IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

KARI LAKE, *Plaintiff/Appellant*,

v.

KATIE HOBBS, et al., *Defendants/Appellees*.

KARI LAKE, *Petitioner*,

v.

THE HONORABLE PETER THOMPSON, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Judge*,

KATIE HOBBS, personally as Contestee; ADRIAN FONTES, in his official capacity as Secretary of State; STEPHEN RICHER, in his official capacity as Maricopa County Recorder, et al., *Real Parties in Interest*.

No. 1 CA-CV 22-0779
No. 1 CA-SA 22-0237
(Consolidated)
FILED 2-16-2023

Appeal from the Superior Court in Maricopa County
No. CV2022-095403
The Honorable Peter A. Thompson, Judge

AFFIRMED; RELIEF DENIED

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OPINION

Chief Judge Kent E. Cattani delivered the opinion of the Court, in which Presiding Judge Maria Elena Cruz and Judge Peter B. Swann[1] joined.

C A T T A N I, Chief Judge:

¶1 Kari Lake appeals the Maricopa County Superior Court's ruling rejecting her request to set aside Katie Hobbs's 17,117 vote win in Arizona's 2022 gubernatorial election. Lake's arguments highlight election-day difficulties, but her request for relief fails because the evidence presented to the superior court ultimately supports the court's conclusion that voters were able to cast their ballots, that votes were counted correctly, and that no other basis justifies setting aside the election results. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 After voting returns were announced, Lake filed this election contest against Hobbs as contestee; the Arizona Secretary of State (now Adrian Fontes); and Maricopa County elections officials.[2] Lake's 10-count complaint primarily alleged that Maricopa County election results were tainted by misconduct on the part of the Maricopa County Defendants, as well as by illegal votes. *See* A.R.S. §§ 16-672(A)(1), (4). Lake sought a declaration that she, not Hobbs, was the victor or, alternatively, an order invalidating the election results. *See* A.R.S. §§ 16-676(B), (C).

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[1] Judge Peter B. Swann retired from this court effective November 28, 2022. In accordance with the authority granted by Article 6, Section 3, of the Arizona Constitution and pursuant to A.R.S. § 12-145, the Chief Justice of the Arizona Supreme Court has designated Judge Swann as a judge *pro tempore* in the Court of Appeals to participate in the resolution of cases assigned to this panel for the duration of Administrative Order 2022-162.

[2] The Maricopa County Defendants include the County's elections officials and board: Maricopa County Recorder Stephen Richer; Maricopa County Director of Elections Scott Jarrett; the Maricopa County Board of Supervisors; and Supervisors Bill Gates, Clint Hickman, Jack Sellers, Thomas Galvin, and Steve Gallardo.

¶3 The superior court dismissed eight of the ten counts for failure to state a claim, for undue delay, as duplicative, as outside the scope of an election contest, or for some combination thereof. The court granted Lake's request for a trial on claims alleging that: (1) an official interfered with ballot-on-demand printers, leading to tabulators rejecting misprinted ballots and costing Lake votes, and (2) the Maricopa County Defendants violated chain-of-custody requirements when handling early ballots submitted on election day, permitting some number of ballots to be unlawfully added to the official results. Both claims were premised on allegations of official misconduct under A.R.S. § 16-672(A)(1). After a bench trial, the superior court found that Lake had failed to prove any element of either claim—including alleged misconduct or an effect on the election results—and confirmed Hobbs's election as governor.

¶4 Lake now challenges the superior court's rulings on five of her ten claims. She asserts that legal errors tainted the court's rulings and that factual errors undermined the court's bench-trial ruling on her printer/tabulator and chain-of-custody claims. Finally, she asserts that the court erroneously dismissed her signature-verification and constitutional (equal protection and due process) claims, and she asks us to order a new election.

DISCUSSION

¶5 Arizona law recognizes only limited grounds to contest election results for state office, and such election contests must be brought in the manner authorized by statute—here, A.R.S. § 16-672. *See Griffin v. Buzard*, 86 Ariz. 166, 168 (1959); *Sorenson v. Superior Court*, 31 Ariz. 421, 422–23 (1927); *see also Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978) ("The failure of a contestant to an election to strictly comply with the statutory requirements is fatal to his right to have the election contested."). Only claims falling within the statutory terms are cognizable. *Henderson v. Carter*, 34 Ariz. 528, 534–35 (1928) ("The remedy may not be extended to include cases not within the language or intent of the legislative act."). "[W]e are not permitted to read into [the election contest statute] what is not there . . . ." *Grounds v. Lawe*, 67 Ariz. 176, 187 (1948).

