Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-053927 03/01/2023

HONORABLE MELISSA IYER JULIAN

CLERK OF THE COURT
A. Delgado
Deputy

MARK FINCHEM, et al. DANIEL J MCCAULEY III

v.

ADRIAN FONTES, et al. CRAIG A MORGAN

AMY BELL CHAN
JUDGE JULIAN

UNDER ADVISEMENT RULING

RE: Secretary of State-Elect Adrian Fontes' Motion for Sanctions, filed December 28, 2022, and Joined by Arizona Secretary of State Katie Hobbs

This Court has considered Secretary of State-Elect Adrian Fontes' Motion for Sanctions, filed December 28, 2022, joined by then-Arizona Secretary of State Katie Hobbs, seeking sanctions in the form of attorneys' fees and a damages penalty against Contestant Mark Finchem and his counsel pursuant to A.R.S. § 12-349 and Rule 11 of the Arizona Rules of Civil Procedure. None of the parties has requested oral argument on the pending sanctions motion. After considering what the parties have submitted, the Court concludes that the issues presented have been fully briefed and oral argument will not assist a decision. *See* Maricopa Cty. Loc. R. 3.2(d).

The Legislature enacted A.R.S. § 12-349 to discourage lawsuits for which there is no legitimate basis in fact or law. Yet in election matters, Arizona's courts have emphasized that sanctions should be awarded only in rare cases, so as not to discourage legitimate challenges. This is such a case. None of Contestant Finchem's allegations, even if true, would have changed the vote count enough to overcome the 120,000 votes he needed to affect the result of this election. The Court finds that this lawsuit was groundless and not brought in good faith.

ANALYSIS

In Arizona, "in any civil action commenced … in a court of record in this state, the court shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party … if the attorney or party . . . [b]rings or defends a claim without substantial justification," "[b]rings or defends a claim solely or primarily for delay or harassment," or "[u]nreasonably expands or delays the proceeding." A.R.S. § 12-349(A)(1)-(3). In creating this statutory remedy, "the legislature intended to further reduce frivolous litigation by increasing the threat of fee sanctions." *Phoenix Newspapers, Inc. v Dep't. of Corr*., 188 Ariz. 237, 244 (App. 1997). An award of fees under this statute may be allocated "among the offending attorneys and parties, jointly or severally, and may assess separate amounts against an offending attorney or party." Ariz. Rev. Stat. Ann. § 12-349(B).

The phrase "'without substantial justification' means that the claim … is groundless and is not made in good faith." A.R.S. § 12-349(F). In this regard, "[w]hile groundlessness is determined objectively, bad faith is a subjective determination." *Takieh v. O'Meara*, 252 Ariz. 51, 61, ¶ 37 (App. 2021), review denied (Apr. 7, 2022). An award under section 12-349 is mandatory where factually supported. *See Phoenix Newspapers, Inc.*, 188 Ariz. at 243.

The moving party bears the burden of demonstrating by a preponderance of the evidence that the claim was both groundless and asserted in bad faith, "with the absence of even one element rendering the statute inapplicable." *Valles v. Pima Cnty*., 642 F. Supp. 2d 936, 957 (D. Ariz. 2009). Moreover, the fact that a party's claims may be subject to dismissal through motion practice, "does not automatically equate to a determination that the complaint itself was frivolous, unjustified, or put forth for an improper purpose." *Compassionate Care Dispensary, Inc. v. Arizona Dep't of Health Servs.*, 244 Ariz. 205, 216, 418 P.3d 978, 989 (Ct. App. 2018).

