

Arizona Supreme Court

Civil Election Appeal

CV-20-0343-AP/EL

KELLI WARD v CONSTANCE JACKSON et al

Appellate Case Information

Case Filed: 4-Dec-2020

Case Closed:

Dept/Composition

Side 1. KELLI WARD, Plaintiff/Appellant

(Litigant Group) KELLI WARD

- Kelli Ward

Attorneys for: Plaintiff/Appellant

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Side 2. CONSTANCE JACKSON; FELICIA ROTELLINI; FRED YAMASHITA; JAMES MCLAUGHLIN; JONATHAN NEZ; LUIS ALBERTO HEREDIA; NED NORRIS; REGINA ROMERO; SANDRA D. KENNEDY; STEPHEN ROE LEWIS; and, STEVE GALLARDO, Defendant/Appellee

(Litigant Group) CONSTANCE JACKSON; FELICIA ROTELLINI; FRED YAMASHITA; JAMES MCLAUGHLIN; JONATHAN NEZ; LUIS ALBERTO HEREDIA; NED NORRIS; REGINA ROMERO; SANDRA D. KENNEDY; STEPHEN ROE LEWIS; and, STEVE GALLARDO

- Constance Jackson
- Ms Felecia A Rotellini
AZ Bar No. 11070
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Admitted 10/25/86
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- James McLaughlin
- Jonathan Nez
- Luis Alberto Heredia
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- Regina Romero
- Sandra Kennedy
- Stephen Roe Lewis
- Steve Gallardo

Attorneys for: Defendant/Appellee

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Daniel A Arellano, Esq. (AZ Bar No. 32304)

Roy Herrera, Esq. (AZ Bar No. 32901)

Side 3. Adrian Fontes (in his official capacity as Maricopa County Recorder) and Maricopa County Board of Supervisors, Intervenor

(Litigant Group) Adrian Fontes (in his official capacity as Maricopa County Recorder) and Maricopa County Board of Supervisors

- Adrian P Fontes, Maricopa County Recorder's Office
- Maricopa County Board of Supervisors

Attorneys for: Intervenor

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Side 4. Katie Hobbs (in her official capacity as the Arizona Secretary of State), Intervenor

(Litigant Group) Katie Hobbs (in her official capacity as the Arizona Secretary of State)

- Katie Hobbs, Arizona State Senate

Attorneys for: Intervenor

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Kristen M Yost, Esq. (AZ Bar No. 34052)

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Side 5. THE LINCOLN PROJECT, Amicus Curiae

(Litigant Group) THE LINCOLN PROJECT

● The Lincoln Project

Attorneys for: Amicus Curiae

Mario Nicolais, Esq. (CO Bar No. CONICOLAIS)

Susan M Freeman, Esq. (AZ Bar No. 4199)

Bruce E Samuels, Esq. (AZ Bar No. 15996)

CASE STATUS

Dec 8, 2020.....**Decision Rendered**

Dec 4, 2020.....**Pending**

PREDECESSOR CASE(S)	Cause/Charge/Class	Judgment/Sentence	Judge, Role <Comments>	Trial	Dispo
MAR	CV2020-015285		Randall H Warner, Trial		

CASE DECISION

08-Dec-2020 DECISION ORDER

* The Court accepted jurisdiction of this expedited election appeal and en banc has considered the record, the trial court's December 4, 2020 minute entry, and the briefing of Appellant Kelli Ward, Defendant Biden Electors, Intervenor Maricopa County and

Filed: **08-Dec-2020**

Mandate:

Decision Disposition

Affirmed

23 PROCEEDING ENTRIES

- 4-Dec-2020 FILED: ARCAP 10(C) Statement; Certificate of Service; Notice of Appeal; Minute Entry (MCSC - 12/04/20) (Appellant Ward)
- 7-Dec-2020 The Court is in receipt of Appellant's notice of appeal and statement designating matter as an expedited election appeal. Good cause appearing.

IT IS ORDERED accepting jurisdiction of this expedited appeal.

IT IS FURTHER ORDERED the parties will file simultaneous briefs no later than noon on Monday, December 7, 2020. The first section of the briefs is to address the deadline by which this Court must decide this appeal.

