ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

Arizona Republican Party v. Stephen Richer/Adrian Fontes
CV-23-0208-PR

PARTIES:

Petitioner/Plaintiff:	Arizona Republican Party ("ARP")
Interveners/Respondents:	Secretary of State Adrian Fontes ("Secretary") Maricopa County Recorder Stephen Richer and Maricopa County Board of Supervisors (collectively, the "County") Arizona Democratic Party
Amicus:	Statecraft, LLC

FACTS:

Under Arizona law, each voting precinct has a polling place. A.R.S. § 16-411(B). Under A.R.S. § 16-602(B), after the election is held and before it is certified, there is a sampling of ballots from precincts. In 2011, the legislature amended A.R.S. § 16-411 to authorize "the use of voting centers in place of or in addition to specifically designated polling places." A.R.S. § 16-411(B)(4). After the polls close, representatives of the recognized political parties participate in selecting the precincts from which a random number of ballots for certain races are used for the statutory hand count audit. "The hand count shall be conducted as prescribed by this section and in accordance with hand count procedures established by the secretary of state in the official instructions and procedures manual adopted pursuant to § 16-452." A.R.S. § 16-602(B). If the results of the hand count audit are within an acceptable margin of error of the tabulation machines, no further audit is required. A.R.S. § 16-602(C).

On September 16, 2020, the Maricopa County Board of Supervisors announced it would be using vote centers for the November 3, 2020 general election. The day after the polls closed, the Maricopa County Chairs of the Republican, Democratic, and Libertarian parties met to select the vote centers and early ballots subject to auditing. The physical hand count, which audited 2,917 ballots cast on voting machines and more than 5,000 ballots cast through mail-in ballots, started on Saturday, November 7 and concluded on Monday, November 9. The hand count audit showed that "[n]o discrepancies were found." court of appeals Opinion ¶ 8.

Lawsuit: ARP filed this challenge against the County on November 12. ARP argued that the 2019 Election Procedures Manuel ("EPM") should not have authorized using voting centers for the random sample because the voting centers were not precincts under A.R.S. § 16-411(B)(4). It also sought mandamus relief directing the County to conduct a hand count of election results from "precincts" and not "vote centers," alleging that "whatever hardship *vel non* it may cause to the county to sample precincts instead of vote centers, such hardship is vastly outweighed by the

benefit to the public in being able to analyze and sort (and organize, process) the sampling data, thereby creating transparency to the public and confidence in the integrity of our elections . . . ." Opinion ¶ 9. The Arizona Democratic Party and Secretary sought and obtained orders authorizing them to intervene in the proceeding.

The Secretary, the County, and the Arizona Democratic Party separately moved for dismissal. The Secretary argued in part that (1) ARP's lawsuit was barred by laches; (2) ARP was wrong as a matter of law because § 16-602(B) is silent on the procedures for counties that use vote centers and it expressly authorizes the Secretary to fill that gap; (3) the lawsuit suffered from procedural defects, including failure to request injunctive relief postponing the official canvass, which had to be completed no later than November 23; and (4) ballots would be treated arbitrarily because several other counties used vote centers to perform their hand count audits. Opinion ¶ 11.

Addressing laches, the Secretary argued ARP had known for "nearly a decade" that the EPM authorizes hand count audits based on samples from vote centers, and the County followed that process in the March 2020 presidential preference election and the August 2020 primary election. Yet, ARP raised no challenge to the procedure the EPM authorized until after the County had completed the hand count for the 2020 general election. The Secretary requested attorneys' fees under § 12-349, which mandates a fee award if a claim is brought, among other reasons, "without substantial justification." Opinion ¶ 12.

The County's motion to dismiss argued that ARP participated—through its county chair—in the process to select vote centers instead of precincts, and that the county chair's participation in the hand count audit "shows [ARP's] unreasonable delay without justification." Opinion ¶ 13.