This Court is also mindful of the caution with which sanctions should be imposed. *See Matter of Est. of Craig*, 174 Ariz. 228, 239, 848 P.2d 313, 324 (Ct. App. 1992) ("Courts should not impose sanctions lightly."); *Molever v. Roush*, 152 Ariz. 367, 375, 732 P.2d 1105, 1113 (Ct. App. 1986) (Sanctions should be imposed "with great reservation."). In election matters, the Court must consider the potential chilling effect a sanctions award may have on legitimate challenges in the future. *Kromko v. Superior Ct. In & For Cnty. of Maricopa*, 168 Ariz. 51, 61, 811 P.2d 12, 22 (1991), *holding modified by Molera v. Hobbs*, 250 Ariz. 13, 474 P.3d 667 (2020) (Denying sanctions in part, "to avoid placing a chill on future petition challenges by private citizens.").

But even election challenges may be subject to statutory sanctions under section 12-349 if brought without substantial justification. *Williams v. Fink*, No. 2 CA-CV 2018-0200, 2019 WL 3297254, at *5–6 (Ariz. Ct. App. July 22, 2019) (Imposing sanctions because "[e]ven assuming portions of Williams's arguments had merit, he never provided a plausible argument that any

irregularities affected the outcome of the election."). Any concern about the chilling effect on future claims must be balanced again the need to deter meritless election challenges that "waste the time and energy of the opposing parties and the resources of this court." *Johnson v. Brimlow*, 164 Ariz. 218, 222 (Ct. App. 1990).

A. Finchem's election contest was groundless.

As noted in this Court's December 16, 2022, ruling (incorporated herein by reference), Finchem's election challenges were filed on two broad grounds: a claim that "misconduct" occurred on the part of an "officer" in the election canvass under § 16-672(A)(1) and a claim that "illegal votes" were cast under § 16-672(A)(4).

Finchem premised his misconduct claim on allegations that then-Secretary Hobbs engaged in various acts of misconduct by failing to recuse herself from her election duties altogether, failing to ensure the right official at the Election Assistance Commission ("EAC") signed the certificate of the independent laboratory, threatening legal action against county officials who delayed in certifying the election results, and in flagging Finchem's Twitter account for misinformation in January 2021. None of these alleged acts of misconduct presented a "fairly debatable" election challenge as Finchem did not and could not allege that any of these acts rendered uncertain the outcome of an election he lost by over 120,000 votes.

In responding to the pending sanctions motion, Finchem emphasizes the alleged Twitter interference as a basis for his election contest. As noted in the ruling, however, Twitter is not an election official and its decision to temporarily suspend Finchem's Twitter account presents no valid basis for an election challenge under Arizona law. Moreover, even if it could be construed as predicate misconduct for an election contest, Finchem does not explain how the effort to flag his Twitter account in January 2021 affected his election loss over twenty months later.

Similarly, Finchem's claims that illegal votes were cast as a result of alleged errors in the laboratory and software certifications were groundless. Finchem set forth his claims under the heading of "illegal votes," but failed to articulate how the signature of a different EAC official on the laboratory's certificate or technical criticisms of the voting software caused illegal votes to be cast.

In his Verified Amended Statement and in response to the pending motion, Finchem points to the several tabulation machines which malfunctioned on election day, creating delays for voters and concerns that some votes may not have been counted. The difficulties caused on election day when tabulation machines did not work properly cannot be discounted. But Finchem's Amended Verified Statement offered no tether between the machine malfunctions and the outcome of the election he challenged here. *See Hunt v. Campbell*, 19 Ariz. 254, 263 (1917) (A valid election

contest may not rely "upon public rumor or upon evidence about which a mere theory, suspicion, or conjecture may be maintained.").

B. Finchem's election contest was filed in bad faith.

In addition to a finding that the claim was groundless, the imposition of sanctions under section 12-349 also requires proof that the election contest was filed "in bad faith." Here the preponderance of the evidence demonstrates the existence of bad faith in the filing of this election challenge.

