that the actions of the parties involved exceeded the acceptable level of tolerance for mere or innocent irregularities but were knowingly and willfully fraudulent and interfered with the full and fair expression of the voter's choice and left the results doubtful. (R. pp. 16-19).

On December 14, 2011, the MEC held a public meeting after due notice and informed the public that the new election would be held on May 8, 2012. (R. p. 219). The new members of the MEC reaffirmed the Commission's commitment to hold a fair election in the town where all resident registered voters could come to the polls without

[4] This was followed up with a letter dated November 29, 2011, from Mary Frances Jowers of the South Carolina Attorney General's Office confirming the same. (R. p. 397).

fear. Additionally, they made initial contact with the League of Women Voters to monitor the election, and they planned to employ poll managers from neighboring counties to help conduct the election. (R. pp. 240, 361, 441).

While the MEC was working to locate an attorney who would draft the Order addressing the November 2011 election and making plans to move forward with the new election, William Booker contacted Governor Haley's office in an effort to circumvent the process. (R. pp. 58-60, 284, 301).

On March 16, 2012, the Governor issued Executive Order No. 2012-03, which ordered a new election pursuant to S.C. Code § 7-13-1170, to be held on May 22, 2012, "or at the earliest possible date and time after sixty days notice has been provided to the citizenry" and designated that the HEC and SCEC perform the duties necessary to carrying out the election process. (R. p. 2). The Governor's Order was premised on incorrect information asserting that the MEC had not set a date for the new election and implying that the members of the MEC who set aside the results of the November 2011 election were the same members about whom the Supreme Court expressed doubts in their ability to properly conduct an election in Cole, rather than the newly-appointed members who had no involvement with the actions decried by the Court. (R. pp. 2, 65-66, 183, 221-22).

The date selected by the Governor in the Order for the election fell within the middle of the Town of Atlantic Beach's 32nd Annual Bike Fest. (R. pp. 65, 362). Atlantic Beach is host of the fourth largest bike rally in the nation, which brings almost a quarter of a million black bikers and their friends and family onto the four streets that make up the Town. (R. pp. 65, 362). After publishing the two newspaper notices concerning the

election in The Sun News, the HEC learned that as result of planned biker week activities the Town's Community Center, which has been the sole polling location for several past elections, was unavailable on the planned election day. (R. pp. 65, 119-20, 257, 363, 406-7). Rather than move the date of the election, which it had authority to do pursuant to the Order, the HEC pressed forward with the election during biker week and decided to move the polling location to the First Missionary Baptist Church, where candidates Charlene Taylor and Josephine Isom are members and serve as church leaders. (R. p. 247). As witnesses Patricia Bellamy and Carolyn Cole testified, they and several other members of the community, including Rev. Price who is the head minister of another church, had been previously told that they were not welcome on the First Missionary Baptist Church premises. (R. pp. 191, 248, 363). They further testified that the First Missionary Baptist Church was viewed by members of the community as being associated with one faction or group of candidates. (R. pp. 191, 247, 363). In an effort to advise voters concerning the change in the polling location, the HEC sent out postcards to the electorate providing the name of the new polling location but giving the street address in North Myrtle Beach. (R. pp. 121, 274, 393-94). The HEC admitted that it did not publish the location change in any newspaper nor did it post notice of the change of the polling location on the door of the town hall, as is the custom in the Town. Many of the postcards were returned to the HEC by the post office and, thus, failed to reach the voters. (R. pp. 255-56). Incredibly, the individual that the HEC used as its minority contact to provide the Department of Justice with information concerning this change in the polling location and its effect that the location change would have on the electorate was none other than William Booker, the bad actor responsible for the "shenanigans" decried by this Court in Cole. (R. p. 290).

Despite its awareness of the concerns with moving forward with the election during Bike Fest at a location seen as anything but neutral, the HEC re-scheduled the November 2011 election for May 22, 2012. Voter turnout was low – approximately 90 voters of a possible 367 to 426. (R. pp. 189, 212). As admitted by Mr. Booker, this was considerably fewer voters than turned out during the November election "that everyone knew about" and was not tainted by "confusion" as the May election was. (R. p. 291).

The HEC commenced the opening of absentee ballots at 9:00 a.m. on election day at the HEC's offices in Conway, S.C., rather than in the Town, as had been the previous practice. (R. pp. 161-62, 398). The challenged ballot hearing was held on Thursday, May 24, 2012, at 10:00 a.m. also in Conway, S.C., rather than in the Town, as was done in past elections. (R. pp. 55, 447). Conway is roughly 25 miles from the Town of Atlantic Beach, and attending both the opening of absentee ballots and voting required some to be in two locations at the same time. (R. p. 398). There is no public transit system available with service to Conway, and many residents are known to be without private means of transportation. (R. pp. 63, 324). The HEC's filing with the DOJ does not show any request for preclearance for these location changes. (R. pp. 119-20, 406-7).

