IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MARK WILLIAMS,
Contestant/Appellant,

v.

THOMAS FINK,
Contestee/Appellee.

No. 2 CA-CV 2018-0200
Filed July 22, 2019

Appeal from the Superior Court in Pima County
No. OV20180334
The Honorable Brenden J. Griffin, Judge

AFFIRMED

COUNSEL

Law Office of Mark L. Williams, Nogales
By Mark L. Williams
Counsel for Contestant/Appellant

McNamara Goldsmith P.C., Tucson
By Eugene N. Goldsmith
Counsel for Contestee/Appellee

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Eckerstrom concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this election appeal, Mark Williams challenges the trial court's order dismissing with prejudice his statement of contest and amendment thereto for failure to state a claim. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 When reviewing a trial court's ruling on a motion to dismiss for failure to state a claim, we assume all facts alleged in the complaint are true. *See Belen Loan Inv'rs, LLC v. Bradley*, 231 Ariz. 448, ¶ 2 (App. 2012). During the November 2018 general election, Williams and Fink were the candidates for a superior court judgeship in Santa Cruz County. On November 16, 2018, the board of supervisors approved the completed canvass and declared Fink the winner.

¶3 Five days later, Williams filed an election contest challenging the result. Specifically, he asserted that he had met with the elections director, who stated that the candidates' names were placed in alphabetical order on the ballot for precinct one and then alternated every precinct afterward. As a result, 8,679 actual voters saw Fink's name first, compared to the 4,989 who saw Williams's name first. Williams alleged the Santa Cruz County Elections Department, its Elections Director Melinda Meek, the Arizona Board of Supervisors, and Santa Cruz County (collectively, "the county"), who made and participated in the canvass, failed to alternate Fink's and Williams's name so that each appeared first on the ballot a substantially equal number of times. He maintained this constituted misconduct under A.R.S. § 16-672(A)(1). In response, Fink filed an answer, as well as a motion to dismiss, arguing the authority upon which Williams relied did not apply to and thus did not support his election contest.

¶4 At the expedited hearing later that month, the trial court directed Williams and Fink to file briefs addressing, in part, the appropriate remedy for an election statute violation and whether § 16-672

was applicable to pre-canvassing misconduct. The court also set an additional hearing for the following month.

¶5 At the second hearing in December, Williams argued the county had violated A.R.S. § 16-502(H) by alternating the names on the ballots alphabetically in a manner that resulted in 3,690 actual voters seeing Fink's name above his. Williams further contended the discrepancy was so large that it affected the outcome of the election. In response, Fink asserted the county had used a randomized and fair method to place the candidates' names first a substantially equal number of times. Fink also argued that Williams did not include statistical analysis to support his assertion that the election outcome was affected or made uncertain because of the county's alphabetical rotation of their names.

¶6 After oral argument, the trial court dismissed Williams's contest for failure to state a claim. The court reasoned the contest did not allege facts to support a claim under § 16-672(A)(1) because that statute relates to "misconduct that occurs during the election canvassing," which arises post-election, as opposed to how the ballots were printed and distributed, which is "more about [pre-election] procedure." The court added, even if § 16-672 applied, misconduct was not "alleged to survive under that statute." And even assuming misconduct had been alleged by Williams, the court reasoned Williams had not presented sufficient facts to show "he would have won the election or that there [was] at least some sort of doubt in who would have won the election" in the absence of the alleged violation. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Standard of Review

¶7 "In reviewing a trial court's decision to dismiss a complaint for failure to state a claim," we will affirm if we are "satisfied as a matter of law that plaintiff[] would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. Ariz. Dep't of Ins.*, 191 Ariz. 222, ¶ 4 (1998); *see* Ariz. R. Civ. P. 12(b)(6). In doing so, we review only the pleading and "consider the well-pled factual allegations contained therein." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, ¶ 7 (2008). "A Rule 12(b)(6) motion that refers to a . . . document attached to the complaint does not trigger Rule 56[, Ariz. R. Civ. P.,] treatment pursuant to Rule 12[(d)] because the referenced matter is not 'outside the pleading' within the meaning of the rule." *Strategic Dev. & Constr., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, ¶ 10 (App. 2010) (quoting Ariz. R. Civ. P. 12(d)). We review de novo orders granting a

motion to dismiss and issues of statutory interpretation. *Premier Physicians Grp., PLLC v. Navarro*, 240 Ariz. 193, ¶ 6 (2016).

