

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-004846

04/30/2020

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

ERIC GORSEGNER

THOMAS J. BASILE

v.

BOYD DUNN, et al.

JOHN DOUGLAS WILENCHIK

MATTHEW BLACK
MARK D BYRNES
JEFFERSON R DALTON
KELLY ELAINE GILLILAN-GIBSON
BRITT W HANSON
KIMBERLY HUNLEY
DANIEL JURKOWITZ
BRIAN JOSEPH PALMER
KORY A LANGHOFER
WILLIAM J KEREKES
ALLEN H QUIST
TIMOTHY A LASOTA
COURT ADMIN-CIVIL-ARB DESK
COURT ADMIN-CIVIL-CCC
DOCKET-CIVIL-CCC
JUDGE BRODMAN

RULING ON NOMINATING PETITION ELECTION CHALLENGE

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I. INTRODUCTION

Boyd Dunn filed petitions seeking the nomination of the Republican Party for the office of the Arizona Corporation Commissioner in the primary election to be held on August 4, 2020. He needed 6663 signatures to appear on the ballot. He filed 7361 signatures. In other words, Dunn cannot appear on the ballot if more than 698 signatures are determined to be invalid.

On April 17, 2020, Robert Branch filed his challenge. On April 20, 2020, Eric Gorseger filed his challenge.

The Court consolidated the two actions and held an all-day evidentiary hearing on April 28, 2020. The Court reviewed the Post-Trial briefs.

II. BACKGROUND

A. County Recorder's Reports

Five counties submitted reports containing challenged signatures.

1. Branch

In Maricopa County, Branch challenged 1288 signatures. The Maricopa County Recorder issued a report finding that 699 of the challenged signatures were valid, and 589 signatures were invalid. Exhibit 8.

In Pima County, Branch challenged 111 signatures. The Pima County Recorder issued a report finding that 76 of the signatures were valid, and 35 were invalid. Exhibit 9.

In Pinal County, Branch challenged 11 signatures. The Pinal County Recorder issued a report finding that seven of the signatures were valid and four were invalid. Exhibit 10.

In Cochise County, the Cochise County Recorder issued a report indicating that one signature was invalid. Exhibit 11.

In Yuma County, the Yuma County Recorder issued a report showing that one signature was invalid. Exhibit 15.

In sum, the county recorders' reports in *Branch* total 633 invalid signatures.

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2. Gorsegner

In Maricopa County, Gorsegner challenged 1029 signatures. The Maricopa County Recorder issued a report finding that 421 of the challenged signatures were valid, and 608 signatures were invalid. Exhibit 12.

In Pima County, Gorsegner challenged 96 signatures. The Pima County Recorder issued a report finding that 40 of the signatures were valid, and 56 were invalid. Exhibit 13.

In Pinal County, Gorsegner challenged 11 signatures. The Pinal County Recorder issued a report finding that seven of the signatures were valid and four were invalid. Exhibit 14.

In Cochise County, the Cochise County Recorder issued a report indicating that one signature was invalid. Exhibit 15.

In Yuma County, the Yuma County Recorder issued a report showing that one signature was invalid. Exhibit 11.

In sum, the county recorders' reports in *Gorsegner* total 673 invalid signatures.

B. Falsification of Signatures

Liberty Henkel worked as a petition circulator. She collected 166 signatures. At trial, Ms. Henkel credibly testified that she forged or falsified over 100 of the signatures she collected. Ms. Henkel did not specifically identify the signatures that were forged or falsified and the Court was not presented with evidence by which it could determine which petition sheets had forged or fraudulent signatures and which did not.

There is no evidence that Dunn was aware of this situation until the weekend before the hearing. Plaintiffs do not suggest that is Dunn anything other than an innocent victim.

III. POST-TRIAL ISSUES

At trial, the Court admitted Dunn's exhibits 38, 39, 40 and 46. In addition, Dunn moved to admit Exhibit 55, which was certified voter records from Maricopa County. The problem was that Dunn did not supply the Court with a copy of Exhibit 55 during the trial and it had not been identified as an exhibit before the trial. Nevertheless, since plaintiffs were aware of Exhibit 55 and had no objection, the Court admitted Exhibit 55. The Court recognized that it was strange to admit an exhibit that was not being presented to the Court, but given the situation the Court

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allowed Dunn to submit Exhibit 55 on the morning of April 29, 2020, the day after trial. Both parties could rely on Exhibit 55 in their post-trial briefs.

