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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

JEANNE KENTCH, *et al.*,

Plaintiffs/Contestants,

v.

No. CV-2022-01468

**MARICOPA COUNTY DEFENDANTS'
RESPONSE TO PLAINTIFFS'
MOTION FOR NEW TRIAL**

1 KRIS MAYES,

2 Defendant/Contestee

3 and

4 ADRIAN FONTES, *et al.*,

5 Official Capacity Defendants.

(Expedited Challenge Matter)

(Assigned to the Hon. Lee F. Jantzen)

6 The Maricopa County Defendants hereby file their opposition to Plaintiffs' Motion
7 for a New Trial (the "Motion"). The Motion should be denied. It is procedurally and factually
8 baseless. In the interest of brevity and to avoid belaboring points already made by other
9 parties, this opposition focuses only on Plaintiffs' misstatements concerning "newly
10 discovery evidence" related to Maricopa County, their unsupported request to conduct a
11 state-wide review of every ballot cast and this court's lack of continued jurisdiction to hear
12 this matter.

13 **ARGUMENT**

14 **I. No newly discovery evidence exists to justify a new trial.**

15 As an initial matter, "Election contests are **purely statutory**. They are unknown to
16 the common law. They are neither actions at law nor suits in equity. They are special
17 proceedings." *Grounds v. Lawe*, 67 Ariz. 176, 186 (1948), *quoting McCall v. City of*
18 *Tombstone*, 21 Ariz. 161, 185 (1919) (emphasis added). Consequently, election contests
19 are "dependent upon statutory provisions for their conduct" and are "**not** governed by the
20 general rules of chancery practice." *Fish v. Redeker*, 2 Ariz. App. 602, 605 (1966)
21 (emphasis added); *Grounds*, 67 Ariz. 184. As such, Plaintiffs' request for a new trial
22 pursuant to Rule 59 is procedurally barred.

23 But even if it were not, Plaintiffs fail to make the requisite showing under Rule 59
24 to justify the grant of a new trial. With respect to Maricopa County, Plaintiffs assert that
25 newly discovered evidence requires a new trial. Specifically: (1) the receipt of the list of
26 names of individuals who voted provisionally in Maricopa County and (2) the disclosure in
27 the Kari Lake election contest that printer errors related to timing marks impacted the ability
28

1 of some onsite tabulators to read ballots cast on tabulators at Vote Centers. (Motion at 13).
2 This is not “newly discovered” evidence.

3 Plaintiffs have known that some individuals cast provisional ballots in the 2022
4 General Election since Election Day. This is the case in every election. Despite this well-
5 known fact, Plaintiffs have yet to identify a single voter who improperly was required to
6 cast a provisional ballot or a single provisional ballot that should have been counted but
7 was not. Not one - the election was 76 days ago. There is nothing “newly discovered” about
8 provisional voters nor is there any basis for the court to determine that anything related to
9 those who voted provisionally, including a list of their names, is material to Plaintiffs’
10 claims. Rule 59(a)(1)(D).

11 Plaintiffs’ assertion regarding testimony about the timing marks on some ballots is
12 similarly specious. Specifically, Plaintiffs assert that testimony in the December 21 and 22,
13 2022, Kari Lake trial “revealed that some ballots in Maricopa County were printed in such
14 a way that their timing marks could not be correctly read, which prevented Maricopa
15 County’s tabulators from properly reading and tabulating a large number of ballots.”
16 (Motion at 13). First, this testimony occurred PRIOR to the hearing in this matter, so it was
17 known at the time Plaintiffs decided to put on a 20-minute case-in-chief and present only
18 one witness. Moreover, the issues related to the printing of timing marks on some ballots
19 in Maricopa County have been known since Election Day. Indeed, at 2:06 PM on Election
20 Day, Maricopa County tweeted the following, “@maricopavote has identified the solution
21 for the tabulation issue at about 60 Vote Centers. County technicians have changed the
22 printer setting, which seems to have resolved the issue. It appears some of the printers were
23 not producing dark enough timing marks on ballots.” See @maricopacounty, Twitter,
24 November 8, 2022,
25 <https://twitter.com/maricopacounty/status/1590088467983499265?lang=en>. Plaintiffs’
26 failure to present any evidence concerning the timing mark printing issues on some ballots
27 in Maricopa County, to the extent that issue somehow relates to their claims in this matter,
28 which it does not, is not a basis for a new trial.

