MEMORANDUM

Date: December 27, 2013

To: The Honorable Chairman and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator

Re: **Decision of the Arizona Court of Appeals Division One Regarding *Pima County Committee of the Arizona Libertarian Party, Inc. v. Pima County***

The Court of Appeals for the State of Arizona, Division One, has affirmed a lower court judge's decision to dismiss the election litigation brought by the Pima County Libertarian Party that raised questions about the validity of the sales-tax-funded 20-year transportation initiative passed by voters in 2006.

The case has been long and complex, with different issues raised by different parties at different times; but Pima County continues to prevail on the merits, beginning with an order by Superior Court Judge Charles Harrington in 2009 in favor of Pima County. That ruling was appealed twice to the Court of Appeals, which sent the case back for further proceedings. Superior Court Judge Kyle Bryson ruled again in favor of Pima County in May 2012. In its December 26, 2013 decision, the Court of Appeals upheld that order.

The plaintiffs still may ask the Arizona Supreme Court to review.

In the December 26 ruling, the Court of Appeals essentially ruled there is no legal basis to grant the injunctive relief to the Libertarian Party, noting "it is not at all clear how 'cheating' allegedly occurred in the 2006 special election.'"

In 2009, the Arizona Attorney General's Office conducted a hand count of the ballots as part of an investigation into fraud allegations in that election and validated the ballot question's 60 percent approval.

As to the Party's concern that protections are not sufficient to prevent improprieties in ballot counting, the court noted there are already a "wide range of statutes to protect our election process" and determined any specific remedy in that area, such as "graphic scanning" of ballots, is a legislative function and not something appropriately determined by the courts.

Indeed, there are multiple safeguards built in throughout the entire process.

Video surveillance captures and records the ballot counting process as it unfolds. Constituents are able to watch a live feed of the ballot counting, track how many ballots the Recorder's Office has turned over to the Elections Department at any given point, and find out if their ballot was turned over for counting; and if not, the reason it was rejected. Additional manual "chain of custody" controls have been implemented.

Political parties, including some members who sit on an independent Elections Integrity Commission, are on premises any time the ballots are being processed or tabulated.

Keypad door locks, motion detectors and alarms protect the ballots, which are kept in a secure vault.

A hand count audit verifies the validity of the results.

Following the 2012 General Election, representatives of the Republican and Democratic parties arbitrarily selected early ballot audit batches to be counted. Five contested races were counted, as required by law, including U.S. President and U.S. Congress. Four percent of precincts were counted, by Board of Supervisors policy, which is twice the threshold required by statute. A discrepancy of seven votes was found out of the 25,818 votes counted by the machine.

Additionally, one percent of early ballots were audited after being selected at random by representatives of the major political parties. The hand count audit checked 12,585 votes and reported a difference of two votes.

In all, with nine differences out of 38,403 votes, results were far below the allowable variance under state law.

Pima County continues to take election integrity very seriously, and we look forward to the final resolution of this matter.

CHH/mjk

Attachment

c: Ellen Wheeler, Assistant County Administrator
Brad Nelson, Elections Director
Dr. John Moffatt, Director, Office of Strategic Planning

NOTICE: NOT FOR PUBLICATION.
UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

PIMA COUNTY COMMITTEE OF THE ARIZONA LIBERTARIAN PARTY, INC., *Cross-Claimant/Counterclaimant/Appellant,*

v.

PIMA COUNTY, a political subdivision of the State of Arizona, by and through its Board of Supervisors and County Administrator, *Cross-Defendant/Appellee;* BETH FORD, in her official capacity as Pima County Treasurer, *Counterdefendant/Appellee.*

No. 1 CA-CV 13-0246

FILED 12-26-2013

Appeal from the Superior Court in Pima County
No. C20085016
The Honorable Kyle Bryson, Judge

AFFIRMED

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MEMORANDUM DECISION

Judge John C. Gemmill delivered the decision of the Court, in which Presiding Judge Maurice Portley and Judge Kent E. Cattani joined.