The evidence appended to Finchem's own amended statement demonstrates that he pursued this contest in bad faith. Attached to Finchem's Amended Statement was his own expert's analysis of the alleged failure to count so-called "black box votes." Finchem's expert report identified 80,000 potentially "missing votes." Yet, Finchem lost the election he challenged by 120,208 votes. That margin was so significant that even if it were assumed that 80,000 votes were missing and that those votes would all have been cast in his favor, the result of the election would not have changed. Indeed, Finchem withdrew his request to inspect the ballots under A.R.S. § 16-677, suggesting that he had no expectation that an inspection would yield a favorable outcome. This demonstrates that Finchem challenged his election loss despite knowing that his claims regarding misconduct and procedural irregularities were insufficient under the law to sustain the contest.

Additionally, the sanctions motion attached several letters from opposing counsel outlining the flaws in Finchem's unfounded claim that the laboratory who tested Arizona's voting machines was not accredited. In so doing, counsel attached the certification documents from the EAC demonstrating that the laboratory was, in fact, accredited. All of this information was also publicly available. Rather than considering the impact this information had on his election contest, Finchem's counsel admitted at oral argument that he had not reviewed the data provided. The decision to pursue his claims without regard to contrary evidence strongly suggests that this election contest was not motivated by a sincere belief that the errors alleged affected the election result.

In addition to the concerns set forth above, attorney McCauley admittedly decided to file this case after "a number of experienced litigators" declined to. In this regard, Mr. McCauley tacitly acknowledges that he undertook the case despite his belief that a more "experienced litigator" with a larger staff was needed to prosecute the action competently. This should have been a deterrent. At a minimum, concerns raised by other attorneys should have prompted further investigation into the contest's validity.

Once McCauley accepted the assignment, he had an obligation to conduct a reasonable investigation to determine whether and to what extent viable challenges to the election could be asserted on Finchem's behalf. He did not do so. As noted above, he did not review data from the EAC confirming the accreditation of the independent laboratory even though that information was publicly available and provided to him before the motion to dismiss was filed.

Attorney McCauley also ignored the Arizona cases establishing that an election contest requires not only alleged acts of misconduct, but also evidence that the misconduct or irregularities complained of rendered the outcome of the election uncertain. McCauley did not endeavor to explain how his client's claims satisfied that standard nor did he articulate a reasonable argument in favor of changing it.

McCauley also devoted much of his response to the motion to dismiss arguing that Rules 8 and 12(b)(6) of the Rules of Civil Procedure could not be applied in an election contest. But he cited no statute or rule that would demonstrate the legislature's intent to nullify many years of controlling precedent that the Rules of Civil Procedure do apply. And he tacitly acknowledged that the rules do apply when he requested discovery under the Rules of Civil Procedure and argued that he should be permitted to file a summary judgment motion under Rule 56.

That McCauley had some awareness that this case lacked merit is apparent by his own comments during oral argument whereby he expressed being less at risk of being disbarred as a result of the filing given his impending retirement. This too supports sanctions as it demonstrates a conscious decision to pursue the matter despite appreciating that the contest had no legal merit.

C. Application of Relevant Statutory Factors in Considering Sanctions

In addition to the above findings, this Court must set forth specific reasons for its orders and is guided by the following statutory factors set forth in A.R.S. § 12-350.

1. <u>The extent of any effort made to determine the validity of a claim before the claim was asserted</u>.

The Court notes that Finchem's amended statement was accompanied by a number of documents detailing election irregularities and asserting criticisms of the voting software and the accreditation of the testing laboratory. But there is no evidence that Finchem or his counsel undertook to scrutinize whether any of the claims made in the attached documents actually formed a valid basis for challenging his election loss. Indeed, and as noted above, the claims regarding the laboratory certification and accreditation process were refuted with publicly available information from the EAC, which was then provided to Finchem's counsel. Finchem's counsel

acknowledged at oral argument that he had not reviewed that data to determine its impact on the validity of his client's claims, even when faced with a dispositive motion.

2. The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid.

Despite receiving communications from opposing counsel regarding the flaws in the claims asserted in his verified statement, neither Finchem nor his counsel agreed to withdraw any of the claims and have persisted in arguing their validity in response to the sanctions motion without articulating any Arizona case or statute that supports the validity of those claims or a viable basis for overturning the law governing election contests.