IT IS FURTHER ORDERED the parties will electronically file an appendix with their exhibits. Any sealed exhibits should be included in a separate appendix filed under seal at the filing counter of the Clerk of the Supreme Court. The appendices are due no later than noon on Monday December 7, 2020.

IT IS FURTHER ORDERED that the briefs will not exceed 3000 words, in a legible 14-point font, double-spaced, with the briefs to include all arguments the parties wish to present to the Court. They may be filed in memorandum format (no tables of contents or authorities). There will be no reply brief and the 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 attorneys. (Hon. William G. Montgomery)
- 7-Dec-2020 FILED: (SEALED) Plaintiff/Contestant's Appendix; Minute Entry (MCSC - 12/04/20 - Order Sealing Appendix) (Appellant Ward)
- 7-Dec-2020 FILED: Opening Brief; Certificate of Service; Certificate of Compliance (Appellant Ward)
- 7-Dec-2020 FILED: Plaintiff/Contestant's Appendix (Except Appendix 5 & 6 filed under seal); Certificate of Service (Appellee Ward)
- 7-Dec-2020 FILED: Defendants' Brief; Certificate of Service; Certificate of Compliance (Appellees Jackson, et al.)
- 7-Dec-2020 FILED: Brief of Maricopa County Intervenor; Certificate of Service; Certificate of Service (Intervenor Fontes, et al.)
- 7-Dec-2020 FILED: The Lincoln Project's Amicus Curiae Brief in Opposition of Appellant's Requested Relief; Certificate of Service; Certificate of Compliance (Amicus Curiae The Lincoln Project)
- 7-Dec-2020 FILED: The Lincoln Project's Motion for Leave to File Amicus Curiae Brief (Amicus Curiae The Lincoln Project)
- 7-Dec-2020 FILED: Appellee Secretary of State Katie Hobbs' Combined Brief and Appendix on Appeal; Certificate of Service; Certificate of Compliance (Intervenor Hobbs)
- 7-Dec-2020 FILED: Record from MCSC: (Electronic)

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12. 7-Dec-2020 On the Court's own motion,
IT IS ORDERED correcting the caption as reflected in this order.
IT IS FURTHER ORDERED this caption shall be used on all further documents filed in this appeal. (Hon. Robert Brutinel)
13. 7-Dec-2020 "The Lincoln Project's Motion for Leave to File Amicus Curiae Brief" (Amicus Curiae The Lincoln Project) and the brief of amicus curiae were filed on December 7, 2020.
IT IS ORDERED granting the motion. The brief shall be filed as of December 7, 2020. (Hon. Robert Brutinel)
14. 8-Dec-2020 FILED: Letter to Roy Herrera, Daniel A Arellano, and Sarah Gonski (Verification of Pro Hac Vice Status for Elias & Spiva)
15. 8-Dec-2020 FILED: Letter to Bruce Samuels (Verification of Pro Hac Vice Status for Nicolais)

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23 PROCEEDING ENTRIES

16. 8-Dec-2020 The Court accepted jurisdiction of this expedited election appeal and en banc has considered the record, the trial court's December 4, 2020 minute entry, and the briefing of Appellant Kelli Ward, Defendant Biden Electors, Intervenor Maricopa County and the Secretary of State, and amicus curiae The Lincoln Project.

The Secretary duly certified the statewide canvass and on November 30, 2020, she and the Governor signed the certificate of ascertainment for presidential electors, certifying that in Arizona the Biden Electors received 1,672,143 votes and the Trump Electors received 1,661,686 votes (a difference of 10,457 votes out of a total of 3,333,829 cast for these two candidates). Although slim, the margin was outside the one-tenth of one percent of the total number of votes cast for both of the presidential electors which is the statutory trigger for an automatic recount. A.R.S. § 16-661(A)(1).

