NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
OCT 28 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BETH FORD, in her official capacity as Pima County Treasurer,

Plaintiff/Appellee,

and

REPUBLICAN PARTY OF PIMA COUNTY, a political organization; PIMA COUNTY, a political subdivision of the State of Arizona, by and through its Board of Supervisors and County Administrator; and REGIONAL TRANSPORTATION AUTHORITY, an Arizona special taxing district,

Counterdefendants/Appellees,

v.

PIMA COUNTY COMMITTEE OF THE ARIZONA LIBERTARIAN PARTY, INC.,

Counterclaimant/Appellant.

2 CA-CV 2010-0001
DEPARMENT B

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20085016

Honorable Charles V. Harrington, Judge

REVERSED AND REMANDED

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V Á S Q U E Z, Presiding Judge.

¶1 In this action for declaratory relief filed by Beth Ford, in her capacity as Pima County Treasurer (the Treasurer), the Pima County Committee of the Arizona Libertarian Party, Inc. (Libertarian Party) appeals from the trial court's judgment on the pleadings authorizing the disposal of voting ballots from a 2006 special election and dismissing its counterclaim.[1] On appeal, the Libertarian Party contends the court erred in finding its counterclaim failed to state a claim upon which relief could be granted and in

[1]In the proceedings below, the Libertarian Party incorrectly labeled its counterclaim a cross-claim. However, the parties do not dispute that it is a counterclaim, and for ease of discussion, we refer to it in this appeal by its proper designation.

refusing to consider a memorandum of supplemental authority filed shortly before a hearing on the motion to dismiss. For the reasons set forth below, we reverse the court's order of dismissal.

Facts and Procedural Background

¶2 In May 2006, a special election was held in Pima County concerning the creation of a Regional Transportation Authority (RTA), a special taxing district. After the election, the Democratic Party of Pima County (Democratic Party) sued for the disclosure of Pima County's voting databases from the special election. After final judgment was entered and the time for appeal in that action had expired, the Treasurer filed this declaratory judgment action seeking guidance from the superior court as to whether it was permitted to destroy the ballots pursuant to A.R.S. § 16-624. The complaint listed the Libertarian Party, the Democratic Party, the Republican Party of Pima County (Republican Party), Pima County, and the RTA as defendants.[2] All of the defendants filed answers opposing declaratory relief, and the RTA and Libertarian Party filed counterclaims. The Democratic Party joined in the Libertarian Party's counterclaim. Pima County then filed a motion to dismiss the Libertarian Party's counterclaim. The Treasurer joined in that motion, and the Republican Party filed a motion for judgment on the pleadings, arguing the Treasurer was required to destroy the ballots.

[2]The Treasurer also listed the Green Party of Pima County as a defendant, but it never filed a responsive pleading.

¶3 After oral argument, the trial court granted Pima County's motion to dismiss the counterclaim and subsequently summarily denied the Democratic Party's motion for reconsideration. This court dismissed the Libertarian and Democratic Parties' appeal from the trial court's dismissal of the counterclaim, because a final, appealable order had not been entered in the case. After jurisdiction was revested in the trial court, it held a second hearing on the Republican Party's motion for judgment on the pleadings, which the court granted, ordering the ballots disposed of pursuant to § 16-624(A). This timely appeal followed, and we have jurisdiction pursuant to A.R.S. § 12-2101(B).

Standard of Review

¶4 In reviewing the trial court's ruling on the motion to dismiss, we assume the allegations contained in the counterclaim are true and will affirm the dismissal only if the Libertarian Party would not have been entitled to relief on any interpretation of the facts presented. *See McCloud v. State*, 217 Ariz. 82, ¶ 21, 170 P.3d 691, 699 (App. 2007). Similarly, because the Libertarian Party opposed the motion for summary judgment, we take its material denials and allegations in its answer to the complaint as true and will affirm the judgment only if the Republican Party "[wa]s clearly entitled to judgment." *Food for Health Co., Inc. v. 3839 Joint Venture*, 129 Ariz. 103, 106, 628 P.2d 986, 989 (App. 1981).

