IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Nomination Papers of Margaret K. Robertson for President of the United States, Erik Viker for Vice President of the United States, Rayburn Douglas Smith for United States Senator of the Commonwealth of Pennsylvania, Marakay Rogers for Attorney General of the Commonwealth of Pennsylvania, Betsy Summers for Auditor General of the Commonwealth of Pennsylvania and Roy Minet for Treasurer of the Commonwealth of Pennsylvania, as candidates of the Libertarian Party in the General Election of November 6, 2012	:	No. 507 M.D. 2012
Objections of: Damon Kegerise, Anne Layng and Judith Guise	:	

BEFORE: HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY SENIOR JUDGE COLINS

FILED: March 13, 2013

This matter is an application filed by Libertarian Party candidates for an award of costs and attorney fees that they incurred in successfully defending against a petition that sought to keep them off the ballot for the November 6, 2012 General Election.

Between February 15, 2012 and August 1, 2012, the Libertarian Party filed nomination papers (the Nomination Papers) with the Secretary of the Commonwealth seeking to put candidates for the offices of President of the United

States, Vice President of the United States, United States Senator, Attorney General, Auditor General and Treasurer (Candidates) on the ballot for the November 6, 2012 General Election. Under Section 951(b) of the Pennsylvania Election Code (the Election Code),[1] nomination papers must contain valid signatures equal to two percent of the largest number of votes cast for a statewide candidate in the last statewide election. Because the largest number of votes cast for a statewide candidate in the most recent election was 1,030,004, the minimum number of valid signatures required to place Candidates on the ballot was 20,601. The Nomination Papers contained over 1,600 separate pages of signatures with a total of 49,164 submitted signatures.

On August 8, 2012, Damon Kegerise, Anne Layng and Judith Guise (Objectors) timely filed a Petition to Set Aside the Nomination Papers. In the Petition to Set Aside, Objectors challenged the validity of over 38,000 individual signature lines of the Nomination Papers. Objectors also asserted global challenges to specific pages of the Nomination Papers seeking to strike those pages of signatures in their entirety on the grounds that the affidavits of the circulators of those pages or the notarization of those circulator affidavits were allegedly improper, and a claim that even if the Nomination Papers had 20,601 valid signatures, the Nomination Papers must be set aside for alleged "pervasive fraud" in the signature gathering process.

On August 23, 2012, the Court held an evidentiary hearing on all of Objectors' global challenges to pages of the Nomination Papers and to the Nomination Papers as whole. At this hearing, Objectors introduced evidence

[1] Act of June 3, 1937, P.L. 1333, § 951(b), *as amended*, 25 P.S. § 2911(b).

concerning circulator affidavits on a number of the pages of the Nomination Papers, the obtaining of signatures on the Nomination Papers and the notarization of circulator affidavits. Objectors introduced no evidence that there was any forgery of any elector signatures on the Nomination Papers or any misrepresentation by circulators in gathering signatures. By Opinion and Order issued September 4, 2012, this Court sustained Objectors' challenges to 20 pages of the Nomination Papers, overruled Objectors' challenges to 101 pages of the Nomination Papers and rejected Objectors' claim of "pervasive fraud."

Between August 20, 2012 and September 6, 2012, pursuant to this Court's orders, teams of reviewers for both parties conducted a line-by-line review of all of the challenged individual signatures against the voter registration records in the electronic Statewide Uniform Registry of Electors (SURE) system. In this initial line-by-line review, the parties agreed on the validity or invalidity of over 25,000 of the challenged signature lines. On September 12, 2012, following completion of that review, the parties stipulated that 7,971 of the challenged signatures were valid and that 17,462 individually challenged signatures could be stricken as invalid. (Amended Joint Stipulation filed September 12, 2012 ¶¶6-7.) The parties further stipulated that 10,402 of the signatures on the Nomination Papers were not challenged. (Amended Joint Stipulation filed September 12, 2012 ¶5.) Under Section 977 of the Election Code, signatures not challenged are deemed valid. 25 P.S. § 2937; *In re Nomination Petition of Johnson*, 509 Pa. 347, 353 & n.3, 502 A.2d 142, 145-46 & n.3 (1985).

