

Arizona Supreme Court

Civil Election Appeal

CV-20-0253-AP/EL

AZ PUBLIC INTEGRITY et al v ADRIAN FONTES et al

Appellate Case Information

Case Filed: 8-Sep-2020
Case Closed:

**Dept/Composition
IN DIVISION**

Hon. Robert Brutinel
Hon. Andrew W. Gould
Hon. John R. Lopez
Hon. James P. Beene

Side 1. ARIZONA PUBLIC INTEGRITY ALLIANCE INC and TYLER MONTAGUE, Plaintiff

(Litigant Group) ARIZONA PUBLIC INTEGRITY ALLIANCE INC and TYLER MONTAGUE

- Arizona Public Integrity Alliance Inc
- Tyler Montague

Attorneys for: Plaintiff

Alexander Michael del Ray Kolodin, Esq. (AZ Bar No. 30826)
Christopher A Viskovic, Esq. (AZ Bar No. 35860)
Chris Ford, Esq. (AZ Bar No. 29437)

Side 2. ADRIAN FONTES (In his official capacity as Maricopa County Recorder), FRANK MCCARROLL (In her official capacity as Clerk of the Maricopa County Board of Supervisors), CLINT HICKMAN, JACK SELLERS, STEVE CHUCRI, BILL GATES, AND STEVE GALLARDO (In their official capacities as members of the Maricopa County Board of Supervisors), AND MARICOPA COUNTY, Defendant

(Litigant Group) ADRIAN FONTES (In his official capacity as Maricopa County Recorder)

- Adrian P Fontes, Maricopa County Recorder's Office

Attorneys for: Defendant

Mary R O'Grady, Esq. (AZ Bar No. 11434)
Joshua David Rothenberg Bendor, Esq. (AZ Bar No. 31908)

(Litigant Group) FRAN MCCARROLL (In her official capacity as Clerk of the Maricopa County Board of Supervisors), CLINT HICKMAN, JACK SELLERS, STEVE CHUCRI, BILL GATES, AND STEVE GALLARDO (In their official capacities as members of the Maricopa County Board of Supervisors), AND MARICOPA COUNTY

- Steve Chucri, Maricopa County Board of Supervisors
- Clint L Hickman, Maricopa County Board of Supervisors
- Steve Gallardo, Maricopa County Board of Supervisors
- Fran McCarroll, Maricopa County Board of Supervisors
- Jack Sellers, Maricopa County Board of Supervisors
- Bill Gates, Maricopa County Board of Supervisors
- Maricopa County

Attorneys for: Defendant County Board of Superviso

Patrick Irvine, Esq. (AZ Bar No. 6534)
Charles E Markle, Esq. (AZ Bar No. 32930)

Side 3. Attorney General Mark Brnovich, Amicus Curiae

(Litigant Group) Mark Brnovich

- Mark Brnovich, Arizona Attorney General's Office

Attorneys for: Amicus Curiae

Mark Brnovich, Esq. (AZ Bar No. 14134)
Joseph A Kanefield, Esq. (AZ Bar No. 15838)
Brunn W Roysden, III, Esq. (AZ Bar No. 28698)
Linley Wilson, Esq. (AZ Bar No. 27040)
Jennifer Wright, Esq. (AZ Bar No. 27145)

CASE STATUS

Nov 5, 2020.....Decision Rendered

Sep 10, 2020....Decision Rendered

PREDECESSOR CASE (S)	Cause/Charge/Class	Judgment/Sentence	Judge, Role <Comments>	Trial	Dispo
1 CA	1 CA-CV 20-0458				
↪ MAR	LC2020-000252-001		James D Smith, Authoring Judge of Order Comments: (none)		

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CASE DECISION

05-Nov-2020 OPINION

We reverse the trial court and grant relief. The County is enjoined from including the New Instruction with mail-in ballots for the November 3, 2020 General Election.