Thereafter, on the day after trial, Dunn's counsel inundated the Court with additional exhibits and documents that had not been previously identified as exhibits and were not discussed at trial. During an emergency telephone conference at 1 PM on April 29, 2020, the Court granted plaintiffs' motion to strike all post-trial exhibits submitted by Dunn with the exception of Exhibit 55.

To be clear, the Court denies Dunn's belated attempt to introduce new evidence after trial.

III. LEGAL ISSUES

There are three threshold legal issues. The Court will address each issue as follows:

1. Should all signatures gathered by Ms. Henkel be excluded or only the fraudulent or falsified signatures?

Undisputed evidence establishes that Ms. Henkel forged over 100 signatures. The Court finds that all 166 signatures collected by Ms. Henkel are invalid.¹ In submitting her petitions, Ms. Henkel's averment that she witnessed the signer affix his or her signature is false.

Brousseau v. Fitzgerald, 138 Ariz. 453 (1984), is on point. There, the supreme court discussed the issue of petition fraud. The court ruled:

We hold that petitions containing false certifications by circulators are void, and the signatures on such petitions may not be considered in determining the sufficiency of the number of signatures to qualify for placement on the ballot.

Id. at 456.

A petition circulator's falsification of signatures or the execution of a verification she knows to be materially inaccurate invalidates all the accompanying signatures. All 166 signatures collected by Ms. Henkel are invalid. Moreover, as a practical matter, the Court has no ability to determine which of the 166 signatures were forged.

11. The impact of this ruling is somewhat muted by the fact that a large majority of signatures gathered by Ms. Henkel already were invalidated by the Maricopa County Recorder for other reasons.

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Dunn admits that 68 of Ms. Henkel's signatures were counted as valid in *Branch* and 79 were counted as valid in *Gorsegner*. Dunn's Post-Trial Brief at 8:3-4.

By eliminating all 166 signatures gathered by Ms. Henkel, Dunn's safety margin dropped to 532 signatures – or 8%.

2. Should the Court view each case separately or aggregate the challenges to obtain the total number of invalid signatures?

If one looks at the county recorder reports in the *Branch* case alone, the county recorders invalidated 633 signatures. If one looks at the county recorder reports in the *Gorsegner* case alone, the county recorders invalidated 673 signatures. If viewed independently, the recorders' reports did not invalidate enough signatures to surpass the 698 signature threshold.

There are some signatures challenged in both cases. But other signatures are challenged in one case but not the other. When combined, county recorders invalidated a total of 841 signatures. See Exhibit 23, p. 46, col. 17.

Dunn argues that the Court should not combine the invalidated signatures in the two cases. Instead, Dunn argues that the Court should consider *Branch* as a separate, standalone case and *Gorsegner* as a separate, standalone case. Dunn argues that aggregating the cases violates due process because the Court would add invalid signatures from one case to invalid signatures from the other case. The Court disagrees with Dunn's analysis.

In *McClung v. Bennett*, 225 Ariz. 154 (2010), the supreme court held that a challenger to petitions could not add additional grounds for a challenge at the hearing with no notice to the other party. The court's basis for the ruling was that the affected candidate needed notice. The court stated:

These procedures provide notice to all parties, permit time to prepare a response, and prevent the ambush that might otherwise occur at hearings on nomination challenges. If the challenger wishes to contest signatures for reasons other than those identified in the complaint or the recorders' reports, he must notify the affected parties and the court. Here, [the challenger's] failure to advise [the candidate] of the specific grounds of challenge deprived [the candidate] of the opportunity to prepare and consequently impaired his right to a fair hearing.

Id. at 157, ¶ 14.

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The concern expressed in *McClung* does not apply here. Between the two cases, the county recorders determined that Dunn's petitions contained 841 invalid signatures. Dunn had advance notice of the challenge to all of the 841 signatures the recorders found to be invalid. All signatures found to be invalid were either referenced in Branch's complaint filed on April 17 or in Gorsegner's complaint filed on April 20. Thus, a case closer on point is *Lubin v. Thomas*, 213 Ariz. 496, 499 (2006), where the court held that a county recorder, in reviewing challenged nomination petition signatures, may invalidate signatures for legitimate reasons other than those specifically alleged in the challenger's complaint. The court was satisfied that issues identified in the county recorders' reports provided sufficient notice to the candidate.

