

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Delaware County Republican :
Executive Committee :
 :
v. : No. 125 C.D. 2021
 : Argued: November 18, 2021
Board of Elections :
 :
Appeal of: Gregory Stenstrom and :
Leah Hoopes :

BEFORE: HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE WOJCIK

FILED: December 13, 2021

Gregory Stenstrom and Leah Hoopes (Observers) appeal the Order of the Delaware County Court of Common Pleas (trial court) denying Observers' Emergency Petition to Intervene in an action filed by the Delaware County Republican Executive Committee (Committee), and denying Observers' Emergency Petition for Sanctions filed against the Delaware County Board of Elections (Board) for its purported violation of a trial court order and the provisions of the Pennsylvania Election Code (Election Code).¹ We affirm.

On November 4, 2020, the Committee filed an emergency petition in the trial court requesting increased access at the Board's office for its party representatives designated as ballot observers, including Observers, and for

¹ Act of June 3, 1937, P.L. 1333, as amended, 25 P.S. §§2600-3591.

designated seating areas for its observers during the pre-canvass and canvassing of ballots after the November 3, 2020 General Election. Following a hearing, the trial court issued an order granting the following relief:

1. Four [o]bservers in total (2 observers from the Republican Party, or affiliated candidates, and 2 observers from the Democratic Party, or affiliated candidates) are permitted to observe the resolution area [in the Board's office] at all hours while ballots are being resolved.

2. Two observers (1 representing the Republican Party, or affiliated candidates, and 1 representing the Democratic Party, or affiliated candidates), are permitted to observe the sorting machine area [in the Board's office] at all times while the machine is in use. However, all observers shall stand back while the machine is in use due to safety concerns.

3. At two-hour intervals, two observers in total (1 representing the Republican Party, or affiliated candidates, and 1 representing the Democratic [P]arty, or affiliated candidates) are permitted to enter the ballot room [in the Board's office], to examine the room; however, [they] are not permitted to examine the physical ballots contained within the room, individually. They must be escorted by a member of the [Board] Staff with the time not to exceed five minutes each visit.

4. Any observer may not interfere[] with the process, nor may any observer object to individual ballots.

Reproduced Record (R.R.) at 34-35.² The Committee did not appeal the trial court's order to this Court or seek its modification or sanctions of any kind based on the purported violation of its provisions. *See, e.g.*, Section 5505 of the Judicial Code,

² Observers filed a reproduced record with this Court, but failed to comply with Pa.R.A.P. 2173, which requires that reproduced record pages be numbered followed by a small "a." Accordingly, this Court references the document consistent with the pagination contained in the Reproduced Record.

42 Pa. C.S. §5505 (“Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry . . . if no appeal from such order has been taken or allowed.”); Section 5571(b) of the Judicial Code, 42 Pa. C.S. §5571(b) (“[A]n appeal . . . from a court to an appellate court must be commenced within 30 days after the entry of the order from which the appeal is taken, in the case of an interlocutory or final order.”).

Forty-eight days after the trial court entered its order, on December 22, 2020, Observers and Dasha Pruett (Candidate), a candidate for the United States House of Representatives (U.S. House),³ filed the instant Emergency Petition to Intervene⁴ and the Emergency Petition for Sanctions.⁵ On January 12, 2021, the trial court issued an Opinion and Order denying the Emergency Petition to Intervene and

³ Candidate is not a party to the instant appeal.

⁴ See Pa.R.Civ.P. 2327 (“At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules”); Pa.R.Civ.P. 2329(2) and (3) (“[A]n application for intervention may be refused, if . . . the interest of the petitioner is already adequately represented; or . . . the petitioner has unduly delayed in making application for intervention”).

⁵ See Section 1806 of the Election Code, 25 P.S. §3506 (“Any member of a county board . . . who shall refuse to permit any overseer or watcher . . . to be present . . . at any . . . computation and canvassing of returns of any . . . election, . . . shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding [\$1,000.00], or to undergo an imprisonment not exceeding [1] year, or both, in the discretion of the court.”); Section 4133 of the Judicial Code, 42 Pa. C.S. §4133 (“Except as otherwise provided by statute, the punishment of commitment for contempt provided in [S]ection 4132 (relating to attachment and summary punishment for contempts) shall extend only to contempts committed in open court. All other contempts shall be punished by fine only.”). See also Section 1642(a) and (c) of the Election Code, added by the Act of October 4, 1978, P.L. 893, *as amended*, 25 P.S. §3260b(a), (c) (“The Attorney General shall have prosecutorial jurisdiction over all violations committed under this act . . . [and t]he district attorney of any county in which a violation occurred has concurrent powers and responsibilities with the Attorney General over such violations.”); Pa.R.Crim.P. 506(A) (“When the affiant is not a law enforcement officer, the complaint shall be submitted to an attorney for the Commonwealth, who shall approve or disapprove it without unreasonable delay.”).

the Emergency Petition for Sanctions with prejudice,⁶ and Observers filed the instant appeal of the trial court's order.

On appeal,⁷ Observers claim that the trial court erred in: (1) determining that they lacked standing to intervene; (2) determining that they acted with undue delay implicating the doctrine of laches; (3) concluding that their Petitions are not supported by a "scintilla" or "smidgen" of legal merit or that their claims are "baseless"; and (4) concluding that the Supreme Court opinion in *In re Canvassing Observation* is controlling in this matter or that their lack of citation to that opinion supported denying the requested relief.⁸

⁶ The trial court dismissed the Petitions on the following bases: (1) there was no active case or controversy in which Observers may intervene and the Committee adequately represented their interests in the proceedings in which the trial court issued its November 4, 2020 order; (2) the trial court lost jurisdiction over the matter 30 days after issuing its November 4, 2020 order and Observers neither sought to intervene or enforce the order, or appeal the order to this Court, within that 30-day period; (3) the doctrine of laches precluded the grant of the requested relief; (4) as part of the requested relief, Observers sought an order, declaration, or injunction precluding the winning U.S. House candidate from exercising official authority, but Observers failed to join that candidate as an indispensable party; (5) the matter was moot based on the Pennsylvania Supreme Court opinion in *In re Canvassing Observation*, 241 A.3d 339, 350-51 (Pa. 2020), upholding the limitations on observers imposed by the Philadelphia County Board of Elections; and (6) Observers sought discretionary relief from the trial court, but had unclean hands by failing to apprise the court of the Supreme Court's opinion in *In re Canvassing Observation*. See Brief of Appellants, Exhibit A at 1-11.

⁷ This Court's scope of review from the denial of a petition to intervene is limited to determining whether the trial court abused its discretion or committed an error of law. *Wells Fargo Bank, N.A. v. James*, 90 A.3d 813, 815 n.5 (Pa. Cmwlth. 2014). Likewise, this Court's scope of review when considering an appeal from the denial of a motion for civil contempt is limited to considering whether the trial court abused its discretion or committed an error of law. *American Federation of State, County, and Municipal Employees, District Council 88 v. Lehigh County*, 541 A.2d 46, 47 (Pa. Cmwlth. 1988).

⁸ On March 10, 2021, the Board filed a Motion to Quash or Dismiss Appeal and for Award of Fees in which it asserts that this Court lacks subject matter jurisdiction because Observers filed their Petition to Intervene more than 10 days after the trial court issued its January 12, 2021 order, **(Footnote continued on next page...)**

and because the trial court's order denying intervention is a non-appealable interlocutory order. However, because the instant appeal flows from the trial court's order denying Observers' Emergency Petition to Intervene and Emergency Petition for Sanctions, and not a proceeding initiated under the provisions of the Election Code, the instant appeal is timely and we have jurisdiction over the appeal because Observers' notice of appeal was filed within 30 days of the trial court's final order. *See* Section 5571(a) of the Judicial Code, 42 Pa. C.S. §5571(a) ("The time for filing an appeal . . . in . . . the Commonwealth Court shall be governed by general rules."); Pa.R.A.P. 903(a) ("[T]he notice of appeal required by [Pa. R.A.P.] 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken."). Additionally, because the trial court's order disposes of all claims against all parties, it is an appealable final order. *See* Section 5105(a)(1) of the Judicial Code, 42 Pa. C.S. §5105(a) ("There is a right of appeal . . . from the final order (including an order defined as a final order by general rule) of every . . . [c]ourt . . . of this Commonwealth to the court having jurisdiction of such appeals."); Pa.R.A.P. 341(b)(1) ("A final order . . . disposes of all claims and of all parties[.]").

Finally, the Board seeks the award of attorneys' fees under Pa.R.A.P. 2744(1), which states that "an appellate court may award as further costs damages as may be just, including . . . a reasonable counsel fee . . . if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious." However, as this Court has explained:

The imposition of counsel fees is solely within the discretion of the court. In determining the propriety of such an award, the court is "ever guided by the principle that an appeal is not frivolous simply because it lacks merit. Rather, it must be found that the appeal has no basis in law or fact." Such a high standard is imposed "in order to avoid discouraging litigants from bringing appeals for fear of being wrongfully sanctioned."

Canal Side Care Manor, LLC v. Pennsylvania Human Relations Commission, 30 A.3d 568, 576 (Pa. Cmwlth. 2011) (citations omitted).

Upon review of the relevant considerations, we exercise our discretion and decline to award attorneys' fees in this case. Ultimately, the instant matter flows from the trial court's November 4, 2020 order directing how Observers may participate in the pre-canvass and canvassing of ballots following the contested November 3, 2020 General Election. Clearly, the necessity of such an order demonstrates the high level of interest and participation by all involved in the electoral process in that election. Although we have determined that the claims raised in this appeal are without merit, we do not believe that the instant appeal meets the high standard outlined above to support an award of attorneys' fees. Accordingly, based on the foregoing, we deny the Board's Motion to Quash or Dismiss Appeal and for Award of Attorneys' Fees.

However, upon review, we have determined that this matter was ably disposed of in the comprehensive and well-reasoned Order and Opinion of the Honorable John F. Capuzzi, Sr., disposing of Observers' Emergency Petition to Intervene and the Emergency Petition for Sanctions. Accordingly, we affirm the trial court's order on the basis of the Order and Opinion in *Delaware County Republican Executive Committee v. Board of Elections* (C.P. Del., No. CV-2020-007523, filed January 13, 2021).⁹



MICHAEL H. WOJCIK, Judge

Judge Covey did not participate in the decision of this case.

Judge Fizzano Cannon did not participate in the decision of this case.

Judge Crompton did not participate in the decision of this case.

⁹ On November 17, 2021, prior to argument, the Board filed an unopposed Application for Leave to File Exhibit to supplement its appellate brief with an exhibit that is referenced in the brief, but was inadvertently left off of the brief that was filed in this Court. The Board's unopposed Application is granted. *See, e.g., Commonwealth v. Gambal*, 561 A.2d 710, 714 (Pa. 1989) ("Our Rules of Appellate Procedure provide that they are to be 'liberally construed to secure the just, speedy and inexpensive determination of every matter to which they are applicable.' Pa.R.A.P. 105(a). Allowing parties to amend their briefs permits review of the discretionary aspects of sentencing to proceed in an efficient and just manner.").