The Arizona Democratic Party urged dismissal on similar grounds and referred to a November 12 letter from the Arizona Attorney General's office to Republican legislative leaders addressing the manual hand count audit and the County's use of voting centers. In the letter, the Attorney General opined that the pertinent statute, A.R.S. § 16-602, was silent as to how the hand count audit should be conducted and that the statute directs the Secretary to fill in the gaps when issuing the EPM, which was duly approved by the Governor and Attorney General in 2019. Opinion ¶ 14.

ARP responded to the Motions to Dismiss contending that there was no improper delay and there was no prejudice because the canvass had not been issued. APR also applied for a preliminary injunction to enjoin the County from certifying the results of the votes and issuing an official canvass until the merits of the complaint could be litigated and a new hand count audit completed. APR asserted:

> Given the importance of this election, and of doing everything with respect to this election "by the book," there are also powerful public-policy reasons to grant this preliminary injunction. If an injunction is not granted, *then there will be lingering questions about the legitimacy of [the election] results* which could otherwise be answered through a proper hand count. This is also the basic prejudice that [ARP] and the voting public will suffer if the Court declines to grant an injunction – *it will create a cloud over the legitimacy of this election and its results*.

Opinion ¶ 16 (emphasis in Opinion).

Following a one-hour oral argument held on November 18, the superior court issued a minute entry denying the request for preliminary injunction and dismissing ARP's complaint with prejudice. The superior court stated that a more detailed ruling would follow and set a deadline by which the Secretary could submit a motion for attorneys' fees under § 12-349. Opinion ¶ 17.

In applying for fees, the Secretary outlined reasons in support of the assertion that ARP's claim was groundless, including that the challenged EPM provision had been "on the books for nearly a decade," that ARP had not objected to it in previous elections, and that ARP failed to timely seek injunctive relief. The Secretary also argued the claim was made in bad faith, asserting ARP's motives in filing the suit were to "delay final election results and sow doubt about the integrity of Arizona's elections system." Opinion ¶ 18.

The superior court issued a ruling addressing the merits of ARP's case. It found that ARP's request for declaratory relief could not succeed because of ARP's unreasonable delay in pursuing the claim. The court also concluded that ARP had no claim for mandamus relief because County election officials followed the 2019 EPM and they lacked discretion to vary from it when performing the hand count. Opinion ¶ 19.

Responding to the Secretary's fee application, as well as addressing the court's merits ruling, ARP argued in part that its lawsuit was justified because it hinged on the plain language of § 16-602(B), and that because the 2019 EPM conflicts with the statute, the statute must control. ARP also asserted it was unaware the hand count had already occurred. ARP asserted its claims were not brought in bad faith because it did not initially seek to delay the canvass. ARP also asserted that by "even contemplating" awarding attorneys' fees the court would be "close to engaging in very serious interference with the First Amendment right to petition government for a redress of grievances." *See* U.S. Const. amend. I; Opinion ¶ 20. The superior court granted the Secretary's request for attorney fees under § 12-349, ordering ARP and its counsel to pay the $18,237.59 award, jointly and severally. Opinion ¶ 21. ARP appealed.

Court of Appeals: The court agreed with the superior court and also awarded sanctions, criticizing ARP for failing to separate its facts from its arguments in a "muddled presentation," failing to provide transcripts, failing to challenge the laches ruling until its reply brief, and abandoning its declaratory relief action as to future elections. *See Baker, v. Baker*, 183 Ariz. 70, 73 (App. 1995) ("When a party fails to include necessary items, we assume they would support the court's findings and conclusions."). Opinion ¶¶ 24-25, 29, 30.

The court evaluated whether ARP brought the claim without substantial justification, which means "that the claim or defense is groundless and is not made in good faith." A.R.S. § 12-349(A)(1), (F). The court found that the following § 12-350 factors were relevant: (1) the extent of efforts to determine a claim's validity before it was asserted; (2) the extent of post-filing efforts to eliminate invalid claims; (3) the availability of facts to help determine the validity of a claim; (4) "whether the action was prosecuted ..., in whole or in part, in bad faith;" and (5) the extent to which the party prevailed. *See* A.R.S. § 12-350(1)–(3), (5), (7). Opinion ¶¶ 32-33.

Groundless: First, the court agreed that the suit was groundless for a number of reasons.

These included (1) the relief sought was not legally available from the parties who were sued at the time the suit was filed. Also, (2) ARP never explained why it could not have brought the challenge timely and did not challenge the laches finding. The court observed that "the context and timing of a lawsuit challenging election procedures [was] critical" to the finding that the action was groundless. Specifically, ARP's assertion that "every election is subject to being investigated, audited in strict accordance with the law, and challenged for falsity" was misdirected because this was not a statutory election challenge and any such action requires a required a showing of fraud or that the alleged defect would have made a difference in the outcome of the election, citing *Findley. Sorenson,* 35 Ariz. 265, 269 (1929) ("[H]onest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain."). The court continued, "ARP has cited no authority suggesting that a specific election procedure, which the aggrieved party is or should be aware of, may be properly challenged as unlawful *after* an election. Instead, as the superior court properly concluded, in the absence of fraud or a specific showing that a different outcome would have occurred, a party lacks a legal basis to file a court action demanding that an alternative election procedure must be performed." Opinion ¶¶ 37-41. Also, the court observed, (3) a writ of mandamus was not available relief as to officials who were following the law, and (4) ARP never named the Secretary of State in challenging the 2019 EPM. Opinion ¶¶ 42-43.

Bad Faith: The court also agreed with the superior court that the action was not made in good faith because (1) ARP articulated that the action was needed to show where the number of votes in a precinct exceeded registered voters, but this was not the purpose of a hand count audit, which is "to assure that the machines are working properly." Opinion ¶ 46. Also, (2) ARP's suggestion that the superior court judge was motivated by his own political views ignored ARP's "failure to acknowledge the problem it was facing—that the lawsuit was based at least partially on the public's concern about elections in general, rather than focusing on claims reasonably supported by the law." Opinion ¶ 49. In addition, (3) "ARP changed from demanding a 'fair election' to wanting 'nothing more than a hand count audit conducted 'completely by the book and in strict accordance with the law.' And even more significant, ARP ignores its admission, made in response to the Secretary's fee application, that '[p]ublic mistrust following this election motivated this lawsuit.'"

Addressing that admission, court of appeals found that the superior court appropriately concluded that "[P]ublic mistrust, is a political issue, not a legal or factual basis for litigation." Opinion ¶ 50. Next, (4) ARP argued that it never alleged fraud, but it did in fact articulate, "perhaps most importantly (and obviously) of all, concern about *potential widespread voter fraud* has taken on a special significance in this general election, warranting a thorough focus on these laws and compelling [ARP] to take action." Opinion ¶ 51. Also, (5) although ARP argued that the superior court judge mischaracterized its arguments, ARP never supplied the transcripts to show otherwise. Opinion ¶ 52. And, (6) the First Amendment does not immunize a party who challenges elections procedures from § 12-349 sanctions. Opinion ¶ 53. Furthermore, (7) APR both contended that the election's legitimacy was not an issue properly before the court but also asked the court to enjoin the canvass raising "concerns about the election's legitimacy if the injunction was not granted." The court articulated that APR's "assertions about the election's legitimacy, along with its failure to properly acknowledge or address the court's legal analysis on the legal flaws in its case, severely undermine[s] ARP's claim that the superior court's ruling was politically motivated."

Opinion ¶ 55. Finally, the court (8) noted that for the reasons it had discussed as well as the reasons "set forth in the superior court's comprehensive rulings addressing the merits and attorneys' fees," it rejected "ARP's insinuation that the judge was biased and that his rulings were affected by political beliefs." Opinion ¶ 56. The court advised that it is well-established that election-related lawsuits, like any other lawsuits, must have a good faith basis in law and fact. Opinion ¶ 57. The court concluded, "The First Amendment does not shield attorneys or parties from a court's obligation under § 12-349 to award attorneys' fees against a party or attorney who brings or defends a claim without substantial justification." Opinion ¶ 58.

ISSUES: Review was granted as to this rephrased issue:

> Were the awards of attorney fees by the superior court and the court of appeals appropriate?