The Secretary's certification followed Maricopa County's audit. Under Arizona law, the county officer in charge of the election conducts a hand count prior to the canvass. A.R.S. § 16-602(B). The statute provides detailed instructions on the hand count process, and in this case the November 9, 2020 Maricopa County hand count included 5000 early ballots and a hand count of Election Day Ballots from two-percent of the vote centers. The audit revealed no discrepancies in the tabulation of the votes between hand count totals and machine totals. The County completed its canvass on November 23, 2020. Maricopa County is the only county implicated in this proceeding.

Appellant filed her contest under A.R.S. § 16-673 raising three statutory bases for a challenge under A.R.S. § 16-672 which include "misconduct" by an election board or officer; "[o]n account of illegal votes"; or "[t]hat by reason of erroneous count of votes the person declared elected ... did not in fact receive the highest number of votes." A.R.S. § 16-672(A)(1), (4) and (5). In her First Amended Complaint, Appellant sought the inspection of an unspecified number of ballots under A.R.S. § 16-677, which authorizes the inspection of ballots before preparing for trial after the statement of contest has been filed.

Under Arizona law, "If any ballot, including any ballot received from early voting, is damaged, or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot in the presence of witnesses and substituted for the damaged ballot. All duplicate ballots shall be clearly labeled 'duplicate' and shall bear a serial number that shall be recorded on the damaged or defective ballot." A.R.S. § 16-621(A).

In this election, Maricopa County had 27,869 duplicate ballots pertaining to the Presidential Electors. Witness testimony explained that "duplicate ballots" include those reflecting "overvotes" or votes for more than one candidate; overseas ballots; and ballots that are damaged or otherwise cannot be machine tabulated. The trial court also heard testimony from a number of witnesses who presented credible testimony that they saw errors in which the duplicate ballot did not accurately reflect the voter's apparent intent as reflected in the original ballot.

Before the trial, the parties conducted a review of randomly chosen sample ballots. The first review was of 100 ballots and the second was of 1526 ballots, and of the 1626 total, there were nine errors, (1617 correct duplicate ballots) that if correct would have given the Trump Electors an additional seven votes and the Biden Electors an additional two votes. The Secretary maintains that this constitutes an error of no more than 0.37% within the sample. Appellant argues that the error rate was 0.55%, and the trial court concluded the results were "99.45% accurate." When this is extrapolated to the total number of duplicate ballots it is not sufficient to come close to warranting a recount under A.R.S. § 16-661.

Although Appellant requested additional time and the opportunity to review additional ballots, Appellant offered no evidence to establish that the 1626-ballot sample was inadequate to demonstrate any fraud, if present. As the trial court noted, this review confirmed the witness testimony that there were mistakes in the duplication process, the mistakes were few, and when brought to the attention of election workers, they were fixed. Extrapolating this error rate to all 27,869 duplicate ballots in the county would result in a net increase of only 103 votes based on the 0.37% error rate or 153 votes using the 0.55% error rate, neither of which is sufficient to call the election results into question.

The parties also presented evidence after reviewing a sample of the envelope signatures on mail-in ballots. Their experts determined that out of 100 signatures, six to eleven of the signatures were "inconclusive" but neither expert could identify any sign of forgery or simulation and neither could provide any basis to reject the signatures.

Election contests are "purely statutory and dependent upon statutory provisions for their conduct." *Fish v. Redeker*, 2 Ariz. App. 602 (1966). Elections will not be held invalid for mere irregularities unless it can be shown that the result has been affected by such irregularity. *Territory v. Board of Sup'rs of Mohave County*, 2 Ariz. 248 (1887). The validity of an election is not voided by honest mistakes or omissions unless they affect the result, or at least render it uncertain. *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). Where an election is contested on the ground of illegal voting, the contestant has the burden of showing that sufficient illegal votes were cast to change the result, *Morgan v. Board of Sup'rs*, 67 Ariz. 133 (1948).

The legislature has expressly delegated to the Secretary the authority to promulgate rules and instructions for early voting. A.R.S. § 16-452(A). After consulting with county boards and election officials, the Secretary is directed to compile the rules "in an official instructions and procedures manual." The Election Procedures Manual or "EPM," has the force of law. The Court recently considered a challenge to an election process and granted relief where the county recorder adopted a practice contrary to the EPM. *Arizona Pub. Integrity All. v. Fontes*, ___ Ariz. ___, 475 P.3d 303, 305 (Ariz. November 5, 2020). Here, however, there are no allegations of any violation of the EPM or any Arizona law.