Dunn had ample notice of which petition signatures were contested and why. To the extent Dunn argues that the complaints are inadequate, the Court grants plaintiffs' request to amend the pleadings to conform to the evidence. Neither plaintiff knew or reasonably could have known the extent of the fraud committed by Ms. Henkel until they were notified by Dunn – just a couple of days before the trial.

Moreover, Dunn was placed on notice that he would be facing an aggregated claim no later than April 21 (the day after Gorsegner's complaint was filed) when plaintiffs moved to consolidate. There was no unreasonable delay by plaintiffs and no unfair prejudice. Dunn's laches argument is rejected.

In conclusion, in determining whether Dunn provided sufficient signatures, the Court will consider the total number of signatures invalidated by the county recorders.

3. Are signatures containing the date but not the year valid?

The Maricopa County Recorder invalidated 28 signatures for lacking a valid date. Each of the signatures in question provided a month and a day of signing but not the year (*i.e.*, instead of writing 3/4/20 the signer put 3/4). Dunn provided testimony from the circulators who gathered all 28 challenged signatures. Each credibly testified that all of the signatures in question were signed in 2020.

“Candidates will not be disqualified based on an error or omission in the nomination documents that substantially comply with statutory requirements.” *Malnar v. Joice*, 236 Ariz. 170, 172, ¶ 9 (2014). No one could seriously contend that the signers signed in any year other than 2020.

The Court finds that the 28 signatures in question will not be disqualified if the only problem with those signatures is that they lacked the year of the signature.

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III. COUNTING SIGNATURES

The Court will first address the total number of signatures found to be invalid. The Court will then address Dunn's rehabilitation efforts.

A. Invalid Signatures

To be sure, petitions are presumed valid upon filing. But once the county recorder identifies any discrepancy between the signature appearing on the petition and the signature appearing in the putative signer's voter registration record, "a prima facie case is made by the contestant that the signer is not a registered voter" -- and then the burden shifts to the candidate to affirmatively establish that the signature was affixed by an individual who was a qualified elector on the date of signing. *Clark v. Pima County Bd. Of Sup'rs*, 128 Ariz. 193, 195 (1981).

The Court finds by clear and convincing evidence that the county recorders invalidated 841 total signatures. *See* Exhibit 23, p. 46, col. 17.

Plaintiffs argue that additional signatures were not invalidated by the recorders but should be invalidated.

As noted above, all signatures obtained by Ms. Henkel are invalid. As a result, any signatures obtained by Ms. Henkel that were not already determined to be invalid by the Maricopa County Recorder must be added to the total. Based on the post-trial briefs and Dunn's acknowledgement that 68 of Ms. Henkel's signatures were accepted as valid in *Branch* and 79 in *Gorsegner*, the Court accepts plaintiffs' number that 47 additional signatures obtained by Ms. Henkel survived challenges by both plaintiffs. *See* Revised Exhibit A attached to plaintiffs' Post-Trial Brief. Given that the Court has excluded all signatures obtained by Ms. Henkel, these 47 signatures should be added to the list of invalid signatures.

Plaintiffs also argue that a number of signatures should be invalidated because the signer signed at least three other candidates' petitions. A.R.S. §§ 16-314(C) and 321(C) provide that a qualified elector may not sign nomination petitions for more candidates than the number of candidates necessary to fill that office at the next election. Because only three individuals may be Republican party nominees for Corporation Commissioner, a qualified elector may not sign nomination petitions for more than three candidates.

Plaintiffs submitted Exhibit 19 showing 22 signers who signed more than three petitions. Using a search function, the Court cross-referenced the 22 names in Exhibit 19 with names already excluded from county recorders' reports. Of the 22 names, 14 were names that were already identified as duplicates and therefore already excluded. To add these 14 names would

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result in double counting of invalid signatures. However, eight names were not already invalidated, and these signatures should be added to the list of invalid signatures. (Snyder, Nagode, Keller, Bell, Breeden, Atkin, Hollis and Foltin were not invalidated in any recorders' reports.) As a result, the Court finds that plaintiffs proved by clear and convincing evidence an additional eight invalid signatures.

