THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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.

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ARGUMENT

By failing to properly notice the May 22, 2012 election and its subsequent hearings, the HEC initiated a proceeding rife with confusion, created a jumbled and incomplete jig-saw puzzle of a record, and denied the protesting candidates any meaningful chance to be heard regarding this critically flawed election. Now, the Respondents hide behind the Gordian Knot they created, unwittingly or not, and ask this Court to dismiss this appeal on highly technical and formalistic grounds. This Court does not elevate form over substance, and the substance of this appeal demands avoidance of this election.

As an initial matter, it is important for this Court to note what the Respondents cannot contest. Neither Respondent can contest that Rev. Price was disallowed the opportunity to have an attorney present at the protest hearing. Neither Respondent can contest that Rev. Price was disallowed the opportunity to make an offer of proof. Neither Respondent can contest that the HEC failed to consult with the Horry County legislative delegation prior to changing the polling location. Neither Respondent can contest that the HEC made false statements to the Federal Elections Commission regarding this election. These violations substantially affect the determination of this election, essential elements of this election, and the fundamental integrity of the election; this election must be declared void. See Gecy v. Bagwell, 372 S.C. 237, 241-2, 642 S.E.2d 569, 571 (2007).

I. The Respondents have not disproved Rev. Price's showing that HEC's violations of the law have substantially affected essential elements of the election and its fundamental integrity.

The Respondents are mistaken in arguing that their violations of election law do not warrant avoidance of the election. While a reviewing court may ignore some

technical violations of the law to uphold a disputed election, "[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." Id. Further, "[a court] will not sanction practices which circumvent the plain purposes of the law and open the door to fraud." May v. Wilson, 199 S.C. 354, 19 S.E.2d 467, 470 (1942).

HEC advances the argument that notice of the correct polling location is not an "essential element" of the election. (HEC Brief Sec. II. B.1). Rev. Price would disagree, as it is axiomatic that arriving at the correct poll location is necessary for one to cast a vote. Here, it is undisputed that the newspaper notices of the election had the incorrect address. (R. pp. 443-46). These notices cannot meet the requirements of S.C. Code § 7-13-35. The HEC would have this Court believe that a single, last-minute mailing of postcards with another (incorrect) address can cure this failure. However, this exception to compliance with section 7-13-35 is not supported by the plain language of the statute. S.C. Code § 7-13-35 very clearly provides that the HEC *must* publish *two* notices in the *newspaper*, and *both* of these notices must contain the *location* of the polling place. There is no provision for notice via a single mailing of postcards, and certainly no provision for postcards with an incorrect address.[1] Furthermore, the HEC did not publish the notice of the precinct in the newspaper on the day of the election, as required by S.C. Code § 7-13-35. These failures taken together constitute a "total disregard of the statute" that is sufficient to declare this election void and illegal.

[1] HEC's contention that "...there is no testimony in the record from a voter that he or she did not receive a postcard or that he or she was confused by the polling location..." is mistaken; witness Carolyn Cole testified she did not receive a postcard, and witness William Booker testified as to confusion in the electorate. (R. pp. 255-56; 291; HEC Brief Sec. II. B.1).

HEC also contends that its failure to obtain the consent of the Horry County legislative delegation did not affect the "fundamental integrity" of this election. (HEC Brief Sec. II. B.2). HEC decided to move the polling location on or about May 1, 2012, thus the law mandated that they obtain consent of the legislative delegation pursuant to S.C. Code § 7-7-910(B)(2). (R. pp. 395-97). By HEC's own admission, they did not do this, and then told the DOJ that it was unnecessary: "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." (R. pp. 119, 406). HEC's violation of S.C. Code § 7-7-910(B)(2) may appear minor in a vacuum, but when considered with above misrepresentation to the U.S. Department of Justice it calls into question the integrity of the handling of this election. Not only does HEC's failure to abide by election law open the door to fraud as described in May, it also constitutes another "total disregard of the statute" as described in Gecy.

The SCEC advances the argument that "there is no statutory right to have an attorney present at an election protest hearing." (SCEC Brief Sec. IV). This argument ignores the fact that any protesting candidate is entitled to due process of law under the South Carolina and United States Constitutions. U.S. Const. amend VI; U.S. Const. amend XIV; S.C. Const. art. I § 3; see also S.C. Code § 7-13-130 ("The right to vote[2] of each person so entitled and the secrecy of the ballot shall be preserved at all times.").

The United States Supreme Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). The fundamental requirement of due process is the

[2] The right to vote is a fundamental right. Sojourner v. Town of St. George, 383 S.C. 171, 176, 679 S.E.2d 182, 185 (2009); see also S.C. Const. art. I § 5 (free and open elections).

opportunity to be heard at a "meaningful time and in a meaningful manner." Id. (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). Rev. Price was not given a hearing at a "meaningful time and in a meaningful manner": Rev. Price had no counsel present to object to evidence, to ensure that exhibits made it into the record, to help organize the proceedings, and to preserve error. Rev. Price's counsel could have prevented the HEC's fatal[3] error in refusing to accept proffered evidence. Rev. Price's injury is especially significant in light of the evidence that the HEC refused to accept: video of illegal curbside voting. (R. pp. 177-78, 196).