G E M M I L L, Judge:

¶1 Pima County Committee of the Arizona Libertarian Party, Inc. ("Libertarian Party") appeals the superior court's dismissal of its claim for failure to state a claim upon which relief can be granted. We affirm.

BACKGROUND

¶2 This is the second appeal arising from a challenge to a 2006 Pima County special election that resulted in the adoption of ballot measures concerning a Regional Transportation Authority plan and the imposition of taxes to fund the plan. Following the election, the Pima County Democratic Party sought to enjoin Pima County Treasurer Beth Ford from destroying ballots cast in the 2006 Pima County special election as she would ordinarily have been required to do six months after the election, in accordance with Arizona Revised Statutes ("A.R.S.") section 16-624(A). In 2008, after a recount and following a final order in the ballot preservation action, Ford filed a petition for declaratory relief, seeking guidance on whether she should continue to preserve the ballots. Ford's

complaint named Pima County and several political parties, including the Libertarian Party, that were represented on the special election ballots. The Libertarian Party then filed a separate "Answer and Cross-Claim" against Ford and Pima County that alleged election tampering by Pima County. The Libertarian Party cross-claimed, requesting the continued preservation of the ballots from the 2006 special election, that the Libertarian Party receive access to the ballots "as part of the on-going investigation into the tampering with ballots," and that the superior court issue an injunction "to prevent this unlawful conduct in future elections."

¶3 After Ford and Pima County moved to dismiss the cross-claim,[1] the court noted that "the cross-claim appears to be an election challenge" and that the claim did not comply with the statutory jurisdictional time limits for bringing an election challenge. The court stated that it could not otherwise "identify a cognizable legal claim," and dismissed the cross-claim. The court later ordered that Ford proceed with destroying the 2006 special election ballots, but on stipulation of the parties, the court stayed its order pending the results of all claims on appeal.

¶4 The Libertarian Party appealed the dismissal, and a panel of this court from Division Two reversed the superior court. *See Ford v. Pima Cnty. Comm. Of Ariz. Libertarian Party, Inc.*, 2 CA-CV 2010-0001, 2010 WL 4296642 (Ariz. App. Oct. 28, 2010) (mem. decision). That decision held that the superior court erred in labeling the Libertarian Party's cross-claim an election challenge because, presuming the Libertarian Party prevailed on its claim, granting injunctive relief would not set aside the result of the 2006 special election. *Id.* at *3, ¶ 10. The holding specifically declined to resolve whether the Libertarian Party's cross-claim actually stated a justiciable claim for injunctive relief. *Id.* at *5, ¶ 18.

¶5 Litigation continued after remand. The Libertarian Party disclosed that it sought "graphic scanning of all ballots cast and the provision of those images to the public[.]" Pima County cited to the

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[1] Pima County's Answering Brief correctly points out that the Libertarian Party's claim against Ford is technically a counterclaim, while the claim against Pima County is a cross-claim. Because the Libertarian Party's claim is primarily against Pima County and because the Libertarian Party denominated its motion as a "cross-claim," we use the term "cross-claim" in this decision.

Arizona Attorney General's Office's investigation and report confirming the results of the 2006 special election, and requested that the superior court dismiss the Libertarian Party's cross-claim on the basis that it failed to state an actionable claim.

¶6 The superior court granted Pima County's motion, holding that a decision whether to require the requested relief of prospective graphic scanning of ballots is a matter more appropriately determined through the legislative process rather than through the courts. The court noted that the most it could do would be to "issue orders that Pima County follow the law," which it declined to do. Accordingly, the court found that "there is no pending claim for which relief can be granted," dismissed the cross-claim, and entered judgment. The Libertarian Party appeals the dismissal of its cross-claim, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

ANALYSIS

¶7 The Libertarian Party presents four issues on appeal, two of which are inadequately briefed pursuant to Arizona Rule of Civil Appellate Procedure 13(a)(6). Moreover, the four issues viewed as a whole appear to present only two issues, which we analyze in turn. To the extent other issues are asserted, they are waived. *See State v. Moody*, 208 Ariz. 424, 452 n. 9, ¶ 101, 94 P.3d 1119, 1147 n. 9 (2004) ("Merely mentioning an argument [in an opening brief] is not enough.").