Discussion

I. Mootness

¶5 Preliminarily, the Treasurer, Pima County, the Republican Party, and the RTA (collectively, Appellees) all contend the Libertarian Party has challenged only the

dismissal of its counterclaim and not the trial court's final judgment directing the Treasurer to dispose of the election ballots in accordance with § 16-624(A). Appellees therefore argue the Libertarian Party "has waived any claim of error associated with the order granting the Republican Party's motion for judgment on the pleadings, thereby mooting the . . . appeal." "A decision [is] moot for purposes of appeal where . . . action by the reviewing court would have no effect on the parties." *Vinson v. Marton & Assocs.*, 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. 1988). However, prior to the appeal, the court ordered that "such portion of [its] order [on the motion for judgment on the pleadings] requiring destruction of the Special Election Ballots is stayed pending appeal and final disposition of all claims in this case." Thus, a reversal of the court's dismissal of the counterclaim would require that the ballots be preserved until the counterclaim has been resolved. The appeal therefore is not moot.

II. Statement of Claim

A. Application of § 16-673

¶6 The Libertarian Party contends the trial court erred in concluding its counterclaim was untimely because the claim constituted an election contest that was required to be filed within five days of the election canvass. *See* A.R.S. § 16-673. It argues that although it was seeking a determination that fraud had occurred in the RTA election, it was not asking that the results of that election be set aside, but was seeking prospective relief only. Therefore, it maintains, the time limits set forth in § 16-673 do not apply to its claim. Alternatively, it argues that even if its counterclaim were to be construed as an election contest, § 16-673 does not adequately protect the purity and

ensure the fairness of elections, as required by article II, § 21 and article VII, § 12 of the Arizona Constitution. It argues that there is no adequate remedy at law to protect the integrity of future elections and that the court abused its discretion by not exercising equity jurisdiction to consider the lawsuit.

¶7 An election contest is a lawsuit that "challenge[s] the results of the . . . election." *Katan v. City of Prescott*, 223 Ariz. 179, ¶ 10, 221 P.3d 370, 373 (App. 2009). In other words, the purpose of an election contest is for the court, "[a]fter hearing the proofs and allegations of the parties, . . . [to] pronounce judgment, either confirming or annulling and setting aside the election." A.R.S. § 16-676. In its counterclaim, the Libertarian Party does not seek to annul and set aside the results of any election. Rather, it stated the claim as one for injunctive relief based on potential tampering with future election results.

¶8 In arguing the Libertarian Party's counterclaim amounted to an election contest, Appellees emphasize the fact that the Libertarian Party has "ask[ed] th[e] Court[s] to determine . . . whether the election was 'rigged.'" And the trial court similarly concluded that because § 16-672 and § 16-673 provide a remedy for "rigged" elections, the only recourse is through those statutes. Although the Libertarian Party requested a finding that tampering had occurred in a past election, its counterclaim plainly states that it was seeking neither a recount nor a finding of fraud or tampering as a means to invalidate the results of the RTA election.

¶9 In its counterclaim, the Libertarian Party alleged there was "substantial evidence of tampering by Pima County elections employees" in the RTA election and

asserted it was entitled to an injunction prohibiting such tampering in future elections. It also requested leave to examine the ballots, time for discovery, and a hearing to determine whether ballot tampering had occurred in the past, which would necessitate a permanent injunction of such actions in the future.

¶10 Given the nature of the claims asserted in the counterclaim, the Libertarian Party's request for a finding of past tampering reflects its understanding that a finding of past harm is an essential element in establishing its entitlement to prospective injunctive relief to prevent a future recurrence. *See Dowling v. Stapely*, 218 Ariz. 80, ¶ 21, 179 P.3d 960, 967 (App. 2008) (to state claim for injunctive relief, applicant must allege past act occurred and likely to reoccur in future and cause applicant harm). Thus, although the Libertarian Party might be required to show there had been fraud or tampering in connection with the 2006 Special Election, in order to establish it is entitled to the relief requested in this action, any finding in that regard merely would be incidental to the court's determination of whether to grant the injunctive relief requested. That remedy is wholly prospective in nature and relates only to future elections; it is not directed at completed elections like the 2006 Special Election. Because granting injunctive relief would not require annulling or setting aside the RTA election results, the Libertarian Party's claim is not an election contest and thus not subject to the five-day filing period. The trial court erred in concluding, pursuant to § 16-673, that the counterclaim was filed untimely.