3. The availability of facts to assist a party in determining the validity of a claim or defense.

Many of the facts asserted as a basis for Finchem's claims were known well in advance, which is why some of those claims were barred by laches. Although election challenges must be filed on an expedited basis, in this instance Finchem had the necessary facts and controlling case law available to him when he nevertheless elected to pursue a meritless challenge.

4. The relative financial positions of the parties involved.

Both parties generally referred to their limited financial means in the body of their memoranda. But none of the parties presented the Court with any evidence regarding their "financial positions," such that the Court can meaningfully consider this factor. Because it is Secretary Fontes and Governor Hobbs's burden in moving for sanctions, the Court presumes this factor would weigh against sanctions in the absence of evidence to persuade it otherwise.

5. Whether the action was prosecuted or defended, in whole or in part, in bad faith.

The Court has explained above why it finds that this action was prosecuted in bad faith.

6. Whether issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict.

There were no disputed fact questions that were "reasonably in conflict." Rather, this Court assumed the truth of Finchem's factual allegations and found that the election challenge could not survive dismissal.

7. The extent to which the party prevailed with respect to the amount and number of claims in controversy.

Finchem did not prevail on any claim he asserted.

8. The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

Because this case does not involve a traditional suit for money damages, this final factor is inapplicable.

Fontes and Hobbs also seek sanctions under Rule 11. "The basis for a sanction according to Civil Procedure Rule 11 is the same as A.R.S. § 12-349(A)(1)." *Goldman v. Sahl*, 248 Ariz. 512, 531, 462 P.3d 1017, 1036 (Ct. App. 2020). Because this Court has already determined that sanctions are appropriate under § 12-349, it need not reach this alternative ground for the sanctions request.

D. Sanctions Granted

Based on its findings above, both Finchem and attorney McCauley filed this election contest "without substantial justification." Under A.R.S. § 12-349, sanctions are appropriate. As set forth below, this Court will award reasonable attorneys' fees incurred by Secretary-Elect Fontes and Secretary Hobbs in defending this action as a sanction for the filing and will allocate those fees as appropriate between Finchem and McCauley. The Court declines, however, to award any additional penalty or damages authorized by the statute beyond the fees actually and reasonably incurred.

E. Costs Awarded

Secretary Elect Fontes filed a verified statement of costs on December 29, 2022. No objection or response to that statement was filed, which the Court deems as a consent to the granting of taxable costs as requested and because the Secretary Elect is the prevailing party. Ariz. R. Civ. P. 7.1(b). The Court has reviewed the Motion and it provides a legal and factual basis for the relief requested.

IT IS ORDERED awarding Secretary-Elect Adrian Fontes' taxable costs pursuant to A.R.S. §§ 12-341 and 12-332 in the amount of $292.55. This amount shall be incorporated into a final judgment once attorneys' fees applications are submitted.

IT IS FURTHER ORDERED granting Secretary of State-Elect Adrian Fontes' Motion for Sanctions, filed December 28, 2022, and joined by Secretary Hobbs on the same date.

IT IS FURTHER ORDERED that not later than 20 calendar days after the entry of this order, Counsel for Secretary-Elect Fontes and Secretary Hobbs may submit an application for an award of attorney's fees and statement of costs. If an application or statement is submitted that Finchem wishes to oppose, a response must be filed not later than 20 calendar days after service. No replies shall be permitted unless specifically requested by the Court.

IT IS FURTHER ORDERED that not later than 20 calendar days after the entry of this order, Counsel for Secretary-Elect Fontes and Secretary Hobbs must also submit a proposed form of judgment, leaving blank spaces for attorney's fees and taxable costs. That form of judgment may incorporate by reference what is said here but otherwise should be confined to the amounts being awarded along with Rule 54(c) language.