¶6 Generally, even in an election contest, official returns are prima facie evidence of the number of votes cast and for whom, and the challenger has the burden to prove otherwise. *Hunt v. Campbell*, 19 Ariz. 254, 268 (1917); *Findley v. Sorenson*, 35 Ariz. 265, 271–72 (1929); *Oakes v. Finlay*, 5 Ariz. 390, 395 (1898); *see also Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986) (drawing "all reasonable presumptions [to] favor the validity

of an election"). Arizona has a "strong public policy favoring stability and finality of election results," *Donaghey*, 120 Ariz. at 95, and mere technical violations are insufficient to invalidate an election. *Territory v. Bd. of Supervisors*, 2 Ariz. 248, 252–53 (1887); *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994). Mistakes or omissions do not invalidate an election unless they affect the result or at least render it uncertain. *Findley,* 35 Ariz. at 269; *Miller*, 179 Ariz. at 180. To satisfy this standard, the challenger must show "ballots procured in violation of a non-technical statute in sufficient numbers to alter the outcome of the election." *Miller*, 179 Ariz. at 180.

I. Preliminary Legal Questions.

¶7 Lake argues that the superior court applied several incorrect legal standards and definitions when assessing her claims. We review such questions of law de novo. *Fitzgerald v. Myers*, 243 Ariz. 84, 88, ¶ 8 (2017).

¶8 Lake first asserts that the challenger in an election contest need only prove her claim by a preponderance of the evidence, not clear and convincing evidence, as the superior court required. The preponderance standard is satisfied by proof that the fact in issue "is more probable than not," whereas the heightened clear and convincing evidence standard requires proof that the fact in issue "is highly probable or reasonably certain." *Kent K. v. Bobby M.*, 210 Ariz. 279, 284–85, ¶ 25 (2005) (citations omitted).

¶9 Lake cites no authority for her argument that a preponderance of the evidence standard applies in an election contest, and we are aware of none. Although Arizona appellate courts have not expressly stated that the clear and convincing standard applies in all election contests, our courts have long noted the general principle that only proof of "the most clear and conclusive character" will overturn an election. *See Oakes*, 5 Ariz. at 398; *see also Hunt*, 19 Ariz. at 268, 271 (holding that "nothing but the most credible, positive, and unequivocal evidence should be permitted to destroy the credit of official returns," and requiring "clear and satisfactory proof" of the alleged fraud "to overcome the prima facie case made by the returns of an election"); *Buzard v. Griffin*, 89 Ariz. 42, 50 (1960) (requiring clear and convincing evidence in a contest alleging fraud); *cf. Griffin*, 86 Ariz. at 173 (noting that an election contest does not require proof beyond a reasonable doubt as necessary to convict in a criminal action).

¶10 A higher burden of proof is consistent with the holdings in those cases. And it is further supported by Arizona's "strong public policy favoring stability and finality of election results," *Donaghey*, 120 Ariz. at 95, and by the presumption of "good faith and honesty" of elections officials. *Hunt*, 19 Ariz. at 268. We thus agree with the superior court that Lake was required to prove her case by clear and convincing evidence.

¶11 Lake also asserts that the superior court erred by requiring proof that the alleged official misconduct "did in fact affect the result" of the election, positing instead that some unquantifiable uncertainty suffices. But election results are not rendered uncertain unless votes are affected "in sufficient numbers to alter the outcome of the election." *Miller*, 179 Ariz. at 180. This rule requires a competent mathematical basis to conclude that the outcome would plausibly have been different, not simply an untethered assertion of uncertainty. *See Reyes v. Cuming*, 191 Ariz. 91, 94 (App. 1997) (setting aside an election because illegal votes "indisputably changed the outcome of the election," proven by the fact that the losing candidate had been in the lead until illegal votes were counted); *Huggins v. Superior Court*, 163 Ariz. 348, 352–53 (1990) (holding that although the aggregate number of illegal votes exceeded the margin of victory, the number was not "of sufficient magnitude to change the result" after a "pro rata deduction of the illegal votes according to the number of votes cast for the respective candidates" in that district) (quoting *Grounds*, 67 Ariz. at 182).

¶12 Finally, Lake contends that the superior court erred by defining "misconduct" under § 16-672(A)(1) as requiring proof that an elections official intended to improperly affect the result. We agree that there may be circumstances under which something less than intentional misconduct may suffice. *Cf. Findley*, 35 Ariz. at 269 (explaining that "honest mistakes or mere omissions" are insufficient to invalidate an election "*unless* they affect the result, or at least render it uncertain") (emphasis added). Nevertheless, Lake's claims alleging misconduct do not entitle her to relief. Ultimately, her arguments about legal standards and definitions are unavailing because her claims fail under any standard for reasons set forth below.

II. Bench Trial Claims.

¶13 On review after a bench trial, we accept the superior court's factual findings unless clearly erroneous. *Shooter v. Farmer*, 235 Ariz. 199, 200, ¶ 4 (2014). The superior court assesses witness credibility, weighs the evidence, and resolves conflicting facts and expert opinions, all factual determinations to which we defer. *Id.* at 201, ¶ 4; *Grounds*, 67 Ariz. at 182.

We review de novo, however, any questions of law, including the ultimate legal conclusions drawn from the superior court's factual findings. *Ariz. Bd. of Regents v. Phx. Newspapers, Inc.*, 167 Ariz. 254, 257 (1991); *Pima Cnty. v. Pima Cnty. L. Enf't Merit Sys. Council*, 211 Ariz. 224, 227, ¶ 13 (2005).

A. Printer/Tabulator Claim.

¶14 Lake alleged that Maricopa County elections officials, either negligently or intentionally, failed to adequately test ballot-on-demand printers or in some other manner "injected" misconfigured ballots that could not be read by on-site tabulators at vote centers. This claim fails because, at most, the evidence regarding misconduct was disputed, and ample evidence supported the superior court's conclusion that the printer/tabulator issues resulted from mechanical malfunctions that were ultimately remedied.

¶15 More importantly, Lake presented no evidence that voters whose ballots were unreadable by on-site tabulators were not able to vote. To the contrary, Lake's cybersecurity expert confirmed that any misconfigured ballots (or ballots that on-site tabulators could not read for other reasons) could be submitted physically through secure "Door 3," duplicated onto a readable ballot by a bipartisan board at Maricopa County's central tabulation facility, and ultimately counted.

¶16 Lake's claim thus boils down to a suggestion that election-day issues led to long lines at vote centers, which frustrated and discouraged voters, which allegedly resulted in a substantial number of predominately Lake voters not voting. But Lake's only purported evidence that these issues had any potential effect on election results was, quite simply, sheer speculation.

¶17 Lake's expert testified that tens of thousands of voters were, in his words, "disenfranchised" by printer/tabulator issues. But the expert based his opinion on the number of people who declined to complete his exit poll on election day and who he thus assumed had been unable to vote. The expert testified—based on about 50 fewer people than expected completing his exit poll on election day—that he could "infer . . . by the absence of their participation" that a population equaling approximately 16% of the total election-day turnout across Maricopa County had been deprived of their right to vote, and that the deprivation derived from printer/tabulator issues. But the expert failed to provide any reasonable basis for using survey responses or non-responses to draw inferences about the motivations or preferences of people who did not vote. The expert

offered no basis for linking any individual's alleged failure to vote to the printer/tabulator issues specifically (as opposed to any other reason), or to otherwise equate a failure to vote with elections officials depriving potential voters of an opportunity to do so. Likewise, he offered no basis for his opinion on the rate of ostensibly-tabulator-induced non-voting—approximately 16% of election-day voters—other than the fact that he picked the number precisely because it was "what it would have needed [to be] in order for it to change the outcome."

¶18 Whatever the merits of the expert's actual poll results, his conclusions regarding alleged "disenfranchise[ment]" were baseless. Thus, the superior court did not err by finding this testimony insufficient to call into question the election results. And lacking proof that the results were in any way uncertain, Lake's printer/tabulator claim fails.

B. Chain-of-Custody Claim.

¶19 In this claim, Lake alleged that Maricopa County failed to maintain proper chain-of-custody documentation or follow chain-of-custody procedures for early ballot packets submitted in drop boxes on election day and that these failures might have permitted some unspecified number of ballots to be wrongfully inserted before being counted.