At the challenged ballot hearing, the HEC refused to accept into evidence police reports or to hear testimony from a police officer who was present with evidence that several of the voters who cast the challenged ballots were not residents of the Town, ruling such evidence as hearsay. (R. pp. 209-10, 324, 346).

The HEC ultimately certified the election results in the race for mayor as follows: 84 votes for Jake Evans, 5 for Retha Pierce, and 1 for Rev. Windy Price. (R. pp. 163).

This was a substantial gain for Evans, who received only 55 votes in the November election with far better turnout.[5]

Both Retha Pierce and Rev. Price timely protested the May 22 election. (R. pp. 117-118). Rev. Price's protest was filed first and was clocked-in as being received by the HEC on May 24, 2012, at 4:56 p.m. (R. pp. 117-18). Her protest was based on the following grounds: lack of proper notice of the election and the election process; improper change in the polling location; election fraud; voter intimidation; lack of secrecy of the ballot; and failure to provide due process and transparency. (R. pp. 117-18).

The HEC held the protest hearing at 3:00 p.m. on Friday, May 25, 2012, rather than on the following Saturday, as had long been the practice in the Town. (R. p. 168). As the with the challenge hearing, the protest hearing was held in Conway, S.C., as opposed to a location within the Town limits, as had long been custom. (R. p. 172). HEC Chairman Russell Hall presided at the protest hearing. (R. p. 172). Chairman Hall denied the MEC's request to be heard as intervenors and denied a request for a continuance to allow Ms. Pierce and Rev. Price to have their attorneys present. (R. pp. 168-69). He further denied Rev. Price's request to proffer evidence after the hearing; due to the short notice, she did not have the opportunity to transfer a video to a deliverable format so that it could be viewed at the hearing. (R. pp. 177-180). The HEC heard testimony from five witnesses, in addition to the presentations by Ms. Pierce and Rev. Price, which were also delivered as testimony. (R. p. 309). Putative Mayor-elect Jake Evans was permitted to cross-examine the witnesses and both protesting candidates were permitted to pose

[5] Rev. Price received 21 in the November election and Pierce received 18. (R. p. 5).

questions to the witnesses and register objections throughout, effectively treating the whole process as one unified hearing (as opposed to two separate, independent hearings). (R. pp. 3, 211, 345). Chairman Hall refused to consider much of the documentary evidence submitted by both protestors and refused to consider significant portions of testimony offered concerning allegations of fraud and voter intimidation. (R. pp. 25, 243-44, 246, 268, 276-79, 285, 295). At the conclusion of the proceedings, the HEC ruled to deny the protests and, thereafter issued a written order on May 29, 2012. (R. pp. 20-27, 306). Rev. Price timely filed her appeal from the decision of the HEC on June 4, 2012, and her appeal was heard by Judge J. Derham Cole on July 26, 2012. (R. pp. 44-73, 311). Judge Cole denied this appeal by order dated August 15, 2012. (R. pp. 28-41; Appx. to R. p. 1). Rev. Price filed a motion to alter or amend Cole's decision on September 10, 2012, which was denied by order dated November 2, 2012. (R. pp. 42-43, 105-38). Rev. Price timely filed her Notice of Appeal on November 27, 2012. (R. pp. 156-7).

STANDARD OF REVIEW

In municipal election cases, this Court reviews the judgment of the circuit court upholding or overturning the decision of a municipal election commission only to correct errors of law. Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 379, 537 S.E.2d 543, 545-46 (2000). This Court's review does not extend to findings of fact unless those findings are wholly unsupported by the evidence. Id. This Court will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful. Id.

Thus, the Court will overturn election results where mandatory statutory provisions have been violated and those violations substantially affect the free and intelligent casting of a vote, the determination of the results, an essential element of the election, or the fundamental integrity of the election." George v. Municipal Election Comm'n of the City of Charleston, 335 S.C. 182, 187, 516 S.E.2d 206, 209 (1999); see also Douan v. Charleston County Council, 357 S.C. 601, 607, 594 S.E.2d 261, 264 (2003). "The Court...will not sanction practices which circumvent the plain purposes of the law and open the door to fraud." Id. (quoting May v. Wilson, 199 S.C. 354, 360, 19 S.E.2d 467, 470 (1942)). Accordingly, the Court will set aside an election even for a mere irregularity if there is fraud, a constitutional violation or no statutory authority.

