| GREENVILLE COUNTY EXECUTIVE COMMITTEE<br><br>REPUBLICAN PARTY OF SOUTH CAROLINA | |
|---|---|
| In the Matter of<br><br>PROTEST OF STEPHEN SELBY OF THE PRIMARY ELECTION FOR COUNTY COUNCIL DISTRICT EIGHTEEN | **MOTION AND MEMORANDUM TO DISMISS OR, IN THE ALTERNATIVE, TO STRIKE THE PROTEST OF STEPHEN SELBY** |

## I. Introduction

Respondent Tony Trout hereby moves the Greenville County Executive Committee of the Republican Party (the "Committee") to dismiss the Protest of Stephen Selby (the "Protest") on the grounds that the Protest is improperly based on evidence that was, as a matter of law, discoverable at the time of the June 22, 2004 run-off election. Mr. Selby's Protest is thus barred by S.C. Code Ann. § 7-13-810 (Supp. 2003); *see also* G*reene v. South Carolina Election Commission*, 314 S.C. 449, 445 S.E.2d 451 (1994); *Hill v. South Carolina Election Commission*, 304 S.C. 150, 403 S.E.2d 309 (1991). In the alternative, Mr. Trout asks that the Committee strike those portions of the Protest that are clearly based on evidence that was available at the time of the run-off election, and to take up this motion again after there has been proof that each of the remaining items was also based on earlier available evidence.

Mr. 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 bald **speculation**. The law is clear that an election may 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 simply failed to discover.

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

It is apparent – as we will discuss below – that **every element** of Mr. Selby's Protest is based on information that he had discovered – or could have discovered with the exercise of reasonable diligence – 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 is based 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. Section 7-13-810 provides, in relevant part, as follows:

> It is the duty of the managers of election to, and any elector or qualified watcher may, challenge the vote of a person who may be known or suspected not to be a qualified voter. However, the challenges by persons other than a manager must be addressed to the manager and not directly to the voter. The manager shall then present the challenge to the voter and act in accordance with the provisions provided for in this section. **All challenges must be made before the time a voter deposits a paper ballot in a ballot box or casts his vote in a voting machine, and no challenge may be considered after that time**.

(Emphasis Added). Thus, the very statute relied upon by Mr. Selby in making this Protest **requires** that an individual ballot be challenged at the polls if that is at all possible. That way, only the questioned ballot is put in jeopardy, instead of the thousands that stand to be tossed out if a protest is upheld and an entire election overturned.

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, Mr. Selby could have undertaken the same investigation before the runoff and made these same challenges at the polls as required by law.[1]

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

---

[1] 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*.[2] *Dukes* is merely a factual holding that certain evidence was "after-discovered." (Thus, *Dukes* actually confirms that the statute requires "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, 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,"[3] and his claims should be dismissed.

[2] Indeed, the *Dukes* Court specifically mentions *Hill* in footnote four of its opinion, and does not overrule *Hill*. 593 S.E.2d at 608, n. 4.

[3] 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.

## 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.

## IV. Each of Mr. Selby's Protest Grounds Is Either Based on After-Acquired Evidence, Requires Speculation, or Both

A review of Mr. Selby's Protest proves conclusively that the evidence he relies on does not qualify as "after-acquired" within the meaning of *Hill* and *Dukes*. We consider his protest grounds in turn:

**Paragraph 1:** Here, Mr. Selby claims that: "Voter Registration Lists used in the elections, in at least twenty (20) cases, voters cast ballots in the Democratic primary election on June 8, 2004, and then cast a ballot in Republican primary runoff held on June 22, 2004 in violation of S.C. Code §7-13-1010 and other applicable statutes." (Protest, ¶ 1).[4] In sum,

[4] A review of the Protest shows that the same poll records are clearly relied upon by Mr. Selby to support the majority of his remaining challenges. (Protest, ¶¶ 2-6, 10, 11, 13).

Mr. Selby claims that a review of these poll records suggests an individual was marked as voting as a Democrat on June 8, 2004, but voted again in the Republican run-off.