¶20 Arizona law requires the "officer in charge of elections" to document "the chain of custody for all . . . ballots during early voting through the completion of provisional voting tabulation." A.R.S. § 16-621(E). Early ballot packets submitted at vote centers on election day need not be counted on location so long as they "are transported in a secure and sealed transport container to the central counting place to be counted there." Ariz. Sec'y of State, *2019 Elections Procedures Manual* ("EPM") 193 (Dec. 2019); *see also Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63, ¶ 16 (2020) (EPM "has the force of law"). A "retrieval form" must be "attached to the outside of the secure ballot container or otherwise maintained in a manner prescribed by the County Recorder or officer in charge of elections that ensures the form is traceable to its respective secure ballot container." EPM at 62. "When the secure ballot container is opened by the County Recorder or officer in charge [of] elections (or designee), the number of ballots inside the container shall be counted and noted on the retrieval form." *Id.*

¶21 At best, Lake's evidence on chain-of-custody misconduct was disputed, and the superior court reasonably credited testimony from Maricopa County elections officials over testimony from Lake's witness.

See Shooter, 235 Ariz. at 201, ¶ 4; *Grounds*, 67 Ariz. at 182. Regarding ostensibly missing chain-of-custody documentation, Lake's evidence was either misdirected (e.g., a witness who reported not receiving certain forms in response to a public records request but who also confirmed that she "know[s] they exist") or was provided by individuals who were not present or could not see the relevant area. For their part, Maricopa County elections officials confirmed the existence of chain-of-custody forms documenting how election-day early ballot packets are processed from vote center to tabulation. The court had ample basis to conclude that Lake failed to prove improper chain-of-custody documentation.

¶22 Lake also asserts that Maricopa County elections officials wrongfully failed to count election-day early ballot packets immediately upon receipt from vote centers, which she argues left the process vulnerable to manipulation. County elections officials explained that, given the volume of ballot packets received from vote centers on election day, they scan tamper-evident seals, complete chain-of-custody documents, open the ballot transport containers, sort the ballot packets by type into mail trays, place those trays into secure cages, and estimate the number of early ballot packets based on the number of trays. A bipartisan team transports those secure cages to Maricopa County's certified election services vendor, where a bipartisan team of County employees supervise as the vendor scans and counts each early ballot packet. Lake argues that this process does not satisfy the EPM's directive that "[w]hen the secure ballot container is opened . . . the number of ballots inside the container shall be counted." EPM at 62. But she does not cite authority imposing any express time requirement or otherwise explain how an initial estimate followed by precise count—when bipartisan teams of county personnel monitor the early ballot packets throughout the process—does not qualify as "counted."

¶23 Moreover, even assuming, for the sake of argument, that Maricopa County's election-day process resulted in a technical violation of the EPM, Lake failed to present evidence, as opposed to speculation, that any such breach affected the election results. Lake suggests the difference between the County Recorder's initial estimate of election-day early ballot packets received—"over 275,000" or "275,000+"—and the precise count after the vendor scanned those packets—291,890—somehow rendered at least 25,000 votes illegal. Questionable mathematics aside, Lake does not explain (or offer any legal basis) for how the difference between an initial estimate and a final, precise figure invalidates any vote.

¶24 Finally, the only other evidence Lake presented to show that the purported chain-of-custody violation affected the election results was

an affidavit from one of the vendor's employees who stated that the vendor permitted its employees to insert their own (and their family members') ballots into batches of early ballot packets coming from the Maricopa County facility. The affiant estimated that she "personally saw about 50 ballots" inserted in this manner. But the superior court "d[id] not give the Affidavit much weight." Instead, the court credited testimony by Maricopa County elections officials that the practice was not permitted and likely did not happen, noting specifically that "County employees—who follow the EPM—have eyes on the ballot process" at the vendor's facility. We defer to these credibility determinations. *See Shooter*, 235 Ariz. at 201, ¶ 4. Moreover, even taking the affidavit as true, 50 ballots (even if *all* were against Lake) is orders of magnitude short of having any plausible effect on the outcome. *See Miller*, 179 Ariz. at 180. The superior court did not err by denying Lake's chain-of-custody claim.

III. Summary Dismissal of Lake's Other Claims.

¶25 We review de novo the superior court's ruling dismissing Lake's other claims before trial. *See Coleman v. City of Mesa*, 230 Ariz. 352, 355–56, ¶¶ 7–8 (2012). We assume the truth of the complaint's well-pleaded factual allegations relating to those claims but are mindful that "mere conclusory statements are insufficient." *Id.* at 356, ¶ 9; *see also Hancock v. Bisnar*, 212 Ariz. 344, 348, ¶¶ 16–17 (2006) (applying Ariz. R. Civ. P. 8 standards to election contest complaint); *Griffin*, 86 Ariz. at 170. We will affirm the dismissal if the challenger "would not be entitled to relief under any interpretation of the facts susceptible of proof." *Coleman*, 230 Ariz. at 356, ¶ 8 (citation omitted).