ARGUMENT

The May 22, 2012, Atlantic Beach Municipal Elections were not free, not fair, and not even in Atlantic Beach. Whether through bias,[6] inadvertence, or incompetence, the HEC failed to properly inform the citizenry of Atlantic Beach of the correct location to exercise its right to vote. Compounding this error, the HEC also did not properly inform the public (and the candidates) of the correct location of its primary modes of redress for the HEC's error: the challenged ballot hearing and the election protest hearing. The effect of this systemic failure in the election process and mechanisms that

[6] It is the appellant's belief that bias was the cause of these errors. (R. pp. 58-73, 170, 176-184, 188, 232-236, 243-44, 246-47, 261-64, 315-16, 319, 362, 364).

regulate it is a confused, nearly clandestine election with a miniscule turnout and a winner[7] that took 93% of those votes. HEC's errors demand that this election be voided.

I. The Circuit Court's order was based on reversible errors of law.

The Circuit Court made an error of law when it limited its ruling to address only errors affecting the "results" of the election. While many election contests are properly decided along these lines, the Court erroneously failed to consider the HEC's violation of mandatory statutory provisions which substantially affected the free and intelligent casting of votes, essential elements of the election, and the fundamental integrity of the election and erroneously upheld the election in spite of uncontroverted evidence that should have led it to overturn the results.

A reviewing court will overturn election results where mandatory statutory provisions have been violated and those violations substantially affect the free and intelligent casting of a vote, the determination of the results, an essential element of the election, or the fundamental integrity of the election. George v. Municipal Election Comm'n of the City of Charleston, 335 S.C. 182, 187, 516 S.E.2d 206, 209 (1999); see also Douan v. Charleston County Council, 357 S.C. 601, 607, 594 S.E.2d 261, 264 (2003). The Circuit Court failed to do this. Additionally, the Circuit Court failed to acknowledge that "[w]here there is a total disregard of the statute, the violation cannot be treated as an irregularity, but it must be held and adjudicated to be cause for declaring the election void and illegal." Gecy v. Bagwell, 372 S.C. 237, 242, 642 S.E.2d 569, 571 (2007).

[7] It is worth noting that Jake Evans, the putative winner of the critically flawed November 1, 2011 and the May 22, 2012, elections, *was also implicated in the misconduct that voided the November election.* (R. pp. 5, 8, 18-19, 427-28).

A. The Circuit Court should have found that in changing the polling location, the HEC failed to comply with mandatory state law and, as a result, substantially affected essential elements of the voting process and the free and fair casting of ballots.

Along with secrecy of the ballot, the location of the polling place is a key component in ensuring fair and free elections. As the South Carolina Supreme Court noted in George, "[p]olling places on Election Day, unlike today's typical experience of waiting quietly in line, often were 'scenes of battle, murder, and sudden death.' In addition to real violence, sham battles were staged to frighten away elderly and timid voters." 335 S.C. at 188-89, 516 S.E.2d at 209 (quoting Burson v. Freeman, 504 U.S. 191, 202-04 (1992)). In fact, the United States Supreme Court has made it clear beyond dispute that the location, safety, and accessibility of a polling place have a direct effect on a person's ability to exercise his franchise. In holding that the use of polling places at locations calculated to intimidate blacks from entering was a practice or procedure which violated Section 1973 of the Voting Rights Act, the Supreme Court stated:

> We think it clear that the location of polling places constitutes a "standard, practice, or procedure with respect to voting." The abstract right to vote means little unless the right becomes a reality at the polling place on election day. The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise.

Perkins v. Matthews, 400 U.S. 379, 387 (1971) (quoting 42 U.S.C. § 1973c).

Thus, providing the public with accurate information concerning the location of the sole polling place in the election was a fundamental aspect of the HEC's duties. Pursuant to S.C. Code § 7-13-35, the entity charged with conducting a municipal election must publish two notices of the election in a newspaper of general circulation in the municipality. These notices must include the location of the polling place. S.C. Code § 7-13-35. This is mandatory language affecting a fundamental aspect of the election.

Here, the record reflects that the HEC posted notices on March 23, 2012 and April 6, 2012 in the legal section of The Sun News in an effort to comply with the law, but those notices listed the polling location as "the Atlantic Beach Community Center...as set by law" instead of the First Missionary Baptist Church, where the election was held. (R. pp. 443-46). Accordingly, the public notice in the newspaper about the general terms of the election did not satisfy the mandatory requirements of S.C. Code § 7-13-35.

In instances where polling locations are changed in municipal elections, in addition to the advance notice as required by S.C. Code § 7-13-35, the authority charged with conducting the election must also publish the location for the precinct in the newspaper on the day of the election. S.C. Code § 7-7-1000. There is no evidence in the record indicating that the HEC met this mandatory, statutory requirement either. In fact, when asked whether the HEC did an adequate job of notifying the public in Atlantic Beach about the election, Sandy Martin testified *only* that the HEC sent postcards to the voters in an attempt to advise them about the changed location. (R. p. 274). In short, the HEC failed to comply with the statutory mandate to publish notice of the polling location in the newspaper on the date of the election.

Even if these postcards met the mandatory requirement of S.C. Code § 7-7-1000, their efficacy was questionable at best. Pierce testified of irregularities with the mail service in Atlantic Beach, and that many residents did not receive these postcards. (R. p. 274). Witness Carolyn Cole testified she did not receive a postcard. (R. pp. 255-56). Further, the MEC has noted: "The State and Horry County Voter Registration office continue to identify Atlantic Beach addresses as being in the city of North Myrtle

Beach." (R. pp. 378, 393-94). At the challenged ballot hearing, Martin presented a stack of postcards that had been returned by the post office. (R. pp. 67, 109). When asked how many cards were in the stack, she replied that she "didn't know." (R. pp. 67, 109). Moreover, the postcards gave the address of the church as *North Myrtle Beach* rather than in *Atlantic Beach*, further adding to the voters' potential confusion. (R. pp. 121, 393, 394).

In addition, the HEC failed to comply with the requirements of S.C. Code § 7-7-910(B)(2) in changing the polling location from the Community Center to the First Baptist Church. South Carolina law requires that where, as in the May 2012 election, a designated polling place is "unavailable for use during an election as a result of an emergency situation,[8] the authority charged by law" may designate an alternative location, but the new location must be approved by the majority of the legislative delegation. S.C. Code § 7-7-910(B)(2). The HEC failed to submit the polling place change to the Horry County Legislative Delegation for their approval, much less obtain such approval:

> I contacted Town Hall in Atlantic Beach for alternative locations since they informed us the normal voting location was booked. The town didn't give me any choices so I contacted the church and asked to use it for one time only. **Both boards agreed. I did not send to the Delegation because we do not typically handle elections for Atlantic Beach, and the change is for only one election.**

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[8] Pursuant to S.C. Code § 7-7-910(B)(1), "[f]or purposes of this subsection, an 'emergency situation' means the designated polling place is not available for use as a polling place on the election day after the first notice of the election is published." Here, per its May 1, 2012, Voting Rights Act submission to the D.O.J., the HEC indicated that it received notice that the Community Center was not available for the election after it had published both notices of the election, thus making it an emergency situation subject to this section.

(R. pp. 119, 406) (emphasis added). By its own admission, HEC did not comply with the mandatory statutory requirement of S.C Code § 7-7-910(B)(2). Furthermore, the HEC did not, as it represented to the DOJ, have the agreement of the MEC to move the polling location. (R. pp. 187-88, 363).

As Rev. Price asserted in her initial demand for a protest hearing:

> [t]he confusion for candidates and voters was a direct result of the actions taken by specific individuals to orchestrate a winning election for specific candidates. 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). These assertions are supported by the record: William Booker admitted to there being confusion among the electorate. (R. p. 291). This confusion, and chilling effects on the election, were predicted by the MEC a week before the election.[9] (R. p. 363). It not necessary to determine how many voters failed to receive notice of the polling location change as a result of the HEC's failure to follow several mandatory requirements – the record clearly reflects that voter turnout was lower than in the previous elections. (R. pp. 117-18, 212, 291).

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[9] First, that Church has never been used as a polling place in the Town elections. It will be completely confusing to the voters to go to the Community Center, only to learn that they must then go to the Church to vote. All of this will occur with the congestion and confusion of Bike Fest.

* * *

Second, membership in this Church is associated with one of the political faction in Town politics...The result will be that many voters who do not support that faction will remain at home on Election Day instead of entering the home church of key members of that faction. The effect would be no more chilling than if the polling place were put in the headquarters of a political party.

(R. p. 363).

As a result of HEC's multiple failures to comply with mandatory state law and local custom concerning the location and prior notice of the polling place, there was prejudicial confusion among the electorate in Atlantic Beach regarding fundamental aspects of the voting process. The Circuit Court must be reversed and the election voided.

B. The Circuit Court erred in failing to find that the change in the location of the challenged ballot hearing and protest hearing also affected essential elements of the election process.

While the HEC took steps to apply for preclearance from the Department of Justice for approval of some aspects of the election process, they failed to submit the change of location for opening absentee ballots, the challenged ballot hearing, and the election protest hearing. (R. pp. 119-20, 406-7). For its convenience, the HEC commenced the opening of absentee ballots at 9:00 a.m. on election day at the HEC's offices in Conway, rather than in the Town as had been the previous practice. (R. pp. 161-62, 398). The challenged ballot hearing was held on Thursday, May 24, 2012, at 10:00 a.m. also in Conway, rather than in the Town, as was done in past elections. (R. pp. 55, 447). Conway is roughly 25 miles from the Town of Atlantic Beach, and attending both the opening of absentee ballots and voting required some to be in two locations at the same time. (R. p. 398). There is no public transit system available with service to Conway, and many residents are known to be without private means of transportation. (R. pp. 63, 324). As a result, many residents who would have attended these events were precluded from doing so. The HEC's filing with the DOJ does not show any request for preclearance for these location changes. (R. pp. 119-20, 406-7).

As recognized by the U.S. Supreme Court, locating key elements of the electoral process in places remote from black communities poses significant barriers to these

minority voters' ability to exercise their rights in relation to the voting process. See Perkins, 400 U.S. at 387. These changes of the Town's standard practices constitute further grounds for overturning the election.

II. The order is based on a wholly unsupported finding that the notice for the May 25, 2012, protest hearing complied with the requirements of the South Carolina Freedom of Information Act.

The Circuit Court improperly found that the HEC gave public notice of the protest hearing 24 hours before the hearing pursuant to and in compliance with the Freedom of Information Act ("FOIA"). (R. p. 36). It appears that this finding was based on an unsupported statement of fact that appears in the HEC's order: "By notice given pursuant to the South Carolina Freedom of Information Act, a hearing was held by the Commission on May 25, 2012..." (R. p. 20). There is no evidence to support this finding, and thus the Circuit Court has committed reversible error.

While this Court's review generally "does not extend to findings of fact" where, as in this instance, such "findings are wholly unsupported by the evidence" the Court has authority to make new findings that *are* supported by the evidence. See George, 335 S.C. at 186, 516 S.E.2d at 208. The evidence of the record supports only one finding: that the HEC failed to comply with FOIA in providing notice for the protest hearing. FOIA requires a minimum 24 hour notice before a public meeting is held. S.C. Code § 30-4-80. Actions taken in violation of the public meeting provisions of the FOIA are invalid. See S.C. Code § 30-4-100; Piedmont Public Services District v. Cowart, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) *affirmed by* Piedmont Public Services District v. Cowart, 324 S.C. 239, 478 S.E.2d 836 (1996). Both Retha Pierce and Rev. Price timely protested the May 22nd election. Rev. Price's protest was filed first and was clocked-in as being

received by the HEC on May 24, 2012, at 4:56 p.m. (R. p. 117).[10] The HEC held the protest hearing at 4:00 p.m. on Friday, May 25, 2012, *less than 24 hours after Rev. Price's filing.*[11] It would have simply been impossible for the HEC to have provided such notice in a manner that complied with FOIA's requirements since it did not know that a hearing was necessary until after 4:00 p.m. on the previous day.[12] (R. p. 347). In addition, the HEC failed to provide any evidence in the record documenting when its written public notice of the hearing was disseminated. To the contrary, Chairman Hall admitted that the HEC did not give written notice 24 hours prior to the hearing, but asserted that "[a]s soon as we decided we would have the hearing" they gave notice to the local media. (R. pp. 174-75).

It is not necessary that Rev. Price or any member of the public prove injury as a result of the HEC's failure to follow FOIA's requirements in order for a court to declare invalid actions taken in violation of the Act. See S.C. Code § 30-4-100(a); Quality Towing, Inc. v. City of Myrtle Beach, 345 S.C. 156, 547 S.E.2d 862 (2001). In fact, any member of the public could bring forth a suit seeking the same relief during the course of the next year. Id. Nonetheless, the effect of this change had a significant impact on Rev. Price's ability to put forth her claim at the protest hearing. The protest hearings for

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[10] As indicated by the stamps on the first page of the Protest Letter, it was clocked-in as being received by the HEC at 4:56 p.m. on May 24, 2012. Rev. Price filed a copy with the Horry County Clerk of Court at 4:43 p.m. that same day. There is a third time-stamp on the document of 2:37 p.m. Looking at the second page of the letter, however, it is clear that the 2:37 p.m. time-stamp was that of the Town of Atlantic Beach MEC, an entity that did not conduct the election and had no authority regarding the protest hearing.

[11] Rev. Price did not receive actual notice of the May 25, 2012, hearing until 8:03 a.m. the day of the hearing. (R. p. 174).

[12] It appears to the contention of the Respondents the HEC, of its own initiative, scheduled and notified the public 24 hours before the protest hearing, thus meeting the requirements of FOIA. This claim is spurious, considering 24 hours before the May 25, 2012, 4:00 p.m. protest hearing *no one had requested a hearing.*

elections in Atlantic Beach are normally held on the Saturday following the election at the polling place within the 48 hour period required by law. (R. p. 168). Rev. Price's attorney was prepared to attend on Saturday but the change without sufficient notice to the appellant interfered with the appellant's ability to have legal counsel present for the hearing. (R. pp. 210-11). HEC Chairman Russell Hall denied a request for a continuance to allow Ms. Pierce and Rev. Price to have their attorneys present, even though the HEC had an attorney present. (R. pp. 168, 176, 210-11). Rev. Price had video evidence of, *inter alia*, irregular curbside voting she intended to introduce at the Protest Hearing, but due to the short notice the video evidence was not in a playable format. (R. pp. 177-78, 196). The HEC not only denied Rev. Price's attempt to introduce this evidence, *it denied her an opportunity to proffer it and then complained in its order that there was insufficient evidence of curbside voting.*[13] (R. pp. 23, 177-79). This was egregious behavior, especially in light of the fact that under S.C. Code § 5-15-140 the HEC had enough time to postpone or continue the hearing to allow Rev. Price's counsel[14] to appear and to present the remainder of her evidence. Furthermore, Rev. Price herself stated that the HEC's inadequate notice of the Protest Hearing resulted in her being forced to proceed *pro se*. (R. p. 176). The substantial prejudice[15] to Rev. Price by the HEC's failure to follow FOIA's notice requirements should be apparent, and this Court should reverse

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[13] In its order, the HEC adds insult to injury by holding it would not address irregularities with curbside voting due to a lack of specific evidence. (R. p. 23).

[14] Rev. Price's counsel was available to appear the day after the Protest Hearing. (R. p. 68).

[15] "It has been stated that when an offer of proof is necessary, it is error for the trial court to refuse counsel an opportunity to state what he proposes to prove by the evidence offered." State v. Lynn, 277 S.C. 222, 225, 284 S.E.2d 786, 788 (1981) (citing 88 C.J.S. Trial § 73 (1955)) see also State v. Schmidt, 288 S.C. 301, 304, 342 S.E.2d 401, 403 (1986) (reversing a conviction due to the trial court's refusal to accept a proffer of exculpatory evidence).

the Circuit Court.[16]

III. The Circuit Court erred in concluding that Rev. Price did not raise any claims regarding notice in her protest letter when the letter fairly apprised any reader of defects in notice.

Rev. Price's May 24, 2012 "Request for Election Protest Hearing" is lengthy and points out numerous irregularities and problems with the May 22, 2012 election held by the HEC. The protest letter particularly cites the HEC's failure to give proper notice:

> The confusion for candidates and voters was a direct result of the action taken by specific individuals to orchestrate a winning election for specific candidates. **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) (emphasis added). This paragraph goes on to specifically cite the date of the election and the change in the polling location as significant problems leading to the aforementioned confusion. (R. p. 118). While Rev. Price did not use the word "notice", the intent of this paragraph is clearly sufficient to set forth a claim that the voters were not given proper notice of the election process as required by state law, and specifically of the date and the location of the election. In addition, at the hearing Rev. Price repeatedly listed as one of the grounds of her protest "violation of state election laws." (R. p. 211).

Pursuant to S.C. Code § 5-15-130, the notice of protest must include a "concise statement of the grounds for the election protest." This Court has long held, however,

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[16] Even if it found that the errors and irregularities in the election process administered by the HEC were not sufficient to rise to the level necessary to overturn the election, the Court should have found that the HEC's failure to provide proper notice of the protest hearing in compliance with FOIA would at minimum require that the HEC hold a new hearing.

that "technical precision in pleading" is not required for election contests.[17] State ex rel. Davis v. State Bd. of Canvassers, 86 S.C. 451, 458-459, 68 S.E. 676, 679 (1910). All is required is that the notice "briefly state facts or a combination of facts sufficient apprise the contestee of the cause for which his election is contested..." Gecy at 243, 642 S.E.2d at 572 (quoting and distinguishing Butler v. Town of Edgefield, 328 S.C. 238, 245-2, 493 S.E.2d 838, 842 (1997) in which the protestant only made vague assertions of fraud). The Gecy court that the protestor's assertion that "persons who had not provided accurate information for the voter rolls were nonetheless allowed to cast full ballots" was sufficient to set forth a claim that challenged voters were allowed to cast ballots in a precinct where they no longer resided, a violation of S.C. Code § 7-5-440.

