

GREENVILLE COUNTY EXECUTIVE  
COMMITTEE

REPUBLICAN PARTY OF SOUTH  
CAROLINA

In the Matter of

PROTEST OF STEPHEN SELBY OF  
THE PRIMARY ELECTION FOR  
COUNTY COUNCIL DISTRICT  
EIGHTEEN

**MEMORANDUM IN  
OPPOSITION TO PROTEST  
OF STEPHEN SELBY**

**I. Introduction**

Stephen Selby's protest is based **entirely** on information that was **known** or that could have been known at the time of the runoff, and on **speculation**. The law is clear that an election will not be overturned on the basis of speculation. Nor can an election be upset when the protester could have made his challenge at the time of the election, and either chose not to do so, or was not diligent in monitoring the course of the election. Our statutes expressly require that a challenge be based on "after-discovered" evidence – and this means evidence that the party could not have discovered, not evidence that he did not bother to discover.

These rules make good sense, and are well established in precedent of the South Carolina Supreme Court. Where the Committee can only **guess** or **assume** regarding whether there was an impact on the election, the election must stand; the electoral results cannot be overturned on surmise alone. For similar reasons, a candidate who has, or who could have had, evidence of an irregularity but who lies in the weeds, waiting to see if it is to his advantage to mention the problem, cannot prevail.

Mr. Selby's protest shows that he is more concerned about preserving his seat on County Council than about the integrity of the electoral process. If he had been concerned

about the process, he could have worked as hard before the election to protect it, as he has since to try to show the election was flawed. Then, instead of asking the Committee to throw out the ballots of thousands of voters who went to the polls, he could have talked about the handful that he claims are flawed.

Given the Supreme Court and other authorities discussed herein, we believe it is inevitable that Mr. Selby's protest will ultimately be denied, and that the runoff result in favor of Mr. Trout upheld. This is the correct result, and the one the Committee should reach in its hearing on Thursday.

## **II. A Protest May Not Be Based Solely on After-Acquired Evidence**

It is apparent that **every element** of Mr. Selby's protest is based on information that he had – or could have had, had he bothered – at or before the runoff. The law is clear that a protest cannot succeed if it is based on such pre-existing evidence.

S.C. Code Ann. § 7-13-810 allows a protest only if it based, in whole or in part, on “after-discovered” evidence. As this language has been interpreted, a protest fails if it is based on information that was known, or available with reasonable diligence, before the election. It is noteworthy too that this requirement is contained in the statute that provides for challenges of individual ballots. The two ideas fit together. The law requires that an individual ballot be challenged if that is at all possible. That way, only the questioned ballot is put in jeopardy, instead of the thousands that a losing candidate might try to toss out by protesting and attempting to overturn an entire election.

These principles are at work in the Supreme Court's decision in *Hill v. South Carolina Election Commission*, 304 S.C. 150, 403 S.E.2d 309 (1991). The protester there (somewhat like Mr. Selby here) argued that more ballots were cast in two precincts than there were voters on the voter registration lists for those precincts. The Supreme Court rejected the challenge

because it was based on information that would have been available at or prior to the time the ballots were cast.

The Court first noted that (like Mr. Selby) the protester had not made challenges at the time the ballots in question were cast. It then concluded that the alleged discrepancies “**could have been discovered** prior to the election,” and noted that “we see no reason why a challenge could not have been made at the time a vote was given a ballot.” *Hill*, 403 S.E.2d at 309-310 (emphasis added). Thus, the protests were not based on “after-discovered” evidence. For those reasons, the Supreme Court reversed a decision of the State Board of Elections and held that the election results should stand.

Under the law, evidence is not “after-discovered” simply because a party did not bother to discover it. It is “after-discovered” only if it **could not have been discovered** with reasonable diligence before the relevant time. **Nothing** that Mr. Selby is relying on fits this category. If he had been as concerned about the process as about preserving his seat, he could have undertaken the same investigation before the runoff.<sup>1</sup>

The *Hill* Court also made a very important point about the difference between a ballot challenge and a protest. When there is a contemporaneous challenge, there is no need to make an assumption about whether the ballot was incorrectly cast or not; it can be segregated and examined. An after-the-fact protest like this one, on the other hand, asks the

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<sup>1</sup> The phrase “after-discovered evidence” – the phrase used in § 7-13-810 – has been construed the same in other areas of the law. *See, e.g., Raby Construction, L.L.P. v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004) (motion for relief from judgment under SCRCP 60(b)(2), must be based on “after-discovered evidence,” defined as “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial.” *See also State v. Spann*, 334 S.C. 618, 619, 513 S.E.2d 98, 99 (1999) (“after-discovered evidence” is evidence that “could not in the exercise of due diligence have been discovered prior to” the event in question). These constructions are powerful evidence of the proper construction here.

fact-finder to make assumptions – often unsupported – about the questioned ballot. 403 S.E.2d at 310. Such assumptions are improper.