Filed: 05-Nov-2020

Mandate:

Decision Disposition

Transferred
Reversed

Andrew Gould.....Author
Robert Brutinel.....Concur
John Lopez.....Concur
James Beene.....Concur

26 PROCEEDING ENTRIES

- 1. 9-Sep-2020 On September 8, 2020, Appellants Arizona Public Integrity Alliance/Tyler Montague filed an "Appellants' Petition to Transfer." After consideration, IT IS ORDERED granting the motion. IT IS FURTHER ORDERED Appellants will re-file the opening brief in this Court no later than 2:00 p.m. on Wednesday, September 9, 2020. The election case number designated to re-file will be CV-20-0253-AP/EL. IT IS FURTHER ORDERED Appellees may file an answering brief no later than 12:00 p.m. on Thursday, September 10, 2020. IT IS FURTHER ORDERED that the briefs may be in memorandum format (no tables of contents or authorities) in a legible font (14-point), double-spaced, with the briefs to include all arguments the parties wish to present to the Court. There will be no reply brief. This matter will be decided without oral argument. IT IS FURTHER ORDERED that in addition to filing briefs with the Clerk of the Supreme Court (with filing and service through AZTurboCourt) all filings are also to be sent by email to all the parties and court staff no later than the filing deadlines. IT IS FURTHER ORDERED the Clerk of the Court of Appeals shall transmit the entire record to this Court no later than 12:00 p.m. on Thursday, September 10, 2020. (Hon. Robert Brutinel)
2. 9-Sep-2020 FILED: Appellants' Opening Brief Expedited Review Requested; Certificate of Service; Certificate of Compliance (Appellants Arizona Public Integrity Alliance/Tyler Montague)
3. 9-Sep-2020 FILED: Record from CofA: Electronic Record
4. 10-Sep-2020 FILED: Notice of Appearance (Attorneys Liddy, Craiger and Branco for Appellees); Certificate of Service (Appellees Fontes, et al.)
5. 10-Sep-2020 FILED: Answering Brief; Certificate of Service; Certificate of Compliance (Appellees Fontes, et al.)
6. 10-Sep-2020 FILED: Brief of Amicus Curiae Arizona Attorney General in Support of Appellants; Certificate of Service; Certificate of Compliance (Amicus Curiae Arizona Attorney General)
7. 10-Sep-2020 FILED: Record on Appeal: MCSC
Index, Instruments and ME's (Electronic)
Exhibits (None)