Failure to State a Claim

¶8 Williams argues the trial court erred in dismissing his election contest for failure to state a claim because he met the jurisdictional requirements of A.R.S. § 16-673 by alleging the county had acted with misconduct pursuant to § 16-672(A)(1). As we understand his argument, Williams contends the county acted with misconduct when it did not follow § 16-502(H) in alternating the candidates' names on the ballots.[1]

¶9 To challenge an election, an elector must file a statement of contest providing "[t]he name and residence of the party contesting the election, and that he is an elector of the state and county in which he resides." § 16-673(A)(1). Additionally, the statement must include the name of the person whose right to office is being contested, the office being contested, and the particular grounds for the contest. § 16-673(A)(2)-(4).

¶10 A statement of contest similarly must meet the requirements of Rule 8, Ariz. R. Civ. P. *See Hancock v. Bisnar*, 212 Ariz. 344, ¶¶ 16-17 (2006) (contestant required to assert sufficient allegations under Rule 8(a) notice pleading requirements to establish court's jurisdiction to consider election contest). It must contain "a short and plain statement of the grounds for the court's jurisdiction," "a short and plain statement of the claim showing that the pleader is entitled to relief," and "a demand for the relief sought." Ariz. R. Civ. P. 8(a). "[C]onclusory statements are insufficient to state a claim upon which relief can be granted" and "a complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard under Rule 8." *Cullen*, 218 Ariz. 417, ¶ 7.

¶11 "[C]hallenges concerning alleged procedural violations of the election process must be brought prior to the actual election." *Sherman v. City of Tempe*, 202 Ariz. 339, ¶ 9 (2002); *see also Tilson v. Mofford*, 153 Ariz. 468, 470 (1987) ("[P]rocedures leading up to an election cannot be questioned after the people have voted."); *Kerby v. Griffin*, 48 Ariz. 434, 444

[1]The statute provides in pertinent part: "When there are . . . more than one candidate for a judicial office, the names of all such candidates shall be so alternated on the ballots used in each election district that the name of each candidate shall appear substantially an equal number of times in each possible location." § 16-502(H).

(1936) ("[I]f parties allow an election to proceed in violation of the law which prescribes the manner in which it shall be held, they may not, after the people have voted, then question the procedure."). For example, the Arizona Supreme Court has concluded that an objection made after an election concerning alleged defects in a nominating petition was "untenable." *Abbey v. Green*, 28 Ariz. 53, 63-64 (1925).

¶12 At the December 2018 hearing, Williams relied on § 16-672(A)(1) as the basis for contesting the election. The statute authorizes an election challenge "[f]or misconduct 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 canvass necessarily occurs after an election. *See Canvass*, Black's Law Dictionary (11th ed. 2019) (defining "canvass" as "[t]he counting of votes and certifying of results"); *see also* A.R.S. § 16-642 (directing that election canvass occur "not less than six days nor more than twenty days following the election"). Therefore, § 16-672(A)(1) does not apply because Williams's contest did not in any way challenge the post-election canvass.

¶13 Williams nevertheless argues that the standard in *Miller v. Picacho Elementary School District No. 33*, 179 Ariz. 178 (1994), "is a good example of misconduct and should be used in th[is] case." In *Miller*, the supreme court set aside the election because absentee ballots were personally distributed to absentee voters, in violation of the statute, and affected the election outcome. *Id.* at 178, 180. The "[d]istrict employees went to the homes of the electors and stood beside them as they voted." *Id.* at 180. The supreme court concluded the actions by the district employees "turned the election around" because all absentee votes were in favor of the district-sponsored budget override. *Id.* at 178, 180.

¶14 *Miller* is inapplicable here. The statutory violation in that case occurred during the voting process, not before. The district employees "delivered ballots to electors whom they knew. Although these electors did not ask for ballots, school employees urged them to vote and even encouraged them to vote for the override." *Id.* at 180. Here, by contrast, Williams's argument is based on purported misconduct with how the ballots were printed—something that necessarily occurred before the ballots could have been voted, and certainly well before post-election canvassing. We agree with the trial court; Williams's contest essentially challenged a pre-election procedure so § 16-672(A)(1) does not apply. Unlike the challenge in *Miller*, Williams's challenge to how the ballots were printed should have been—and could have been—addressed before the vote. Because he failed to address the county's method of alternating the

candidates' names on the ballots prior to the election, he cannot, after the election, question the county's procedure. *See Kerby*, 48 Ariz. at 444. Accordingly, we agree with the trial court's conclusion that Williams failed to state a claim upon which relief could be granted. *See Premier Physicians Grp.*, 240 Ariz. 193, ¶ 6.