B. Separation of powers

¶11 In their motion to dismiss the counterclaim, Appellees also argued the trial court lacked subject matter jurisdiction because there was no statutory authority authorizing the Libertarian Party to "request[] that it be allowed to conduct a criminal investigation, [have] . . . the Court make a finding confirming criminal conduct occurred, and then have the Court fashion a remedy" for the criminal conduct. The court agreed, concluding that, "[a]ssuming for the sake of argument that the [counter]claim is not an election challenge, then it can only be a request for this Court to conduct an investigation into criminal conduct." The Libertarian Party asserts this conclusion is erroneous and argues that whether the wrongful actions alleged in the counterclaim amount to criminal conduct is irrelevant to a determination of its civil claim. We agree.

¶12 "It is not uncommon to find allegations in civil action complaints that charge defendants with a violation of a criminal statute." *Griffin v. Buzard*, 86 Ariz. 166, 173, 342 P.2d 201, 205 (1959). Indeed, criminal and civil statutes contain different burdens of proof, and whether a defendant is liable civilly based upon certain acts is a separate inquiry from whether he or she may be convicted in a criminal proceeding. *See Pfeil v. Smith*, 183 Ariz. 63, 65, 900 P.2d 12, 14 (App. 1995). As the Libertarian Party points out, A.R.S. § 16-1010 makes it a felony for "[a] person charged with performance of any duty under any law relating to elections [to] knowingly refuse[] to perform such duty, or . . . , in his official capacity, [to] knowingly act[] in violation of any provision of such law." Yet parties may nevertheless initiate civil proceedings and seek civil remedies for any harm arising out of an election official's action or inaction that also would give

rise to criminal culpability. *See Buzard v. Griffin*, 89 Ariz. 42, 44, 358 P.2d 155, 156 (1961) (noting "[a]lthough this is not a criminal action, certain of the allegations in the statement of election contest charge appellant with violations" of penal provisions of election law).

¶13 In addition, there are many "other instances in which civil remedies are permitted for acts which also carry criminal penalties, e.g., wrongful death actions and murder or manslaughter criminal charges and criminal prosecution under A.R.S. § 45-112 and civil actions for damages for diverting water from a stream." *Acolla v. Peralta*, 150 Ariz. 35, 37-38, 721 P.2d 1162, 1164-65 (App. 1986) (private "RICO" cause of action permissible for damages based on criminal actions). *See also Barnes v. Vozack*, 113 Ariz. 269, 550 P.2d 1070 (1976) (civil cause of action based on criminal fraud); *Smith v. Superior Court*, 17 Ariz. App. 79, 80, 495 P.2d 519, 520 (1972) (involving simultaneous criminal and civil proceedings arising out of common nucleus of fact), *overruled in part on other grounds by State v. Buchanan*, 110 Ariz. 285, 518 P.2d 108 (1974); *Williams v. Baugh*, 214 Ariz. 471, 154 P.3d 373 (App. 2007) (civil proceedings for aggravated assault and battery following guilty plea to aggravated assault and burglary). Therefore, even though the Libertarian Party may allege and then produce evidence of conduct that may well amount to a criminal violation, this does not convert its claim for injunctive relief into an impermissible "investigation into criminal conduct." Rather, it is simply a necessary part of establishing its claim for injunctive relief. The trial court therefore erred in dismissing the counterclaim on this basis.