I. Rule 12(b)(6) Motion to Dismiss

¶8 The Libertarian Party argues that the superior court erred in granting Pima County's motion to dismiss for failure to state a justiciable claim. *See* Ariz. R. Civ. P. 12(b)(6). We review de novo a complaint's dismissal for failing to state a claim. *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶ 7, 284 P.3d 863, 866 (2012). "Arizona follows a notice pleading standard." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 6, 189 P.3d 344, 346 (2008). Courts must "look only to the pleading itself" when deciding a Rule 12(b)(6) motion, and they must likewise assume that well-pled factual allegations are true. *Id.* at ¶¶ 6-7. "Mere conclusory" statements cannot establish a claim, and courts may consider "a complaint's exhibits or public records regarding matters referenced in the complaint" in deciding whether to grant a Rule 12(b)(6) motion. *Coleman*, 230 Ariz. at 356, ¶ 9, 284 P.3d at 867. Ultimately, a Rule 12(b)(6) motion for dismissal will be granted only when "as a matter of law . . . plaintiffs

would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fidelity Sec. Life Ins. Co. v. State, Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4, 954 P.2d 580, 582 (1998).

¶9 The Libertarian Party initially sought, at the superior court, a court-initiated investigation into alleged ballot-tampering, which later included a request that the ballots at issue be "graphically scanned." The Libertarian Party justified seeking this relief by claiming it was proper as an extension of "election monitoring functions" granted to political parties under A.R.S. §§ 16-602 and -603. On appeal, the Libertarian Party argues that it seeks "several types of relief, [including] an injunction requiring the graphic scanning of all ballots cast." Although the Libertarian Party's opening brief states that "[t]here has not been a specific remedy yet urged by the Libertarian Party," its reply brief urges this court to hold that injunctive relief is proper in this case "pursuant to the 'principles of equity'" as articulated in A.R.S. § 12-1801(3).

¶10 In the minute entry dismissing the Libertarian Party's claim, the superior court noted that "[f]or the Court to be able to issue an injunction there must be an underlying act to enjoin." Implying that no such underlying act existed in this case, the superior court declined to "issue orders that Pima County follow the law." The superior court further concluded that the Libertarian Party's claim "must fail" because "the posture in which this case now stands is such that there is no pending claim for which relief can be granted."

¶11 The superior court correctly noted that injunctive relief requires an underlying act to enjoin. *See* A.R.S. § 12-1801(1)-(2); *Dowling v. Stapley*, 218 Ariz. 80, 87, ¶¶ 19-23, 179 P.3d 960, 967 (App. 2008). Although trial courts are empowered to fashion injunctions as equitable remedies, injunctive relief exists either to compel parties toward some action or to prevent ongoing harmful action. *See Ahwatukee Custom Estates Management Ass'n, Inc. v. Turner*, 196 Ariz. 631, 635, ¶¶ 9-10, 2 P.3d 1276, 1280 (App. 2000) (discussing equitable considerations for issuing injunctions and types of behavior justifying injunctions); *TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, 495, ¶ 21, 307 P.3d 56, 62 (App. 2013) ("An injunction may serve to undo accomplished wrongs, or to prevent future wrongs that are likely to occur."); *see also* A.R.S. § 12-1801.

¶12 In this case, the Libertarian Party has not sufficiently identified an action that injunctive relief would remedy. Instead, it relies on notions of equity and pronouncements on the importance of the

election process to argue that the court should allow its claim to move forward. Although we take the allegations of the Libertarian Party's complaint as true,[2] we have already held – and the Libertarian Party agrees – that its claim is not an election challenge. *See Ford*, 2010 WL 4296642 at *3, ¶10. The Libertarian Party's briefs do not cast any further light on the nature of its claim, except to express a concern that Pima County will, it believes, "cheat again" in future elections. But it is not at all clear how "cheating" allegedly occurred in the 2006 special election. The Libertarian Party argues that this lack of clarity is why its claim must proceed to trial, despite agreeing that its claim is not an election challenge.