Affected the Election Result

¶15 Even assuming § 16-672(A)(1) applied and the county acted with misconduct by not complying with § 16-502(H), Williams failed to show how the election results were affected or uncertain. *See Wenc v. Sierra Vista Unified Sch. Dist. No. 68*, 210 Ariz. 183, ¶ 10 (App. 2005).

¶16 "[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." *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). Without fraud, a party is required to show the misconduct "may have affected the result of the election." *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986).

¶17 The Arizona Supreme Court has developed a "rule for deducting illegal votes from otherwise valid election results when it is impossible to determine . . . for whom the ineligible voters actually voted." *Clay v. Town of Gilbert*, 160 Ariz. 335, 338 (App. 1989). Specifically, "unless it can be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidate having the largest number." *Id.* (quoting *Grounds v. Lawe*, 67 Ariz. 173, 183 (1948)). Applying this rule, illegal votes are proportionately deducted "from both candidates." *Id.* (quoting *Grounds*, 67 Ariz. at 183); *see also Huggins v. Superior Court*, 163 Ariz. 348, 352 (1990) (stating calculation based on "pro rata deduction of the illegal votes according to the number of votes cast for the respective candidates in [that] election district" (alteration in *Huggins*) (quoting *Grounds*, 67 Ariz. at 182)).

¶18 Williams argues on appeal that the county's alleged violation of § 16-502(H) caused 3,690 more actual voters to see Fink's name before Williams's name. He then contends that if "half of those 3,690 actual voters (1845) saw [Williams's] name on top of [Fink's] name and voted for [Williams] it would have changed the result of the election (e.g., [Williams] would have received 4,818 + 1,845 = 6,663 and [Fink] would have received 7,755 – 1,845 = 5,910)." Fink responds that Williams did not allege any action, by Fink or the county, that "likely changed the result of the

election." Specifically, Fink points out that he received more votes in every precinct, including the precincts in which Williams's name was listed first. Further, because Fink won by a margin of 59 percent to 41 percent in precincts where Williams's name was first, and 63 percent to 37 percent in the precincts where Fink's name was first, deducting 3,690 votes proportionally would not change the election outcome.

¶19 To apply proportional deduction to this case, the 3,690 actual votes on the ballots where Fink's name appeared above Williams's would have to be illegal and the voters' true intent impossible to determine. *See Clay*, 160 Ariz. at 338. Were we to assume the additional 3,690 ballots with Fink's name appearing before Williams's were in violation of § 16-502(H), they may be considered illegal. Next, while it may be possible to determine whether those 3,690 actual voters voted for Fink solely because his name was first, in doing so those voters would be subjected to a compromise of their right to ballot secrecy. *See Huggins*, 163 Ariz. at 351. Thus, applying proportional deduction would be appropriate to determine whether the election was affected.[2]

¶20 Fink received the most votes in all twenty-four precincts. Even subtracting the illegal votes, using proportional deduction, the election outcome would not be affected or rendered uncertain because he won by a substantial margin. Without a showing that the election result would have been affected or uncertain, Williams failed to state a claim for this reason as well. *See Premier Physicians Grp.*, 240 Ariz. 193, ¶ 6.

Failure to Join an Indispensable Party

¶21 Fink also argues Williams failed to join an indispensable party as he did not name the county in his statement of contest or amendment. Williams contends the county was not an indispensable party required to

[2] At oral argument, Williams maintained proportional deduction only applies in the context of "ineligible voters," which he contends does not apply here because the Santa Cruz County voters were "valid." We disagree. As discussed above, proportional deduction is appropriate to determine whether an election result was affected by a mistake, omission, or irregularity in directory matters by the election officer and it is impossible to determine for whom the ineligible voters voted. *See Findley*, 35 Ariz. at 269; *Clay*, 160 Ariz. at 338. Because Williams argues the election result was affected by the county's method of alternating names on ballots, and it is uncertain whether he would have received more votes if the names were alternated differently, the proportional deduction rule is appropriate.

contest the 2018 general election because he pled what was required under § 16-673. Whether a party is indispensable is a question of law that we review de novo. *Gerow v. Covill*, 192 Ariz. 9, ¶ 19 (App. 1998).