The parties could not agree at that time as to the validity of the remaining more than 12,000 disputed signature lines, many of which were subject to three issues of law as to which the parties disagreed. On September 13, 2012, a

panel of this Court ruled on those contested legal issues, holding 1) that challenged signatures on pages of the Nomination Papers for counties other than the county where the elector is registered to vote were invalid; and 2) that otherwise valid and complete signature lines where the elector failed to write the year of signing ("Missing Year" signatures) were invalid; but 3) that otherwise valid signatures where the address written by the elector did not match his or her voter registration address in the SURE system ("Not Registered at Address" signatures) were valid. At the request of both parties, the Court certified this Order for interlocutory appeal to the Pennsylvania Supreme Court. Objectors sought reversal of the Court's Not Registered at Address ruling, and Candidates sought reversal of the ruling invalidating the Missing Year signatures. The Supreme Court granted the parties' joint petition for permission to appeal these two issues. *In re Nomination Papers of Robertson*, ___ Pa. ___, 54 A.3d 13 (2012).

Following the September 13, 2012 Order, this Court held a day of hearings on September 13, 2012, on the disputed signature lines. At that hearing, the parties' attorneys recognized that some of the disputed signatures were in fact valid signatures regardless of the legal rulings in the Court's September 13, 2012 Order and that some others were invalid regardless of the Court's legal rulings. From that hearing, the parties' lawyers also concluded that they would be able, through closer review, to resolve most factual disputes and to stipulate to the validity or invalidity of many of the over 12,000 disputed signatures.

Between September 13, 2012 and October 10, 2012, while the interlocutory appeal was pending, the parties' attorneys conducted further review of the disputed signature lines against the voter registration records in the SURE system. In this process, the parties were able to resolve the factual disputes

concerning all but 125 of the more than 38,000 signatures that had been challenged by Objectors. The parties agreed that 2,344 additional signatures were valid as to all Candidates, regardless of the parties' legal disputes, and found there were an additional 40 unchallenged signatures, bringing the total stipulated valid signatures for all Candidates to 20,757.[2] (October 10, 2012 3:30 P.M. Final Joint Daily Stipulation.) The parties also agreed in this review that an additional 6,545 signatures could be stricken as invalid regardless of the parties' legal disputes. (October 10, 2012 3:30 P.M. Final Joint Daily Stipulation.) With respect to the legal disputes, the parties stipulated that at least 1,424 signatures were stricken solely on Missing Year grounds (September 28, 2012 Joint Stipulation filed in Supreme Court Appeal ¶3), and that 2,036 signatures were valid as to all Candidates under the Court's Not Registered at Address ruling. (October 10, 2012 3:30 P.M. Final Joint Daily Stipulation.)

On October 10, 2012, this Court, accordingly, dismissed Objectors' Petition to Set Aside the Nomination Papers and ordered that Candidates' names be placed on the ballot for the November 6, 2012 General Election. This Court held that Objectors' stipulations established that all Candidates had more than the required 20,601 valid signatures, even if all legal disputes were resolved in Objectors' favor, including both of the Court's September 13, 2012 legal rulings on signature validity that were before the Supreme Court and this Court's denial of Objectors' motions to withdraw validity stipulations as to 124 signatures.

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[2] Four pages of the Nomination Papers did not contain the names of the Candidates for President and Vice-President and the valid signatures on those pages counted only for the Candidates for offices other than President and Vice-President. The parties stipulated that those four pages contained 73 valid signatures, and that the Candidates for offices other than President and Vice-President therefore had 73 additional valid signatures beyond the total for all Candidates.

Also on October 10, 2012, the Supreme Court issued its ruling on the interlocutory appeal, holding that the 1,424 Missing Year signatures were valid signatures because the elector's failure to write "2012" on the Nomination Papers was not a material defect where it was clear from the face of the Nomination Papers that the elector signed the Nomination Papers in 2012. *In re Nomination Papers of Robertson*, ___ Pa. ___, 55 A.3d 1044 (2012). The Supreme Court did not address whether the Not Registered at Address signatures were valid because the Nomination Papers had sufficient valid signatures regardless of the resolution of that issue. ___ Pa. at ___, 55 A.3d at 1045. Thus, the Nomination Papers were ultimately found to have at least 22,057 valid signatures, 1,456 more than required, even if all legal disputes not ruled on by the Supreme Court were resolved in Objectors' favor. Under the unreversed legal rulings of this Court, Candidates had 24,217 valid signatures, 3,616 more than required.