In the face of the relatively low bar set by Gecy and Davis for pleading, the Circuit Court erroneously held that the issue of notice was somehow not raised in Rev. Price's *pro se* protest letter. (R. p. 34). Even a cursory review of the letter, and especially of the excerpt above, clearly shows that the HEC was made aware of defects in notice. Requiring Rev. Price to use the word "notice" or other "magic words" to preserve her

[17]Similarly, a party need not use "magic words" in arguing an issue in order for it to be preserved for appellate review. See e.g. Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973); State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (issue was preserved even though defendant did not use the exact words "corpus delecti" in his request for directed verdict); In re: Robert D., 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000) *overruled on other grounds by* State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012) (although party did not specifically mention any constitutional provisions to the trial court, the record reflected that he complained the testimony would violate his right of confrontation). Such a contention "is simply an exercise in semantics without any significance of substance." Toole at 240, 195 S.E.2d at 390-91. The issue must only be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. See Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998); S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007) (finding that although SCDOT did not phrase objection in the exact terms used in the issues on appeal, the objection was sufficiently specific to allow the trial court to rule on the issue).

protest "is simply an exercise in semantics without any significance of substance." Toole at 240, 195 S.E.2d at 390-91.

Moreover, issues concerning notice were addressed by Rev. Price and the HEC during the hearing and the HEC received evidence on these issues *without objection or expression of surprise*. For example, witness Carolyn Cole testified: "Here you change the absentee balloting process willy nilly without notice to the people..." (R. p. 239), and witness Sandy Martin, HEC Director of Registration and Elections, gave testimony concerning the notice of the election process. (R. pp. 272-275).

IV. All excluded evidence was relevant and admissible.

In its order, the HEC states that "certain emails and other evidence pertaining to preclearance and the Executive Order" were not considered as they were irrelevant to the protest. (R. p. 25). The order does not specify which exhibits and evidence was irrelevant, and the transcript of the hearing is not clear what exhibits were entered into evidence[18] and what testimony was not considered.

Reading in conjunction the transcript, the documents provided by the court reporter post-hearing, and the HEC Order, it appears the following exhibits were introduced at the hearing:

Exhibit 1. Public Notice in Sun News: Accepted into evidence, though the court reporter did not have a copy of the exhibit.[19] (R. pp. 174-75, 443-46).

[18] In fact, the numbering of the exhibits in the transcript does not match the numbering of the exhibits provided by the court reporter. (R. pp. 310, 352, 355, 357, 399, 406, 448-49).

[19] Due to the chaotic nature of the HEC hearing and the fact that Rev. Price was forced to proceed without counsel, certain exhibits did not make it into the court reporter's file. (Note from court reporter; Exhibit list from court reporter). Candidate Retha Pierce noted the dysfunction of the hearing: "When it goes to the court of appeals, if you don't

Exhibit 2. Notice of Protest Hearing to Rev. Price: Accepted into evidence. (R. pp. 174-75, 352).

Exhibit 3. 05/18/12 Letter from DOJ to Swati Patel: Possibly excluded as irrelevant, though read into the record. (R. pp. 25, 187-88).

Exhibit 4. 05/14/12 Letter from MEC to DOJ: Possibly excluded as irrelevant. (R. pp. 25, 357-97).

Exhibit 5. 05/22/12 Letter from Patricia Bellamy to Sandy Martin: Possibly excluded as irrelevant, though read into the record. (R. pp. 25, 198-99).

Exhibit 6. 01/20/12 Handwritten letter from "Concerned Citizens of Atlantic Beach": Possibly excluded as irrelevant. (R. p. 25).

Exhibit 7. 05/24/12 Letter from Patricia Bellamy to Sandy Martin: Possibly excluded as irrelevant, though read into the record. (R. p. 25, 199-201, 398).

Exhibit 8. 01/29/09 Letter from DOJ to Amanda Bailey: Possibly excluded as irrelevant, though read into the record. (R. pp. 24, 201).

Exhibit 9. Incident report. Excluded as hearsay. (R. pp. 210, 399-405).

Exhibit 10. Unknown,[19] possibly letter from Bennie Webb to Swati Patel: Excluded as hearsay and as irrelevant. (R. p. 243).

Exhibit 11. Unknown.[19]

Exhibit 12. Supreme Court decision in Cole v. Town of Atlantic Beach Election Commission: Possibly excluded as irrelevant. (R. p. 25).

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stipulate -- if they don't know exactly what you're referring to with preserved evidence, then they don't know. They don't know that it's being preserved." (R. p. 268). The fact that the HEC does not have a mechanism to preserve error like Rules 59 or 60, SCRCP, further complicated matters.

