

DA 19-0248

## IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 291

RONNIE BURNS, Individually, as an Elector, and a  
Write-in Candidate for Musselshell County Sheriff,

Petitioner and Appellee,

v.

COUNTY OF MUSSELSHELL, STATE OF MONTANA ELECTION  
ADMINISTRATOR CHERYL TOMASSI, COUNTING BOARDS,  
CANVASSING BOARD, and RECOUNT BOARD,

Respondents and Appellees,

and

SHAWN L. LESNIK, elected candidate,

Intervenor and Appellant.

APPEAL FROM: District Court of the Fourteenth Judicial District,  
In and For the County of Musselshell, Cause No. DV 18-73  
Honorable Katherine M. Bidegaray, Presiding Judge

## COUNSEL OF RECORD:

For Appellant:

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For Appellee Ronnie Burns:

Chris J. Gallus, Gallus Law, Helena, Montana

For County Appellees:

Peter Michael Meloy, Meloy Law Firm, Helena, Montana

Submitted on Briefs: October 23, 2019

Decided: December 17, 2019

Filed:



Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Shawn L. Lesnik appeals from the order of the Fourteenth Judicial District Court, Musselshell County, denying his motion for attorney fees under either the private attorney general doctrine or § 13-36-205, MCA. Lesnik argues both theories for attorney fees on appeal. Because we agree the District Court abused its discretion in denying fees under the private attorney general doctrine, we decline to consider Lesnik's arguments under § 13-36-205, MCA. We reverse the District Court and remand with instructions for further proceedings in accordance with this Opinion.

#### **PROCEDURAL AND FACTUAL BACKGROUND**

¶2 Ronnie Burns and Lesnik both sought the Republican nomination for Sheriff of Musselshell County in the 2018 primary election. Lesnik won the primary and his name appeared on the general election ballot in November 2018 as the Republican nominee. After the primary, Burns filed his intention to run as a write-in candidate for the race with the election administrator for Musselshell County, Cheryl Tomassi, pursuant to § 13-10-211, MCA. Burns included fourteen different variations of his name with his declaration.

¶3 After the official canvass of the vote on November 19, 2018, Lesnik was declared the winner, defeating Burns by forty-one votes. Burns filed a petition for a court-ordered recount with the District Court on November 26, 2018. Burns asserted votes cast for him were not correctly counted and Tomassi failed to follow the correct statutory procedures. Burns served his petition on the County but did not serve his petition on Lesnik.

¶4 On November 30, 2018, Burns filed a motion for a temporary restraining order and preliminary injunction to prevent the County from seating a Sheriff candidate before the resolution of Burns' recount petition and attached affidavits from himself and election judges, asserting irregularities in the counting process. The District Court issued an order for preliminary injunction and temporary restraining order that same day and set a show cause hearing for December 7, 2018. Once again, Burns did not serve Lesnik.

¶5 On December 6, the County and Burns stipulated to stay the show cause hearing. They stipulated probable cause existed for a court-ordered recount and requested the court order one. They agreed to negotiate the legal parameters and framework for conducting the recount and that Burns should not be required to post a bond for the costs of the recount. The court entered an order the same day, approving the stipulations.

¶6 On December 19, the County and Burns stipulated that Tomassi should relinquish all access and control over any and all ballots related to the election and give them to the County attorney. They agreed to conduct a recount to begin at 9 a.m. on December 21, 2018. On the morning of December 21, Burns filed a motion to set parameters for the recount. The motion stated the County did not oppose the proposed parameters. The court signed an order approving the parameters set forth by Burns, which included:

1. The Court directs that the Board shall count any of the 14 variations contained in the application, which includes last-name-only;
2. The recount board should consider other oddities and may count, in its own wisdom, obvious additional markings such as "Ronnie Burns (or other listed or acceptable variations) for Sheriff" without rejecting the vote solely due to "for Sheriff";
3. The recount Board will be allowed to consider variations which might not necessarily be on the application for write-in candidacy;

4. The board is permitted to determine voter intent pursuant to MCA 13-15-206(4) taking into account MCA Sec. 13-15-102 or any other statute that assists them in determining voter intent so long as all ballots are treated equally, and the voter's intent or expression can be gleaned without speculation as objectively determined by a majority of the board.
5. The Board should take notice a voter's intent be clear and that objective standards control;
6. The board will not reject ballots solely on the basis of blackening the oval for the reasons stated above, and so long as the voter's intent can otherwise be determined without speculation.
7. The Court will notify the County upon conclusion of the present matter.
8. The County shall not certify the election prior to conclusion of this proceeding so the Petitioner has an opportunity to present any outstanding issues prior to certification.

¶7 Lesnik attended the recount in person on December 21, 2019. Upon receiving a copy of the agreed parameters at the recount, Lesnik contacted his attorney in Billings. Lesnik's attorney sought an emergency hearing to challenge the parameters and the court held an emergency hearing that same day. At the hearing, Lesnik made an oral motion to intervene in the case and to challenge the parameters as violations of § 13-15-206, MCA. The court set an expedited briefing schedule on the issues and set another hearing for December 27. Burns filed a brief renewing his objection to Lesnik's intervention and Lesnik's motion to vacate the court's orders. Lesnik filed a brief addressing his oral motions to intervene and halt the recount proceedings due to illegality of the parameters for the recount. He requested an award of attorney fees. The County filed a brief declining to make an argument in respect to the legal issues raised and stating it would "administer the procedures to complete this election as determined by the Court."

¶8 On the morning of the second hearing, the court granted Lesnik's motion to intervene in the case. After hearing arguments, the court found Burns had failed to serve

Lesnik with the original petition for recount in violation of § 13-16-302, MCA; Burns had failed to have the court hold the statutorily required probable cause hearing within five days of the petition's filing in violation of § 13-16-301(3), MCA; and Burns and the County agreed to procedures and parameters for the recount that were not consistent with the requirements of § 13-15-206, MCA. The court vacated its prior orders and ordered further briefing on Lesnik's request for attorney fees.

¶9 After further briefing, the District Court denied Lesnik's request for attorney fees. In its order denying attorney fees, the District Court considered the three factors this Court adopted in *Montanans for the Responsible Use of the School Trust v. State ex rel. Bd. of Land Commissioners*, 1999 MT 263, ¶¶ 66-67, 296 Mont. 402, 989 P.2d 800 (*Montrust*). The court explained that it vacated its prior orders on three grounds: (1) Burns failed to serve Lesnik with the Petition; (2) Burns did not have the Court hold a hearing on his petition for recount within the statutorily mandated five-day period; and (3) Burns entered into stipulations with Musselshell County setting procedures and parameters of a recount that were not consistent with Montana election laws. The District Court recognized the societal importance of the public policy vindicated by the litigation, writing the court's "role in maintaining the sanctity and integrity of the electoral process for the people is one of its most important responsibilities." The court explained, however, that although the County and Burns entered into stipulations setting procedures and parameters that were not consistent with the statutes intended to guarantee the integrity of the electoral process, the recount did not take place and Lesnik was not prevented from taking his office on schedule. Further, although Lesnik was not served and a hearing on the petition was not held, Lesnik

was given sufficient notice of the recount proceedings to intervene in the proceedings the day of the scheduled recount and was given the opportunity to be heard at an emergency hearing. Finally, the court concluded although “Burns and Musselshell County engaged in conduct that led the Court to set aside its recount orders and stop a recount[, it] does not mean that Burns’ Petition for recount was without merit” and it “does not mean that Lesnik and his attorney bore a burden that was any more disproportionate to Lesnik’s stake in the litigation.” It concluded Lesnik had not met the criteria for an award of attorney fees pursuant to the private attorney general doctrine.

### STANDARD OF REVIEW

¶10 We review an order granting or denying attorney fees under the private attorney general doctrine for an abuse of discretion. *Bitterroot River Protective Ass’n v. Bitterroot Conservation Dist.*, 2011 MT 51, ¶¶ 9-10, 359 Mont. 393, 251 P.3d 131 (*BRPA III*); see also *Clark Fork Coal. v. Tubbs*, 2017 MT 184, ¶ 9, 388 Mont. 205, 399 P.3d 295. A district court’s determination whether legal authority exists for an award of attorney fees is a conclusion of law we review for correctness. *Clark Fork Coal.*, ¶ 9.