On December 31, 2012, over two and one-half months after this Court's final order in this matter, Candidates filed the instant application for costs and fees, seeking an award of $35,500 in costs and $178,074 in attorney fees against Objectors and one of their two counsel. This application was not accompanied by any documentation or bill of costs itemizing these costs and attorney fees or even setting forth the types of costs Candidates sought to recover. Objectors timely filed an answer opposing any award of costs or attorney fees.

On January 29, 2013, after Objectors filed their answer, Candidates filed a verified bill of costs. In this bill of costs, Candidates set forth the amount of costs sought as $35,499.43, consisting of $6,498.50 in printing and photocopying costs, $9,362.93 for paid signature reviewers and "reviewer personal costs and expenses" incurred in the signature review of $19,638. With respect to their claim

for attorney fees, Candidates significantly increased the fees sought to $259,681.50. Of that amount, $179,556 was for fees during the successful defense of the Nomination Papers, consisting of 920.8 hours of attorney time at $195 per hour. The remaining $80,125.50 in attorney fees was incurred after the Petition to Set Aside had been dismissed and the case was over. On February 12, 2012, Objectors filed exceptions to the bill of costs, opposing any award of fees and costs, and also asserting that the amounts sought were inconsistent with amounts set forth in Candidates' campaign finance reports and that two attorneys for whom a total of $50,778 in fees were sought were not retained and acting as attorneys. Objectors in their exceptions also requested an award of their attorney fees and costs in responding to application and bill of costs.

The standards applicable to this application are clear. A court cannot award costs to either candidates or objectors in an election case simply because they are the prevailing party. *In re Nomination Petition of Farnese*, 609 Pa. 543, 563-69, 17 A.3d 357, 369-73 (2011). Under Section 977 of the Election Code, costs may be awarded only where the prevailing party shows circumstances that make an award of costs against the losing party just. 25 P.S. § 2937 (providing that "the court shall make such order as to the payment of the costs of the proceedings, including witness fees, as it shall deem just"); *Farnese*, 609 Pa. at 563-69, 17 A.3d at 369-73. This standard is satisfied where fraud, bad faith, or misconduct by the losing party is shown. *Farnese*, 609 Pa. at 567, 17 A.3d at 372; *In re Nomination Paper of Nader*, 588 Pa. 450, 458-66, 905 A.2d 450, 455-60 (2006); *In re Nomination Paper of Rogers*, 942 A.2d 915, 923-26, 928-29 (Pa. Cmwlth. 2008), *aff'd without op.*, 598 Pa. 598, 959 A.2d 903 (2008). An award of costs may also be just where it is shown that the losing party should have known

that its chance of success was remote or that its legal position was invalid. *Farnese*, 609 Pa. at 567, 17 A.3d at 372.

In determining whether it is just to order the losing party to pay costs, it is critical that the Court keep in mind that the nature of election challenges places both candidates and objectors under difficult circumstances that make errors on both sides likely.

> [I]n assessing what is just, the court must be cognizant of the practical reality that both parties in election contests are operating within the truncated timeframes of the Election Code. As a result, candidates generally err on the side of filing well in excess of the required signatures, perhaps with near certainty that a number of them will be invalid, and in the hope of deterring any challenge. On the other hand, depending on the number of signatures involved and required, prospective objectors often have a limited opportunity for extensive investigation of signatures prior to expiration of the period for forwarding objections. Thus, objectors often must determine whether to proceed at a point where the prospect of success is uncertain.

Farnese, 609 Pa. at 568-69, 17 A.3d at 372-73 (citations omitted).

Section 977 of the Election Code does not authorize the imposition of attorney fees on the losing litigant in a challenge to a candidate's nomination papers. *Rogers*, 942 A.2d at 927-28; *City of Wilkes-Barre v. Urban*, 915 A.2d 1230, 1232-33 (Pa. Cmwlth. 2007). Attorney fees can be awarded in a case such as this only as a sanction under Section 2503 of the Judicial Code, if Candidates showed that Objectors' conduct in these proceedings was "dilatory, obdurate or vexatious," or if Candidates showed the filing of the Petition to Set Aside was "arbitrary, vexatious or in bad faith." *Rogers*, 942 A.2d at 928-29; 42 Pa. C.S. § 2503(7), (9).

There is not just cause for awarding costs or grounds for awarding attorney fees for this ballot challenge as a whole. Objectors' filing of the Petition to Set Aside and their continuing to litigate until it was determined that Candidates had sufficient signatures was neither in bad faith nor without any reasonable prospect of success, given the closeness of Candidates' signature margin in comparison to the total number of signatures submitted and challenged. In addition, the validity of several thousand signatures was dependent on legal issues that were substantial enough to produce disagreement within this Court and be accepted for review by the Supreme Court. Objectors did not prevail in those legal challenges, and it ultimately was determined, when the parties' attorneys finished jointly reviewing the thousands of signatures in dispute, that Candidates had a sufficient number of unquestionably valid signatures to be placed on the ballot, irrespective of those legal issues. However, neither an objector nor a candidate can be expected to have perfect knowledge or predict the exact number of signatures that will be held valid where tens of thousands of signatures are at issue.[3]

Furthermore, Objectors affirmatively demonstrated a notable and substantial degree of good faith by stipulating to the validity of over 10,000 signatures when they concluded that those signatures were in fact valid, even when it resulted in the dismissal of their challenge, rather than forcing delay and additional cost on Candidates and the Court by litigating the validity of those signatures. As this Court previously noted, both Objectors and Candidates here

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[3] The Court notes that this reasoning would apply equally to a request for costs and fees by Objectors, if Candidates had fallen short by a similarly small number of signatures. Objectors could not have shown that Candidates would be liable to them for costs or fees, given the absence here of any evidence of forgery or fraudulent obtaining of signatures and the fact that significant numbers of challenged signature were being found from the beginning to be valid.

showed an extraordinary and commendable degree of professionalism in resolving factual disputes as to over 38,000 signature lines, a level of cooperation far greater than this Court has seen from objectors and candidates in other ballot challenges of this size.

Objectors did challenge over 10,000 signatures that were in fact valid and not the subject of any legal dispute and erroneously contested over 2,000 valid signatures in the initial round of signature review and stipulations. Although the large number of erroneous challenges is disturbing, it does not by itself show bad faith by Objectors where Objectors also affirmatively cooperated to resolve the validity disputes by stipulation and there was a substantial amount of error on both sides. Candidates submitted over 24,000 signatures that that they ultimately stipulated invalid, and Candidates' reviewers in the initial round of signature review refused to stipulate to the invalidity of over 6,000 signatures that their attorneys later agreed could be stricken. While the Court recognizes that Candidates had reason to be willing to strike contested signatures to expedite the resolution of the ballot challenge because they did not need those signatures, it cannot be said that Objectors' initial contentions on signature validity were less accurate than Candidates' positions or that Objectors' initial reviewers acted significantly differently from Candidates' initial reviewers.

Given the closeness of the margin of valid signatures here in comparison to the number of signatures required and submitted, coupled with the professionalism and cooperation by Objectors, as well as Candidates, in resolving tens of thousands of signature disputes by stipulation, neither costs nor attorney fees in defending against the Petition to Set Aside as a whole are warranted.

In support of their application, Candidates also make assertions of various instances of alleged misconduct by Objectors and one of their counsel and contend that some of that conduct caused increased attorney fees and costs. Objectors dispute these allegations. It is unnecessary for the Court to resolve these factual disputes or determine whether such conduct or Objectors' unsupported claim of "pervasive fraud' could warrant a much more limited partial award of costs or attorney fees because Candidates' application for fees and costs is untimely.

This election matter was before this Court in its original jurisdiction. Under Section 5505 of the Judicial Code, a court of original jurisdiction lacks authority to award additional relief not sought within 30 days after its final order in a case. *Strohl v. South Annville Township*, Nos. 2162 C.D. 2009 & 2324 C.D. 2009, slip op. at 11-12 (Pa. Cmwlth. April 13, 2011); *Freidenbloom v. Weyant*, 814 A.2d 1253, 1255 (Pa. Super. 2003), *overruled in part on other issue by Miller Electric Co. v. DeWeese*, 589 Pa. 167, 907 A.2d 1051 (2006); *see* 42 Pa. C.S. § 5505 (trial court loses authority to modify or rescind order after 30 days). Accordingly, Candidates were required to file any application for costs or attorney fees within 30 days of the final order in this case. *Strohl*, slip op. at 11-13; *Freidenbloom*, 814 A.2d at 1255-56.[4]