¶13 Because it is not an election challenge, Libertarian Party's cross-claim is essentially a legal argument disguised as an equitable claim seeking to expand its legal authority to monitor elections in Arizona. As the Libertarian Party stated in its opening brief, "The Libertarian Party seeks to ensure the fairness of future elections by prohibiting the processes which currently facilitate cheating." The integrity of elections is undoubtedly important, and allegations of improprieties, as the superior court noted, must be taken seriously. Indeed, Arizona has recognized the need to maintain the integrity of elections by enacting a wide range of statutes to protect our election process from tampering, fraud, and corruption. *See* A.R.S. §§ 16-452, -671-678, -1001-1021. Those statutes provide remedies, including investigation and recounting by the Attorney General's Office. With the Attorney General's affirmation of the 2006 election's result, the procedures implemented by the legislature have run their course. The Libertarian Party's dissatisfaction with the statutory procedures in place to investigate election tampering does not establish a justiciable claim in law or equity. *See Chavez v. Brewer*, 222 Ariz. 309, 318-19, ¶ 29, 214 P.3d 397, 406-07 (App. 2009); *cf. Chambers v. United Farm Workers Organizing Committee, AFL-CIO*, 25 Ariz. App. 104, 107, 541 P.2d 567, 570 (App. 1975) (holding that a "grievance" is "more than mere dissatisfaction with the state of the law which results from the judgment.").

¶14 Moreover, the Libertarian Party's requested relief essentially asks the court to impose a mechanism to require that Pima County obey the law in future elections. But as the superior court noted,

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[2] *Fidelity Sec. Life Ins. Co.*, 191 Ariz. at 224, ¶ 4, 954 P.2d at 582 ("In reviewing a trial court's decision to dismiss a complaint for failure to state a claim, we assume as true the facts alleged in the complaint[.]").

such "obey the law" injunctions are improper because Pima County is already obligated to follow the law. *See NLRB v. Express Pub. Co.*, 312 U.S. 426, 435-36 (1941); *see also West Valley View, Inc. v. Maricopa Cnty. Sheriff's Office*, 216 Ariz. 225, 228, ¶ 11, 165 P.3d 203, 206 (App. 2007) (observing that "courts are generally hesitant to order a defendant to obey a law in the future"). By failing to allege a specific continuing pattern of objectionable behavior, the Libertarian Party has not stated a claim. *See Dowling*, 218 Ariz. at 87, ¶¶ 21-23, 179 P.3d at 967 (failing to allege action to be enjoined negates the possibility of an injunction as a remedy). Rather, it asks the court to devise a claim and remedy in equity on its behalf. We conclude that the superior court did not err by acknowledging the valid legal processes put in place by the legislature and declining the Libertarian Party's request for judicially imposed procedures to oversee the election process.

II. Motion for New Trial

¶15 Libertarian Party further argues that the superior court erred by not granting its motion for a new trial. We review the denial of a motion for new trial under an abuse of discretion standard. *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996). Trial courts have broad discretion in deciding motions for new trial, and we will affirm a decision that is not clearly an abuse of discretion or legally erroneous. *Pullen v. Pullen*, 223 Ariz. 293, 296, ¶ 10, 222 P.3d 909, 912 (App. 2009).

¶16 The Libertarian Party argues that the superior court abused its discretion by denying its motion for a new trial because the court based its ruling on an erroneous legal standard. For the same reasons we affirm the granting of Pima County's motion to dismiss the Libertarian Party's cross-claim, we also conclude that the superior court did not abuse its discretion by denying the motion for new trial.

CONCLUSION

¶17 We affirm the judgment of the superior court.

Ruth A. Willinghams · Clerk of the Court
FILED: mjt