C. Justiciable controversy

¶14 As an alternative ground for their motion below and for affirming the trial court on appeal, Appellees contend that the "well pled fact allegations of the [counterc]laim were not susceptible to any interpretation that there was a good faith basis for believing an impending election was going to be compromised, such that the Trial Court's assistance was required at that juncture." It is unclear whether Appellees intend by this argument to challenge the sufficiency of the counterclaim separately from their argument that the Libertarian Party's claim constituted an investigation into a criminal action. But even if this were Appellees' intention, the court does not appear to have considered or ruled separately on this issue apart from its conclusions that the counterclaim was barred because it was an untimely election contest or because it was a "request for th[e] court to conduct an investigation into criminal conduct."[3]

¶15 Generally, when reviewing a trial court's decision to dismiss a counterclaim for failure to state a claim, "we assume as true the facts alleged in the [counterclaim] and will not affirm the dismissal unless satisfied as a matter of law that [the counterclaimant] would not be entitled to relief under any interpretation of the facts susceptible of proof."[4] *Fid. Sec. Life Ins. Co. v. State*, 191 Ariz. 222, ¶ 4, 954 P.2d 580,

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[3]The trial court explicitly stated that because of its ruling on the first two issues, it was not considering the argument that the Attorney General is an indispensable party.

[4]The factual allegations in the counterclaim incorporate findings of fact and conclusions of law issued in a minute entry from a different, although apparently related, cause of action. Based on the parties' briefs, it appears they and the trial court were familiar with the minute entry; however, the minute entry does not appear in the record on appeal. Generally, it is the appellant's "burden to see that all documents necessary to

582 (1998); *see also Chalpin v. Snyder*, 220 Ariz. 413, ¶ 18, 207 P.3d 666, 671 (App. 2008). But, because Appellees' argument is unclear, and the trial court has not ruled on the issue in the first instance, we decline to consider it further. *See Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 179 Ariz. 5, 13, 875 P.2d 1310, 1318 (App. 1993) (remanding to trial court for determination of issue court did not reach by virtue of erroneous ruling on other issue).

III. Supplemental authority

¶16 The Libertarian Party also argues the trial court erred in not considering its supplemental citation of additional authority, which it filed on January 13, 2009, the day before the hearing on the motion to dismiss.[5] However, because we are reversing the trial court's ruling on the motion to dismiss and remanding this matter for further proceedings, the issue is moot and we need not address it.

IV. Attorney fees

¶17 The Libertarian Party has requested an award of attorney fees under the private attorney general doctrine. The private attorney general doctrine gives courts

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his arguments on appeal were made part of the record on appeal." *Plattner v. State Farm Mut. Auto. Ins. Co.*, 168 Ariz. 311, 319, 812 P.2d 1129, 1137 (App. 1991). "[I]t is not the responsibility of the court to supplement the appellate record in a civil case where the parties have done nothing in that regard." *Am. Nat. Fire Ins. Co. v. Esquire Labs of Ariz., Inc.*, 143 Ariz. 512, 520, 694 P.2d 800, 808 (App. 1984). And, we normally would presume the missing record supports the trial court's determination. *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). But, here, the missing record relates to an issue Appellees have raised on appeal and, as we note above, the court did not address this issue separately.

[5]The Libertarian Party contends the supplemental authority was filed on January 6, 2009, but the superior court date stamp indicates it was filed on January 13.

discretion to award fees "to a party who has vindicated a right that: (1) benefits a large number of people; (2) requires private enforcement; and (3) is of societal importance." *Arnold v. Ariz. Dep't of Health Servs.*, 160 Ariz. 593, 609, 775 P.2d 521, 537 (1989). If the Libertarian Party ultimately is successful in obtaining an injunction, it may be entitled to fees under this doctrine. However, at this point, it has not vindicated any rights, and it is impossible to determine whether it is likely to succeed in doing so in the future. Therefore, in our discretion we deny the Libertarian Party's request for attorney fees at this time, "without prejudice . . . to again request them below" if it succeeds on the merits of the litigation. *See Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 30, 158 P.3d 232, 242 (App. 2007).

Disposition

¶18 For the reasons set forth above, we conclude the trial court erred in dismissing the Libertarian Party's counterclaim on the grounds that it constituted an untimely filed election contest and amounted instead to a request for the court to conduct a criminal investigation. We do not decide whether the counterclaim otherwise stated a claim for injunctive relief and remand this matter to the trial court for further proceedings consistent with our decision.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge