Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-095403 12/24/2022

HONORABLE PETER A. THOMPSON

CLERK OF THE COURT
V. Felix
Deputy

KARI LAKE

v.

KATIE HOBBS, et al.

BRYAN JAMES BLEHM

DAVID ANDREW GAONA

THOMAS PURCELL LIDDY
COURT ADMIN-CIVIL-ARB DESK
DOCKET CV TX
JUDGE THOMPSON

UNDER ADVISEMENT RULING

The Court has considered the evidence presented at the Evidentiary Hearing on December 21-22, 2022, including all exhibits admitted as well as the testimony of witnesses. The Court has read and considered all 220 Affidavits attached to the Verified Petition. The Court has also considered the arguments by counsel. The Court accordingly issues the following findings of fact and conclusions of law:

LEGAL STANDARDS AND BURDEN OF PROOF

Throughout the history of Arizona, the bar to overturn an election on the grounds of misconduct in this State – or Territory – has always been a high one. *See Territory ex rel. Sherman v. Bd. of Supervisors of Mohave Cnty.*, 2 Ariz. 248, 253 (1887) ("It is the object of elections to ascertain a free expression of the will of the voters, and no mere irregularity can be considered, unless it be shown that the result has been affected by such irregularity.") (citations omitted).

Our Territorial Supreme Court agreed in *Oakes v. Finlay*, 5 Ariz. 390, 398 (1898) that "it is . . . unwise to lay down any rule by which the certainty and accuracy of an election may be jeopardized by the reliance upon any proof affecting such results that is not of the *most clear and conclusive character*." (citing *Young v. Deming*, 33 P. 818, 820 (Utah 1893)) (emphasis added). The official election returns are prima facie evidence of the votes actually cast by the electorate. *See Hunt v. Campbell*, 19 Ariz. 254, 268 (1917). The burden of proof in an election contest is on the challenger. *Findley v. Sorenson*, 35 Ariz. 265, 271-72 (1929). "The duty of specifying and pointing out the alleged illegal irregularities and insufficiencies is a task that should be undertaken by litigants and their counsel." *Grounds v. Lawe*, 67 Ariz. 176, 189 (1948).

As for the actions of elections officials themselves, this Court *must* presume the good faith of their official conduct as a matter of law. *Hunt*, 19 Ariz. at 268. "[A]ll reasonable presumptions must favor the validity of an election." *Moore v. City of Page*, 148 Ariz. 151, 155 (App. 1986). Election challengers must prove the elements of their claim by clear and convincing evidence. *Cf. McClung v. Bennett*, 225 Ariz. 154, 156, ¶ 7 (2010).

The Order granting in part Defendants' Motions to Dismiss gave Plaintiff two independent claims for seeking their requested relief under A.R.S. § 16-672(A)(1). Plaintiff has only these options because election contests, "are purely statutory and dependent upon statutory provisions for their conduct." *Fish v. Redeker*, 2 Ariz.App. 602, 605 (1966). Put another way, Plaintiff has no free-standing right to challenge election results based upon what Plaintiff believes – rightly or wrongly – went awry on Election Day. She must, as a matter of law, prove a ground that the legislature has provided as a basis for challenging an election. *See Henderson v. Carter*, 34 Ariz. 528, 534-35 (1928) ("[O]ne who would contest an election assumes the burden of showing that his case falls within the terms of the statute providing for election contests. The remedy may not be extended to include cases not within the language or intent of the legislative act."); *see also Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978) ("[F]ailure of a contestant to an election to strictly comply with the statutory requirements is fatal to h[er] right to have the election contested.").

Plaintiff's remaining claims are based on the following statutory ground:

"[M]isconduct 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."

A.R.S. § 16-672(A)(1). This trial was premised on Plaintiff's theories arising from the second clause, concerning an officer making or participating in a canvass.

The Order permitted two counts to proceed to Trial: 1) the claim that ballot-on-demand ("BOD") printer malfunctions experienced on Election Day were caused intentionally and that these malfunctions resulted in a changed outcome (Count II); and 2) the claim that Maricopa

County violated its own election procedures manual ("EPM") as to chain of custody procedures in such a way as to result in a changed election outcome (Count IV). As outlined in the Order partially granting the Motion to Dismiss, there are four elements to each claim. Plaintiff needed to prove by clear and convincing evidence, each element to be entitled to relief:

1) That the alleged misconduct – whether the BOD printer irregularities, or the ostensible failure to abide by county election procedures – was an intentional act. *See Findley*, 35 Ariz. at 269.

2) That the misconduct was an intentional act conducted by a person covered by A.R.S. § 16-672(A)(1), that is – an "officer making or participating in a canvass."

3) That the misconduct was intended to change the result of the November 2022 General Election. *See Findley*, 35 Ariz. at 269.

4) That the misconduct did, in fact, change the result of that election. *See Grounds*, 67 Ariz. at 189.

It bears mentioning that because of the requested remedy – setting aside the result of the election – the question that is before the Court is of monumental importance to every voter. The margin of victory as reported by the official canvass is 17,117 votes – beyond the scope of a statutorily required recount. A court setting such a margin aside, as far as the Court is able to determine, has never been done in the history of the United States. This challenge also comes after a hotly contested gubernatorial race and an ongoing tumult over election procedures and legitimacy – a far less uncommon occurrence in this country. *See e.g.*, *Hunt, supra*. This Court acknowledges the anger and frustration of voters who were subjected to inconvenience and confusion at voter centers as technical problems arose during the 2022 General Election.

But this Court's duty is not solely to incline an ear to public outcry. It is to subject Plaintiff's claims and Defendants' actions to the light of the courtroom and scrutiny of the law. *See Winsor v. Hunt*, 29 Ariz. 504, 512 (1926) ("It is the boast of American democracy that this is a government of laws, and not of men.") And so, the Court begins with a review of the evidence.

DISCUSSION

It was Plaintiff's burden to establish each element by clear and convincing evidence. If Plaintiff herself failed to sustain her burden of proof, the matter is decided. Thus, the Court begins with Plaintiff's case in chief.

a. Mark Sonnenklar

The Court first considers Mark Sonnenklar, a roving election attorney with the Republican National Committee. Mr. Sonnenklar testified that, on Election Day, he went from polling location to polling location speaking with partisan observers. Mr. Sonnenklar visited eight voter centers on Election Day. He testified of his personal knowledge of 1) the failure of tabulators at multiple locations to accept ballots, 2) his own personal estimate of the rate of failure, 3) the efforts – of varying degrees of efficacy – of Maricopa County T-Techs to fix the tabulators, and 4) the frustration and anger of voters who had to wait in longer lines due to these failures. He testified that the County-provided wait times were not accurate and that a much higher number of voter centers suffered from printer/tabulator failure than was admitted by Maricopa County.

The Court credits the personal observations of Mr. Sonnenklar and does not doubt his knowledge or his veracity. But the Court cannot follow Mr. Sonneklar to ascribing intentional misconduct to any party. Mr. Sonnenklar said at Trial that it was "common sense" that such widespread failures must have been the result of intentional conduct. But this intuition does not square with Mr. Sonnenklar's own observations. For one thing, County T-Techs being sent to troubleshoot and fix the issues with tabulators are not consistent with a scheme by a person or persons to alter the result of an election. Mr. Sonnenklar testified to nothing that suggested those tech efforts were anything other than best-efforts intended to remedy the problem. Second, as Mr. Sonnenklar himself admitted, he did not personally observe anything that allowed him to support his intuition that someone had engaged in intentional misconduct. Third, Mr. Sonnenklar admitted that he had no technical knowledge which would allow him to infer that these ostensible technical failures were anything but malfunctions rather than malfeasance. Last, Mr. Sonnenklar admitted that he had no personal knowledge of any voter being turned away from the polls as a result of BOD printer failures.

As far as evidence of misconduct is concerned, the Court finds nothing to substantiate Plaintiff's claim of intentional misconduct as to either claim through Mr. Sonnenklar's testimony.

b. Heather Honey

The Court next considers Heather Honey, a supply chain auditor and consultant who testified primarily concerning the chain of custody claim. The Court, again, credits Ms. Honey's observations and personal knowledge of the system of early voting ballots. As relevant to misconduct, her testimony makes two main points: 1) that Maricopa County did not produce (pursuant to a Public Records Act request) Maricopa County Delivery Receipt forms for ballot packets dropped off by voters at drop boxes on Election Day; 2) that an employee of Runbeck Election Services (a county contractor) averred that Runbeck employees were permitted to submit about 50 ballot packets of family and friends into the ballot stream improperly.

Again, the Court does not doubt Ms. Honey's veracity, but her testimony is of limited use in making a finding that intentional misconduct occurred. For one thing, Ms. Honey agreed during cross examination that, while she has not received the Maricopa County Delivery Receipt forms – she knows that these forms do, in fact, exist. While she testified that the public records request has not yet been fulfilled, to the extent there is a claim to be made for insufficient production by Maricopa County in response to a public records request, that claim is not before the Court. Because Plaintiff's expert agreed that the forms which are the basis for this claim were generated, Plaintiff cannot point to their absence writ large as a violation of the EPM.

Next, as to the 50 ballot packets, Ms. Honey admitted that neither she nor her contacts with Runbeck had personal knowledge of any permission given by Maricopa County to Runbeck employees to bring the ballots of family for improper insertion into the ballot packet counting process.

The Court must also consider the Affidavits by Leslie White and Denise Marie on this point. The White Affidavit is less helpful on these points, as Ms. White testifies mainly to the limitations of what she was allowed to see as an observer at the Maricopa County Tabulation and Election Center ("MCTEC"). She expresses worry about the rapid pace of processes at MCTEC, objects to the limited field of her view as an observer but does not point to any violation of the EPM, nor does counsel draw the Court's attention to any EPM violation found in this Affidavit.

As for Ms. Marie's Affidavit, the Court must weigh her averment that family ballots were inserted into the ballot stream in violation of the EPM and chain of custody requirements against the sworn testimony of both Mr. Valenzuela and Mr. Jarrett who testified that Maricopa County employees – who follow the EPM – have eyes on the ballot process during their time at Runbeck. The Court finds the latter more credible given that Ms. Marie does not allege anything about Maricopa County employees' role in this alleged violation, the combined testimony of multiple Maricopa County officials concerning training of employees and lack of authorization for such a violation, and given that the purported authorization for such a practice is hearsay within the affidavit. The Court cannot afford this document much weight.

In his closing, counsel for Plaintiff argues that it "does not make sense" that Maricopa County did not know how many ballots Maricopa County had received on election night. But, at Trial, it was not Maricopa County's burden to establish that its process or procedure was reasonable, or that it had an accurate unofficial count on Election Night. Even if the County did bear that burden, failing to carry it would not be enough to set aside election returns. *See Moore v. City of Page*, 148 Ariz. 151, 165-66 (App. 1986). Particularly where Plaintiff's own witness on this point lacks personal knowledge of the intent of the alleged bad actor, admits that Defendants did in fact generate the documents they were required to, and otherwise affirms the County's

compliance with election processes, the Court cannot say that Plaintiff proved element one of Count IV by clear and convincing evidence.

c. Clay Parikh

Mr. Parikh has an impressive technical background as a cybersecurity expert for Northrup Grumman. The Court again credits his substantial experience and personal knowledge as far as it goes. His primary contention was that the printer errors he saw reflected in the A.R.S. § 16-677 ballot review he conducted – the printing of a 19-inch ballot on a 20-inch ballot paper – must have been done intentionally, either by overriding the image file that was sent from the laptop to the printer, or from the ballot image definition side. However, if the ballot definitions were changed, it stands to reason that *every* ballot for that particular definition printed on every machine so affected would be printed incorrectly. As Plaintiff's next witness indicates, that was not the case on Election Day. In either event, Mr. Parikh acknowledged that he had no personal knowledge of any intent behind what he believes to be the error.

The Court notes that Mr. Parikh also acknowledged a fact admitted by several of Plaintiff's witnesses: that any ballot that could not be read due to BOD printer or tabulator failure could be submitted for ballot duplication and adjudication through Door 3 on the tabulators. Plaintiff's own expert acknowledged that a ballot that was unable to be read at the vote center could be deposited by a voter, duplicated by a bipartisan board onto a readable ballot, and – in the final analysis – counted. Thus, Plaintiff's expert on this point admitted that the voters who suffered from tabulator rejections *would nevertheless have their votes counted*. This, at a minimum, means that the actual impact element of Count II *could not be proven.* The BOD printer failures did not actually affect the results of the election.

Further, as to the intent elements, the Court must pair its consideration of Mr. Parikh's testimony with that of another witness called by Plaintiff.

d. David Betencourt

Mr. Betencourt was a temporary employee of Maricopa County (a T-Tech) called by Plaintiff to testify as to the technical issues experienced on Election Day. T-Techs, in addition to setting up voter centers, provide technical support on Election Day.

As relevant here, Mr. Betencourt testified that there were, in fact, multiple technical issues experienced on Election Day. He testified that these were solved by means such as: 1) taking out toner and/or ink cartridges and shaking them, 2) cleaning the corona wire, 3) letting the printers warm up, 4) cleaning the tabulators, and 5) adjusting settings on the printer. It is of note that, apart from 5), none of these solutions implicates the ballot in a manner suggesting intent. Mr. Betencourt

testified that each of these on-site actions were successful to varying degrees, with shaking the toner cartridge being the most effective. It is worth repeating that ballots that could not be read by the tabulator immediately because of printer settings – or anything else – could be deposited in Door 3 of the tabulator and counted later after duplication by a bipartisan adjudication board.

Mr. Betencourt testified that, not only did he lack knowledge of any T-Tech (or anyone else) engaging in intentional misconduct, but further testified that the T-Techs he worked with diligently and expeditiously trouble-shot each problem as they arose, and they did so in a frenetic Election Day environment. Plaintiff's own witness testified before this Court that the BOD printer failures were largely the result of unforeseen mechanical failure.

e. Richard Baris

Mr. Baris testified as the Director of Big Data Poll. He testified that, as a result of the BOD printer failures on Election Day, that a number of voters were disenfranchised, and opined that this change resulted in Plaintiff losing the election. He testified that he knew this because of the decreased response rates to his exit poll for the General Election in Arizona. The Court will, with respect, put aside the ongoing internecine fights among pollsters and political scientists as to methodology and reliability. Indeed, giving all weight and due credit to Mr. Baris, he does not prove element four of Count II – an actual effect on the election.

Further, Mr. Baris admitted at Trial that "nobody can give a specific number" of voters who were put off from voting on Election Day. Thus, even if Plaintiff proved elements 1-3 of Count II by clear and convincing evidence, the truth of this statement alone dooms element 4. No election in Arizona has ever been set aside, no result modified, because of a statistical *estimate*. In the Court's view, it is a quantum leap to go from analogizing cases where malfeasance was precisely quantified such that this Court could provide a remedy, to setting aside a result where the result of alleged malfeasance is itself unknown. In cases where, for instance, a proportionality method has been utilized, it has been to remedy a *known* number of illegal votes cast in *unknown* proportions for the candidates. *See Grounds*, 67 Ariz. at 183-85; *Clay v. Town of Gilbert*, 160 Ariz. 335, 339 (App. 1989). But election contests are decided by votes, not by polling responses, and the Court has found no authority suggesting that exit polling ought to be used in this manner. Given that exit polling is done after a vote has been cast – the weight of authority seems to be contrary to this proposition. *See Babnew v. Linneman*, 154 Ariz. 90, 93 (App. 1987) (citing *Young*, 33 P. at 820)).

Indeed, to the extent that a range of outcomes was suggested by Mr. Baris, he suggested that – with his expected turnout increase on Election Day of 25,000-40,000 votes the outcome could be between a 2,000-vote margin *for Hobbs* to a 4,000-vote margin for Plaintiff. Taking Mr. Baris's claims at face value, this does not nearly approach the degree of precision that would

provide clear and convincing evidence that the result did change as a result of BOD printer failures. While this Court (in the absence of controlling authority) is reticent to state that statistical evidence is always insufficient as a matter of law to demonstrate a direct effect on the outcome of an election, a statistical analysis that shows that the current winner *had a good chance of winning anyway* is decidedly insufficient. *Cf. Moore*, 148 Ariz. at 159 (suggesting that population data might in some cases be admissible to prove voter disenfranchisement).

Further, Mr. Baris cannot say—and further, there was no evidence at Trial—that these voters were turned away or refused a ballot. These were voters who elected not to vote, whether at a voter center due to long lines or due to media coverage of "chaos" on Election Day, or any number of unknown reasons. None of these constitutes a direct effect permitting the Court's intervention as outlined in prior cases. Mr. Baris's testimony does not show by clear and convincing evidence that alleged misconduct surrounding BOD printers influenced the election outcome.

f. Intentional Misconduct Standard

The Court makes the following observations about Plaintiff's case as a general matter. Every one of Plaintiff's witnesses – and for that matter, Defendants' witnesses as well – was asked about any personal knowledge of both intentional misconduct and intentional misconduct directed to impact the 2022 General Election. Every single witness before the Court disclaimed any personal knowledge of such misconduct. The Court cannot accept speculation or conjecture in place of clear and convincing evidence.