A. Signature-Verification Claim.

¶26 The superior court construed Lake's signature-verification claim as a challenge to Maricopa County's existing election procedures, a type of claim that must be brought before an election occurs, not after. *See, e.g.*, *Sherman v. City of Tempe*, 202 Ariz. 339, 342, ¶¶ 9–11 (2002) (noting that requiring such challenges be brought before the election avoids post-election requests "to overturn the will of the people, as expressed in the election" based on grounds that existed beforehand). Lake asserts that her complaint did not challenge the validity of Maricopa County's signature-verification procedures but rather alleged violations of those procedures during the 2022 election, and that the superior court therefore erred by dismissing this claim.

¶27 In Arizona, early ballots are returned in envelopes containing a ballot affidavit that the voter must sign. *See* A.R.S. § 16-547(A), (D). Before the early ballot is tabulated, the ballot-affidavit signature must be verified. *See* A.R.S. § 16-550(A). To do so, the county recorder must compare the signature on the ballot affidavit with the voter's "registration record" to verify that the voter made the signature on the ballot affidavit. A.R.S. § 16-550(A).

¶28 To complete signature verification, the EPM (in effect since 2019) directs elections officials to consult the voter registration form and "additional known signatures from other official election documents in the voter's registration record, such as signature rosters or early ballot/PEVL request forms." EPM at 68. Likewise, the signature-verification process described in Maricopa County's 2022 Elections Plan involves a comparison of the ballot-affidavit signature against "a historical reference signature that was previously verified and determined to be a good signature for the voter," drawn from documents including "voter registration forms, in-person roster signatures and early voting affidavits from previous elections." Maricopa County's process also contemplates "multi-level signature verification," with a first-level reviewer comparing the ballot-affidavit signature to up to three signatures on file, and if the signature does not match those exemplars, further review by a manager, who compares the signature against all of the signatures on file for the voter.

¶29 If the signature-verification process results in a determination that the signatures "correspond," the ballot may be tabulated; if the signatures do not match, the voter must, if reasonably possible, be contacted, given an opportunity to cure the mismatch, and have their vote counted. *See* A.R.S. § 16-550(A); EPM at 68–69.

¶30 Although she now argues otherwise, Lake's signature-verification claim alleged a procedural violation of the election process. Lake's complaint alleged that the Maricopa County Recorder "accepted a material number" of early ballot packets with an "affidavit signature that the Maricopa County Recorder or his designee determined did not match the signature in the putative voter's 'registration record.'" But this assertion was premised on *first-level* reviewers' rejection rates, not on the ultimate determination after Maricopa County's multi-level signature-verification process. Thus, at best, Lake's signature-verification claim attacked Maricopa County's process for verifying signatures that first-level reviewers questioned—a challenge to the County's election procedures, not a claim that the *overall* procedures were violated. Accordingly, the superior court correctly concluded that Lake's contest attacked the manner of

holding an election. *See, e.g.*, *Sherman*, 202 Ariz. at 342, ¶ 10 (timing of publicity pamphlet distribution); *Tilson v. Mofford*, 153 Ariz. 468, 470–72 (1987) (manner of drafting ballot initiatives and descriptions in publicity pamphlets); *Kerby v. Griffin*, 48 Ariz. 434, 449 (1936) (printing and circulating publicity pamphlets). And because Lake waited until after the election to challenge a signature-verification process of which she was on notice months before the election, the superior court correctly dismissed the claim. *See Kerby*, 48 Ariz. at 444.

B. Equal Protection and Due Process Claims.

¶31 Lake argues that the superior court erred by dismissing her claims asserting equal protection and due process violations. Her arguments fail, however, because these claims were expressly premised on an allegation of official misconduct in the form of interference with on-site tabulators—the same alleged misconduct as in Lake's printer/tabulator claim. *See supra* ¶¶ 14–18. Because these claims were duplicative of a claim that Lake unsuccessfully pursued at trial, the superior court did not err by dismissing them.

CONCLUSION

¶32 For the foregoing reasons, we affirm the superior court's ruling confirming Hobbs's election as governor.

¶33 We deny Hobbs's request for an award of attorney's fees on appeal because she offered no substantive basis for the award. *See* ARCAP 21(a)(2); *see also* Ariz. R.P. Spec. Act. 4(g) (cross-referencing ARCAP 21's requirements).

AMY M. WOOD • Clerk of the Court
FILED: AA