Plaintiffs also attach Exhibit 20, showing 20 names of signers who had duplicate signatures. The Court cross-referenced the 20 names against the names already excluded from recorders' reports. Three names were not otherwise invalidated and should be added to the list of invalid signatures. (Misenhimer, J. Simonton and Raymond were not invalidated in any recorders' reports.) As such, the Court finds that plaintiffs proved by clear and convincing evidence an additional three invalid signatures.

In conclusion, the Court finds that plaintiffs demonstrated that $841+47+8+3 = 899$ signatures were invalid.

B. Rehabilitation

Dunn would need to rehabilitate 201 signatures in order to survive the ballot challenge. He fails.

In his post-trial brief, Dunn attempts to rehabilitate 169 signatures: 39 "out-of-county" signatures, 50 "conflicting county" signatures, 28 "incomplete date" signatures, 10 "incomplete address" signatures and 42 "various issues." Even if the Court accepted all 169 of the attempted rehabilitated signatures, Dunn would still be 32 signatures short of the required number. Moreover, the Court rejects Dunn's efforts to rehabilitate some signatures as noted below. The Court notes that several of these arguments are appearing for the first time in Dunn's post-trial brief.

1. Out-of-county signatures

Dunn claims 39 signatures were disqualified from one county's report although the signer was a registered voter in another county. Dunn argued that Exhibit 40 establishes that 17 Pinal voters were improperly disqualified. However, Exhibit 40 contains only nine voters. The Court finds that Dunn established that all nine Pinal voters identified in Exhibit 40 were improperly invalidated in the Maricopa County Report. Plaintiffs conceded Briggs, p. 241, line 5. The Court finds that two Coconino voters were improperly invalidated (Exhibit 39), six Santa Cruz voters were improperly invalidated (Exhibit 46) and three Maricopa voters were improperly invalidated (Exhibit 55). As a result, the Court finds that Dunn successfully rehabilitated 21 out-of-county signatures.

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However, the remaining signatures appear based on the Republican voter database, which the Court refused to admit as an exhibit at the April 29, 2020 hearing. At the very least, other than the exceptions discussed in the previous paragraph, Dunn's Exhibit A attached to his post-trial brief does not reference admitted exhibits so the Court finds it unpersuasive. The Court will give Dunn credit for 21 rehabilitated out-of-county signatures.

2. Conflicting County signatures

Dunn argues that there are 50 instances where the two recorders' reports reflect inconsistencies. The Court will give Dunn credit for all instances where Branch and Gorsegner made identical challenges but the County Recorder invalidated one but not the other. The Court will give Dunn credit for all 50 signatures identified in Exhibit B to Dunn's Post-Trial Brief.

3. Dunn's "incomplete date" signatures are 25, not 28

As noted above, 28 signatures contained the day but not the year. Dunn established that each was signed on the date in 2020. However, there were challenges to some of the signatures other than the lack of the year. Petition 281 contained 10 signatures invalidated for an incomplete date. However, Branch objected to four of the signatures on the grounds that the signers were Not Registered. (DeRosso, Shroeder, Boyle and Barrerra.) *See Branch* Complaint. Although Dunn failed to establish that any of these four signers were properly registered when they signed, in their post-trial exhibit plaintiffs concede that all four (lines 5-8) were rehabilitated.

On Petition 297, 10 signatures were invalidated for an incomplete date. However, Gorsegner also objected to four signers for wrong address (lines 4 and 6), registered Democrat (line 7) and Not Registered (line 10). *See Gorsegner* Complaint. Although Dunn failed to establish that any of these four signers were properly registered when they signed, in their post-trial exhibit plaintiffs concede that all but line 7 were rehabilitated. The Court finds that nine signatures were rehabilitated.

On Petition 390, 8 signatures were invalidated for an incomplete date. However, Branch objected to four signers as being Not Registered (Kraknide, McGarick, Vird and Durezo, lines 1,2,5 and 6). *See Branch* Complaint. Dunn failed to establish that any of these other four signers were properly registered when they signed, but plaintiffs concede that McGarick (line 2) and Vird (line 5) were rehabilitated. The Court finds that six signatures were rehabilitated.

Dunn gets no credit for signatures he did not fully rehabilitate. The Court finds that Dunn rehabilitated $10+9+6=25$ signatures due to incomplete date.

