

THE STATE OF SOUTH CAROLINA
In The Supreme Court

IN THE SUPREME COURT'S ORIGINAL JURISDICTION

Appellate Case No. 2012-213345

South Carolina Republican Party,..... Petitioner,

v.

South Carolina Election Commission, The Honorable
Jeannette W. McBride, in her official capacity as Richland
County Clerk of Court; South Carolina Democratic Party;
Richland County Election Commission. Respondents,

**RETURN OF THE RESPONDENT RICHLAND COUNTY
ELECTION COMMISSION**

ATTORNEYS FOR RESPONDENT RICHLAND
COUNTY ELECTION COMMISSION

Steven W. Hamm
C. Jo Anne Wessinger Hill
RICHARDSON PLOWDEN & ROBINSON, P.A.
Post Office Drawer 7788
1900 Barnwell Street
Columbia, South Carolina 29202
(803) 771-4400
shamm@richardsonplowden.com
jhill@richardsonplowden.com

INTRODUCTION

Respondent Richland County Election Commission (“County Commission”) respectfully responds to the Emergency Petition for Writs of Prohibition and Injunction filed by the South Carolina Republican Party (“Republican Party”) on Friday, November 9, 2012. The County Commission has been deprived of its ability to conduct its statutory duty in accordance with South Carolina Code of Laws §§7-17-10 and 7-17-20. The Richland County Board of Canvassers is required to canvass the votes on the date and time stated in the public notices required by South Carolina Code of Laws §7-13-35 and then to transmit its findings to the State Board of Canvassers no later than noon on Saturday, November 10, 2012.

The County Commission asserts that the lower court in Richland County did not have subject matter jurisdiction or the authority to hear the underlying matter and issue temporary restraining orders in an election challenge. Here, the underlying complaint and matter filed before the lower court is, in essence, an election protest concerning SC House of Representative District No. 75. On its face, the Complaint/Petition before the lower court asserts that certain alleged “illegalities and irregularities appear to be outcome determinative in HD-75 [SC House of Representatives District No. 75].”¹ *See*, SC Democratic Party’s

¹ In paragraphs 1, 7-60, 63, and 67 of the SC Democratic Party’s Petition for a Temporary Restraining Order and Emergency Hearing, alleges various irregularities similar to that which would be alleged by a losing candidate in an election protest. The Democratic Party alleges that the Defendants, including the County Commission, failed to comply with the mandates of S.C. Code Ann. §7-13-1470 regarding the referenced number of voting machines; however, the number of voting machines at a polling place is discretionary and that any purported failure to strictly follow the assignment of voting machines does not invalidate an election. 1967-68 Op Atty Gen, No. 2453, p. 114; 1967-68 Op Atty Gen, No. 2503, p. 183.

Petition for a Temporary Restraining Order and Emergency Hearing in Civil Action number 2012-CP-40-07551.

The election challenge filing made by the South Carolina Democratic Party (“Democratic Party”) was filed prior to certification of the results by the County Commission and with the wrong jurisdiction. The authority to hear and make any decisions related in this election involving House of Representative candidates has not been granted to the lower court by the General Assembly. The long-standing principles of statutory construction that apply to clear and unambiguously worded statutes dictate the process and jurisdiction for matters raised by the Respondent South Carolina Democratic Party in the lower court filing in civil action numbered 2012-CP-40-0755. Based upon the statutory construction standards applied by this Court in multiple rulings, the Court has no other option than to grant the underlying Emergency Petition for Writs of Prohibition and Injunction, to vacate the underlying temporary restraining orders dated November 8, 2012, and to order the return of the election materials and ballots seized by the State Law Enforcement Division (SLED).

ARGUMENT

The election protest process for candidates seeking election to the SC House of Representatives is clearly established by the General Assembly in South Carolina Code of Laws §§7-17-250 and 7-17-260. If there is an election protest concerning the State House of Representatives or multi-county matters, that protest must be heard by the State Election Commission. S. C. Code Ann. §7-17-260. When there are county-wide matters (i.e., the sales tax option question, etc.) at issue in an election, the County Commission acting as the Richland County Board of Canvassers is the only entity statutorily allowed to hear and decide an election challenge or protest. S. C. Code Ann. §7-17-30.