Additionally, in some circumstances Due Process demands that a litigant has a right to counsel in non-criminal matters of great importance. See S. Carolina Dep't. of Soc. Servs. v. Vanderhorst, 287 S.C. 554, 560, 340 S.E.2d 149, 153 (1986) (citing Lassiter v. Dept. of Social Servs., 452 U.S. 18 (1981)) (termination of parental rights).

> ...what process is due varies in relation to the interests at stake and the nature of the governmental proceedings. Where the individual's liberty interest is of diminished or less than fundamental stature, or where the prescribed procedure involves informal decisionmaking without the trappings of an adversarial trial-type proceeding, counsel has not been a requisite of due process. Implicit in this analysis is the fact that the contrary conclusion sometimes may be warranted. Where an individual's liberty interest assumes sufficiently weighty constitutional significance, and the State by a formal and adversarial proceeding seeks to curtail that interest, the right to counsel may be necessary to ensure fundamental fairness.

Lassiter at 37. The right to vote has this "weighty constitutional significance", and a right to counsel is necessary to ensure that proceedings are fundamentally fair. SCEC is

[3] The HEC's refusal to accept Rev. Price's proffered evidence deprived her of her right to a fair hearing, and is thus a violation of her due process rights in and of itself. See State v. Lynn, 277 S.C. 222, 225, 284 S.E.2d 786, 788 (1981); State v. Schmidt, 288 S.C. 301, 304, 342 S.E.2d 401, 403 (1986); Brief Sec. II n. 15.

mistaken – Rev. Price does have a right to counsel in this hearing, and this right was violated.

Even if Rev. Price had no *right* to counsel, HEC cannot deprive Rev. Price of the opportunity to have counsel present and then benefit from the fact that she was forced to appear *pro se* (especially since HEC had counsel present). The HEC is now contesting Rev. Price's appeal based on hyper-technical points of procedure and evidence that would have likely have been avoided (or made more clear in the record) if she had been given the benefit of counsel.

II. The Respondents have presented no evidence that the HEC has complied with the Freedom of Information Act, and HEC's violation has substantially undermined the integrity of this election.

As a public body, the HEC had a clear statutory mandate to provide notice of its meeting in accordance with FOIA. The Respondents present no evidence that the HEC has complied with this requirement, and this deficiency calls into question the integrity of this election. In order to comply with notice requirements of South Carolina's FOIA statute, a public body must do the following:

> (a) All public bodies, except as provided in subsections (b) and (c) of this section, must give written public notice of their regular meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. Agenda, if any, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings. **All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting.** The notice must include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings of public bodies.

S.C. Code § 30-4-80(a). The alleged evidence of HEC's attempt to comply with FOIA is this exchange between Rev. Price and the Chairman Russell Hall of the HEC:

Rev. Price: The question is: Did you give 24-hour written notice that this hearing would be here today?

Chmn. Hall: **We did not.** We gave 24-hour notice via the news media. As soon as we decided we would have the hearing we did that.

Rev. Price: Did you give 24-[hour]written notice to the public?

Chmn. Hall: The answer to that is: We gave, via the media, notice of the hearing. We gave written notice to the concerned parties as best we could. Due notice to them in writing and via a phone call.

(R. p. 175) (emphasis added). There is no evidence that notice for the protest hearing was posted at the HEC's bulletin board in compliance with section 30-4-80(a). The only "evidence" in the record is an unsworn statement by an interested party that a "notice" with unknown content was provided to unknown "news media". (R. pp. 172-75). Even if the statements of Chairman Hall were evidence, and assuming that he notified the "news media" 24 hours in advance[4] of the hearing (even without a protest in hand), this notification still does not meet the clear and unambiguous requirement that written notice be posted at the HEC's office.[5] Accordingly, there is no evidence supporting the HEC's and the Circuit Court's conclusion that the HEC complied with FOIA.

The prejudicial effects of this lack of notice cannot be understated. The lack of notice and the timing of this hearing prevented Rev. Price from having counsel present. (R. pp. 168, 176, 210-11). Lack of counsel prevented the parties from unambiguously preserving error and maintaining an orderly hearing. The notice and timing of this

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[4] HEC's insinuation that Rev. Price's litigiousness was a cause for HEC's early notification of the "news media" is a non-evidence-based *ad hominem* argument that belies a certain amount of animus toward Rev. Price. (HEC Brief Sec. III n. 5).

[5] The requirement that the notice be posted in writing is necessary because not every household owns a television. (R. p. 198).

hearing prevented Rev. Price from submitting video evidence of illegal curbside voting. (R. pp. 177-78, 196). These issues also prevented Rev. Price from presenting evidence that non-residents had submitted ballots. (R. pp. 93-95, 399-405).

