

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

HONORABLE LEE F. JANTZEN
DIVISION 4
DATE: JULY 17, 2023

*DL

COURT ORDER/NOTICE/RULING

JEANNE KENTCH, et al., et ux.,
Plaintiffs,

vs.

CV-2022-01468

KRIS MAYES, et al., et ux.,
Defendants.

This matter came before this Court on a Motion for New Trial filed by the Plaintiffs against all the Defendants, including current Secretary of State, Kris Mayes. The Court denied the Motion for New Trial in a separate ruling on July 14, 2023.

Mayes and Plaintiff Abraham Hamaden were involved in one of the closest elections in Arizona history and perhaps the history of the United States. With more than 2.5 million voters in the election, after a mandatory recount, Mayes was declared the winner by a mere 280 votes.

The recount results have not been appealed.

The Arizona Constitution gives the Arizona legislature the right to make the rules concerning elections and they have created specific rules to handle election contests. See A.R.S. § 16-671, *et seq.* The expedited time limits mandated by the legislature preclude issuing a new trial with extended discovery in election contests.

The manner in which to contest an election in Arizona is outlined in the statutes. Specifically, Plaintiffs filed an A.R.S. § 16-672 election contest, which reads (in relevant part) as follows:

A. Any elector of the state may contest the election of any person declared elected to a state office, or declared nominated to a state office at a primary election, or the declared result of an initiated or referred measure, or a proposal to amend the Constitution of Arizona, or other question or proposal submitted to vote of the people, upon any of the following grounds:

1. For misconduct on the part of election boards or any members thereof in any of the

counties of the state, or on the part of any officer making or participating in a canvass for a state election.

3. That the person whose right is contested, or any person acting for him, has given to an elector, inspector, judge or clerk of election, a bribe or reward, or has offered such bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise.

5. That by reason of erroneous count of votes the person declared elected or the initiative or referred measure, or proposal to amend the constitution, or other question or proposal submitted, which has been declared carried, did not in fact receive the highest number of votes for the office or a sufficient number of votes to carry the measure, amendment, question or proposal.

B. The contest may be brought in the superior court of the county in which the person contesting resides or in the superior court of Maricopa county.

C. In a contest of the election of a person declared elected to a state office or of an initiated or referred measure, constitutional amendment, or other question or proposal, which has been declared carried, the attorney general may intervene, and upon demand, the place of trial of the contest shall be changed to Maricopa county, if commenced in another county.

The time constraints for a contested election are found in A.R.S. § 16-676, which reads in section A: *In any contest brought under the provisions of § 16-672... the court shall set a time for the hearing of the contest, not later than ten days after the date on which the statement of contest was filed, which may be continued for not to exceed five days for good cause shown.* (emphasis added)

This Court had jurisdiction over this statewide case because one of the Plaintiffs is a resident of Mohave County. These statutes govern this Court's actions in addressing the election. The time frames used in this statute are quick and designed to be outside of the normal processes of a civil case. There are obviously reasons for that, including getting some finality in the results. Time elements in election contests must be strictly construed. *Bohart v. Hanna*, 231 Ariz. 480 (2006).

This Court held a bench trial on December 23, 2023, within the timelines of the statutes and after hearing evidence from the Plaintiff. The trial covered the following four counts

Count I: against Maricopa County and alleged "Erroneous Count of Votes and Election Board Misconduct; Wrongful Disqualification of Provisional and Early Ballots. (Ariz.

Const. art. II §§ 13, 21: A.R.S. §§ 12-2021, 16-672(A)(1) and (A)(5)).”

Count II: against Maricopa County and allegation of “Erroneous Count of Votes and Election Board Misconduct; Wrongful Exclusion of Provisional Voters.” (A.R.S. §§ 16-584, 12-2021, 16-672(A)(1) and (A)(5)).

Count III: Erroneous Count of Votes: Inaccurate Ballot Duplications. (A.R.S. §§ 16-672(A)(1) and (A)(5)).

Count IV: Votes and Erroneous Count of Votes: Improper Ballot Adjudications. (A.R.S. §§ 16-621, 16-672A(1) and (A)(5)).

The Court held the trial after thousands of ballots were inspected. Plaintiff offered only one witness and at the end of the day, the evidence showed that only about six votes difference would have been found after reviewing the numerous undercounted ballots. Following the trial and after review of the evidence, the Court denied the election contest in a timely manner as contemplated by the statutes.

Of note in relation to this current Motion for New Trial, is the lack of evidence presented in the December trial concerning Counts I and II of the Complaint as they relate to provisional ballots in Maricopa County. Plaintiff was alleging issues with provisional ballots from the opening of this case but provided no significant evidence of specific problems at the trial on the merits. The Plaintiff is now requesting additional discovery to investigate if a problem exists with provisional ballots. There is only limited discovery allowed in elections contests. See A.R.S. § 16-677. The only discovery allowed in these contested elections is a limited inspection of ballots which was done prior to trial.