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26 PROCEEDING ENTRIES

8. 10-Sep-2020 The Court, by a panel consisting of Chief Justice Brutinel, Justice Gould, Justice Lopez, and Justice Beene, has considered the briefs of the parties, the record, the trial court's ruling, and the relevant statutes and case law in this expedited election matter.
- Plaintiffs sought to enjoin the Maricopa County Recorder and the Maricopa County Board of Supervisors from including a particular instruction ("New Instruction") with mail-in ballots for the 2020 general election. The New Instruction informed voters that that they could vote for one candidate and, if they made a mistake, could cross out their selection and vote for a different candidate.
- On September 4, 2020, the trial court determined that although Plaintiffs showed a likelihood of success on the merits, Plaintiffs did not meet the other criteria to warrant a preliminary injunction. The trial court, therefore, denied Plaintiffs' application for a preliminary injunction.
- The Court finds Defendants exceeded their authority by proposing to include the New Instruction. While election statutes have changed, the permissible voter instructions, as authorized by A.R.S. § 16-502 and the Election Procedural Manual, have not. Further, we conclude that Plaintiffs have satisfied the requirements for obtaining a preliminary injunction.
- IT IS ORDERED reversing the trial court's order.
- IT IS FURTHER ORDERED enjoining election officials, the Maricopa County Recorder and its vendors from inserting the "New Instruction" in the envelopes with the ballots for the November 3, 2020 general election.
- An opinion will follow. (Hon. Robert Brutinel)
9. 10-Sep-2020 AMENDED ORDER FILED
- The Court, by a panel consisting of Chief Justice Brutinel, Justice Gould, Justice Lopez, and Justice Beene, has considered the briefs of the parties, the record, the trial court's ruling, and the relevant statutes and case law in this expedited election matter.
- Plaintiffs sought to enjoin the Maricopa County Recorder and the Maricopa County Board of Supervisors from including a particular instruction ("New Instruction") with mail-in ballots for the 2020 general election. The New Instruction informed voters that that they could vote for one candidate and, if they made a mistake, could cross out their selection and vote for a different candidate.
- On September 4, 2020, the trial court determined that although Plaintiffs showed a likelihood of success on the merits, Plaintiffs did not meet the other criteria to warrant a preliminary injunction. The trial court, therefore, denied Plaintiffs' application for a preliminary injunction.
- The Court finds Defendants exceeded their authority by proposing to include the New Instruction. While election statutes have changed, the permissible voter instructions, as authorized by A.R.S. § 16-502 and the Election Procedural Manual, have not. Further, we conclude that Plaintiffs have satisfied the requirements for obtaining a preliminary injunction.
- IT IS ORDERED reversing the trial court's order.
- IT IS FURTHER ORDERED enjoining election officials, the Maricopa County Recorder and its vendors from inserting the "New Instruction" in the envelopes with the ballots for the November 3, 2020 general election.
- An opinion will follow. (Hon. Robert Brutinel)
10. 11-Sep-2020 FILED: Notice of Errata [Correct statement on Page 13 that the "accompanying instruction are being printed" to "...the County's vendor has already printed the early ballot instructions."]; Certificate of Service (Appellee Fontes, et al.)
11. 24-Sep-2020 FILED: Appellants' Statement of Attorneys' Fees and Costs; Certificate of Service; Appellants' Affidavit in Support of Their Statement of Attorney Fees and Costs (Appellants Arizona Public Integrity Alliance/Tyler Montague) (Attorney Fees - \$32,321.00 /Costs -\$319.11)
12. 8-Oct-2020 FILED: Motion to Withdraw and Substitution of Counsel; Certificate of Service (Appellees Fontes, et al.)
13. 8-Oct-2020 FILED: Notice to Substitute as Counsel for Maricopa County Recorder Adrian Fontes; Certificate of Service (Appellees Fontes, et al.)
14. 8-Oct-2020 FILED: Joint Motion for a Procedural Order to Extend Deadline to Respond to Appellants' Fee Application; Certificate of Service (Appellees Fontes, et al.)
15. 8-Oct-2020 FILED: Notice of Appearance; Certificate of Service (Appellees Fontes, et al.)