SCEC advances the argument that FOIA is somehow not applicable to elections because FOIA requires 24 hours' notice and section 5-15-130 requires "due notice". (SCEC Brief Sec. IV). This is incorrect. It is well settled that statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result. Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010). Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement. Id.

SCEC also seeks an interpretation of the law that effectively abrogates FOIA in the context of elections. This is not a proper interpretation, as FOIA and election law can be construed to produce a harmonious result. "Due notice" is not abrogated, but instructed by FOIA, *i.e.* the 24 hour notice provision of FOIA provides legislative guidance on what "due notice" constitutes. Other notice provisions of election law meet the minimal requirements of FOIA and are thus can be read in harmony. E.g. S.C. Code § 5-5-50 (three weeks notice for change in form of government); Yonce v. Lybrand, 254 S.C. 14, 173 S.E.2d 148 (1970) (noting a vote on a bond referendum required fifteen days notice to the public); S.C. Code § 4-11-265(D)(1) (requiring not less than five nor more than fifteen days notice of a referendum involving the budgetary powers and election of the governing bodies of special purpose districts).

SCEC also appears to advance the argument that the election protest process is somehow not part of the election: "...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." (SCEC Brief Sec. IV). This argument is incorrect: public notice requirement statute, S.C. Code § 5-15-130, is in chapter fifteen of title five and is entitled: "NOMINATIONS AND ELECTIONS FOR MUNICIPAL OFFICES". To argue that the election protest process is somehow not an integral part of an election defies logic.

III. Rev. Price's arguments are pervasive in the record and are thus preserved for appeal.

The Respondents point to Rev. Price's *pro se* petition letter as evidence that she did not preserve arguments for appeal. However, arguments in election protests need only be set forth in enough detail to "adequately inform the contestee as to the nature of the contest." 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 best indicator as to whether a contestee was adequately informed of the nature of the contest is the transcript of the protest hearing. When the transcript in this hearing is examined the Respondents cannot contest that these issues were raised at the hearing without objection or expression of surprise.

During the hearing,[6] the issue of notice appears frequently. Rev. Price questions Chairman Hall about notice of the protest hearing without objection. (R. pp. 172-174). Patricia Bellamy also questions the adequacy of the notice of the protest hearing. (R. pp. 197-98). Notice of the election itself is raised multiple times through questioning, without objection, of the adequacy of the postcards used to change the polling location. (R. pp.

[6] Pre-hearing questions included multiple questions on the notice of the absentee ballot hearing by Rev. Price and others. (R. pp. 161-63).

255, 273-74). Carolyn Cole questions notice of changes to the absentee balloting process. (R. p. 239). The issue of false information being provided to the DOJ was also raised without objection. (R. p. 180). Rev. Price made clear that she would be protesting all aspects of this election:

> Chmn. Hall: For housekeeping, that part of the protest -- you're protesting the actual election itself?
>
> Rev. Price: And the entire procedure. **The entire procedure surrounding this election.**

(R. p. 188) (emphasis added).

The HEC knew it had the capability to object, and did so at times:

> Chmn. Hall: That's irrelevant to today.
>
> Ms. Cole: No, it isn't. It's your application for preclearance.
>
> Chmn. Hall: I'm objecting to that and sustaining my own objection.

(R. p. 244).

The HEC also knew that issues of notice were before it during the hearing:

> Chmn. Hall: Housekeeping, for the record, I objected on relevance, objected on relevance about where the witness lived. Not that she saw the notice. Make clear for the record, she saw someone else's notice. Go ahead.

(R. pp. 257-58).

The fact that some of these issues are not addressed in the HEC's order is of no relevance to preservation of error. The HEC has no mechanism similar to Rule 59, SCRCP, by which a protestant can ask the HEC to alter or amend its order. The inability to request this relief, combined with the deficiencies[7] in the trial transcript, and Rev.

[7] As noted in Rev. Price's brief, it is difficult to determine what testimony and exhibits were objected to, and on what grounds. (Appellant's Brief Sec. IV).

Price's disallowance of counsel, should excuse Rev. Price from dogmatic adherence to rules for preservation of error. See Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973) ("an exercise in semantics without any significance of substance").

Finally, the simple concept of fairness demands that Rev. Price's arguments be considered. The lack of a robust record in this matter that would unambiguously preserve all errors is a direct result of the HEC's refusal to allow Rev. Price to have counsel present. To allow the HEC to benefit from the unfair hearing it created strains the concepts of due process and substantial justice.

CONCLUSION

For want of notice, Rev. Price was unable to have an attorney present. For want of an attorney, Rev. Price was denied a fair hearing. For want of a fair hearing, this election was lost. The HEC's complete disregard for the law has tainted this election and opened the door for fraud. It is incumbent on this court to void the May 22, 2012, election to allow a free and fair special election to take place.

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9 May 2013

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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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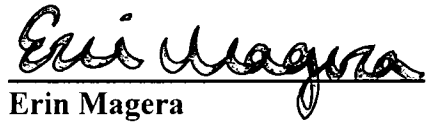

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