Exhibit 13. 05/11/12 Letter from Rev. Windy Price to "Ms. Singletary": Possibly excluded as irrelevant. (R. p. 25).

Exhibit 14. DOJ Section 5 voting submission: Possibly excluded as irrelevant. (R. pp. 25, 246, 406-7).

Exhibit 15. Booklet of Emails: Possibly excluded as irrelevant. (R. pp. 25, 226-27).

Exhibit 16. Protest of Retha Pierce: Possibly excluded as irrelevant. (R. p. 25).

The HEC also excluded various testimonial evidence, although the transcript is not clear many times as to exactly what was excluded. (R. pp. 243-44, 246, 268, 276-279, 285, 295). It appears from the HEC's order that this testimony was excluded because the testimony "...pertain[ed] to preclearance and the Executive Order" and were thus irrelevant. (R. p. 25).

South Carolina has a lenient standard for what constitutes "relevant" evidence:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 401, SCRE.

Notice is central to this appeal, and any evidence that has a tendency to prove or disprove notice is therefore relevant. The testimony and exhibits[20] excluded by the HEC on relevance grounds clearly implicate the issue of notice to the public and other governmental entities. Generally speaking, testimony or exhibits related to preclearance or the Executive Order speak to the HEC's failure to provide legally sufficient notice of

[20] While certain exhibits were not included in the record on appeal, Appellant does not concede their irrelevance. On the contrary, the exhibits omitted from the record were relevant to the issues discussed at the Protest Hearing, but were either not pertinent to the issues on this appeal or cumulative to other exhibits in the record.

the polling place and hearing locations. For example, Exhibit 4 (05/14/12 Letter from MEC to DOJ) serves to prove: (1) the ineffectiveness of the postcards sent to Atlantic Beach voters as notice (R. pp. 393-94); (2) the chilling effect of inadequate notice (R. p. 363); and (3) the background facts of the November election (R. p. 397). Exhibit 7 (Patricia Bellamy's 05/24/2012 letter to Sandy Martin of the HEC) serves as further evidence of the HEC's failure to properly notify voters (R. p. 398). Similarly, Exhibit 14[21] (DOJ Section 5 voting submission) proves two facts key to this appeal: (1) the HEC misrepresented to the DOJ that it had the consent of the MEC for the change, and, more importantly (2) the HEC neither notified nor obtained the consent of the Horry County legislative delegation for the polling location change, as required by law (see Section I.A). These are violations of mandatory law that warrant voiding the election.

Exhibit 9 (the incident report) was excluded on hearsay grounds by the HEC. (R. pp. 210, 399-405). Had Rev. Price been given the opportunity to have counsel present, her attorney would have been able to introduce this report into evidence under the business records, official records, and/or present sense impression exceptions, and would have been able to set up the foundation to prove these exceptions. Rules 803(1), 803(6), 803(8), SCRE. Unfortunately, Rev. Price was forced to proceed without an attorney, and the somewhat confused transcript to the Protest Hearing is a direct result. This Court should reverse the evidence rulings of the HEC, as best they can be ascertained, and direct that it review the proffered evidence.

[21] This is also Exhibit B to the Motion to Alter or Amend.

CONCLUSION

The errors of law and fact that control the Circuit Court's order, and the HEC's order it affirms, are fatal to the integrity of this election. Rev. Price asks this Court to reverse the decision of the Circuit Court, thus reversing the Horry County Election Commission's decision and nullifying the May 22, 2012 election.[22]

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9 May 2013

[22] At the bare minimum, this Court must reverse the Circuit Court, vacate the HEC's order, and order a new hearing for HEC's violations of FOIA.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas
J. Derham Cole
Circuit Court Judge

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Appellate Case No.: 2012-213489

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v.

Horry County Election Commission,
South Carolina Election Commission,
Jake Evans, Josephine Isom, and
Charlene Taylor ..... Defendants.

Of whom Horry County
Election Commission and
South Carolina Election
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CERTIFICATE OF COUNSEL

I certify that the Brief and Reply Brief comply with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

I certify that I have served the *Brief of Appellant, Reply Brief of Appellant, and Certificate of Counsel* on the Clerk of the Supreme Court at P.O. Box 11330, Columbia, SC 29211 and on counsel for the Respondents by serving copies of the same via U.S. Mail on May 13, 2013 to the following:

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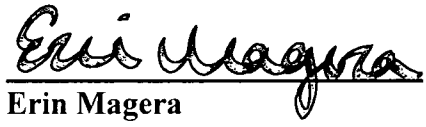

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13 May 2013