### DISCUSSION

¶11 Lesnik argues the District Court abused its discretion in denying him attorney fees under the private attorney general doctrine, because Lesnik was forced to intervene in the recount proceedings when the County’s attorneys failed to defend the electoral process. He argues the three factors of the private attorney general doctrine all support an award of fees. First, he vindicated the fundamental constitutional rights of all Musselshell County voters to select a candidate by popular vote in a free and fair election as protected by

Article II, Section 1, and Article IV, Section 5, of the Montana Constitution. Second, it was necessary for him to intervene and take over the defense of Montana’s electoral process because the County failed to enforce and follow the statutes detailing the processes for conducting a recount. Finally, all Musselshell County voters benefited from the enforcement of election laws and the seating of a candidate elected by popular vote.

¶12 The County and Burns both argue the District Court properly denied attorney fees because the private attorney general doctrine is only applicable when litigation vindicates a constitutional interest and Lesnik raised only statutory claims before the District Court. The County argues the constitutional interests Lesnik identifies in his briefing are only “tangentially related to our constitutionally based electoral process.” The County maintains Lesnik persuaded the District Court it was improper to conduct the recount under the statutes governing elections, but his arguments and the court’s rulings were not based on the application of any constitutional rights or interests. Further, the County argues elected officials did not fail to perform any duty or enforce any interest on behalf of the citizens of Musselshell County. Finally, the County argues Lesnik’s attorney performed the same legal services she would have performed had the proper procedure been followed from the beginning and an award of fees would be unjust under the circumstances.

¶13 Absent a specific contractual or statutory provision, a prevailing party in a civil case is generally not entitled to attorney fees. *BRPA III*, ¶ 20. The private attorney general doctrine, however, is an equitable exception to this general rule, “when the government, for some reason, fails to properly enforce interests which are significant to its citizens” and private citizens must take up litigation to vindicate those interests. *Montrust*, ¶ 64 (quoting

*In re Dearborn Drainage Area*, 240 Mont. 39, 43, 782 P.2d 898, 900 (1989)). In determining whether to award attorney fees under this doctrine, a court must consider the following factors: “(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision.” *BRPA III*, ¶ 20 (quoting *Montrust*, ¶ 66). The court must also consider whether awarding fees would be unjust under the circumstances. *BRPA III*, ¶ 20. A court may award fees under the private attorney general doctrine “only in litigation vindicating constitutional interests.” *Clark Fork Coal.*, ¶ 15 (quoting *Am. Cancer Soc’y v. State*, 2004 MT 376, ¶ 21, 325 Mont. 70, 103 P.3d 1085).

¶14 The parties disagree whether Lesnik’s intervention in the recount proceedings vindicated constitutional interests. Lesnik’s emergency motions and briefing focused on the failure of the County to follow statutorily required processes for conducting a recount. While the private attorney general doctrine is only available in litigation vindicating constitutional interests, the doctrine does not require a party bring a direct constitutional challenge. *See BRPA III*, ¶ 26. In both *BRPA III* and *Clark Fork Coalition* we addressed whether statutory challenges vindicated constitutional interests.

¶15 In *BRPA III*, this Court affirmed an award of attorney fees under the private attorney general doctrine. *BRPA III*, ¶ 49. The underlying litigation focused on the interpretation of two statutes: whether the Mitchell Slough was a “natural, perennial-flowing stream” for purposes of the Natural Streambed and Land Preservation Act of 1975 and whether it was a “natural water body” for purposes of the Stream Access Law. We concluded attorney



fees under the private attorney general doctrine were proper as the statutes at issue “directly implemented constitutional provisions.” *BRPA III*, ¶ 23. We explained the Legislature enacted the statutes at issue “to accomplish the goals of the constitution” and “[o]ur interpretation of the statute[s] was expressly premised upon its constitutional purpose.” *BRPA III*, ¶ 23 (internal quotations omitted). Although based on statutory interpretation, “constitutional concerns were integrated into the rationale underlying the decision.” *BRPA III*, ¶ 25. We concluded the “extent of the implication of constitutional issues within” our decision interpreting the statutes “satisfy[ies] the requirement that constitutional interests be vindicated to demonstrate the societal importance of the litigation.” *BRPA III*, ¶ 26.