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2 **II. Plaintiffs are not entitled to “meticulously inspect” all ballots cast.**

3 In addition to requesting a new trial, Plaintiffs continue to improperly request
4 additional discovery, which is neither authorized nor allowed in election contests. In
5 Arizona, plaintiffs are not entitled to discovery and certainly are not entitled to review every
6 ballot cast so they may argue to the court why each should or should not be counted
7 differently¹. The only discovery vehicle the Legislature granted in election contests is the
8 inspection of ballots in preparation for trial. A.R.S. § 16-677(A). That is exactly what
9 occurred in this case. Indeed, as the Court rightly pointed out, “[t]he court granted your
10 petition to inspect ballots. You [Plaintiffs’ counsel] conceded today that you got to inspect
11 many more ballots than what were inspected even in the other cases’ process. And I think
12 that’s a good thing. I’m glad that was able to happen.” [Hearing Transcript, p. 115, 2-6].

13 There is simply no basis for the unprecedented relief of allowing Plaintiffs to inspect
14 all 2,592,313 ballots cast in the state of Arizona in the 2022 General Election. A.R.S. § 16-
15 677 provides no such authorization. Moreover, granting this request more than two months
16 after the election, after a statewide recount for this office, after the statewide canvass, and
17 after Ms. Mayes has taken office would, to put it lightly, fly in the face of the “strong public
18 policy favoring stability and finality of election results.” *Ariz. City Sanitary Dist v. Olson*,
19 224 Ariz. 330 ¶ 12 (App. 2010) (cleaned up). This election and this contest is over. As was
20 the case when the court ruled on December 23, 2022, “[t]his is a contesting of an election
21 that, you know, was done in early November. And it just doesn’t overcome the presumption
22 that the election was done correctly. There isn’t enough information. I wouldn’t even think
23 there is even slight information that something was done illegally or incorrectly.” [Hearing
24 Transcript, p. 116, 4-9].

25
26 ¹ Indeed, as the Court correctly found, it is not a court’s role to determine how individual
27 ballots should be counted based on its opinion of the intent of the voters: “[t]he request
28 that’s being made today for me to count these 14 ballots based on their intent, while it
sounds simple enough, it’s just not how election contests should work”. [Hearing
Transcript, p. 113, 1-4].

1 **III. This Court no longer has jurisdiction to hear this matter.**

2 What Plaintiffs really want here is to bring a *new* election contest, with new
3 arguments and new evidence. But a new election contest would be time-barred. A.R.S. §
4 16-673(A)(1) (requiring that election contests must be brought “within five days after
5 completion of the canvass of the election”). Plaintiffs attempt to get around that
6 jurisdictional bar by asking this Court to grant them a new trial as part of their already-filed
7 election contest. But they fare no better with that request.

8 As explained above, election contests are purely statutory. Jurisdiction is thus limited
9 to only that provided by the election contest statutes. Those statutes are clear: when a contest
10 is filed, the trial court must set a time for the hearing of the contest no later than ten days
11 after the date the contest was filed. A.R.S. § 16-676(A). The trial court must then issue its
12 judgment within five days after the hearing and taking the matter under advisement. A.R.S.
13 § 16-676(B). That is the extent of the trial court’s jurisdiction: once judgment is issued, the
14 trial court is divested of jurisdiction to hear additional substantive arguments in the contest.
15 The parties may appeal to the court of appeals, but there is no statutory grant of jurisdiction
16 to the trial court to grant a new trial.

17 From a policy standpoint, this makes sense because of the importance of finality for
18 elections. Further, A.R.S. § 16-667 allows courts to stay a recount while an election contest
19 is at issue. That is what happened in the instant action. The announcement of the results
20 of the statewide recount was stayed by a court in Maricopa County until after this court
21 issued its decision. Then the Superior Court in Maricopa County announced the final
22 election results in open court and set forth its determination with a certified copy of its order
23 directing the Secretary of State to issue a certificate of election pursuant to A.R.S. § 16-665.
24 (See Exhibit F to the Motion). As a result, this Court was divested of jurisdiction to provide
25 any further relief affecting election results.

1 CONCLUSION

2 For the foregoing reasons this Court should deny the Plaintiffs' Motion for a New
3 Trial.

4
5 RESPECTFULLY SUBMITTED this 23rd day of January, 2023.

6
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