The final order in this case was entered on October 10, 2012 and no appeal from that order was filed by any party. Candidates did not file any

[4] Candidates' request for costs is not subject to Pa. R.A.P. 3751's 14-day time limit for filing a bill of costs. Rule 3751 applies to a party's right as a prevailing party to costs on appeal under Pa. R.A.P. 2762. Candidates do not have a right to costs as a prevailing party under Pa. R.A.P. 2762. Rather, as discussed above, costs may be awarded in a ballot challenge only under Section 977 of the Election Code, where the Court finds that an award of costs would be just. *Farnese*, 609 Pa. at 563-69, 17 A.3d at 369-73.

application for costs or attorney fees or bill of costs, nor did they make any other attempt to seek any further relief in this matter until December 31, 2012, 82 days after this Court's final order.

Even if the Court could make an exception to this time limitation, Candidates have not shown that they lacked notice of the conduct they allege and could not have timely asserted their claims for costs and attorney fees. Candidates necessarily had notice of any invalid Not Registered at Address objections and any other overstatement of challenges or understatement of valid signatures by October 10, 2012, when their counsel finished the process of reviewing and stipulating with Objectors as to the validity or invalidity of all challenged signatures. Candidates were aware of the conduct of Objectors' private investigator well before October 10, 2012. Candidates knew of Objectors' counsel's assertions concerning fees and costs when they were made in August 2012, and knew that Objectors had had no basis for asserting a claim for fees and costs well before the completion of the signature review on October 10, 2012. Because Candidates failed to file any application for fees or costs within thirty days after the final October 10, 2012 order, this Court is without authority to make any award of costs or attorney fees. *Strohl*, slip op. at 11-13; *Freidenbloom*, 814 A.2d at 1255-56.

The Court also rejects Objectors' request for attorney fees and costs. While the Court has concluded that an award of costs and attorney fees is not warranted under the totality of the circumstances here, Objectors did erroneously challenge over 10,000 valid signatures and maintained challenges to over 2,000 valid signatures even after a round of signature review. The Court cannot say that a request for costs and attorney fees is frivolous or vexatious where the unsuccessful party has asserted that high a number of invalid challenges. Nor can

the Court say that the law is so clear on the untimeliness of Candidates' application as to make it frivolous. The case law addressing this issue does not include any reported decision of this Court or any decision of the Supreme Court. The language of Section 5505 of the Judicial Code itself restricts authority to modify orders and the reported decisions of this Court do not clearly resolve the issue whether a motion for additional relief must be filed within thirty days of a final order. Moreover, Objectors themselves were not a model of timeliness in their request. Objectors did not assert a request for fees and costs in their Answer. Rather, they asserted it for the first time in their exceptions to the bill of costs, the fourth filing in this matter, creating a situation where either Candidates would not have the opportunity to respond or the litigation of this application would be further extended.

For the foregoing reasons, both Candidates' application for an award of costs and attorney fees and Objectors' request for attorney fees and costs in responding are denied.

James Gardner Colins

JAMES GARDNER COLINS, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Nomination Papers of Margaret K. Robertson for President of the United States, Erik Viker for Vice President of the United States, Rayburn Douglas Smith for United States Senator of the Commonwealth of Pennsylvania, Marakay Rogers for Attorney General of the Commonwealth of Pennsylvania, Betsy Summers for Auditor General of the Commonwealth of Pennsylvania and Roy Minet for Treasurer of the Commonwealth of Pennsylvania, as candidates of the Libertarian Party in the General Election of November 6, 2012	:	No. 507 M.D. 2012
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ORDER

AND NOW, this 13th day of March, 2013, upon consideration of Respondents' Motion for Imposition of Costs and Related Fees and Expenses against Petitioners, Respondents' Bill of Costs, and Petitioners' Answer and Exceptions thereto, it is hereby ORDERED that Respondents' Motion for Imposition of Costs and Related Fees and Expenses is DENIED. Petitioners' request for attorney fees and costs in responding to this Motion and Bill of Costs is DENIED.

JAMES GARDNER COLINS, Senior Judge