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4. Dunn gets no credit for “incomplete addresses”

In Exhibit 38, Dunn attached affidavits from 10 individuals providing an address. The Court cross-referenced the 10 individuals’ names against names found to be invalid in both Maricopa County Recorder reports. Only one of the 10 (Baylee Hunt) was listed as invalid in the two recorders’ reports. However, Baylee Hunt was disqualified because she was Not Registered. Providing her address doesn’t correct the problem and mean she is qualified to sign the petition. Signatures that were not invalidated cannot be rehabilitated. There was no evidence that nine of the affiants were registered, much less signed petitions.

As a result, Dunn gets zero rehabilitated signatures arising from “incomplete address.”

5. “Various Issues”

Dunn argues that 42 signatures are rehabilitated for various reasons. The signatures are supported by Exhibit C in Dunn’s post-trial brief.

As an initial matter, although Dunn argues for 42 signatures, Exhibit C in his post-trial brief references only 35 names.

In Exhibit C, Dunn cites Exhibit 56 on seven occasions. Exhibit 56 was never admitted or provided at trial, and does not consist of a sufficient basis to rehabilitate a signature. Nevertheless, in their post-trial attachment plaintiffs acknowledge that four signatures referencing Exhibit 56 were rehabilitated (Manning, Pennington-Askey, Conley and Modglin) so the Court finds four signatures rehabilitated.

On 12 occasions, Dunn cites to the Republican Data Center. These records were not provided at trial and were not supplied until the day after trial. On April 29, 2020, the Court ruled that the Republican Data Center records were not an admissible source of evidence. Any claims that rely on an unadmitted exhibit are not persuasive.

Exhibit C lists six “Signature Does Match” challenges (Heidenrich, Tenney, Weitz, Davis, Jordan and McDermed). It also lists one “printed signature” challenge (Board). But the Court was not provided with a copy of any of these signatures from the petitions. As a result, the Court had nothing to compare and cannot determine whether or not the signatures match. Dunn failed to rehabilitate these signatures. Moreover, Dunn did not establish that any of these signatures were not on petitions submitted by Ms. Henkel. As a result, Dunn failed to prove by a preponderance of the evidence that these seven signatures were rehabilitated.

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Dunn met his burden of rehabilitating Gomes, Lyons, Martin, Halmagean, Howell, Kern, Fantus, Sanchez and Barney.

Thus, Dunn rehabilitated $4+9 = 13$ signatures from Exhibit C.

6. Summary

In conclusion, the Court finds that Dunn rehabilitated $21+50+25+0+13 = 109$ signatures.

IV. FINAL COMMENTS

This entire proceeding was rushed. And the situation was made more difficult by the Covid-19 pandemic. But both sides operated under the same deadlines. The time lines were established by the legislature and this trial court has no ability to disregard statutes. *See* A.R.S. §16-351(A) (superior court shall hear and render a decision on the matter within 10 days of filing).

V. CONCLUSION

The Court finds by clear and convincing evidence that plaintiffs established that $899-109 = 790$ of the signatures are invalid. Thus, the Court finds that defendant Dunn presented 6571 valid signatures of the required 6663 valid signatures to appear on the ballot. He lacks 92 valid signatures. Without a sufficient number of signatures, defendant's name cannot appear on the ballot.

IT IS ORDERED granting plaintiffs' request for an injunction prohibiting defendant Boyd Dunn from appearing on the ballot for the August 4, 2020 primary election for the office of Arizona Corporation Commissioner.

The parties are notified that, under A.R.S. § 16-351(A), any notice of appeal must be filed within five calendar days after the superior court's decision in a challenge to the nomination of a candidate. *See Bohart v. Hanna*, 213 Ariz. 480, 482 (2006). An appeal that is belatedly prosecuted, such as one filed on the last day of the statutory deadline, may be dismissed on grounds of laches even if timely filed. *See McClung v. Bennett*, 225 Ariz. 154 (2010). Special procedural rules govern expedited appeals in election cases. Ariz. R. Civ. App. P. 10.

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IT IS FURTHER ORDERED signing this minute entry as a final written judgment of the Court. No matters remain pending so the Court enters judgment under Rule 54(c).

DATED this 30th day of April, 2020

/s/ Roger E. Brodman
HONORABLE ROGER E. BRODMAN
JUDICIAL OFFICER OF THE SUPERIOR COURT