**By definition, Mr. Selby's "evidence" 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 and available to Mr. Selby following the June 8 primary! A poll watcher could have seen it and challenged the ballot of anyone who appeared to be in that situation. Indeed, many **identical** challenges using the **same** records were made at the polls on June 22 and were in fact reviewed by the Committee at the June 24, 2004 certification meeting. In at least one instance, the challenge was contested by the voter at the certification meeting and the vote was deemed proper by the Committee. Mr. Selby's present argument would rob these untimely-challenged voters of this same statutory and constitutional right of due process. In turn, Mr. Selby would deprive thousands of other voters of their sacred right to vote.

**Paragraph 2:** This is very similar to paragraph 1, but it depends even further on speculation. Here, 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. In addition, as before, this is information contained on the face of the Voter Registration List – so it cannot be "after-discovered."

**Paragraph 3:** This is an allegation that an individual voted absentee, and then voted a second time in person. The absentee list was available to the public prior to the election. Thus, this also is not "after-discovered" evidence.

**Paragraphs 4-6, and 13:** These paragraphs contain contentions that the Republican runoff should be tossed out because the total votes in the Democratic primary do not match the total number of persons marked on the Voter Registration Lists as having signed in for that primary. Here again, this is information that was plain and available on the face of the Voter Registration Lists **before** the runoff. Accordingly, it cannot be "after-discovered" evidence.

**Paragraph 7:** This correctly alleges that a voting machine had to be taken off line. However, there is no evidence that any votes were affected by this, and so any inference from this fact would be speculation and improper.

**Paragraphs 8 and 9:** These are allegations that the Voter Registration Lists have improper addresses. The only factual basis for these allegations are post cards that Mr. Selby has apparently mailed out; he contends that the returned cards prove that the addressees do not live at that address. Besides being based on inadmissible hearsay, this position is not based on "after-discovered" evidence because this mailing operation could have been undertaken earlier. The argument is also based on speculation, because there are many other explanations for a return – including use of a Post Office box, closing a Post Office Box, misaddressed postcards, or a temporary absence (such as by a soldier or college student) 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.

**Paragraph 10:** This is a claim that a felon who was convicted in 1998 voted. This information is six years old. It thus cannot be "after-discovered" evidence as a matter of law.

In short, every ground of Mr. Selby's protest is invalid under § 7-13-810. Each one 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. Section 7-13-810 requires that this protest be rejected in its entirety. In the alternative, Respondent Trout submits that those portions of the Protest clearly based on evidence discoverable at the time of the election, such as those based solely on analysis of the Voter Registration List, be dismissed at the outset, until the record is made that the same is true for Mr. Selby's other grounds.

## V. Conclusion

Mr. Selby's Protest is riddled with speculation and conjecture. Further, the Protest rises and, inescapably, falls upon evidence that was available to Mr. Selby at the June 22 run-off. Evidence is not "after-acquired" simply because the party fails to take advantage of information readily available to them. Indeed, Respondent Trout has shown beyond a doubt that **identical** challenges were made by poll workers or watchers at the polls on June 22. As Mr. Selby failed to challenge these ballots at the polls, he simply cannot challenge them now as a matter of law. *See* S.C. Code Ann. § 7-13-810; G*reene*, 314 S.C. 449, 445 S.E.2d 451; *Hill*, 304 S.C. 150, 403 S.E.2d 309 (1991).

Accordingly, Mr. Selby's Protest should be dismissed and the result of the recount naming Tony Trout the Republican nominee for District 18 should be affirmed. In the alternative, those portions of Mr. Selby's Protest improperly based on evidence that was available at the time of the election should be dismissed as a matter of law.

Respectfully submitted,

________________________________________

J. Theodore Gentry
WYCHE, BURGESS, FREEMAN & PARHAM, P. A.
44 E. Camperdown Way
Post Office Box 728
Greenville, SC 29602-0728
Direct Dial: 864-242-8270
Telecopier: 864-235-8900
E-Mail: tgentry@wyche.com

William H. Foster, III
NELSON MULLINS RILEY & SCARBOROUGH, LLP
104 S. Main St., Suite 900
P. O. Box 10084
Greenville, SC 29603-0084
Direct Dial: 864-250-2222
Telecopier: 864-250-2383
bill.foster@nelsonmullins.com

Date: July 1, 2004
Greenville, South Carolina

**ATTORNEYS FOR TONY TROUT**