When the South Carolina Democratic Party filed its action in the Court of Common Pleas for Richland County (Case Number 2012-CP-40-07551) on November 8, 2012, the Honorable L. Casey Manning issued a Temporary Restraining Order and then issued an Amended Temporary Restraining Order clarifying that the court-ordered seizure by the State Law Enforcement Division (SLED) was for all materials regarding votes cast in Richland County. Those materials include the Electronic Disks from voting machines – both flash card and Personal Electronic Ballot (PEB) – and all paper ballots in Richland County. SLED did comply with the lower court’s Order and seized the materials referenced therein on November 8, 2012. The County Commission was scheduled to hold its canvassing meeting on Saturday, November 10, 2012 pursuant to the notice issued by the County Commission in accordance with state law. The County Commission was prevented from holding its publicly noticed canvassing meeting to address any challenged or provisional ballots in Richland County, not just for State House District 75. As a direct result, the County Commission could not certify the final election results for any race in Richland County to the State Election Commission by noon on Saturday following the general election (i.e., Saturday, November 10, 2012) in accordance with S.C. Code Ann. §7-17-20. Meanwhile, the Republican Party filed its Emergency Petition for Writs on Friday, November 9, 2012 and sought an Order from the Court to stay any recount or other actions ordered by the lower court. The Court issued its Order on November 9, 2012 to stay all matters concerning any action directed by the lower court in its Temporary Restraining Orders, and by anyone else acting in accordance with such lower court orders. Thus, as of Friday afternoon, November 9, 2012, all matters related to the issues involving the election concerning the State House

District No. 75 and all related duties of the County Commission to complete its statutory duties have been stayed.

Sections 7-17-30, 7-17-250 and 7-17-260 of the South Carolina Code of Laws sets forth a clear and unambiguous protest process for a candidate for State House of Representatives, as well as any other county-wide issue. There has been no certification of the election results for any Richland County race by the County Commission to the State Election Commission due to the seizure of all ballots and related materials needed to complete canvassing. S.C. Code Ann. §7-17-20. Without the proper authority to do so, the lower court's orders have usurped the authority of the County Commission.

Section 7-17-260 states:

The state board [SC State Election Commission] **shall decide all cases under protest or contest that may arise in the case of** federal officers, state officers, **members of the State Senate and the State House of Representatives**, and offices involving more than one county. Any such protest or contest shall be filed in writing with the chairman of the board, together with a copy for each candidate in the race, not later than noon five days **following the canvassing of the votes for such offices by the board**; provided, however, that service upon the board may be perfected by depositing at the office of the Chief of the State Law Enforcement Division a copy of the protest, together with a copy for each candidate in the race. The chief shall take immediate steps to deliver such copies to the chairman. The protest shall contain each ground thereof concisely stated separately. The chairman of the board shall forthwith serve upon each candidate in the protested race a copy of the protest and serve a notice of the time and place of the meeting of the board for the purposes of hearing the protest. A protest or contested case heard by the state board pursuant to Chapter 17 of Title 7 shall be considered an "administrative action" pursuant to Section 15-36-10.

S.C. Code Ann. §7-17-260 (emphasis added).

The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996). If a statute's language is plain and unambiguous, and conveys a

clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning. Miller v. Doe, 312 S.C. 444, 441 S.E.2d 319 (1994). The above quoted statute is clear. No challenge, protest or contest may proceed until after the canvassing of the votes for such office.²

In the case at hand, an election challenge for State House Representative District No. 75 would be made to the State Election Commission following the certification of the results by the County Commission to the State Election Commission. S.C. Code Ann. §§7-17-20, 7-17-260; *see also*, Stone v. Leatherman, 343 S.C. 484, 541 S.E.2d 241 (2001). At present, the results in State House District No. 75 are not final, but preliminary until certified. The protest matter was not only filed in the wrong jurisdiction (i.e. lower court) but, in addition, no justiciable controversy exists at this time. “Before any action can be maintained, there must exist a justiciable controversy.” Byrd v. Irmo High Sch., 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). “A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.” Pee Dee Elec. Coop. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E. 2d 761, 762 (1983). Justiciability encompasses several doctrines, including ripeness, mootness, and standing. Jackson v. State, 331 S.C. 486, 489 S.E. 2d 915 (1997). The lower court should have dismissed the matter on its face, not only for lack of jurisdiction

² Section 7-17-220 provides that “...the Board of State Canvassers shall convene a meeting scheduled through the office of the Election Commission within ten days after any general election for the purpose of canvassing the vote for all officers voted for at such election, including the vote for the electors for President and Vice President, and for the purpose of canvassing the vote on all Constitutional Amendments and questions and other issues...” S.C. Code Ann. §7-17-220. Also, Section 7-17-20 states that “the county board of canvassers, respectively, shall then proceed to canvass the votes of the county and make such statements of such votes as the nature of the election shall require no later than noon on the Saturday next following the election and at such time shall transmit to the State Board of Canvassers the results of their findings.” S.C. Code Ann. §7-17-20.

and authority to rule on the election dispute, but also based upon the absence of a justiciable or ripe controversy concerning the yet to be certified election results.