The Court finds the Certified Recount, which announcement was stayed pending the result of this Court’s trial, was the final decision in this election. The Plaintiff can appeal the decision made in this Court and could have appealed the recount, but a new trial with extended discovery is not available under the road map laid out by the Legislature.

If the Court is incorrect about the statutory interpretation, the Court further finds that the allegations in the Motion for New Trial do not rise to the level of granting a new trial and extended discovery. The Motion for New Trial alleges discoveries made from work done during the mandatory recount process should open the door in this contested election case for new proceedings with additional discovery.

If a new trial is a possibility, then Arizona Rule of Civil Procedure 59 would control. The relevant section of Rule 59 reads as follows:

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues--and to any party--on any of the following grounds materially affecting that party's rights:

- (A) any irregularity in the proceedings or abuse of discretion depriving the party of a fair trial;**
(B) misconduct of the jury or prevailing party;
(C) accident or surprise that could not reasonably have been prevented;
(D) newly discovered material evidence that could not have been discovered and produced at the trial with reasonable diligence;
(E) excessive or insufficient damages;
(F) error in the admission or rejection of evidence, error in giving or refusing jury instructions, **or other errors of law at the trial or during the action;**
(G) the verdict is the result of passion or prejudice; or
(H) the verdict, decision, findings of fact, or judgment is not supported by the evidence or is contrary to law. (emphasis added)

In the trial that was held, the Court followed the contested election rules. The hearings were set quickly. The trial was relatively short, but the Court had set aside time for a longer trial on December 23, 2023 and would have come back after the Christmas holiday if the trial had not concluded. The Court allowed and directed the inspection of ballots to get completed in time. The trial did conclude and the Court, in a timely manner, concluded the Plaintiff did not meet its burden of having the election results changed. There were no irregularities in the proceedings.

The Court further finds there were no errors of law in the Court's denial of a delay to conduct additional discovery. As mentioned before, the Court did allow the discovery the legislature contemplated in A.R.S. § 16-677.

Plaintiff does allege newly discovered material since the trial. In order for newly discovered material to be allowed in a new trial it must be found that the evidence is 1) material, 2) existed at the time of trial, 3) could not have been discovered by due diligence, and 4) would probably change the result.

The Court finds the evidence proffered at oral argument related to provisional ballots is material to this case and did for the most part exist at the time of trial. However, the evidence of potential problems with provisional ballots and people with multiple addresses that was proffered at the time of oral argument was information that was discoverable in November and December with sufficient diligence. Furthermore, even considering the Plaintiff's chart showing how election day voters were trending in Maricopa County, it is still speculation to say that the difference in votes would have been made up with further discovery.

The Court recognizes the difficulty in the task that Plaintiff took on by filing this case. The election contest statutes are extremely difficult to comply with and the time constraints are real. However, the Court also recognizes the difficulty that the State and the counties have in processing these election cases. There were more than 2.5 million votes counted in this election. The short timelines of election cases make it difficult, but if there is an allegation of problems with provisional ballots made in the Complaint, they must be asserted in some detail at the trial and not investigated later.

Plaintiff also alleges newly discovered evidence of human error in Pinal County with regard to some 63 ballots with some unclear marks. This matter came up as a result of the recount process that was being done simultaneously to this case. The record reflects those errors were corrected in the recount and those 63 votes were counted. Plaintiff speculates that this error was repeated in other counties but has no proof. That information was not discoverable until December 29, 2023, based on the recount judge order precluding the sharing of information about the recount prior to the certification.

The Court finds the Defendants did not violate any discovery rules in this case by following the order of the Court in the recount case not to disclose findings found in the recount. The Court further finds that the evidence of the Pinal County errors would not be sufficient to be more than speculation about other errors for which there is no proof.

Rule 59 does not mandate a new trial.

Plaintiffs spent some time in their pleadings discussing *Hunt v. Campbell*, a 1917 Arizona case that stands for the proposition that there are no artificial time restraints on completing the contest of an election. See *Hunt v. Campbell*, 9 Ariz. 254 (1917). The Court agrees with that analysis. But the more important analysis of that case is that at the time of that contested election, there was not an Arizona statute covering contested elections. It was after *Hunt v. Campbell* that the first rules were put in place, and they have been amended over and over since. The statutes would have controlled in 1917 if they existed.

In summary, the Court finds Arizona election contest statutes do not contemplate additional discovery in election cases after the trial on the merits. The trial must be held in an expedited fashion and that was done in this case. The Plaintiffs remedy is appeal. Furthermore, if that analysis is incorrect, the Court finds Plaintiff failed to meet the burden for a new trial under Rule 59. The existence of potential problems with the Maricopa provisional ballots that the Plaintiff wants the Court to consider existed at the time of the filing of the original Complaint and was discoverable with due diligence before the December 23, 2023 trial.

IT IS ORDERED denying Plaintiff's Motion for New Trial.

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