¶16 In *Clark Fork Coalition*, we distinguished *BRPA III* to reverse an award of attorney fees under the private attorney general doctrine. *Clark Fork Coal.*, ¶ 23. In that litigation, we determined an administrative rule from the Department of Natural Resources and Conservation conflicted with the Montana Water Use Act. We explained, although the Montana Water Use Act “implements the mandates of Article IX, Section 3, of the Montana Constitution, the Department’s rule is a step removed” and no constitutional concerns were “integrated into the rationale.” *Clark Fork Coal.*, ¶ 22 (internal quotations omitted). Thus, we held “[t]he litigation did not directly implement constitutional provisions but centered only on construction of the” Montana Water Use Act and whether the administrative rule was consistent with that authorizing statute. *Clark Fork Coal.*, ¶ 22 (internal quotations omitted). The challenge did not involve application of a statute implementing constitutional provisions to the facts of a case, but whether an administrative

rule was consistent with an authorizing statute that happened to implement constitutional provisions.

¶17 This case differs from *Clark Fork Coalition* in important respects. This is not a challenge to an administrative rule implementing the statute. Rather, Burns and the County agreed to parameters that failed to apply the requirements of § 13-15-206, MCA. Thus, to determine whether Lesnik vindicated constitutional interests, we must first examine whether the election statutes at issue “directly implemented constitutional provisions.” *Clark Fork Coal.*, ¶ 18 (quoting *BRPA III*, ¶ 25). The District Court halted the recount due to three statutory violations. We focus our analysis on the third violation: the agreement between the County and Burns to set procedures and parameters for the recount that were not consistent with § 13-15-206, MCA.<sup>1</sup>

¶18 The 2003 Legislature enacted § 13-15-206, MCA, as part of HB 155. In the preamble to the bill, the Legislature explained HB 155 was a response to the United States Supreme Court decision in *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000), which “found that the lack of uniform procedures for determining voter intent in Florida during the 2000 presidential election led to a violation of the U.S. Constitution’s Equal Protection Clause

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<sup>1</sup>Section 13-15-206(1), MCA, mandates that any recount board in Montana must “count and determine the validity of each vote in a uniform manner as provided in this section.” The statute provides specific instructions for counting write-in votes, which state in pertinent part: “A write-in vote may be counted only if . . . the write-in vote identifies an individual by a designation filed pursuant to 13-10-211(1)(a) . . . and . . . the oval, box, or other designated voting area on the ballot is marked.” Section 13-15-206(5), MCA. The statute further instructs “[a] vote is not valid and may not be counted if the elector’s choice cannot be determined as provided in this section.” Section 13-15-206(6), MCA. The agreed parameters, however, instructed the recount board to “consider variations which might not necessarily be on the application for write-in candidacy” and “the board will not reject ballots solely on the basis of blackening the oval.” As the District Court found, these parameters violated the plain language requirements of § 13-15-206(5), MCA.

of the 14th Amendment.” 2003 Mont. Laws ch. 414, pmbl. 1519. The Legislature determined it needed to “define uniform standards and procedures to provide equal protection for votes cast by Montana voters” and to “require all counting boards to use the uniform counting procedures specified.” 2003 Mont. Laws ch. 414, pmbl. 1519-20.