Intervenor Maricopa County argues that the trial court could not entertain this challenge under A.R.S. § 16-672(A) which authorizes a contest of the "election of any person declared elected to state office." Intervenor/Defendants/Amicus contend that the Court must decide this matter within the "safe harbor" deadline of 3 U.S.C. § 5. The Court concludes, unanimously, that the trial judge did not abuse his discretion in denying the request to continue the hearing and permit additional inspection of the ballots. The November 9, 2020 hand count audit revealed no discrepancies in the tabulation of votes and the statistically negligible error presented in this case falls far short of warranting relief under A.R.S. § 16-672. Because the challenge fails to

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present any evidence of "misconduct," "illegal votes" or that the Biden Electors "did not in fact receive the highest number of votes for office," let alone establish any degree of fraud or a sufficient error rate that would undermine the certainty of the election results, the Court need not decide if the challenge was in fact authorized under A.R.S. § 16-672 or if the federal "safe harbor" deadline applies to this contest. Therefore,

IT IS ORDERED affirming the trial court decision and confirming the election of the Biden Electors under A.R.S. § 16-676(B).

IT IS FURTHER ORDERED directing Defendants/Intervenors to file a response, which may be a collective response, to Appellant's Motion to Unseal Exhibits no later than Friday, December 11, 2020.

IT IS FURTHER ORDERED denying the Secretary's request for attorneys' fees under A.R.S. § 12-349. (Hon. Robert Brutinel)

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| 17. | 11-Dec-2020 | RECEIPT No.: 2020-01271 ; \$140.00, Authorization: 821841396356208722, Applied to: CONSTANCE JACKSON; FELICIA ROTELLINI; FRED YAMASHI - Class B Filing Fee (\$140.00) Paid for: CONSTANCE JACKSON; FELICIA ROTELLINI; FRED YAMASHITA; JAMES MCLAUGHLIN; JONATHAN NEZ; LUIS ALBERTO HEREDIA; NED NORRIS; REGINA ROMERO; SANDRA D. KENNEDY; STEPHEN ROE LEWIS; and, STEVE GALLARDO - By nCourt LLC |
| 18. | 11-Dec-2020 | FILED: Appellee Secretary of State Katie Hobbs Response to Request to Unseal Exhibits 14 and 35; Certificate of Service (Intervenor Hobbs) |
| 19. | 11-Dec-2020 | FILED: Response Brief of Maricopa County Intervenors Concerning Appellant's Request to Unseal Ballots; Certificate of Service (Intervenors Fontes, et al.) |
| 20. | 16-Dec-2020 | RECEIPT No.: 2020-01299 ; \$280.00, Authorization: 8A153692-6151-46B1, Applied to: KELLI WARD - Class A Filing Fee (\$280.00) Paid for: KELLI WARD - By nCourt LLC Portal (Memo: AF08-445698BEB1E3) |
| 21. | 15-Dec-2020 | FILED: Notice Regarding Pro Hac Vice Status of Counsel; Certificate of Service; Minute Entry (MCSC) 11/30/2020 (Appellees Jackson, et al.) |
| 22. | 21-Dec-2020 | Plaintiff appeals the trial court's orders (1) denying her requests to permit additional inspection of ballots and (2) sealing trial exhibits 14 and 35. We previously decided the merits of the appeal as to the first issue by Decision Order dated December 8, 2020 and asked for any response to the second issue. Intervenors Secretary of State and Maricopa County subsequently filed responses.

After considering the parties' arguments,

IT IS ORDERED dismissing the appeal as to the second issue. This Court lacks jurisdiction as the issue remains pending in the trial court and has not been reduced to final judgment. (Hon. William G. Montgomery) |
| 23. | 11-Dec-2020 | FILED: Notice from USSC - Petition for Writ of Certiorari filed on December 11, 2020(No. 20-0809) (S. Harris, Clerk) (Rec'd from USSC on 12/21/2020) |