*Hill* is based on S.C. Code Ann. § 7-13-810, and while that statute has been amended since *Hill* was decided, the amendment for purposes of this case merely confirms and codifies the result in *Hill*. As currently codified, § 7-13-810 (after setting forth the procedure for challenging allegedly improper votes) allows a protest only “when the protest is based in whole or in part on evidence discovered after the election. This evidence may include, but is not limited to, after-discovered evidence of voters who have voted in a precinct or for a district office other than the one in which they are entitled by law to vote.” In other words, the amendment to § 7-13-810 retains the limitation on protests to “after-discovered” evidence, the language which is the basis for *Hill*.

*Dukes v. Redmond*, 357 S.C. 454, 593 S.E.2d 606 (2004), relied on by Mr. Selby, does not change the rule in *Hill*. *Dukes* is merely a factual holding that certain evidence was “after-discovered.” (Thus, *Dukes* actually confirms that the statute still requires that a protest be based on “after-discovered” evidence.) Because there is no discussion in the opinion of how the evidence was obtained, *Dukes* provides no concrete guidance on when a particular item of evidence qualifies as “after-discovered.” That is a determination that depends on what the particular evidence was, and whether it could have been obtained before the election. Here, most or all of Mr. Selby’s challenges are based on the public record that existed before the election; his evidence cannot be classified as “after-discovered.”<sup>2</sup>

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<sup>2</sup> A good example of “after-discovered” evidence is *In re Bamberg Ehrhardt School Board Election*, 337 S.C. 561, 524 S.E.2d 400 (1999), in which a challenge was upheld where it was discovered after the election that the voting machines were improperly programmed.

All of Mr. Selby's contentions could have been made during the runoff. One very clear example of this is his claim that a number of individuals were marked as having voted in the Democrat Party runoff, but then allowed to vote in the runoff. **By definition, this is something that can be seen on the face of the Voter Registration List.** This is not merely something that could have been discovered – it was there in the book itself! A poll watcher could have seen it and challenged the ballot of anyone who appeared to be in that situation. (Indeed, such challenges were brought in this election.) Under *Hill*, this ground for protest is plainly invalid, because it is not “after-acquired” evidence.

The same is true for every other ground of the protest. It relies either on information contained within the Voter Registration List itself, or on information (as Mr. Selby's own post-election efforts prove) that could have been acquired with reasonable diligence. *Hill* requires that this protest be rejected in its entirety.

### **III. A Protest Cannot Be Based on Inference or Speculation**

A second clear legal principle applying to protests is that speculation cannot be substituted for proof. The Supreme Court has repeatedly held that “every reasonable presumption in favor of sustaining a contested election will be employed.” *Fielding v. South Carolina Election Commission*, 305 S.C. 313, 408 S.E.2d 232 (1991). Furthermore, in *Fielding* the Court made it clear that a protest based on “conjecture, speculation, and surmise” will not be upheld. 408 S.E.2d at 235.

*Fielding* also repeats the requirement that the contemporaneous challenge requirement be followed. “[T]he making of a challenge is essential to the preservation of an adequate record upon which appellate review can be had.” 408 S.E.2d at 235.

Mr. Selby's arguments all involve speculation – and they invite the Committee to draw inferences **against** the validity of the election. This is precisely contrary to law. All

inferences must be drawn against Mr. Selby's position. This rule destroys each of his contention.

For instance, Mr. Selby claims there are eight voters who voted in the primary without a mark being placed in either the Democrat or Republican box for that vote, and who then voted in the runoff. He asks the Committee to "infer" or "guess" that each of these voted in the Democratic primary. In fact, the law requires precisely the opposite inference – that they voted in the Republican primary.

Another example is Mr. Selby's apparent ongoing attempt to "prove" that voters in the runoff do not live in the district because a postcard he sent them has been returned.<sup>3</sup> While his position is one possible inference, there are many others – including use of a Post Office box, closing a Post Office box, misaddressed postcards, or a temporary absence without intent to change residence. This is not **proof** that any one of these persons voted improperly. Because inferences are drawn in favor of maintaining the election result, the Committee cannot speculate about where these people now reside.

#### **IV. Justice Department Review Will Delay Any New Election at Least 60 Days**

If this runoff result is voided, Under S.C. Code Ann. § 7-13-1170, the Governor will be required to call for a new election.

We have been told that, under Section 5 of the federal Voting Rights Act of 1965 as it applies to South Carolina, this will trigger a mandatory review of the new election by the United States Department of Justice. We understand the Justice Department has sixty days to complete this review, and that if the Justice Department asks for additional information, the sixty days starts to run again from the time of receipt of that information.

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<sup>3</sup> For one thing, these postcards are clear hearsay – statements of a third-party declarant, offered for the proposition that the person does not live at his or her address.

Thus, as we have been informed, from the time that the Supreme Court of South Carolina rules on any ultimate appeal of this matter, a new runoff would be unlikely to take place before 60 days. This means that if the Court ruled in late July, another runoff could not occur, before late September.

**V. Conclusion**

The Selby protest is constructed of speculation, and information that was available to him long before the election, had he bothered to look. An election cannot be thrown out on such bases. This is not just – or even primarily – a dispute between Mr. Selby and Mr. Trout. Mr. Selby is attacking the integrity of the election, and asking that thousands of citizens' votes be tossed out. Accordingly, the result of the recount naming Tony Trout the Republican nominee for District 18 should be affirmed.

Respectfully submitted,

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