The County Commission must be allowed to complete all statutory duties so that it may then certify the results to the State Election Commission in order for the public to be advised and know the official results of the votes cast in the Richland County Elections, and thus, provide an opportunity to any losing candidate to pursue any election challenge or protest as may be authorized by law.

For these reasons set forth herein, the Court is limited in its options on what it can or cannot do by the clear and unambiguous language in the election statutory system established by the General Assembly. The process on how and when a candidate may protest, contest or appeal the results in an election is clear. This matter is not yet ripe since the election results have not been certified or finalized by the County Commission, and any appeal or protest would properly rest with the State Election Commission and not the circuit court.

CONCLUSION

For the reasons stated above, the Court should dismiss the Emergency Petition for Writs of Prohibition and Injunction pending before it; should vacate all underlying Orders for a Temporary Restraining Order (including the Amended Order) issued by the Court of Common Pleas for Richland County; should order and direct the return to the County Commission of all ballots and materials seized by SLED; and provide until 5:00 p.m. on Friday, November 16, 2012 for the County Election Commission to complete its statutory duties regarding the ballots cast in the 2012 General Election conducted on November 6, 2012. The County Commission must certify the results to the State Election Commission as required by law. In addition, the Court should confirm that any deadline or time period for

any party or candidate in the general election to file or make a protest regarding Richland County elections does not begin until the County Election Commission has certified the results to the South Carolina State Election Commission.

The arguments presented and relief sought in the County Commission's Motion to Dismiss dated November 13, 2012 and filed today is also incorporated in this Return as if repeated verbatim herein.

Respectfully submitted this 13th day of November, 2012,

RICHARDSON PLOWDEN &
ROBINSON, P.A.

By: s/ Steven W. Hamm
Steven W. Hamm (S.C. Bar No. 2634)
C. Jo Anne Wessinger Hill (S.C. Bar No. 15025)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
(803) 779-0016 facsimile

ATTORNEYS FOR RESPONDENT, RICHLAND COUNTY
ELECTION COMMISSION

THE STATE OF SOUTH CAROLINA
In The Supreme Court

IN THE SUPREME COURT'S ORIGINAL JURISDICTION

Appellate Case No. 2012-213345

South Carolina Republican Party,..... Petitioner,

v.

South Carolina Election Commission, The Honorable
Jeannette W. McBride, in her official capacity as Richland
County Clerk of Court; South Carolina Democratic Party;
Richland County Election Commission. Respondents,

PROOF OF SERVICE

The undersigned employee of RICHARDSON PLOWDEN & ROBINSON, P.A., attorneys for Appellant, does hereby certify that service of the foregoing **RETURN OF THE RESPONDENT RICHLAND COUNTY ELECTION COMMISSION** in the above-captioned matter was made upon all counsel of record this 13TH day of November 2012, by electronic mail and by depositing a copy of same via electronic mail, hand delivery and/or in the U.S. Mail, postage prepaid, addressed as indicated below:

VIA HAND DELIVERY

Marci Andino
Executive Director of the South Carolina State Election Commission
2221 Devine Street, Suite 105
Columbia, SC 29205

VIA HAND DELIVERY AND ELECTRONIC MAIL

Richard A. Harpootlian, Esq.
Chris Kenney, Esq.
RICHARD A. HARPOOTLIAN, PA
Attorney for SC Democratic Party
1410 Laural Street
Columbia, SC 29202
Email: rah@harpootlianlaw.com
Email: cpk@harpootlianlaw.com

VIA HAND DELIVERY AND ELECTRONIC MAIL

John S. Nichols, Esq.
Attorney for Honorable Jeanette McBride, Clerk of the Richland County
Court of Common Pleas
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC
1614 Taylor Street
Columbia, South Carolina 29202
Email: jsnichols@BNTDlaw.com

VIA HAND DELIVERY AND ELECTRONIC MAIL

J. Robert Bolchoz, Esq.
ROBERT BOLCHOZ, LLC
Attorney for SC Republican Party
1331 Park Street
Columbia, SC 29201
Email: robert@bolchoz.com

s/ Kathy J. Templeton

Kathy J. Templeton

November 13, 2012
Columbia, South Carolina