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16. 9-Oct-2020 On October 8, 2020 Appellees Fontes, et al., filed a "Motion to Withdraw and Substitution of Counsel" and a "Joint Motion for a Procedural Order to Extend Deadline to Respond to Appellants' Fee Application." After consideration,
- IT IS ORDERED granting the motion to withdraw and substitution of counsel.
- IT IS FURTHER ORDERED granting a first extension of time to file the response to appellants' fee application on or before October 15, 2020. No further extensions of time shall be granted absent extraordinary circumstances. (Hon. Clint Bolick)
17. 15-Oct-2020 FILED: Appellees' Objection to Appellants' Fees and Costs; Certificate of Service (Appellees Fontes, et al.)
18. 16-Oct-2020 FILED: Joint Motion for Procedural Order to Extend Time for Appellants to Reply in Support of Their Fee Application; Certificate of Service (Appellants Arizona Public Integrity Alliance/Tyler Montague)
19. 20-Oct-2020 A "Joint Motion for Procedural Order to Extend Time for Appellants to Reply in Support of Their Fee Application" (Appellants Arizona Public Integrity Alliance/Tyler Montague) having been filed on October 16, 2020,
- IT IS ORDERED granting a first extension of time to file a Reply in support of their Statement of Attorneys' Fees and Costs on or before November 5, 2020. No further extensions of time shall be granted absent extraordinary circumstances. (Hon. Clint Bolick)
20. 29-Oct-2020 FILED: Appellants' Motion That the Court Hold Appellees in Contempt Under A.R.S. § 12-864 and ARCAP 25; Certificate of Service; Declaration of Lori Hunnicutt with Exhibits; Declaration of Alexander Kolodin (Appellants Arizona Public Integrity Alliance/Tyler Montague)
21. 30-Oct-2020 Upon receipt of "Appellants' Motion that the Court hold Appellees in Contempt under A.R.S § 12-864 and ARCAP 25," ("Motion for Contempt") the Court held an informal telephonic scheduling conference. Alexander Kolodin appeared on behalf of Appellants. Patrick Irvine appeared on behalf of the Board of Supervisors, Clerk of the Board and Maricopa County. Joshua Bender and Emma Cone-Roddy appeared on behalf of Adrian Fontes, Maricopa County Recorder. Linley Wilson, Beau Roysden and Jennifer Wright appeared on behalf of the Attorney General.
- Pursuant to the scheduling conference,
- IT IS ORDERED any response to Appellant's Motion for Contempt shall be filed no later than December 2, 2020. Appellant's reply shall be filed no later than later than December 16, 2020.
- Appellants, the County, and the Recorder consented to the filing of amicus briefs. Therefore,
- IT IS FURTHER ORDERED any amicus briefs shall be filed no later than December 9, 2020. Any response to an amicus brief shall be filed no later than December 16, 2020.
- The Court defers Appellant's request for an order to show cause hearing pending completion of the briefing in this matter. (Hon. Andrew W. Gould)
22. 4-Nov-2020 FILED: Appellants' Reply in Support of their Statement of Attorneys' Fees and Costs; Certificate of Service (Appellants Arizona Public Integrity Alliance/Tyler Montague)
23. 4-Nov-2020 FILED: Motion for Leave to File a Supplemental Brief; Certificate of Service; Exhibit A (Appellees Fontes, et al.)
24. 5-Nov-2020 OPINION - We reverse the trial court and grant relief. The County is enjoined from including the New Instruction with mail-in ballots for the November 3, 2020 General Election. (Hon. Andrew W. Gould - Author; Hon. Robert Brutinel - Concur; Hon. John R. Lopez IV - Concur; Hon James P. Beene - Concur)
25. 5-Nov-2020 On November 4, 2020, Appellees Fontes, et al. filed a "Motion for Leave to file Supplemental Brief." After consideration,
- IT IS ORDERED denying the motion. (Hon. Robert Brutinel)

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26. 13-Nov-2020 On September 10, 2020, this Court issued its Order reversing the superior court's ruling denying Appellant's application for preliminary injunction, and enjoining Appellees and their vendors from inserting the "New Instruction" with mail-in ballots for the November 3, 2020 General Election.

Thereafter, Appellants filed an Application for Attorney Fees and Costs on September 24, 2020, seeking \$32,321.00 in attorneys' fees regarding the proceeding before this Court, as well as \$25,850.09 for fees regarding the proceedings in superior court.

On November 5, 2020, this Court issued its Opinion explaining its reasons for issuing the Order. Specifically, the Court held that the Recorder acted unlawfully by including the "New Instruction" with mail-in ballots, and that with respect to overvotes, the Recorder had a non-discretionary duty to provide the Overvote Instruction authorized by the Arizona Secretary of State, 2019 Elections Procedures Manual.

We conclude that because this case is a mandamus action, Appellants, as the prevailing party, are entitled to an award of fees pursuant to A.R.S. § 12-2030(A). Therefore,

IT IS ORDERED granting Appellants \$57,970.90 in attorneys' fees.

IT IS FURTHER ORDERED awarding Appellants \$979.01 in costs. (Hon. Andrew W. Gould)