¶19 In fact, this Court relied on the constitutional principles outlined in *Bush v. Gore* to interpret § 13-15-206, MCA, in *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 109 P.3d 219. Quoting the Supreme Court, we explained “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Big Spring*, ¶ 18 (quoting *Bush*, 531 U.S. at 105, 121 S. Ct. at 530). The United States Supreme Court faulted the court-ordered recount in *Bush* for “the absence of specific standards” to determine the “intent of the voter” and held “[t]he formulation of uniform rule to determine intent . . . is practicable and, we conclude, necessary” to ensure the right to equal protection and protect the right to vote. *Big Spring*, ¶ 19 (quoting *Bush*, 531 U.S. at 105-06, 121 S. Ct. at 530).

In light of the principles outlined in *Bush*, we held:

Montana’s statutes provide that the ballots be treated equally “among jurisdictions using similar ballot types and voting systems.” In other words, uniformity must be on a statewide basis, not just how ballots are treated within a particular locale. The Supreme Court concluded in *Bush* that allowing county officials to exercise their individual discretion in interpreting ballots violated the Equal Protection Clause of the United States Constitution. Moreover, the overriding goal of the 2003 amendments to Montana’s election code was statewide uniformity. Nothing in the 2003 amendments suggests a desire on the part of the Legislature to give increased discretion to local election officials.

*Big Spring*, ¶ 28 (quoting § 13-15-206(7), MCA).

¶20 The agreed parameters in this case implicate the heart of the constitutional purpose of HB 155. Despite stating “that objective standards control,” the agreed recount parameters eliminated the specific uniform standards for determining voter intent laid out by the Legislature—the standards intended to ensure counting boards did not violate the constitutionally protected rights to vote and to equal protection. Although Lesnik’s challenges to the recount were couched in terms of statutory violations, this Court had already determined in *Big Spring* that § 13-15-206, MCA, implements the constitutional requirement to ensure equal protection of voting rights and the statute must be interpreted in light of those purposes. Thus, litigation to enforce the uniform requirements of § 13-15-206, MCA, is litigation to vindicate constitutional interests.

¶21 The District Court discounted the strength or societal importance of the public policy vindicated by the litigation because the recount was halted and Lesnik was not prevented from taking his office on schedule. This may be true, but this is only because Lesnik *successfully* litigated important public policies. It is the vindication of constitutional interests that demonstrates the societal importance of the litigation.

¶22 The second factor of the private attorney general doctrine is the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff. *BRPA III*, ¶ 20. Contrary to the District Court’s findings and the County’s arguments, the County’s actions in this case forced Lesnik to pursue private enforcement of the election laws and increased the burden on Lesnik to do so. The County agreed to parameters for the recount that clearly violated § 13-15-206, MCA. Lesnik bore the entire burden to halt the recount taking place under the illegal parameters. Similar to *BRPA III*, the County’s involvement “was hardly

the usual effort” of a governmental entity “seeking enforcement of the law.” *BRPA III*, ¶ 32. Without Lesnik’s efforts, a recount would have proceeded without applying the statutorily required uniform standards of § 13-15-206, MCA.

¶23 The third factor of the private attorney general doctrine considers the number of people standing to benefit from the decision. *BRPA III*, ¶ 20. The District Court acknowledged Lesnik “defend[ed] the electoral process for the citizens and taxpayers of Musselshell County,” but it was not unjust to impose the fees and costs on Lesnik because he did not bear a burden “that was anymore disproportionate to [his] stake in the litigation.” While Lesnik had a stake in the recount proceedings, the County and Burns’ agreement to conduct a recount in contravention of the standards laid out in § 13-15-206, MCA, changed and increased his burden. The District Court failed to recognize that the County and Burns’ actions required Lesnik to defend the electoral process for the benefit of all Musselshell County voters, not merely to exercise his statutory rights to be heard in the proceedings and to be present and represented at any recount under § 13-16-302, MCA.

¶24 We conclude that the District Court abused its discretion when it denied attorney fees to Lesnik under the private attorney general doctrine. Thus, it is appropriate to reverse and remand this matter to the District Court to award Lesnik his reasonable attorney fees.

### **CONCLUSION**

¶25 The District Court’s Order denying attorney fees is reversed and remanded for further proceedings consistent with this Opinion.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH

/S/ BETH BAKER

/S/ JIM RICE

/S/ DIRK M. SANDEFUR