The closest Plaintiff came to making an argument for quantifiable changes resulting from misconduct, was Ms. Marie's Affidavit as discussed by Ms. Honey. Again, she states that Runbeck Election Services employees were permitted to introduce about 50 ballots of family members into the stream. But even this is not sufficient. Such a claim – if the Court accepted the Affidavit at face value – would constitute misconduct but would not come close to clear and convincing evidence that the election outcome was affected. Though again, weighing her Affidavit against other testimony, the Court does not give the Affidavit much weight.

Plaintiff failed to provide enough evidence with which this Court could find for her on either count by clear and convincing evidence. To the extent that certain claims are contradicted by Defendants' case in chief, it is unnecessary to go into extensive detail, but a few points are worth noting.

As Ray Valenzuela, Co-Director of Elections for the Maricopa County Recorder's Office testified, no direction or permission was given by Maricopa County to Runbeck to allow its employees to submit ballots in any manner other than authorized to the general public. He, Mr.

Scott Jarrett – also a co-director, and Mr. Stephen Richer – County Recorder, each testified that Maricopa County election workers are trained to follow the EPM and that – to their knowledge – this was done in 2022. As noted above, both Mr. Valenzuela and Mr. Jarrett testified that Maricopa County employees were observing the ballots at each stage in the process. Plaintiff brought forward no evidence sufficient to contradict this testimony.

It bears mentioning that election workers themselves were attested to by both Plaintiff's witnesses and the Defendants' witnesses as being dedicated to performing their role with integrity. Not perfectly, as no system on this earth is perfect, but more than sufficient to comply with the law and conduct a valid election.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Considering all evidence presented, the Court finds as follows:

<u>As to Count II – Illegal BOD Printer/Tabulator Configurations:</u>

a. The Court DOES NOT find clear and convincing evidence of misconduct in violation of A.R.S. § 16-672(A)(1).

b. The Court DOES NOT find clear and convincing evidence that such misconduct was committed by "an officer making or participating in a canvass" under A.R.S. § 16-672(A)(1).

c. The Court DOES NOT find clear and convincing evidence that such misconduct was intended to affect the result of the 2022 General Election.

d. The Court DOES NOT find clear and convincing evidence that such misconduct did in fact affect the result of the 2022 General Election.

<u>As to Count IV – Chain of Custody Violations:</u>

a. The Court DOES NOT find clear and convincing evidence of misconduct in violation of A.R.S. § 16-672(A)(1).

b. The Court DOES NOT find clear and convincing evidence that such misconduct was committed by "an officer making or participating in a canvass" under A.R.S. § 16-672(A)(1).

c. The Court DOES NOT find clear and convincing evidence that such misconduct was intended to affect the result of the 2022 General Election.

d. The Court DOES NOT find clear and convincing evidence that such misconduct did in fact affect the result of the 2022 General Election.

Therefore:

IT IS ORDERED: confirming the election of Katie Hobbs as Arizona Governor-Elect pursuant to A.R.S. § 16-676(B).

The Court notes the representations of the County Defendants that a motion for sanctions would be forthcoming and the Court also considers the need of this Court to enter an Order under Rule 54(c), Arizona Rules of Civil Procedure so that an appeal on all issues might be taken in a timely fashion.

Therefore:

IT IS FURTHER ORDERED: that a statement of costs including compensation of inspectors under A.R.S. § 16-677(C) must be filed by 8:00 a.m. Monday, December 26, 2022. Failure to do so by the deadline will be deemed a waiver of those costs.

IT IS FURTHER ORDERED: any motion for sanctions must be filed by 8:00 a.m. Monday, December 26, 2022, and any response by Plaintiff must be filed by 5:00 p.m. Monday, December 26, 2022. The Court will not consider a reply.

After consideration of any sanctions motion, or the failure to file such a motion, and the presentation of costs to be assessed, the Court will enter a signed judgment under Rule 54(c).