¶22 A party generally must be joined if without the party, "the court cannot accord complete relief among existing parties." Ariz. R. Civ. P. 19(a)(1)(A). In Williams's statement of contest and amendment he only named Fink as a contestee. Williams's statement of contest and amendment, however, requested the 2018 general election be invalidated, a special election be held at the county's expense, and the county pay for Williams's election campaign.

¶23 Williams's requested relief cannot be granted without the inclusion of the county. *See Int'l Bhd. of Elec. Workers, Local Union 640 v. Kayetan*, 119 Ariz. 508, 510 (App. 1978) ("The test of indispensability in Arizona is whether the absent person's interest in the controversy is such that no final judgment or decree could be entered . . . ." (quoting *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 549 (1971)). The county's interest in the trial court's ruling is such that no final judgment may be entered because Williams seeks relief that only the county could give him.

¶24 Williams, however, only attempted to join the county after the November 2018 hearing. Time requirements for filing an election contest are strictly construed. *Hunsaker v. Deal*, 135 Ariz. 616, 617 (App. 1983). His failure to include the county within the five-day statutory requirement "is fatal to his right to have the election contested." *Donaghey v. Ariz. Att'y Gen.*, 120 Ariz. 93, 95 (1978). Not only is the county an indispensable party, but Williams was required to join the county as a party within the five-day statutory time limit.[3] *See* § 16-673(A). Without joining an indispensable

[3]Williams's statement of contest incorrectly alleged the county had violated A.R.S. § 16-464(A). Although Williams's amendment cited the correct statute, it was untimely. *See* § 16-673(A). As stated above, time requirements are strictly construed for election contests. *Hunsaker*, 135 Ariz. at 617. And the failure to comply with the statutory requirements "is fatal" to Williams's right to contest the election. *Donaghey*, 120 Ariz. at 95. Because Williams sought relief under an improper statute and did not amend his contest within the five-day statutory period, he failed to show he was entitled to relief. *See* Ariz. R. Civ. P. 8(a), 12(b)(6). We may therefore affirm the trial court's dismissal on this ground as well. *See Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9 (App. 2006) (we may affirm trial court's ruling for any correct reason apparent in record).

party, especially within the statutory timeframe, Williams failed to state a claim for this reason as well. *See Premier Physicians Grp.*, 240 Ariz. 193, ¶ 6; *see also Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9 (App. 2006).

Attorney Fees and Costs

¶25 Both parties request their costs on appeal pursuant to Rule 21, Ariz. R. Civ. App. P. Fink also requests his attorney fees, pursuant to Rule 25, Ariz. R. Civ. App. P., and A.R.S. § 12-349. He argues Williams "had no reasonable basis to file [the] action or appeal" and "is now wasting time, money and judicial resources on this action." In our discretion, we grant Fink his attorney fees because Williams's appeal was frivolous. *See* § 12-349(A); Ariz. R. Civ. App. P. 25; *see also Johnson v. Brimlow*, 164 Ariz. 218, 222 (App. 1990) ("[A] frivolous appeal is one brought for an improper purpose or based on issues which are unsupported by any reasonable legal theory."); *City of Phoenix v. Bellamy*, 153 Ariz. 363, 367-68 (App. 1987) (appeal not frivolous if reasonable people may differ on legal questions presented). Even assuming portions of Williams's arguments had merit, he never provided a plausible argument that any irregularities affected the outcome of the election. Indeed, the data—which demonstrated that he lost by a substantial margin even in those precincts where his name appeared first—unambiguously demonstrated the contrary. We impose sanctions "with 'great reservation,'" but we cannot ignore that Williams brought this appeal with no reasonable chance of securing relief under settled legal standards. *Ariz. Tax Research Ass'n v. Dep't of Revenue*, 163 Ariz. 255, 258 (1989) (quoting *Molever v. Roush,* 152 Ariz. 367, 375 (App. 1986); *Price v. Price,* 134 Ariz. 112, 114 (App. 1982)). Additionally, because Fink is the prevailing party on appeal, he is entitled to his costs. *See Braillard v. Maricopa County*, 224 Ariz. 481, ¶ 60 (App. 2010).

Disposition

¶26 For the reasons stated above, we affirm.